UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0800

September Term, 2014

ERIC BROADWAY

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Hotten, J.

Filed: December 22, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Eric Broadway, appealed a decision of the Circuit Court for Baltimore County, affirming his conviction for the shooting death of Jermaine Dalton ("Mr. Dalton"). Appellant was charged by criminal indictment for first degree murder, Md. Code (2002, 2012 Repl. Vol.) §§ 2-201 and 2-208 of the Criminal Law Article ("Crim. Law"), first degree assault, Crim. Law, § 3-202, firearm violation, Crim. Law, § 4-204(b), and illegal possession of a regulated firearm, Md. Code (2002, 2011 Repl. Vol) § 5-133(b) and (c) of the Public Safety Article. After a five-day trial,[1] the jury acquitted appellant of first degree murder, but returned guilty verdicts on charges of second degree murder, use of a handgun in the commission of a felony or crime of violence, and illegal possession of a regulated firearm following a felony conviction. Appellant was sentenced to twenty-five years for the murder, ten consecutive years for use of a handgun, and a concurrent term of six years for illegal possession of a firearm after a disqualifying conviction.

Appellant noted a timely appeal to this Court and presents four questions for our review, which we have restated as follows:[2]

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[1] Appellant's first trial, which ended on December 4, 2013, resulted in a mistrial after several jurors contracted the flu. A second jury trial took place April 4-9, 2014.

[2] As stated in appellant's brief, the issues are:

> 1. Did the [trial court] abuse [its] discretion by denying [a]ppellant's pretrial motion to exclude the testimony of an expert witness?
>
> 2. Did the trial court err by admitting into evidence State's Exhibits #43 and #44, still photographs taken from a

(continued...)

1. Did the trial court abuse its discretion in denying appellant's pretrial motion to exclude the testimony of an expert regarding the use of cell phone data to determine the location of appellant's cell phone shortly before and after the murder?

2. Did the trial court err in admitting two still photographs (State's Exhibits 43 and 44) purportedly showing the truck driven by appellant on the night of the murder, taken by surveillance video camera at a nearby convenience store shortly before the murder?

3. Did the trial court err in denying appellant's motion *in limine* to exclude excerpts from a recorded statement made to a police investigation by appellant's friend Alexander Sutherlin?

4. Is there sufficient evidence to sustain appellant's convictions?

With respect to the first three issues, we conclude that the trial court did not err or abuse its discretion. Because the evidence was sufficient to convict appellant, we shall affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, the State's prosecution theory was that appellant shot the victim following an altercation involving a woman with whom both men had a relationship. Although

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[2](...continued)

surveillance video?

3. Was the trial court wrong to deny [a]ppellant's motion to exclude portions of the statement made by Alexander Sutherlin to Detective [Gary] Childs?

4. Is the evidence legally insufficient to sustain [a]ppellant's convictions?

appellant admitted that he fought with the victim earlier that night, appellant denied returning to the scene of the dispute and shooting him.

On October 12, 2012, Nicole "Nikki" McLean ("Ms. McLean") lived on Bluejay Court in the Halethorpe neighborhood of Lansdowne. Ms. McLean had been friends with both appellant and Mr. Dalton since childhood. Mr. Dalton and Ms. McLean previously had a "boyfriend girlfriend" relationship and remained friends.

Appellant lived two miles away, at 617 Roundview Road in Cherry Hill, with Daniel Capel ("Mr. Capel"), whose Chevrolet pickup truck he frequently used. Appellant's friend Alexander "Bo" Sutherlin ("Mr. Sutherlin") lived next door, at 619 Roundview Road. Although appellant's girlfriend, "Dana," lived two doors down, at 621 Roundview, he was simultaneously "dealing with" Ms. McLean in Lansdowne. At 10:07 p.m. that evening, appellant called Ms. McLean, then went to her house, where the two engaged in sexual activity. While appellant was with Ms. McLean, Mr. Dalton repeatedly attempted to contact her, by cell phone calls and text messages. Ms. McLean told Mr. Dalton that she was "fucking" and to leave her alone. Intoxicated, Mr. Dalton came to Ms. McLean's townhouse and beat on her door until she opened it. Mr. Dalton pushed inside, grabbed Ms. McLean, and choked her. Appellant came downstairs, put Mr. Dalton into a chokehold, then left him on the floor. At that point, appellant "ran out the door."

Ms. McLean pushed Mr. Dalton out her door. Although Ms. McLean demanded that he leave, Mr. Dalton continued to bang on her door. Using one of her two cell phones, Ms.

McLean talked to appellant "multiple times," telling him that Mr. Dalton "was still banging on the door." Ms. McLean made several calls and texts to appellant during this period. A "few minutes" after she warned Mr. Dalton that she was going to call the police, he stopped knocking. Minutes later, Mr. Dalton was fatally shot in McDowell Lane, the street adjacent to McLean's residence, by two bullets fired at close range.

At 11:38 p.m., Baltimore County Police Officer Miller[3] was on duty at a nearby precinct when he heard two gunshots, separated by several seconds. Minutes later, at 11:46 p.m., the officer was dispatched to McDowell Lane, where he found Mr. Dalton lying in the street near Ms. McLean's residence, dying from two gunshot wounds.

Meanwhile, at 11:42 p.m., Ms. McLean's neighbor on McDowell Lane, Elijah Hopper ("Mr. Hopper"), called 911 to report that after hearing "a commotion," someone yelling "stop!", and "a pop," he looked out his window. He saw a man standing over another man, who lay prone in the street with his hand reaching up. The man fired at the victim. Although Mr. Hopper "saw and heard" the shots, he could not identify the shooter from his vantage point. About two and a half minutes afterward, he saw a dark four-door sedan that he believed to be an Acura, pull up next to Mr. Dalton, open the rear door, close the door, and drive away.

