UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0852

September Term, 2014

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DONALD GEORGE PEOPLES, JR.

v.

STATE OF MARYLAND

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Woodward,
Kehoe,
Arthur,

JJ.

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Opinion by Arthur, J.

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Filed: July 28, 2015

Appellant Donald George Peoples, Jr., was charged with a variety of offenses arising out of the kidnapping and execution-style shooting of 15-year-old Sterling Watts. After an eight-day trial in the Circuit Court for Howard County, a jury found Peoples guilty of attempted murder in the first degree, attempted murder in the second degree, conspiracy to commit attempted murder in the first degree, conspiracy to commit attempted murder in the second degree, kidnapping, first-degree assault, use of a firearm in the commission of a crime of violence (attempted first-degree murder), use of a firearm in the commission of a crime of violence (kidnapping), and robbery. The court sentenced Peoples to a total executed time of life in prison plus 85 years.[1]

## QUESTIONS PRESENTED

On appeal, Peoples raises six issues, which we re-state as follows:

1. Did the trial court err in admitting jailhouse letters from Peoples to his former girlfriend, who was his accomplice?

2. Did the trial court erroneously permit a police officer to testify as an expert in cell phone location and mapping, using cell phone and cell tower records?

3. Did the trial court abuse its discretion in denying a defense motion for a mistrial based on the State's rebuttal closing argument?

4. Did the trial court abuse its discretion in overruling a defense objection that redirect testimony about a photo array went beyond the scope of cross-examination?

[1] The sentences run as follows: attempted murder in the first degree, life; conspiracy to commit murder in the first degree, life, concurrent to count 1; kidnaping, 30 years, consecutive to count 1; use of a firearm in the commission of a crime of violence (attempted murder in the first degree), 20 years, consecutive, with a mandatory minimum of five years; use of a firearm in the commission of a crime of violence (kidnaping), 20 years, consecutive; and robbery, 15 years, consecutive.

5. Did the trial court abuse its discretion in overruling a Md. Rule 5-403 objection that a photograph of Peoples recovered from an accomplice's cell phone was more prejudicial than probative?

6. Did the trial court abuse its discretion in admitting a photo array over a defense objection that the photograph of Peoples was an unduly prejudicial "mug shot"?[2]

Concluding that there was no error or abuse of discretion, we shall affirm Peoples's convictions.

## FACTUAL AND PROCEDURAL BACKGROUND

The State's theory, as argued in closing, was that Sterling Watts "had the unfortunate luck – lack of luck – of being on [a shortcut] path shortly after this defendant

[2] As originally phrased by Peoples on appeal, the issues are:

1. Did the lower court err in admitting letters from Peoples to Laura Karr into evidence because they were not probative of Peoples's consciousness of guilt and their probity was outweighed by the potential undue prejudice?

2. Did the trial court err by permitting a State's witness, Sergeant Justin Baker, to be qualified as an expert witness?

3. Did the trial court abuse its discretion in denying the motion for mistrial during the State's rebuttal closing argument?

4. Did the trial court abuse its discretion in permitting a detective to bolster the reliability of the photo array and go beyond the scope of defense counsel's cross-examination?

5. Did the trial court abuse its discretion in admitting into evidence, State's Exhibit 66, a photograph that was unduly prejudicial?

6. Did the trial court abuse its discretion by admitting a photo array into evidence that contained a mug shot of Peoples?

got robbed from dealing drugs"; that Peoples kidnapped Watts, who was an innocent bystander; and that Peoples, along with his girlfriend Laura Karr and his friend Chiquita Sketers, drove Watts to a rural area where Peoples shot him in the back and left him to die.

At trial in November 2013, Watts was 16 years old and in ninth grade. He testified that sometime after 4:00 p.m. on June 19, 2012, he was taking a short-cut on foot between his Reisterstown residence and a friend's apartment, when he mistook Peoples for one of his "homeboys" and called out to him. As Peoples approached, Watts realized he did not know him. Peoples asked, "who your homeboy?" When Watts did not respond, Peoples grabbed his left wrist and accused him of knowing "something." Watts replied that he did not know what Peoples was talking about.

Peoples had a handgun and forced Watts into the back seat of a silver, four-door car. A white woman, who Watts guessed to be Peoples's girlfriend, was in the driver's seat. Peoples repeatedly asked her whether Watts was the person who had robbed her. Eventually, she said "I think that's him."

Peoples told the driver to go to "his sister's house, so he can shoot" Watts. En route, Watts tried to open the door and roll down the window but could not do so because the child lock was on. Peoples took Watts's identification and his two cell phones. Although Watts insisted that he did not "know what he [was] talking about," Peoples remained angry, leaned over the front seat, and punched Watts in the face, opening a cut above his left eyebrow. Peoples said, "you little niggers going to stop playing with me."

