Circuit Court for Howard County
Case No. 13-K-17-057484

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 423

September Term, 2018

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DAVON JONES

v.

STATE OF MARYLAND

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Kehoe,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned)
JJ.

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Opinion by Kehoe, J.

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Filed: February 5, 2020

A jury sitting in the Circuit Court for Howard County convicted Davon Philip Jones of one count of first-degree murder, one count of first-degree assault, and numerous other crimes, all of which arose out of the robbery of two would-be drug dealers. Jones presents two questions for our review, which we have reworded slightly:

> 1. Did the trial court violate Jones's constitutional right of confrontation by improperly limiting his cross-examination of the prosecution's DNA expert?
>
> 2. Did the trial court err in admitting into evidence videos recovered from Jones's cellphone because they were unfairly prejudicial?

Because we find no error on the trial court's part, we will affirm the convictions.

## Background

Jones does not challenge the legal sufficiency of the evidence against him. We summarize the evidence produced at trial to give context to the parties' appellate contentions. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

Kaiyon Stanfield, the murder victim in this case, and his cousin Khalil Stanfield agreed to sell four ounces of marijuana to Jones, one of Kaiyon's former classmates. On the afternoon of December 18, 2016, Khalil picked up Kaiyon in a rental car and they drove to a prearranged location: Birdsong Court in Howard County. There they met Jones and another man, later identified as Derrick Johnson.

Jones and Johnson got in the car. Khalil sat in the driver's seat and Kaiyon was in the right front seat. Jones sat in the left rear seat, while Johnson sat in the right rear seat. After Jones and Johnson entered the car, Khalil drove to a nearby convenience store, where they

bought cigarette papers. They returned to the rendezvous point, and Khalil rolled two marijuana cigarettes, which the men smoked, passing them around.

Jones and Kaiyon haggled over the selling price, and Kaiyon eventually agreed to lower the price from $800 to $600. Khalil then heard what he described as a loud "boom," which he soon realized was a gunshot. Khalil had been shot in his right shoulder. He got out of the car and fled across an open field, sustaining an additional gunshot wound to his back as he did so. He ultimately found refuge at a nearby residence.

Residents of the neighborhood heard the gunshots and called the Howard County Police, who responded to the area. One of the residents directed emergency responders to Khalil's car, which was parked nearby. There, they found Kaiyon, slumped over the front seat, suffering from a bullet wound to his head but still breathing. Kaiyon was transported to Shock Trauma, where he died of his wounds five days later. Khalil was also taken to the hospital. While there, Khalil told the police that Jones was one of the passengers in the back seat of the car. From a photo array, he later identified Johnson as the other passenger.

The police recovered video footage from the home-security system of a nearby home, which was entered into evidence. The video recording depicts the rental car pulling into a parking area, with four persons inside. The video shows three people getting out of the car a short time later. In his testimony, Khalil identified himself as the person exiting from the front seat. The video also shows two people exiting from the rear seats and running off towards a nearby wooded area. In the video, the person who exited from the left rear seat

appeared to be wearing a hat. According to Khalil, Jones had been sitting in the left rear seat when the shootings occurred. The police searched the wooded area into which the two had fled and found a black knit hat lying on the ground. The hat was tested for DNA. We will discuss the DNA evidence in part 1 of our analysis.

Apart from the video footage and the hat, police officers also found a total of six spent cartridge casings both inside and outside of Khalil's vehicle. At trial, a forensics expert testified that all of the casings, as well as the bullet fragments recovered from both victims, had been fired from two .38-caliber semiautomatic handguns. The police were unable to recover either of these weapons.

Police gathered additional evidence introduced at trial when they arrested Jones and searched his residence with a warrant two days after the shootings. Among other things, police recovered a plastic bag of marijuana from his bedroom. When the prosecutor showed a photograph of this bag to Khalil, Khalil testified that it was the marijuana that he and Kaiyon had planned to sell to Jones. Khalil testified that the marijuana was packaged in the same way that he had packaged it on December 18, 2016, namely, a zip-lock bag inside of a larger bag. During the search, the police also seized Jones's cell phone, which was later analyzed by police forensic investigators. These investigators recovered, among other things, videos from the phone, which depicted Jones wearing a hat, similar to the one recovered at the crime scene, and holding two different semiautomatic handguns. Some of

these images were introduced into evidence at trial. Jones contends that they should not have been, and we will address these arguments in part 2 of our analysis.