[3] Officer Miller's first name does not appear in the trial transcript.

Police had no witness or forensic evidence identifying the shooter. Their investigation led them, through the victim's cell phone, to Ms. McLean. There were multiple calls and texts between Mr. Dalton and Ms. McLean throughout the evening, but the last ones were calls from Ms. McLean to Mr. Dalton at 11:33, 11:24, and two at 11:36 p.m. When police learned about the altercation involving Ms. McLean, Mr. Dalton, and appellant, they questioned appellant, who admitted to the fight but denied shooting Mr. Dalton. Appellant admitted to driving Mr. Capel's Chevy truck with North Carolina tags that night. He claimed that after the altercation with Mr. Dalton, he returned to Cherry Hill, where he met up with Mr. Sutherlin.

Baltimore County Police Detective Gary Childs ("Detective Childs") developed incriminatory information during recorded interviews of Ms. McLean and appellant's friend, Mr. Sutherlin. Ms. McLean revealed that in a cell phone conversation with appellant shortly after he left appellant on her floor, she informed appellant that Mr. Dalton was still at her door and refused to leave. Shortly after Mr. Dalton stopped knocking, appellant called her and told her "to take his number and everything out of" her cell phone and to use only her other cell phone to contact him. He also asked about the presence of police helicopters in the area.

Cell phone records indicated that the call from Ms. McLean to appellant complaining about Mr. Dalton occurred at 11:36 p.m., minutes before he was shot, while the call from appellant to Ms. McLean directing her to remove his information from her cell phone and

asking about police helicopters occurred at 11:42 p.m., at the same time Mr. Hopper was reporting Mr. Dalton's murder, and lasted for five minutes.

A few weeks after Mr. Dalton's murder, Mr. Sutherlin was arrested on burglary charges.[4] In a recorded interview on November 5, 2012, Mr. Sutherlin recounted that appellant called him that night, asking to be picked up on their street in Cherry Hill. While driving to get cigarettes at a local convenience store, appellant told Mr. Sutherlin that he needed a ride because he had to "get rid" of the truck and that he had just shot someone in a dice game in East Baltimore. Police records showed that on that night, there were no reported shootings of that kind in Baltimore.

Surveillance camera video from a Royal Farms convenience store that was en route between appellant's residence and Ms. McLean's residence provided additional circumstantial evidence that appellant returned to McDowell Lane at the time of the murder. Two still photographs from the footage showed a Chevrolet pick up truck with distinctive markings and a large side-mirror like those on the truck owned by appellant's roommate, who told police that he allowed appellant to drive the vehicle. The vehicle is shown leaving the Royal Farms parking lot minutes before the murder, traveling in the direction of McDowell Lane, which is less than a mile away.

[4] The burglary charges against Mr. Sutherlin were later dismissed, after cell phone records and other evidence corroborated his alibi.

The State's theory was that after shooting Mr. Dalton, appellant "stashed" his roommate's pickup, then attempted to establish an alibi by calling on his close friend and neighbor, Mr. Sutherlin. Cell phone records and statements by Mr. Sutherlin established that at 11:51 p.m, approximately ten to twelve minutes after Mr. Dalton was shot, appellant called Mr. Sutherlin to ask him to pick him up on their street. While the two drove to get cigarettes, appellant was talking on his phone, saying "[s]omething about a helicopter." Later, "[h]e said he got into it with a–at a dice game with somebody over east Baltimore." Appellant also stated that he needed Mr. Sutherlin to give him a ride because he did not have Mr. Capel's truck.

The State charged appellant with Mr. Dalton's murder. Its theory was that after Mr. Dalton "disrespected" him and attacked Ms. McLean, appellant left Ms. McLean's house, but after hearing from her that Mr. Dalton remained outside her home, he returned to find Mr. Dalton still on McDowell Lane. According to the State, appellant either planned to shoot Mr. Dalton or had enough time to deliberate between the execution-style shots.

At trial, the State presented testimony by Officer Miller, Mr. Hopper, Mr. Capel, Ms. McLean, Mr. Sutherlin and police investigators, as well as evidence of cell phone calls and texts and related expert testimony. Dion Pittman ("Mr. Pittman"), a Sprint expert in cell sites, testified regarding the cell tower and sector that appellant's phone connected to on eighteen calls occurring between 10:00 p.m. on October 12, 2012 and 12:15 a.m. on October 13. He explained that the calls immediately before and after the murder connected through

closest cell tower, which was the Rosemont cell tower that services the street where Mr. Dalton was murdered, rather than the Brooklyn cell tower that services the street where appellant lives.

Detective Charles Gruss ("Detective Gruss"), a retired police detective with expertise in mapping cell phone calls based on such data, also testified that of the eighteen calls made or received by appellant's cell phone during that time frame, the calls between appellant and Ms. McLean that occurred just before the murder at 11:36 p.m. and just after the murder at 11:42 p.m. connected through the Rosemont cell tower servicing McDowell Lane in Lansdowne, not the Brooklyn cell tower servicing appellant's residence on Roundview Road in Cherry Hill.

The jury, apparently not persuaded beyond a reasonable doubt that the murder was premeditated, acquitted appellant of first degree murder, but convicted him of second degree murder, use of handgun in the commission of a felony or crime of violence, and possession of a firearm after a disqualifying conviction. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

DISCUSSION

I. Expert Testimony Regarding Cell Phone Location

Appellant contends that the trial court abused its discretion in denying his pretrial motion *in limine* to exclude testimony by Mr. Pittman, a radio frequency engineer employed by Sprint, regarding the location of appellant's cell phone at the time of calls he made and

received during the period immediately before and after the murder. We are not persuaded that the trial court abused its discretion in admitting the challenged testimony.