The driver drove them to Carriage Hill Apartments in Randallstown, where Watts was forced onto the floor of the car as they passed through a security booth. Peoples then

got out of the car and spoke to a woman whom he called his sister. The sister went into an apartment and returned with a rifle. She got into the front passenger seat while Peoples moved to the back seat next to Watts. She gave the driver directions and, as they were driving, loaded the rifle. At trial, Peoples identified a photograph of Chiquita Sketers as the "sister" with the rifle.

When the vehicle arrived at a dirt road "in the middle of nowhere," the sister passed the rifle to Peoples. Peoples took Watts out of the car and instructed him to "walk to the bushes." Watts testified that as he was walking, he "heard two gunshots." He then fell to the ground with a gunshot to the back of his head. After the car drove away, Watts tried to get up and called for help, but he "blacked out" and woke up in the hospital.

A passerby on horseback had happened to discover Watts, who was lying in a property owner's field, semi-conscious, moaning, and covered in blood and vomit. The rider alerted the property owner, who called 911. Watts was transported by helicopter to the Shock Trauma Center at the University of Maryland Medical Center for emergency treatment.

Watts had a bullet wound behind his right ear. He suffered a fracture of the right occipital condyle, a bony surface at the base of the skull. In addition, he had a subdural hematoma (swelling in the membrane surrounding the brain) and an injury to the right, internal carotid artery. Medical testimony established that his injuries were life-threatening and that he would not have survived but for the timely medical treatment that he received.

Ten days after the shooting, on June 29, 2012, an anonymous call to a 911 dispatcher prompted the police to investigate Peoples. On July 11, 2012, while Watts was in a

rehabilitation hospital, Howard County Police Detective Donald Guevara took Watts's detailed statement about the incident and showed him an array of six photographs of possible suspects. Watts "immediately" identified Peoples as "the guy who shot" him.

Ronald Karr testified that in June 2012, his daughter, Laura Karr, was living with Peoples at the Karrs' residence. Laura Karr frequently drove Peoples around in her gray Mazda 3. Mr. Karr testified that in early June of 2012, he found a loaded .22-caliber rifle under the mattress in Laura's room, and that he directed Peoples to get it out of the house immediately.

When the police questioned Laura Karr on July 13, 2013, she gave a written statement admitting her role in the crime, identifying Peoples as Watts's shooter, and implicating Sketers. At the time of trial, Karr was still incarcerated in the Howard County Detention Center. She testified pursuant to a plea agreement dated December 20, 2012, under which she would plead guilty to kidnapping, in return for which the State would recommend a sentence of 15 years.

Karr testified that at approximately 3:00 p.m. on June 19, 2012, she and Peoples drove her gray Mazda 3 to the Owings Manor apartment complex in order to sell some marijuana. While Karr and Peoples were with the buyer in the vehicle, the buyer ran away with the $200 bag of marijuana. Peoples was not able to catch the buyer and directed Karr to drive around looking for him. After a couple of minutes, Peoples told Karr to park outside of Owings Manor. Karr stated that Peoples exited the car and "came back with some boy." Although Karr repeatedly said she did not know if the young man was the person who took the marijuana, she eventually "just said yes." Peoples then told Karr to

drive to his sister's house. As Karr drove, Peoples kept asking "where his weed was at," and started hitting the young man in the face, causing a cut over his eye.

Karr testified that when they arrived at the Carriage Hill Apartments, Peoples told Chiquita Sketers, a friend whom he called his "sister," to "get the gun." Sketers went inside and returned with the rifle inside a black trash bag. Sketers got in the front passenger seat of the car, and Peoples got in the back seat with Watts. Sketers gave Karr directions "through back roads" to Marriottsville. As Karr drove, both Peoples and Sketers asked Watts "if he wanted to die."

Karr stated that she then turned off the main road, onto a long gravel driveway. Peoples and Sketers got out of the car, and Sketers grabbed the rifle and handed it to Peoples. Peoples told Watts to get out of the car and stand behind it. Karr "didn't want to look," but she heard Watts get shot. After Peoples and Sketers went to look at the body, they got back into the car.

Karr then drove to a cemetery in Woodlawn, where Sketers threw the young man's cell phones into the water. The three went to a liquor store and returned to the Karr residence, where Peoples and Sketers played video games for about an hour. Karr took Sketers and the rifle back to Sketers's apartment.

In addition to the testimony of Watts and Karr, the State presented corroborating circumstantial evidence. On July 12 and 13, 2012, the police executed search warrants at the residences of Peoples and Sketers. From the room that Peoples shared with Karr police recovered two cell phones, a .22-caliber rifle loaded with 11 live rounds, and six loose rounds of .22-caliber ammunition, the brand of which matched an intact .22-caliber bullet

recovered at the scene of the shooting. Police also seized from Sketers's apartment a cell phone and latex gloves. Those gloves matched the color on the finger of a latex glove recovered from Karr's vehicle, which contained .22-caliber bullets matching the bullets found both at the scene of Watts's shooting and in the rifle recovered from Peoples's and Karr's shared bedroom.