Jones was convicted of the first-degree murder of Kaiyon Stanfield and the attempted first-degree murder of Khalil Stanfield, as well as various conspiracy, robbery and firearms charges.[1] Jones then noted this appeal.

**Analysis**

1.

The police performed a DNA analysis on the hat they recovered near the scene of the shootings. At Jones's trial, the prosecution called Kristiana Kuehnert as an expert witness to explain the results of that analysis. On direct examination, Kuehnert testified that the testing produced DNA profiles of three or more individuals, including a major male contributor. She further related that the profile of the major male contributor matched Jones's DNA profile, and that the probability of randomly selecting an unrelated individual in the African-American population of the United States with the same DNA profile was 1

[1] Specifically, in addition to the first-degree murder and first-degree assault convictions, Jones was found guilty of attempted first-degree murder, two counts each of armed robbery and conspiracy to commit armed robbery, use of a firearm in the commission of a crime of violence, possession of a regulated firearm by a person less than twenty-one years old, and possession of a regulated firearm after having been previously adjudicated delinquent for a disqualifying offense. The court sentenced Jones to a term of life imprisonment without the possibility of parole for first-degree murder and additional sentences, including a consecutive term of life imprisonment for attempted murder.

in 5.5 octillion. She stated that she had been unable to develop usable DNA profiles for the minor contributors to the DNA samples obtained from the hat, and their identities were unknown.

On cross-examination, defense counsel explored the significance of the unknown minor contributors to the DNA recovered from the hat. For example, defense counsel asked, "[Y]our analysis states that [the DNA sample are] consistent with a mixture of three individuals, is that true?" Kuehnert replied, "Of three or more individuals." Shortly thereafter, defense counsel asked, "There was a mixture of DNA in the hat of at least three or more individuals, correct?" and Kuehnert replied, "That's correct." In response to other questions, Kuehnert testified that investigators had obtained buccal DNA swabs from Jones, Johnson, Khalil, and Kaiyon and that she had forwarded them to a laboratory for comparison with DNA found on the hat. Then the following occurred (emphasis added):

> [DEFENSE COUNSEL]: And if you had a buccal sample outside of the ones you had, that matched anything else in the mixture, could you have gotten a hit?
>
> [KUEHNERT]: . . . I was only able to make comparisons on the major component, [however] the minor component or components I was not able to make comparisons on. . . . [A]ny known samples sent to [to the forensic laboratory] would have been compared to the major component DNA profile that was obtained, [but] I could not make any comparisons to the other peaks present in that profile.
>
> [DEFENSE COUNSEL]: Now in this particular case it was a hat right?
>
> [KUEHNERT]: That's correct.

[DEFENSE COUNSEL]: And a hat is something you're familiar with that people put on their heads, right?

[KUEHNERT]: Yes.

[DEFENSE COUNSEL]: Okay. Now the fact that you found three potential -- it was a mixture of three or more people, doesn't that complicate your analysis in the sense that okay, *you're saying that this Davon Jones' DNA was on that hat, but you can't tell when he wore it correct? Or when he had contact with it correct?*

[KUEHNERT]: *We can't tell the time frame from the DNA profile that's obtained, no.*

[DEFENSE COUNSEL]: So it wouldn't—*it would be possible for one of the unknown samples to have actually had the hat when it was recovered, correct?*

[KUEHNERT]: *It's possible, you can't tell the time frame from an item of evidence.*

[DEFENSE COUNSEL]: Right, right. *But you can say with your expertise that it's [a] mixture of three or more samples, correct?*

[KUEHNERT]: *The DNA profile obtained was a mixture of three or more individuals.*

[DEFENSE COUNSEL]: *Which means Mr. Davon Jones was not the only individual who had that hat [on] at some point in time, correct?*

[PROSECUTOR]: *Objection.*

THE COURT: *Sustained.*

[DEFENSE COUNSEL]: *Well the other samples indicate other—the other mixtures indicate other people, right?*

[KUEHNERT]: *[The] DNA [of] other individuals . . . was found on [the hat]*.