Testimony by experts is governed by Md. Rule 5-702, which provides:

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

Generally, testimony relying on cell phone location technology must be given by an expert witness. *See generally State v. Payne*, 440 Md. 680, 701-02 (2014) (trial court erred in admitting police officer's non-expert testimony regarding location of co-defendants based on cell phone and cell tower records); *see also Hall v. State,* 225 Md. App. 72, 92 (2015) ("We have already explained in detail that expert testimony is required–much less appropriate–to plot cell phone data onto a map."); *Coleman-Fuller v. State*, 192 Md. App. 577, 619 (2010) (error for police detective to give lay opinion that cell phone records placed the defendant in the vicinity of crime); *Wilder v. State*, 191 Md. App. 319, 364-65 (2010) (error to permit police detective to plot defendant's location on map using cell phone records without qualifying him as an expert). "To qualify as an expert, one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will probably aid the trier [of fact] in his search for the truth." *Thanos v. State*, 330 Md. 77, 95 (1993) (internal quotation marks and citations omitted).

Trial courts have "wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony." *Massie v. State*, 349 Md. 834, 850-51 (1998). In the absence of an error of law or fact, we review the admission of expert testimony for abuse of discretion. *See Bomas v. State*, 412 Md. 392, 416-17 (2010); *Wilson v. State*, 370 Md. 191, 200 (2002).

In particular, trial courts also have broad discretion in determining the relevancy of proffered expert testimony. Subject to particularized exceptions not pertinent here, "all relevant evidence is admissible. Evidence that is not relevant is not admissible." Md. Rule 5-402. 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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403.

"The trial court's relevancy determination, as well as its decision to admit relevant evidence over an objection that the evidence is unfairly prejudicial, will not be reversed absent an abuse of discretion." *Collins v. State*, 164 Md. App. 582, 609 (2005). *See Merzbacher v. State*, 346 Md. 391, 404-05 (1997). "[E]vidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Burris v. State*,

435 Md. 370, 392 (2013). "The more probative the evidence, . . . 'the less likely it is that the evidence will be unfairly prejudicial.'" *Id.*

Before trial, appellant moved *in limine* to exclude Mr. Pittman's expert testimony regarding locations of appellant's cell phone at times that support the State's prosecution theory that after Ms. McLean called to tell appellant that Mr. Dalton was still outside her house, appellant returned and shot appellant. In a motion hearing, defense counsel acknowledged that the cell phone records were relevant and that Mr. Pittman was qualified as an expert in cell phone location analysis. However, defense counsel proffered that there were three cell towers serving appellant's Cherry Hill residence, so that it was "just as probable" that appellant was home when the crime took place, as it was that he was at the scene of the crime in Lansdowne. Defense counsel argued that Mr. Pittman's location analysis should be excluded because expert testimony about the mere "possibility" that appellant's cell phone was in a particular area at a particular time would be unduly prejudicial. The trial court denied appellant's motion, ruling that if, as expected, the expert testimony established a "50-50" possibility of appellant's presence in the area where of the shooting, Mr. Pittman's testimony would not be "overly prejudicial."

On the first day of trial, before jury selection began, defense counsel advised the court that he had just become aware that the State's cell phone location evidence could not be challenged on the factual basis he previously asserted at the motion hearing, (*i.e.*, that calls made from appellant's Cherry Hill residence could connect through any one of three cell

phone towers). After talking with counsel for the State, defense counsel acknowledged that appellant's defense "as to what the cell phone records would bear out[] . . . isn't necessarily accurate anymore[.]" Based on information and maps just provided by the State, defense counsel acknowledged that Mr. Pittman's expert testimony would undermine that defense. For appellant's benefit in determining whether to request a postponement, defense counsel reviewed the materiality of that new information to appellant's defense, explaining that it would contradict the theory that the cell phone evidence was too equivocal to place appellant in the area of the crime scene at the time of the murder.

During trial, Mr. Pittman testified that, as a radio frequency engineer with a degree in electrical engineering, his duties include optimizing Sprint cell towers (also known as cell sites), analyzing cell phone data, and mapping information from such records. Mr. Pittman explained that cell phones connect with the closest cell tower at the time a call is originated. There are three sides, or "sectors," to each cell tower, pointing in different directions and representing the equivalent of three equal portions of a clock-face. Connections will be made through the sector that is directly in front of the cell phone, in its direct beam.

Thus, if appellant made or received a call on his Nextel phone while home at 617 Roundtree Road in Cherry Hill, that cell phone would communicate with sector 3 of the Brooklyn cell tower, whereas if appellant made or received a call at or near the crime scene, at 3801 McDowell Lane in Lansdowne, his cell phone would communicate with either

sector 2 or sector 3 of the Rosemont tower. Mr. Pittman explained that if appellant was on a call at his residence, his cell phone would not link to the Rosemont tower.

On cross-examination, Mr. Pittman acknowledged that it was not technologically possible to pinpoint the exact location within a sector or cell tower coverage area where appellant's Nextel phone was in use. Although a cell signal cannot bend around a cell tower, he acknowledged that it is possible for a call to connect to a cell tower other than the nearest one, as a result of service disruptors such as malfunctioning equipment, severe weather, or a large number of simultaneous users within the coverage area, such as during a football game. Mr. Pittman would have been notified in the event of service problems affecting the Brooklyn and Rosemont cell towers, but he did not have any service records for the relevant October 12-13 period.