Detective Clate Moton-Jackson, who is assigned to the Computer Crimes Section of the Howard County Police Department, testified as an expert in mobile phone forensic analysis. He examined the three cell phones seized under the search warrants. The phones with numbers assigned to Peoples and Sketers had cross-contacts for "Sis" and "Bro," with cross-calls and text messages; the phones with numbers assigned to Peoples and Karr had cross-contacts for "Husband" and "Wife," with cross-calls and text messages. Sketers's phone had a digital photograph of Peoples, which was admitted over defense objection, as State's Exhibit 66. From Peoples's phone, the detective recovered a digital photograph, saved in April 2012, showing a rifle, like the one used in the shooting, on the comforter police later found in the bedroom shared by Peoples and Karr.

Over defense counsel's objections, Howard County Police Sergeant Justin Baker testified as an expert in locating and plotting the origins and receptions of cell phone calls, based on cell phone records and cell tower records. Sgt. Baker mapped calls placed by the three seized cell phones on June 19, 2012. No calls were registered on Peoples's cell phone between 3:18 p.m. and 7:25 p.m. on June 19, 2012, a period corresponding to Karr's account of the kidnapping, shooting, and aftermath. Calls on Sketers's phone at 12:18 p.m. and 1:33 p.m. that day used the cell tower within two to three miles of Sketers's apartment.

But Sketers's next call, at 4:47 p.m., which was made while the crime was in progress, used the cell tower within a mile and a half of the shooting site in Marriottsville.

Karr, who was pregnant with Peoples's child at the time she was incarcerated in July 2012, corresponded with Peoples while both were in the Howard County Detention Center awaiting trial. Over the defense's objections, two of Peoples's letters were admitted into evidence.

Karr received the first letter, dated August 7, 2012, through someone in her GED class. In that letter, Peoples professed his love for Karr, asked her to have the birth of their daughter recorded, and warned her that if he did not "come home,"

> itz your fault. You better not get on da stand and testafy against me, keep you mouth shut but itz kind of too late but I'm not mad at you (you talk to ur friends). And for The Record I didn't shoot dat boy. [Sic].

The court admitted the letter as part of State's Exhibit 91.

Karr received the second letter from Peoples on January 14, 2013, after she had given birth in November and had entered the plea deal in December – under which, as stated, the State would recommend a 15-year sentence. Having learned of Karr's deal, Peoples wrote:

> OMFG.[3] Wen did you get tuff Im a bitch. Wen I get home I'm going 2 Burn your house down. Datz why your dum ass gotta do 15 years LMFAO![4] I don't give A fuc about you or dat baby I hope you found one of dez Jail birdz 2 be her father. And when you come home we got it out 4 dat ass I'm going 2 get Kenisha n Shelika 2 wear dat ass out. . . . [sic]

The court admitted the letter as part of State's Exhibit 92.

[3] OMFG is an abbreviation for "oh my fucking god."

[4] LMFAO is an abbreviation for "laughing my fucking ass off."

Over the defense's objections, the trial court also admitted two handwritten notes found in Peoples's jail cell. Correctional Officer Alton Barr was working at the Howard County Detention Center on February 5, 2013, when he responded to a report of signs being illegally displayed in Peoples's window sill, which was on the ground floor facing a recreation yard used by inmates. In Peoples's cell, facing outward toward the yard, Barr found a note written on a plain sheet of paper, in large, thick block letters, stating: "THE WHITE GIRL LAURA KARR IS A RAT THE ONE DAT WAS PRAGANTE [sic]." Barr also recovered, from inside Peoples's cell, a package of legal papers related to these charges, with the following note in Peoples's handwriting next to a mug shot of Karr: "Let me tell you about this Rat bitch that I know her Name is Laura Karr."

## DISCUSSION

### I. Admission of Peoples's Jailhouse Letters to Karr

Peoples contends that the trial court erred in admitting the two "letters from [a]ppellant to Laura Karr" as evidence suggesting consciousness of guilt, because "[n]othing in the letters showed the use of threats or bribes to induce Ms. Karr to testify in a certain manner" or "to testify falsely," or "rose to the level of subornation." Alternatively, Peoples argues that, "[a]ssuming that the letter did show consciousness of guilt, its scant probity was outweighed by the potential undue prejudice[.]"[5] For the reasons explained below, we conclude that the trial court did not err or abuse its discretion in admitting the letters.