> [DEFENSE COUNSEL]: Okay. Now in this particular case, you did already testify that you did not have Mr. Malik Harris'[2] buccal sample, right?
>
> [KUEHNERT]: I do not believe it was tested, no.
>
> [DEFENSE COUNSEL]: Okay. And then you went through out of all the other items, you never found an exact match to Mr. Jones' DNA correct?
>
> [KUEHNERT]: I believe that's correct.
>
> [DEFENSE COUNSEL]: And you did find matches in other items with Mr. Khalil Stanfield correct?
>
> [KUEHNERT]: That's correct.
>
> [DEFENSE COUNSEL]: No further questions Judge, thanks.

On appeal, Jones asserts that the trial court improperly restricted his cross-examination of Kuehnert when it sustained the prosecutor's objection, thereby violating his right of confrontation under the federal Constitution and the Maryland Declaration of Rights. He states in his brief (emphasis in the original):

> The trial court erred in precluding what amounted to not only relevant but critical cross-examination, and the error requires reversal.
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> • • •
>
> Th[e] black hat was the only independent physical evidence that the State had in order to attempt to connect [Jones] to the crime scene, and then only by way of inferential connection. Under this logic, the presence of others' DNA on that black hat was just as likely to provide proof of the presence of any of *at least two others* at the crime scene *instead* of [Jones]. (The evidence suggested that the hat fell off its wearer, although the surveillance video does not reflect this; and, obviously, only one person can wear a hat a given time.) Defense counsel was foreclosed from cross-examining Kuehnert on the

[2] The parties do not explain who Mr. Harris was or what his alleged role in the shootings might have been.

> meaning of the presence of that other DNA vis-à-vis possession of, and wearing of, the recovered black hat, in relation to the hat's presence near the crime scene.

Before addressing the merits of Jones's contention, we need to clarify what precisely is, and is not, properly before us.

Md. Rule 5-103 states in relevant part (emphasis added):

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or
>
> (2) Offer of Proof. *In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered*. The court may direct the making of an offer in question and answer form.

After the trial court sustained the prosecution's objection, trial counsel did not make a proffer as to what additional information he sought to elicit from Kuehnart. Therefore, we are left with what "was apparent from the context within which the evidence was offered." Trial counsel's question to the witness was, in effect, whether persons other than Jones had worn the hat found at the crime scene. After the court sustained the objection, trial counsel asked additional questions without objections from the prosecutor or limitations from the court. Thus, we are not dealing with a categorical refusal by the trial court to permit cross-examination of the significance of the presence of the other contributors' DNA on the hat. We are dealing with the court's refusal to permit defense ask to ask Kuehnart whether

persons other than Jones had worn the hat in light of the fact that she had previously testified that DNA samples from at least three people were on the hat.

The Sixth Amendment guarantees a criminal defendant the right to be "confronted with the witnesses against him." U.S. Const. amend. VI. Article 21 of the Maryland Declaration of Rights provides a similar guarantee.[3] This right of confrontation protects the defendant in two ways. It allows him to physically face those who testify against him. *See Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) ("A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.'" (quoting Zechariah Chafee, *The Blessings of Liberty* 35 (1956)). More importantly for this case, the confrontation right also allows the defendant to test the witness and the testimony he provides "in the crucible of cross-examination," *Crawford v. Washington*, 541 U.S. 36, 61 (2004), "the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 415 U.S. 309, 316 (1974).

[3] Jones presents his argument exclusively in terms of the Sixth Amendment and does not make any separate contention under Article 21.

As important as it is, the right to cross-examine witnesses is not unrestricted. *Martinez v. State*, 416 Md. 418, 428 (2010) (cleaned up).[4] Trial judges have "wide discretionary control over the extent of cross-examination," the guarantees of the Confrontation Clause notwithstanding. 1 *McCormick on Evidence* § 19 (8th ed. 2020). They may "impose reasonable limits on cross-examination to protect witness safety or to prevent harassment, prejudice, confusion of the issues, or inquiry that is repetitive or marginally relevant." *Marshall v. State*, 346 Md. 186, 193 (1997) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). But courts cannot limit cross-examination so much that the defendant is denied "his 'constitutionally required threshold level of inquiry.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Brown v. State*, 74 Md. App. 414, 419 (1988)). Criminal defendants must remain free to bring to light the witnesses' "biases, interests, or motives to testify falsely," so that the jury may "appropriately draw inferences relating to the reliability" of those witnesses. *Peterson v. State*, 444 Md. 105, 122 (2015). They must also have the opportunity to ask questions that "elucidate, modify, explain, contradict, or rebut testimony given in chief," *Smallwood*, 320 Md. at 307, in order to "place the testimony . . .