In closing, the State relied heavily on the cell phone location evidence to place appellant at the scene of the crime. The State argued that the cell tower locations for the eighteen phone calls to and from appellant's cell phone during the period immediately before and after the murder were consistent with other circumstantial evidence indicating that appellant went to Ms. McLean's home (serviced by the Rosemont tower), left after the altercation with Mr. Dalton, went home to Roundview Road (serviced by the Brooklyn tower), stopped at the Royal Farms store, and then returned to McDowell Lane and shot Mr. Dalton outside Ms. McLean's residence. Afterward, he immediately called Ms. McLean to tell her to delete his "information" from her phone and called Mr. Sutherlin to pick him up

in Cherry Hill, thereby creating an alibi. The State used the times, phone numbers, and cell tower locations of those calls to "connect the dots" showing appellant's presence at the crime scene:

> The first call at 10:07 comes from this tower in Brooklyn, and this is the Brooklyn tower, Sector 2, and that call, [appellant] [is] talking to [Ms. McLean]. And he's setting up their meeting for later that night. We have Call 2, and this is the Rosemont tower, Sector 2. That call at 11:24 is to [Ms. McLean]. And again, he's setting up the meeting, probably saying, I'm here, . . . I'll be right there. Then we have Call 3 that's at 11:19. And that call, as I said earlier, that's after [Mr.] Dalton is choked because [appellant] is leaving [Ms. McLean's townhouse]. And we know that because he's calling [her]. If he was with [Ms. McLean], there would be no need to call to her. Then we have the call at 11:21. And again, that's a call to [Ms. McLean], and it's hitting off Sector 2 of [the] Rosemont tower.
>
> And then we have another call at 11:21, and we know at this time [appellant] is on the move. Why? Because that call is the same time as the previous call, 11:21, but it's hitting off Sector 3. . . . Detective Gruss told you that . . . those calls can show up at the same time because Sprint doesn't round to seconds. So they both show up as 11:21, but we know that [appellant] is on the move because he's hitting off two separate towers.
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> The next call, 11:30, again, it's another call with [Ms. McLean]– I think [she] calls [appellant]. At that time, [appellant] is hitting . . . off of Sector 3 of the Brooklyn tower. That is what [Detective] Gruss . . . called [appellant's] home tower. . . . Next we have Call 7 at 11:36 p.m., and at that time he's hitting off of Sector 2 of the Rosemont tower. The map and the call records show that [appellant] is going from his home in Roundview, hitting off the Brooklyn tower, over to Lansdowne, hitting off the Rosemont.
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> And, ladies and gentlemen, we know that this time, 11:36, [appellant] is in fact in the area. We know that because of the surveillance from the Royal Farms. When you couple that surveillance with the cell phone records, the only conclusion you can draw is that [appellant] is in that area. We know that's a few minutes before the murder. We know that Detective Childs drove from McDowell Lane to Roundview. He said it was a little under seven

> minutes. And he was driving it in the middle of the day. [Appellant] would be driving it at 11:30 at night on a Friday. So getting from Roundview at 11:30 over to this area at 11:36 and in the area of the Royal Farms fits the time line.
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> We know after the 11:36 call that [appellant] is calling [Ms.] McLean at that time. We know at sometime in those calls, [she] tells [appellant] that [Mr.] Dalton is still banging on her door. [Appellant] is in the area, and then [Mr.] Dalton is murdered. And again, we know when the murder happens because of the 9-1-1 call[ ] from Mr. Hopper and from the gunshots that Officer Miller hears. We know it's in the 11:40 area, that timeframe. . . .
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> After that, [appellant] again calls [Ms. McLean]. So we know he's not with [her] at that time, but he's in the area of her residence because he hits off Sector 2 of the Rosemont tower. Then we get calls 10 through 16. That includes the call where [appellant] tells [Ms. McLean] to call him on her other cell phone. And at that time, [appellant] is hitting off of the Sector 3 Brooklyn tower, and [he's] at home. We know that because during that timeframe, he calls [Mr.] Sutherlin and [Mr.] Sutherlin picks him up at his house. Again, those calls, the cell phone records, . . . are corroborated by the other testimony that we have in this case.
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> Then we have Call 17. 12:06 he hits off Sector 2 of the Brooklyn tower. And again, that fits the evidence that we have cause we know that [appellant] and [Mr. Sutherlin] went to the Wing Hing to get cigarettes, and then [Mr. Sutherlin] dropped [appellant] back off at his house. . . . And then at 12:12, we have the final call from [appellant's] house. And again, it's hitting off of Sector 3 of the Brooklyn tower.
>
> Ladies and gentlemen, based upon the cell phone records, and . . . the other evidence in this case, you can track [appellant's] movements that night. All the evidence in this case points to [appellant]. The fight with [Mr. Dalton], the things he tells [Ms. McLean], the things he tells [Mr. Sutherlin], getting rid of the truck, telling [Ms. McLean] to take his . . . information out of her phone and the cell phone records, it all points to one person, [appellant].

Appellant contends that the trial court abused its discretion in denying his motion to exclude Mr. Pittman's expert testimony regarding the location of calls on appellant's cell

phone, because "the probative value of [that] evidence was outweighed by the danger of unfair prejudice." Indeed, in appellant's view, "the evidence had no probative value" because "[t]he [trial court] found [during the motion hearing] that the proposed testimony could show '50-50' that [a]ppellant was either in Lansdowne or in Cherry Hill." Citing *Diggs and Allen v. State*, 213 Md. App. 28, 66-67 (2013), appellant maintains that, just as "an inconclusive [DNA] test is evidence of nothing," and therefore should be excluded on the ground that its slight probative value is outweighed by its prejudicial effect, so, too, should an inconclusive location analysis be excluded as unduly prejudicial. Because "it is possible that the jury could have given undue weight to" the expert cell phone location testimony, it should have been excluded.