[5] Although Peoples's argument variously refers to "letters" and "the letter," we shall assume that he challenges the admission of both State's Exhibits 91 and 92.

**Admissibility of Threats Against a Witness**

Under Md. Rule 5-402, "[e]vidence that is not relevant is not admissible." 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) (internal quotation marks and citations omitted). "The more probative the evidence, . . . the less likely it is that the evidence will be unfairly prejudicial." *Id.* (internal quotation marks and citations omitted).

We accept any factual finding underlying an evidentiary ruling unless it is clearly erroneous. *See Gordon v. State*, 431 Md. 527, 538 (2013). "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).

"Evidence of threats to a witness, or attempts to induce a witness not to testify . . . is generally admissible as substantive evidence of guilt when the threats can be linked to the defendant[.]" *Washington v. State*, 293 Md. 465, 468 n.1 (1982); *see also Copeland v. State*, 196 Md. App. 309, 315 (2010) ("Threats are admissible because they demonstrate consciousness of guilt"); *Saunders v. State*, 28 Md. App. 455, 459 (1975) ("an attempt by an accused to suborn a witness is relevant and may be introduced as an admission by conduct, tending to show his guilt"); *cf.* Md. Code (2002, 2012 Repl. Vol.), § 9-303(a) of the Criminal Law Article ("A person may not . . . threaten to harm another, or damage or destroy property with the intent of retaliating against a . . . witness for . . . giving testimony"); *id.* § 9-305 ("A person may not, by threat . . . , try to influence, intimidate, or impede . . . a witness").

**The Record**

Before trial, the State moved *in limine* to admit Peoples's jailhouse letters to Karr, arguing that the letter telling her "to keep her mouth shut" was an admission of guilt, and that the letter stating that he would burn her house down was admissible under *Washington* "as threats" against Karr. Defense counsel opposed the motion, arguing that "[w]ithout the context of all these letters, . . . it's not relevant" and would be "prejudicial and completely confusing for the jury." According to defense counsel, the letter written after Karr's plea deal was "not an intimidating letter, it's a mad letter," reflecting Peoples's objection to Karr's plea deal, because "there is absolutely nothing at all about, you know, don't come to court and testify against me."

The trial court rejected defense counsel's benign characterization, explaining:

> "OMFG, when did you get tough. I'm a bitch. When I get home, I'm going to burn your house down." That's somebody that is angry because she's going to jail for 15 years? . . .
>
> "That's why your dumb ass got to do 15 years. LMFAO. I don't give a fuck about you or that baby." Something about that would be her father. And then talking about Kenisha and whatever, Chiquita to "wear that ass out." That's not threatening? That's because he's angry that she's going to jail for 15 years, so he's going to have his two former girlfriends "wear that ass out" and burn her house down?
>
> All right. The Court has considered the arguments. It's clear based on . . . that letter – and it was after he knew, meaning the defendant knew that she was taking a plea and was cooperating with the State for a plea of 15 years, and that's when that letter was received. And that could – and that is a threatening letter.
>
> And the other letter, since it doesn't contain personal information, and it has admissions, clearly those would be – those would be [hearsay] exceptions. . . .
>
> [T]he court is going to grant the State's motion in limine concerning these letters to be used as intimidation, as well as an admission, with a statement by a party opponent.

At trial, the court admitted both letters over defense's objections.

**Peoples's Relevancy Challenges**

Although Peoples broadly challenges the "letters," he focuses solely on the January 2013 letter and does not specifically address the earlier, August 2012 letter in which Peoples urged Karr to "shut up" and not to testify. A relevancy challenge that has not been briefed is not preserved for appellate review. *See Klauenberg v. State*, 355 Md. 528, 552 (1999). Even if it had been preserved, the trial court did not err or abuse its discretion in ruling that the August 2012 letter is relevant to show consciousness of guilt, because it

expressly "attempts to induce a witness not to testify[.]" *See Washington*, 293 Md. at 468 n.1.

The evidence also supports the trial court's finding that the January 2013 letter was an intimidating threat against Karr. Peoples referred to the plea agreement by mentioning the "15 years" that Karr had agreed to serve. In contrast to his previously affectionate letter, he spurned Karr and their child, then vowed to burn Karr's house down, and announced that he and his female acquaintances were "out for" her. Such threats of physical harm are relevant to show Peoples's consciousness of guilt. *See id.*

Although defense counsel, in challenging these letters, did not expressly invoke Md. Rule 5-403 or its standard of "more prejudicial than probative," we shall assume that Peoples's relevancy objections encompassed such a challenge. We are not persuaded that the trial court abused its discretion in failing to exclude the letters under Rule 5-403. Although Peoples's warnings and threats were prejudicial, they were not "unfairly" so, because they did not improperly encourage the jury to disregard the evidence or to decide the case on an emotional basis.[6] *See Burris*, 435 Md. at 392; *Weiner v. State*, 55 Md. App. 548, 555 (1983). As discussed, the letters showed that Peoples repeatedly attempted to dissuade Karr from testifying, first by warning her not to testify and then by threatening her in retaliation for her cooperation with the State. Accordingly, the trial court did not

[6] Defense counsel did not argue that other portions of the letters were irrelevant or unfairly prejudicial; nor did he ask for redactions. Accordingly, our decision is limited to the admissibility of the warnings and threats in those letters.

abuse its discretion in ruling that the probative value of the letters was not "substantially outweighed by the danger of unfair prejudice[.]" *See* Md. Rule 5-403.