[4] Not all information that may be solicited from a witness on cross-examination falls within "the confrontational essence of the Confrontation Clause." *United States v. Jinwright*, 683 F.3d 471, 483 (4th Cir. 2012). When the cross-examiner seeks not to challenge or contextualize the testimony given on direct examination, but rather to elicit "friendly testimony," *id.*, the right to extract such testimony is protected by the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

in its proper setting," so that the jury can fairly decide what to make of it, *Myer v. State*, 403 Md. 463, 477 (2008) (quoting *State v. Cox*, 298 Md. 173, 184 (1983)).

In short, a criminal defendant should generally be allowed to ask questions that "reasonably tend[] to explain, contradict, or discredit any testimony given by the witness in chief, or which tend[] to test his accuracy, memory, veracity, character or credibility." *Id.* (quoting *Cox*, 298 Md. at 184). But as long as the trial court does not deny the defendant this "threshold of inquiry" required by the Confrontation Clause—that is, as long as the criminal defendant is given a fair opportunity to challenge and contextualize—a court's limitation on cross-examination will be reversed only for an abuse of discretion. *Peterson*, 444 Md. at 123–24.

In some cases, it can be difficult to ascertain precisely when a defendant has been afforded the "constitutionally required threshold level of inquiry." *Smallwood*, 320 Md. at 307 (cleaned up). This isn't one of them. We have no difficulty in concluding that the trial court's sustaining the single objection lodged by the prosecutor was appropriate and did not infringe upon Jones's confrontation rights.

There are at least two overlapping reasons why the prosecution's objection to the question about whether someone besides Jones ever "had" the hat was rightly sustained. When the objected-to question was asked, the witness had already made clear in her testimony that she was unable to tell exactly how and when DNA samples might have been contributed to the hat. She had explained that the limited function of forensic DNA testing

is to determine "whether or not an individual can be included or excluded as the source of [a] DNA profile [taken] from [an] evidence item." There was no foundational testimony to support the notion that her analysis could definitively establish whether any of the contributors to the DNA samples had ever "had" the hat in hand or on their heads. Insofar as the question sought to establish just that—whether someone besides Jones had "had" the hat that Keuhnert tested for DNA—it called for a speculative conclusion beyond the scope of Keuhnert's purported expertise. Insofar as the question simply sought to have Keuhnert reiterate or reconsider her points—that it was "possible" someone else had "had" the hat tested by Keuhnert, but that her analysis could not provide any kind of time line or chain of custody—it was repetitive. *Martinez*, 416 Md. at 428 (holding trial courts generally have discretion to limit cross-examination "to prevent . . . inquiry that is repetitive or only marginally relevant"). In sustaining objections to repetitive questions and questions that call for speculation beyond a witness's expertise, a trial court does not abuse its discretion.

Because the jury already had the information that this question might have permissibly elicited from the witness, we cannot conclude the trial court's sustaining the objection improperly denied Jones his constitutionally required "threshold level of inquiry." Keuhnert's testimony on direct examination that Jones was with near certainty the major contributor to the DNA samples from the hat found near the crime scene was damaging to Jones's case. But he was not denied an opportunity to challenge or to place into context

that testimony. Defense counsel was still able to seek (and obtain) from Keuhnert just the information that, according to Jones's brief on appeal, he or she sought to elicit on cross-examination: the significance of the presence of others' DNA in the samples from the recovered hat, i.e., that it was "possible" that one of the unknown contributors to the DNA found on the hat had been wearing the hat shortly before police found it. With this testimony in the record, counsel could have permissibly argued, and the jury could have permissibly inferred, that the mixed DNA profile could have shown the presence of someone other than Jones at the crime scene. The trial court's de minimis limitation of Jones's cross-examination of Kuehnert simply denied Jones the opportunity to have the expert witness draw an inference that could appropriately be drawn only by the jury.

2.