Appellant's challenge is not supported by the record or the law. In contrast to the inconclusive DNA results in *Diggs*, the cell phone location evidence at issue here was highly relevant to a central issue in the case–whether the cell phone calls made by and to appellant's phone circumstantially established whether, when Mr. Dalton was murdered at approximately 11:40 p.m, appellant was at home on Roundview Road in Cherry Hill or at the crime scene outside Ms. McLean's residence in Lansdowne.

Although the trial court, in ruling on the pretrial motion, characterized the anticipated expert testimony as merely establishing a "50-50" proposition "that [appellant's] phone was in the Lansdowne area," that remark reflected defense counsel's proffer that the expert evidence could not definitively establish which of three cell towers would be linked when

appellant made a call from his home. At trial, defense counsel withdrew that proffer, conceding that it "was not necessarily accurate anymore" based on the cell phone location evidence that defense counsel had just reviewed with counsel for the State. As set forth above, defense counsel admitted that the State's expert had a factual basis for testifying that calls made from the crime scene would connect to the Rosemont tower whereas calls made from appellant's residence would connect to the Brooklyn tower.

At trial, Mr. Pittman testified that calls occurring at appellant's residence in Cherry Hill cannot connect through the Rosemont tower that services calls made near the crime scene on McDowell Lane in Lansdowne. This expert testimony placed appellant in the immediate vicinity of the crime scene, by showing that the calls between appellant and Ms. McLean that took place at 11:36 p.m. and 11:42 p.m.–minutes immediately before and after the fatal shots were fired at approximately 11:40 p.m.–connected through the Rosemont cell tower. Although the Brooklyn and Rosemont cell towers are only 1.9 miles apart, and cell towers may have some overlapping coverage when there is heavy usage, Mr. Pittman testified that was not likely to occur at this hour. Moreover, if such an unusual event occurred on October 12-13, Mr. Pittman was not aware of it.

Based on this record, *Diggs* is factually, and therefore legally, inapposite. In that case, an expert testified that the defendant could neither be excluded nor included as the source of DNA on a t-shirt. *Diggs*, 213 Md. App. at 66. Observing that "an inconclusive test is evidence of nothing," this Court concluded that the trial court should not have

admitted the DNA evidence. *Id.* In contrast, the evidence in the case at bar was not inconclusive or equivocal as to the fact that appellant's calls in the minutes before and after the murder could not have been made from his Cherry Hill residence but could have been made near the crime scene because they connected through the Rosemont tower.

Appellant also invokes *Snyder v. State*, 361 Md. 580, 601 (2000), holding that the minimal probative value of the fact that the accused failed to inquire about progress in the investigation into his wife's murder was substantially outweighed by its unfairly prejudicial effect, given the possibility that "jurors may have been inflamed by the evidence that the petitioner did not show an interest in the police investigation and, therefore, ignored the nonexisting, or weak, link between the failure to inquire and a consciousness of guilt." Appellant asserts, with no supporting argument, that "[t]he same analysis is applicable here."

When weighing probative value and prejudice, "we keep in mind that 'the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in [Md.] Rule 5-403.'" *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Lynn McLain, *Maryland Evidence: State and Federal*, § 403:1(b) (2d ed. 2001)). Rather, evidence is unfairly prejudicial only when "'[ ] it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Id.* (citation omitted). As the probative value of the evidence increases, the likelihood that it will be unfairly prejudicial decreases. *Id.* *See Burris*, 435

Md. at 392-93. *See generally* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 506(B), at 209 (4th ed. 2010) ("Probative value is outweighed by the danger of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.") (emphasis in original).

We are not persuaded that the probative value of the challenged cell phone location testimony was minimal, let alone that it was unfairly prejudicial. As discussed, the evidence was powerful enough to prompt defense counsel to warn appellant that it undermined his alibi defense (*i.e.*, that he was at his house when he was on the phone with Ms. McLean only two minutes before and after the murder). Although that testimony was prejudicial, it was not "unfairly" so, because it did not improperly encourage the jury to disregard the evidence or to decide the case on an emotional basis. *See Burris,* 435 Md. at 392; *Weiner v. State*, 55 Md. App. 548, 555 (1983). Given the probative value of Mr. Pittman's expert testimony, the trial court did not abuse its discretion in denying appellant's motion to exclude it.

II. Photos From Convenience Store Surveillance Camera

Appellant next asserts that "[t]he trial court erred by admitting into evidence State's Exhibits #43 and #44, still photographs taken from a surveillance video." These photos, which show a pickup truck leaving the premises of a Royal Farms store located in Lansdowne at the intersection of Patapsco Avenue and Annapolis Boulevard, were the subject of another motion *in limine*. Before jury selection, defense counsel sought to exclude these photos on the ground that they were of such poor quality that the make and

model of the vehicle cannot be discerned. In counsel's view, the photos would be "highly prejudicial" if admitted as evidence that "this is the truck going from [appellant's] house to the murder scene when you can't even tell that it's the truck." Counsel also pointed to a discrepancy between the time stamp on the video, which indicated the images were taken at 11:38 p.m., and the corresponding cash register receipts, which indicated the same images were taken at 11:36 p.m. The trial court reserved its ruling.

The following morning, the court observed that the convenience store was approximately one mile from the murder scene and that the photos show a vehicle heading in the direction of the shooting, less than five minutes before it occurred. Defense counsel conceded that the photos would be relevant if the vehicle depicted was the one used by appellant, then insisted that the vehicle in the photo could not be identified as the one driven by appellant.