## II. Expert Qualification in Cell Phone Location and Mapping

Peoples next contends that "the trial court erred by permitting a State's witness, Sergeant Justin Baker, to be qualified as an expert witness." Although he concedes that Sgt. Baker had specific training and experience in cell phone location and mapping techniques, Peoples renews his trial objection that his qualifications did not "fit[] the bill" for expert testimony. We disagree.

Testimony by experts is governed by Maryland 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 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 Coleman-Fuller v. State*, 192 Md. App. 577, 619 (2010) (error for police detective to give lay opinion that cell phone records placed defendant in 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," however, "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).

In voir dire concerning his qualifications as an expert, Sgt. Baker testified that he is a 13-year veteran of the Howard County Police Department who had acquired more than 80 training hours from teaching courses "specific to cell phone and cell tower analysis[,]" including "anything pretty much pertaining to cell phones and how they would be used in an investigation." Forty of those training hours were "specifically dedicated to cell tower analysis and mapping[.]" In addition, Sgt. Baker had conducted training for police detectives in how to investigate using cell tower tracking and mapping techniques. He consulted in 50 to 75 cases specifically involving cellular telephone location mapping, both within the County and with other State and federal agencies. He had given expert testimony in Howard County regarding cellular telephone location technology and mapping. According to his résumé, which was admitted into evidence, Sgt. Baker's "related experience" encompassed:

> . . . over 100 criminal investigations at the Federal, State, and Local levels involving the use of historical cell phone records. These cases specifically involved using historical cell phone records/call details records to determine the phones [sic] general geographical area at the time of a cell site activation. These investigations involved both inculpatory and exculpatory evidence and involved numerous cell phone carriers/networks within the Baltimore/Washington area.

On this record, there was therefore a sufficient basis to conclude that Baker was qualified, by his "knowledge, skill, experience, training, and education," to give expert testimony "in locating and mapping the origins and receptions of cell phone calls using cell phone records and cell tower records." *See* Md. Rule 5-702; *Stevenson v. State*, 222 Md.

App. 118, 136 (2015) (holding that circuit court did not abuse its discretion in concluding that detective was qualified to testify as expert in field of cell phone location, where detective had multiple years of direct experience and extensive training in field). The trial court did not abuse its discretion in accepting him as an expert for that purpose.

### III. Denial of Mistrial Based on Rebuttal Argument

Peoples complains that "the trial court abused its discretion in denying [his] motion for mistrial during the State's rebuttal closing argument." He specifically asserts that the State improperly "put the burden of proving innocence on the defendant" and "the jury was never instructed to disregard the argument[.]" We are not persuaded that the challenged argument was improper, much less that the trial court abused its discretion in denying a mistrial.

"Mistrials are required for improper remarks in closing argument only when 'the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.'" *Washington v. State*, 191 Md. App. 48, 108 (2010) (quoting *Lee v. State*, 405 Md. 148, 164 (2008)). "The determination [of] whether a prosecutor's comments were sufficiently prejudicial to warrant a mistrial lies within the sound discretion of the trial court." *Washington*, 191 Md. App. at 108 (citing *Lawson v. State*, 389 Md. 570, 592 (2005)).

The Court of Appeals has emphasized that "the propriety of closing argument must be judged contextually, on a case-by-case basis[.]" *Mitchell v. State*, 408 Md. 368, 381 (2009). "Because the trial judge is in the best position to gauge the propriety of argument in light of [record] facts, . . . '[a]n appellate court should not disturb the trial court's

judgment absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party.'" *Id.* at 380-81 (citation omitted).

In evaluating a challenged remark, we are mindful that "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom" and, in doing so, to "indulge in oratorical conceit or flourish[.]" *Wilhelm v. State*, 272 Md. 404, 412 (1974) (citations omitted). Even if a prosecutor's closing argument "exceed[s] the limits of permissible comment" on the evidence or reasonable inferences therefrom (*Lee*, 405 Md. at 164), a reviewing court "may consider several factors" before reversing, "including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005) (citation omitted).