When the police searched Jones's residence two days after the shooting, they seized his cellphone. A police digital forensic analyst was able to recover several video recordings from the device. The prosecution filed a pretrial motion regarding the admissibility of eight of these recordings. Seven of these videos depicted one or more people holding what the prosecution asserted was a .38-caliber automatic pistol. The State asserted that Jones was in each video. The trial court excluded three videos[5] but ruled that the remaining five were

[5] The court found that it was not clear that Jones was the person shown in two of the videos. It excluded another recording because the recording suggested that Jones was a member of gang.

admissible, subject to certain conditions. First, the court required that the prosecution redact the audio portion of each video. Second, the prosecution had to provide evidence that the handgun held by Jones in the videos was the type of gun used in the shooting. Finally, the prosecution would have to establish that each video was made on a different date and that all were made within a reasonable temporal proximity to the date of the shootings. When defense counsel asserted that introducing more than one video was unnecessarily cumulative, the court rejected this argument, concluding, "[I]t it seems to me that him possessing the same type of gun—and from appearances, the same gun—on multiple dates strengthens the inference of ownership of the gun."

At trial, the prosecution introduced evidence that the five videos were made between November 24, 2016, and December 16, 2016, in the days and weeks leading up to the December 18 shooting. Four of the videos depicted Jones holding what an expert witness identified as a .38-caliber Kel-Tec automatic pistol.[6] Another expert testified that all the shell casings recovered at the crime scene, as well as the bullets removed from the victims, were .38-caliber. The videos were therefore allowed in.

[6] Jones did not have a gun in the fifth video, which was offered into evidence only to link Jones to the cellphone.

Jones contends that the circuit court erred in admitting these videos into evidence. Alternatively, he contends the videos were not relevant or, if relevant, that they were unnecessarily cumulative and far more prejudicial than probative, because they were essentially improper character or "other acts" evidence. We are not persuaded by either contention.

Evidence is relevant if it has "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." Md. Rule 5-401. The relevance threshold "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). But if evidence fails to clear this hurdle, it is inadmissible, and trial judges have no discretion to decide otherwise. *See* Md. Rule 5-402 ("Evidence that is not relevant is not admissible.") Trial judges also receive no deference for their relevancy determinations. These are legal conclusions subject to *de novo* review on appeal. *Brethren Mutual Insurance Co. v. Suchoza*, 212 Md. App. 43, 52 (2013).

In arguing that the videos showing Jones with a .38-caliber handgun were irrelevant, Jones points out that one of the detectives testified that .38-caliber handguns are very common, and that there are hundreds of thousands of firearms in the world that fire such ammunition. Jones also correctly asserts that, because the police were unable to find the murder weapons, the prosecution presented no evidence that that the handguns shown in the videos were the same handguns used to shoot the victims. Although these facts might make the videos less *probative*, they do not render the videos *irrelevant*. The videos, all of

which had been created shortly before the shootings, depicted Jones with a handgun that was of the same caliber as the weapons used to commit the crimes charged. This evidence certainly had at least some tendency to show that Jones had access to at least one of the guns used to shoot the victims. *See Grymes v. State*, 202 Md. App. 70, 104 (2011) (holding that the admission into evidence of a handgun, along with photographs of where that gun was recovered, was not an abuse of discretion because such evidence was relevant as the prosecution had introduced other evidence that the defendant was previously "seen with a revolver style handgun prior to the crime," and the room in which the revolver was discovered was located at the bottom of the defendant's building); *Reed v. State*, 68 Md. App. 320, 330 (1986) (holding that a trial court did not err in permitting a witness to testify that she saw the defendant carrying a handgun, two years prior to the murder for which he was on trial, because such evidence "was probative to show that the [defendant] possessed the type of weapon employed in killing [his victim]."); *Hayes v. State*, 3 Md. App. 4, 8 (1968) (holding that the trial court did not err in permitting a witness to testify that Hayes was in possession, four days before the charged killing, of the type of pistol used to kill the victim, because "[i]t is always relevant to show that the defendant before the date of the crime had in his possession the means for its commission"). The videos were not irrelevant.