The trial court denied appellant's motion to exclude the photos, reasoning that there was a sufficient factual basis to identify the vehicle as the one driven by appellant, as follows:

> [I] think that the proper analysis is to weigh the probative [value] versus the unfair prejudice, any unfair prejudice to [appellant]. And I've looked at the pictures carefully and I understand [appellant's] point that the quality isn't perfect and that the lighting is certainly not that good and it's hard to discern the color of the vehicle in the pictures probably because of the lighting and the quality of the surveillance video.
>
> But it appears to be a [pickup] truck in the photos that have been marked as . . . State's Exhibits 1 and 2 [later renumbered as Exhibits 43 and 44], and it

> matches the size and shape of [appellant's] [pickup] truck [a photo of] which has been marked as State's Exhibit 3. And even more important, there are distinctive markings on the side of the truck which is–you can see clearly in the State's Exhibit Number 3, which is a photo of [appellant's] truck, and you can make out distinctive markings on the side of that pick-up truck in Exhibits 1 and 2 even with the poor quality of the photos and the distance that the truck is from the camera.
>
> If you look closely, you can see that darker panel along the side of the–on the passenger side of the truck, and it is clearly I think a [pickup] truck shown in the photos. And you can–what appears to be those distinctive markings on the–on the passenger side panel of the truck are darker in color and there are some splotches of lighter color. And you can see the rather large side view mirror next to the passenger side window, and you can see that in both Exhibits 1, and it matches the passenger side [ ] view mirror in Exhibit 3.
>
> So I believe that there is probative value for these pictures, and it outweighs any potential unfair prejudice to [appellant], so I will deny [appellant's] motion to exclude those photos . . . because I believe the probative value outweighs any un[]fair prejudice to [him].

Appellant contends that "[t]his ruling was erroneous." Acknowledging that the admissibility of these photos lies within the sound discretion of the trial court, he "asks this Court to find that the photographs do not show definitively the make, model, color, shape or size of the vehicle. Also, they do not show who is driving the vehicle."

"The general rule regarding admission of photographs is that their prejudicial effect must not substantially outweigh their probative value." *State v. Broberg*, 342 Md. 544, 552 (1996). "[W]hether or not a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge." *Conyers v. State*, 354 Md. 132, 188 (1999). "A photograph is relevant if it 'assist[s] the jury in understanding the case

or aid[s] a witness in explaining his testimony[.]'" *Thompson v. State*, 181 Md. App. 74, 95 (2008) (citations omitted).

The trial court did not err in admitting these photos. The court articulated sufficient factual reasons that the jury could find that the vehicle in the photos was the distinctively colored, marked, and equipped truck that appellant admittedly drove on the night of the murder. There is nothing unfair about the prejudicial effect of these photographs. They purported to show that appellant was within one mile of the murder scene, heading in that direction, just minutes before the fatal shots were fired. Because the challenged photos did not improperly influence the jury to disregard the evidence or lack of evidence supporting the charges against appellant, the trial court did not abuse its discretion in declining to exclude those exhibits.

III. Appellant's Incriminating Statements to Mr. Sutherlin

Appellant contends that the trial court erred in admitting, as prior inconsistent statements, portions of Mr. Sutherlin's recorded statement to police. In appellant's view, his prior out-of-court statements are hearsay that do not fit within the exception for prior inconsistent statements because they are not inconsistent with his trial testimony. Moreover, appellant avers, the statements were inadmissible "other crimes" evidence from which the jury could have improperly inferred that he had a criminal propensity. We agree with the State that the trial court did not err in admitting these statements.

Maryland Rule 5-802.1(a)(3) provides that a prior statement made by a witness who testifies at trial and is subject to cross-examination may be admissible as an exception to the rule against hearsay if it is "inconsistent with the declarant's testimony" and "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]" "Inconsistency includes both positive contradictions and claimed lapses of memory." *Nance v. State*, 331 Md. 549, 564 n.5 (1993) (citation omitted). "The tendency of unwilling or untruthful witnesses to seek refuge in forgetfulness is well recognized." *Id.* at 572. "When witnesses display such a selective loss of memory, a court may appropriately admit their prior statements." *Id.*

We review a trial court's ruling that evidence is admissible under an exception to the rule against hearsay, for clear error in any factual findings, then apply the law *de novo* to those findings of fact. *See Hailes v. State*, 442 Md. 488, 499-501 (2015); *Gordon v. State*, 431 Md. 527, 538 (2013). In doing so, we consider the evidence, as well as inferences therefrom, in the light most favorable to the prevailing party. *See Hailes*, 442 Md. at 499.

"When determining whether inconsistency exists between testimony and prior statements, 'in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony.'" *McClain v. State*, 425 Md. 238, 250 (2012) (citation omitted). Under Md. Rule 5-104(a), such preliminary questions concerning the admissibility of evidence are determined by the trial court.

In *Corbett v. State*, 130 Md. App. 408, 426 (2000), this Court addressed an analogous claim of contrived denial, recognizing that "the decision whether a witness's lack of memory is feigned or actual is a demeanor-based credibility finding that is within the sound discretion of the trial court to make." Like any other factual finding, we must accept a determination that the witness's memory is not faulty unless it is clearly erroneous. *See Gordon*, 431 Md. at 538. "A holding of 'clearly erroneous' is a determination, as a matter of law, that, even granting maximum credibility and maximum weight, there was no evidentiary basis whatsoever for the finding of fact." *State v. Brooks*, 148 Md. App. 374, 399 (2002).