One of the recognized boundaries that prosecutors may not cross in closing argument is to make comments that "tend[] to shift the State's burden to prove all the elements of the crime beyond a reasonable doubt[.]" *Lawson*, 389 Md. at 596. For this reason, the State may not make a "missing evidence" argument that impinges on the accused's right to remain silent or the presumption of innocence. *See Eley v. State*, 288 Md. 548, 555 n.2 (1980). "Said another way, Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Wise v. State*, 132 Md. App. 127, 148 (2000).

One circumstance in which the State may be able to make a "missing evidence" argument is when the defense "opens the door." "If the State fails to produce evidence that is reasonably available to it or fails to explain why it has not produced the evidence, a defendant is permitted to comment about the missing evidence in his or her closing argument to the jury." *Patterson v. State*, 356 Md. 677, 682 (1999). Making such an argument, however, may open the door for the State to argue in rebuttal that the defendant also had an opportunity to present the same evidence. In *Mitchell*, 408 Md. at 392, the Court of Appeals held that a "prosecutor's remarks calling attention to [the defendant's] subpoena power were a narrow and isolated, justified response to defense counsel's 'opening the door'" and therefore "did not shift the burden of proof[.]"

This case falls within the ambit of *Mitchell*. Defense counsel began his closing argument by acknowledging that "the State has put together a case that has a certain surface appeal," but then argued that "an illusion is really what it is." In support of that theory, defense counsel attacked the credibility of Laura Karr and her police station confession, in which she implicated Peoples more than five months before she negotiated a plea deal. Defense counsel pointed out that Karr "lied to the State in order to save the [plea] deal"[7] and that she did not make her written statement until after "she had been interviewed for hours at Baltimore County Police Department." Defense counsel posited that Karr also

[7] At trial, Karr admitted to having falsely told the authorities that she had never previously seen the rifle that Peoples used in the shooting. She explained that she mistakenly believed that such knowledge would be an obstacle to obtaining the plea agreement that she sought.

lied in her written statement in order to obtain a plea deal, pointing out that her preceding interview:

> was videotaped and audiotaped. And she gave that statement after she was interviewed. **The State chose not to show that statement – that audio statement and video statement – to you.** So you don't know what had been suggested or told to her prior to the time that she gave that statement.

(Emphasis added.)

When the prosecutor began his rebuttal by attempting to address this "missing evidence" argument, defense counsel objected, prompting the following debate over whether defense counsel had opened the door for the State:

> **[PROSECUTOR]: Thank you. In the face of overwhelming evidence of guilt, and in the absence of any evidence to the contrary –**
>
> **[DEFENSE COUNSEL]: Objection, Your Honor, could we approach[?]**
>
> THE COURT: Yes.
>
> [Counsel and defendant approached the bench, and the following ensued]:
>
> [DEFENSE COUNSEL]: The State has the burden.
>
> [PROSECUTOR]: I said that there was no evidence to the contrary.
>
> [DEFENSE COUNSEL]: You said that there's not – overwhelming evidence of guilt and any evidence to the contrary. That's shifting the burden.
>
> [PROSECUTOR: Of course (indiscernible) but there's no evidence that is contrary to guilt in this case. I didn't say they have to present some, or shift the burden towards them.
>
> THE COURT: (Indiscernible.)
>
> **[DEFENSE COUNSEL]: Well, I hate doing this but I'm going to move for a mistrial because of the shift of the burden.**
>
> **[PROSECUTOR]: That is not what I said.**

THE COURT: (Indiscernible) a mistrial would be (indiscernible). He didn't say any evidence to the contrary – **he didn't say he wanted you to produce evidence.**

[PROSECUTOR]: Exactly.

THE COURT: (Indiscernible.) . . . .

[PROSECUTOR]: It's a response to the argument in this case, Your Honor. In the end, I'm going to be able to say that the Defense didn't produce evidence – specifically, the videotape of Laura Karr's testimony. He specifically –

[DEFENSE COUNSEL]: You can't do that.

[PROSECUTOR]: Oh I absolutely can. He said during his opening – his closing argument, that the State chose not to produce a videotape. He has completely opened the door for me to respond, even more specifically the Defense also chose not to do that. The case law is very clear, when the Defense opens the door in argument there is missing evidence or evidence the State didn't present but could have, the State can then say that – the example, if – the Defense has opened the door for a fair response. And a fair response to the State not showing Laura Karr's video in this case, would be that the Defense could have, too. The State has – or, the case is Manturo[8] [phonetic] versus State, it is a Court of Appeals case, and in that case the defense lawyer referred to witnesses that weren't called. And the prosecutor brought up in rebuttal close, that the Defense also has subpoena power. And if there is some contradictory evidence that the Defense thought would be helpful, they also have the right to bring it into court and have the Court (indiscernible). And the Court of Appeals held that, A) it was not shifting the burden to make that specific of a comment, and, B) that it was opening – the door was opened by the Defense's comments. This is completely fair argument in light of what defense counsel has argued.