But even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Before

courts admit evidence, they should decide whether it is "worth what it costs." 1 *McCormick on Evidence* § 185 (8th ed. 2020). Md. Rule 5-403 asks judges to consider the probative value of the challenged evidence in light of any improper "adverse effect beyond tending to prove the fact or issue that justified its admission." *Hannah v. State*, 420 Md. 339, 347 (2011) (cleaned up); *see also Smith v. State*, 218 Md. App. 689, 705 (2014) (explaining that unfair prejudice is determined by weighing "the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case"). Unlike relevancy determinations, the balancing done by the trial court under Md. Rule 5-403 is subject to review only for an abuse of discretion. *Smith*, 218 Md. App. at 704.

As we recently explained in *Montague v. State*, __ Md. App. __, 2019 WL 7045959 (2019), our evidence rules contain special relevancy rules, like the rules on character and other-acts evidence, that are "particularized applications of the balancing test notion of Rule 403." *Id.* at *4, n.4 (quoting Norman M. Garland, *An Overview of Relevance and Hearsay*, 22 Sw. U. L. Rev. 1039, 1047 (1993)). In adopting Md. Rule 5-404, which bars the admission of "evidence of a person's character or character trait" and "[e]vidence of other crimes, wrongs, or other acts . . . to prove the character of a person in order to show action in conformity therewith," the Court of Appeals has, in effect, simplified one aspect of the Md. Rule 5-403 balancing process for trial judges. The rule provides that the probative value of these specific types of evidence, *if used for proscribed character or*

*propensity purposes*, is substantially outweighed by the danger of unfair prejudice to the defendant. This evidence is inadmissible, and trial judges may not decide otherwise. However, judges may admit the same evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, [or] absence of a mistake or accident." Md. Rule 5-404(b); *see also Wagner v. State*, 213 Md. App. 419, 458 (2013) (explaining that evidence of other acts may still be admissible if it has "special relevance, *i.e*. is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character" (cleaned up).

Jones argues that the five videos admitted into evidence by the trial court were "unnecessarily cumulative . . . of each other."[7] He also argues that their admission ran afoul of Md. Rule 5-404 by presenting the jury with bad acts that could be misused as "demonstrative of dangerousness and/or flawed character, or even gang-related activity." We disagree.

[7] Jones also asserts, without further explanation, that the videos were cumulative of other evidence, namely "numerable still photographs." He does not otherwise identify or describe these still photographs, and we will not consider the matter further. *See* Md. Rule 8-504(a)(4) (requiring briefs to contain "a clear concise statement of the facts material to a determination of the questions presented"); *Rollins v. Capital Plaza Assocs*., 181 Md. App. 188, 201 (2008) (An appellate court "cannot be expected to delve through the record to unearth factual support favorable" to a party.).

We cannot conclude that the trial court abused its discretion by admitting the video evidence. As we have related, before trial, the court examined all the videos the prosecution sought to introduce and carefully weighed what was admissible and what should be excluded. The judge found the videos highly probative; as the trial court noted, that Jones possessed "the same type of gun—and from appearances, the same gun—on multiple dates strengthens the inference of ownership of the gun." And by conditioning the admissibility of the videos upon a showing that each had been created on a different date, the trial judge ensured the presentation of the videos would not be cumulative.

Neither can we hold that the admission of the videos ran afoul of Md. Rule 5-404. The videos, which show Jones with a similar gun were introduced for a permissible purpose: to establish opportunity, that is, to show that Jones was in possession of a .38-caliber handgun days before the shootings took place. The trial court also minimized the risk of their misuse for a forbidden propensity purpose by determining that all audio from the video recordings would be redacted and by excluding entirely a video that suggested Jones was a member of a gang. This avoided exposing the jury to any gang-related improper character or other-acts evidence.[8]

[8] Jones also points to the fact that some of the videos showed him smoking what appears to be a marijuana cigarette. Assuming for purposes of analysis that merely smoking marijuana is widely viewed as an attribute of bad character (a proposition about which we are extremely doubtful in light of Maryland's decriminalization of possession of small amounts of marijuana), the fact remains that there was ample other evidence linking Jones

In short, because they were not cumulative, and because they were admitted for a proper purpose, the circuit court neither erred nor abused its discretion in admitting the videos.

**THE JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY ARE AFFIRMED. COSTS ASSESSED TO APPELLANT**.

to that drug, including the fact that several ounces of marijuana were found in his possession when he was arrested.