At trial, Mr. Sutherlin was a reluctant and belligerent witness for the State. Counsel for the State advised the court that Mr. Sutherlin had not returned phone calls and had actively resisted service of the summons to appear for trial. Defense counsel indicated that after meeting with Mr. Sutherlin, he expected the witness to recant. When Mr. Sutherlin failed to appear on the morning he was scheduled to testify, the trial court issued a body attachment. Although Mr. Sutherlin belatedly arrived in court, he was uncooperative and disrespectful to the court and counsel for the State during his direct examination.

The State asked Mr. Sutherlin to repeat what he told investigators about appellant's incriminating statements during the 11:51 p.m. phone call summoning him to Roundview Road and while they drove to a convenience store for cigarettes. In particular, the State sought to elicit testimony that within minutes of Mr. Dalton's murder, appellant told Mr.

Sutherlin that he "got rid of" Mr. Capel's truck that he had been driving and that he had just shot someone.

Mr. Sutherlin insisted that he could recall only that when he picked appellant up at Roundview Road around midnight, appellant said he did not have Mr. Capel's truck and that "he got into it with a–at a dice game with somebody over east Baltimore." According to Mr. Sutherlin, appellant did not specify what he meant by "getting into it" at the dice game. Although the State provided him an opportunity to refresh his recollection by reviewing a transcript of his police interview, Mr. Sutherlin maintained that he could not recall having said what appeared in that transcript.

The court made a factual finding that Mr. Sutherlin's lack of memory was "a contrivance" designed to avoid having to repeat the damaging statements he made against his friend during his recorded interview with police. As in *Corbett*, *supra*, the trial court found that Mr. Sutherlin's prior statements were inconsistent with his trial testimony, explaining:

> Well, to the extent, again, that this witness is not testifying based on a lack of memory, at least on his demeanor in this courtroom today and his extreme reluctance to testify, and . . . uncooperativeness, I do find that his testimony about not remembering anything is a contrivance. It's not an actual failure to remember, but it's just that he is unwilling to remember it so that he doesn't have to testify about the events.

The trial court admitted the following excerpts from Sutherlin's recorded interview, as prior inconsistent statements:

> "Man he said he shot somebody."
>
> "Understand what I'm saying? What . . . when I found out exactly what he said he shot somebody over east in a dice game but when I found out really what was going on."
>
> "He was in a dice game and he shot somebody."
>
> "All he said was it was a dice game and he shot somebody."
>
> "He said . . . I had to get rid of the truck. Shot somebody at a dice game over east. I'm gonna need you ride me somewhere . . . I need you ride me somewhere um. . . ."

Appellant maintains that these prior statements about what appellant told him on the night of the murder were inadmissible hearsay and that the effect of admitting them "was to improperly admit evidence of prior bad acts." He argues that the trial court erred in ruling "that [Mr.] Sutherlin's trial testimony was inconsistent with his statements made during the recorded interview" and in failing to conduct the proper analysis before admitting "other crimes" evidence that he confessed to shooting someone.

The trial court did not commit clear error in finding that Mr. Sutherlin's lack of recollection was feigned. The court was entitled to infer that his memory lapse was a contrivance designed to protect his friend. Mr. Sutherlin's testimony and his actions on the night of the murder establish that appellant was a close enough friend for Mr. Sutherlin to leave his girlfriend's home late on a Friday night and drive ten to fifteen minutes back home in response to appellant's call. Notwithstanding Mr. Sutherlin's repeated statements to Detective Childs that appellant said he shot someone, at trial, he refused to acknowledge

that appellant made such statements. On this record, the trial court did not err in finding that Mr. Sutherlin's trial testimony was inconsistent with the portions of his recorded interview that were played to the jury or in admitting those excerpts as prior inconsistent statements. *See* Md. Rule 5-802.1(a)(3).

Nor are we persuaded that such excerpts should have been excluded as impermissible evidence of prior bad acts or crimes. *See* Md. Rule 5-404(b). The trial court agreed with the State that, based on the content and timing of appellant's statements to Mr. Sutherlin, cell phone records showing that appellant was not in East Baltimore that night, and the State's evidence that there were no reported non-domestic shootings in Baltimore on the evening of October 12, 2012, a jury could conclude that the shooting to which appellant confessed was the Broadway murder, but that he told Mr. Sutherlin that it occurred at a dice game in East Baltimore, to protect himself and/or Mr. Sutherlin. That finding was not clearly erroneous.

In turn, because the State proffered appellant's statement to Mr. Sutherlin as a confession to the Dalton murder, the jury considered that statement only as evidence that appellant committed the crime for which he was on trial. With little or no risk that the jury treated it as other crimes evidence, we conclude that the trial court did not err in failing to exclude it as such.

IV. Sufficiency of Evidence

In his final assignment of error, appellant asserts that the State did not present sufficient evidence to convict him of second degree murder and related handgun offenses. The State counters that appellant's arguments merely attack the weight of the evidence and the credibility of the witnesses, and that the guilty verdicts are "amply supported by the evidence." We agree.