[DEFENSE COUNSEL]: That's not really (indiscernible) right now. That may be an issue that we may raise a little bit later on during his rebuttal. But right now, he specifically said there is no evidence to the contrary which did

[8] From his description of the case, it is apparent that the prosecutor was attempting to cite *Mitchell v. State*, 408 Md. 368 (2009), which held that the prosecutor's "missing evidence" rebuttal at closing argument was not improper, as defense counsel had "opened the door" to the response.

> shift the burden. If the Court is not inclined to grant my motion for a mistrial, I would request that the jury be admonished that it is the State's burden.
>
> THE COURT: Okay, I can say the State has the burden.
>
> [PROSECUTOR]: The defense has no burden, the State has to show (indiscernible). Is that fair?
>
> [DEFENSE COUNSEL]: What's that? That be –
>
> THE COURT: I'll just refer them back to the burden of – that the State has the burden to prove beyond a reasonable doubt. That the defendant is not required to prove his innocence.
>
> [DEFENSE COUNSEL]: Thank you.
>
> [Counsel and defendant returned to the trial tables, and the following ensued in open court]:
>
> THE COURT: Ladies and gentlemen, just let me remind you as to the instructions that I read. You will actually get a copy of – or, part of the instructions - which you'll find on page three. Let me just also explain to you and remind you, as proof – proving the defendant's guilt beyond a reasonable doubt. The burden remains on the State throughout the entire trial and the defendant is not required to prove his innocence.

(Emphasis added.)[9]

On this record, we are persuaded that the trial court did not abuse its discretion in accepting that prosecutor's interrupted argument was intended to rebut the "missing evidence" inference drawn by defense counsel. As the prosecutor correctly argued, the Court of Appeals has held in substantially similar circumstances that the State is entitled to respond when defense counsel opens the door by asking the jury to draw a negative

[9] Although the prosecutor stated at the bench that he intended to comment on the defense's failure to produce the videotape of Karr's testimony, the prosecutor in fact never revisited the subject. The defense raised no additional objections to the State's rebuttal closing argument.

inference based on the State's failure to present evidence that the accused had an equal opportunity to present. *See Mitchell*, 408 Md. at 392. Thus, the challenged "argument," which was little more than a sentence fragment, was both invited and a "fair comment" – a response to the defense's argument that the State could have and should have presented a recording of Karr's interview.

Furthermore, even though the challenged remark did not improperly shift the burden of proof, the trial court gave a clarifying instruction that Peoples was not required to prove his innocence. As defense counsel acknowledged, this was an adequate remedy for any misunderstanding caused by the challenged remark.

On this record, the trial court did not abuse its discretion in failing to instruct the jury to disregard the prosecutor's argument or in denying Peoples's request for a mistrial.

## IV. Scope of Redirect Examination

In his fourth assignment of error, Peoples asserts that "the trial court abused its discretion in permitting a detective to bolster the reliability of the photo array and go beyond the scope of defense counsel's cross-examination." This contention stems from the testimony of Detective Donald Guevara, who conducted the photo array during which Sterling Watts identified Peoples as the person who shot him.

On cross-examination, defense counsel elicited from Det. Guevara that on July 11, 2012, he showed Watts a single piece of paper with six photographs; that in the spring of 2013, the Howard County Police Department changed its array procedure to reduce the risk of misidentification; and that the current protocol was to provide witnesses with individual pages containing only one photograph per page. On redirect, the prosecutor elicited the

detective's testimony that arrays with multiple photos on a single page had been the standard police procedure for his "entire career[.]" After the prosecutor continued, defense counsel interjected, as follows:

> **[PROSECUTOR]: And can I ask[ ] you Detective Guevara, why do you include six – why almost in your entire career did you include six photographs —**
>
> **[DEFENSE COUNSEL]: Objection.**
>
> [PROSECUTOR]: — on one piece of paper.
>
> [DEFENSE COUNSEL]: Approach.
>
> THE COURT: Yes.
>
> [BENCH CONFERENCE ensued, with the defendant present]
>
> [DEFENSE COUNSEL]: It's immaterial as to why he included six. The issue is the way it's displayed, not the number.
>
> [PROSECUTOR]: I think he raised the issue of reliability of the six figures being shown that way.
>
> [DEFENSE COUNSEL]: But it's not a number, Your Honor. It's the way it's displayed.
>
> THE COURT: All right. Mr. [Prosecutor]?
>
> [PROSECUTOR]: He raised the issue of avoiding misidentifications and I think it's fair for the State it [sic] to explain the procedure, the methods that the police use to avoid misidentifications in this case. He's opened the door at this point.
>
> THE COURT: I agree. Overruled.
>
> [DEFENSE COUNSEL]: Just to be clear. Just because I said they've changed the procedure and I asked they did it for the reasons they changed avoiding misidentification does not give them launch to go into their entire methodology prior to this spring, this past spring [sic].
>
> THE COURT: Well, I understand that. The way in which it was presented inference is possible misidentification from the way it was presented [sic],

> so **I do think the door has been opened. And the State can clear that up.**

(Emphasis added.)