The Court of Appeals recently summarized the standards governing appellate review of a challenge to the sufficiency of evidence, as follows:

> It is the responsibility of the appellate court, in assessing the sufficiency of the evidence to sustain a criminal conviction, to determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' '[O]ur concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.' Making this determination 'does not require [the appellate] court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.''
>
> Indeed, 'we are mindful of the respective roles of the [appellate] court and the [trier of fact]; it is the [trier of fact's] task, not the court's, to measure the weight of the evidence and to judge the credibility of witnesses.' The appellate court gives deference to 'a trial judge's or a jury's ability to choose among differing inferences that might possibly be made from a factual situation[.]' 'We do not second-guess the [trier of fact's] determination where there are competing rational inferences available.' It is simply not the province of the appellate court to determine 'whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.' Such deference is accorded, in part, because it is the trier of fact, and not the appellate court, that possesses a better opportunity to view the evidence

> presented first-hand, including the demeanor-based evidence of the witnesses, which weighs on their credibility.
>
> In other words, 'when evaluating the sufficiency of the evidence in a non-jury trial, the judgment of the trial court will not be set aside on the evidence unless clearly erroneous[.]' We apply this standard 'to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt [beyond a reasonable doubt] based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts.' In other words, similar to instances involving the presentation of direct evidence, where the determination of the accused's guilt is formed entirely upon the basis of circumstantial evidence, such evidence must permit the trier of fact to infer guilt beyond a reasonable doubt, and must not rest solely upon inferences amounting to 'mere speculation or conjecture.'

State v. Manion, 442 Md. 419, 430-32 (2015) (citations and emphasis omitted).

Appellant cites the following as deficiencies in the evidentiary foundation for his convictions:

> "[T]here were no eyewitnesses who could link [a]ppellant to the crime."
>
> "Officer Miller's testimony about when he heard the gunshot reflected an approximate rather than a precise time."
>
> Mr. Hopper testified that a car pulled up minutes after the shooting, then sped off before police arrived.
>
> Although "Miss Soto, who lived across the street from the shooting, was identified as a witness by Detective Childs, . . ." she was not called to testify at trial.
>
> There was no forensic evidence linking appellant to the shooting. "[A] key, cigarette butts, and two spent shell casings" were recovered at the scene but never "tested for fingerprints or DNA evidence."
>
> The State's cell phone location expert was unable to pinpoint where a cell phone user is located within a coverage area because Nextel did not have that

> capability. "The two cell phone sites at issue in this case had overlapping coverage." And according to appellant, the cell phone data introduced through Detective Childs, Detective Gruss, and Mr. Pittman did not contradict "[a]ppellant's account of his whereabouts at the time of the shooting."
>
> The Royal Farms photos were taken at a location just three-quarters of a mile from the crime scene, near where appellant worked. The time stamp on the surveillance footage was wrong according to Detective Childs, but the only evidence of that was an image time stamped 11:39:19 p.m. together with an image of a register receipt for that transaction at 11:35:33 p.m.
>
> Mr. Sutherlin admitted that after he provided incriminatory information against appellant, "the criminal case against him was dismissed." And Mr. Sutherlin "changed his story while speaking to Detective Childs," stating first that appellant said "he got into an altercation at a dice game in east Baltimore" but eventually saying appellant said he shot someone.

We are not persuaded that any of evidence "cherry-picked" by appellant precluded the jury from convicting him. As the State demonstrates in its response, the record contains countervailing evidence that, when viewed in the light most favorable to the State as the prevailing party, "fills the holes" posited by appellant.

Specifically, as it did to the jury, the State argues the following evidence proves beyond a reasonable doubt that appellant was the person who murder Mr. Dalton:

> [Appellant] and [Ms.] McLean were at [Ms.] McLean's townhouse when [Mr.] Dalton forced his way in, attacked Ms. McLean, and engaged in an altercation with [appellant]. After subduing [Mr.] Dalton, [appellant] left and drove home in [Mr.] Capel's [pickup] truck, which [appellant] frequently used. An analysis of [appellant's] cell phone records corroborated this account, showing that [he] had left [Ms.] McLean's house by 11:19 p.m., traveled toward his residence, and arrived at around 11:30 p.m.
>
> According to the cell phone records, [appellant] then returned to the area of the crime scene.[] Moreover, . . . surveillance video from a Royal Farms store

> about a mile from the crime scene showed a [pickup] truck similar to that driven by [appellant] driving towards the crime scene minutes before the shooting. [Mr.] Hopper called 911 at 11:42 p.m., shortly after he heard a gunshot, looked out the window, and saw one man lying on the ground and another man standing over him, firing a second shot at the victim.
>
> The cell phone records then show that [appellant] traveled back to his residence, after which he called [Ms.] McLean and told her to erase his information from her cell phone and to use a different cell phone to contact him. [Appellant] then called [Mr.] Sutherlin to pick him up. Once in [Mr.] Sutherlin's vehicle, [appellant] said that he shot someone and that he had to get rid of the [pickup] truck. Although [appellant] told [Mr.] Sutherlin that the shooting occurred in East Baltimore, [appellant's] cell phone records showed otherwise. [Appellant] also called [Ms.] McLean and asked whether there were police or police helicopters in the area. [Mr.] Sutherlin overheard [appellant] talking on his cell phone and mentioning helicopters.
>
> [Appellant] told police that he was home at the time of the shooting, and then he said that he was in Yale Heights. [Appellant's] cell phone records, however, belied both claims.

We agree with the State that based on this view of the evidence, jurors could rationally find that appellant intentionally shot and killed Mr. Dalton, and that he committed that crime of violence with a handgun that he was disqualified from possessing.

> The fact that no direct evidence was produced linking appellant to the crime does not mean that no reasonable jury could have found him guilty beyond a reasonable doubt. That all the evidence against him was circumstantial is irrelevant. As we have repeated time and time again, '[a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.' Therefore, the only inquiry is whether the circumstantial evidence presented to the jury was sufficient for 'any rational trier of fact . . . [to find] the essential elements of the crime beyond a reasonable doubt.'

Hall, 225 Md. App. at 81 (citations omitted). Here, the evidence, though circumstantial, is sufficient to sustain appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.