The prosecutor proceeded to elicit Det. Guevara's testimony that he was trained to include six photographs in photo arrays because showing only one photograph would be too prejudicial and showing more photographs reduced the possibility of misidentification.

Peoples argues that "[t]he trial court abused its discretion in allowing the State to introduce this redirect examination testimony through Detective Guevara" because "the fact that Detective Guevara was questioned about the change in procedure for showing photo arrays did not open the door for the State to examine why six photographs had always been included in a photo array." In support, Peoples cites authorities establishing that "the scope of redirect examination should ordinarily be limited to new matters brought out on cross-examination." *See Thruman v. State*, 211 Md. App. 455, 468-70 (2013); Md. Rule 5-611(b). *See also* 5 Lynn McLain, *Maryland Evidence* § 300:2 at 269 (2d ed. 2001); 6 McLain, *supra*, § 611:11 at 602; Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1207 at 574 (4th ed. 2010). In Peoples's view, "the introduction of bolstering testimony as to why six photographs were included in the photo array did not explain or reply to any new matter brought up during cross-examination[.]"

As this Court has recognized, the scope of redirect may expand to address an impeaching fact that comes to light during cross-examination.

> The trial judge's discretion in controlling the scope of redirect examination is wide. Even inquiry into new matters not within the scope of cross-examination may be permitted, and **a party is generally entitled to have his witness explain or amplify testimony that he has given on cross-**

> **examination** and to explain any apparent inconsistencies. **The judge's discretion is particularly wide where the inquiry is directed toward developing facts made relevant during cross-examination or explaining away discrediting facts.**

*Daniel v. State*, 132 Md. App. 576, 583 (2000) (emphasis added) (citations omitted).

Contrary to defense counsel's objections, the State's rehabilitation of its witness on redirect was neither "immaterial" nor a fishing expedition into the police department's "entire methodology" for photo arrays. Defense counsel cross-examined Det. Guevara in detail about the photo array procedures used by the Howard County Police Department, eliciting the discrediting fact that a single-photo-per-page method had been adopted to reduce the risk of misidentification, but that that protocol was not used when Watts identified Peoples. On redirect, it was fair to allow the prosecutor to address that new information by eliciting testimony that the array showed six photographs, which is another recognized technique for reducing misidentification. Peoples was not harmed by this redirect inquiry, because on re-cross-examination defense counsel was permitted to ask additional questions in an effort to further impeach the reliability of the photo array. In these circumstances, the trial court did not abuse its discretion in overruling Peoples's objection to the challenged redirect examination.

## V. Admission of Cell Phone Photograph of Peoples

Peoples next contends that the trial court erred in admitting State's Exhibit 66, a copy of a digital photograph recovered from Chiquita Sketers's cell phone, showing Peoples giving the "finger" to the camera.[10] At trial, defense counsel objected that the

[10] The State did not address this assignment of error in its brief.

photograph "was clearly inflammatory" and "highly prejudicial," as well as unnecessary because, "[i]f the State is seeking to establish a connection . . . between Ms. Sketer[s] and my client, [the State has] just done it with the cellphone contact." Defense counsel later offered to stipulate that there was a photograph of Peoples on Sketers's cell phone.

The prosecutor countered that the challenged photo was not unduly prejudicial, arguing that "[t]here's nothing criminal in nature or really disgusting about that photograph" because "giving . . . the middle finger . . . isn't really shocking to anybody in this day and age." In addition, the prosecutor proffered:

> . . . it's the only photograph that the State would be able to put [sic] for Ms. Sketer's phone with this defendant on it. I think it's confusing to the jurors to have to deal with phone numbers and the vagaries of which phone number is whose but when they see that, they can visually see a photograph that Ms. Sketers had this defendant's photograph on it.

The trial court agreed with the State, ruling that the photo was not "overly prejudicial . . . if there is any prejudice at all."

Invoking Md. Rule 5-403, Peoples argues that the trial court abused its discretion in admitting the photo because "[a]ny minimal relevance was substantially outweighed by the prejudice" in showing the jury a photograph that "could only have served to prejudice the jury's perception of his character." In support, Peoples cites *Banks v. State*, 84 Md. App. 582 (1990), a narcotics case in which this Court held that the prejudicial effect of a photograph showing the defendant holding a handgun substantially outweighed its minimal probative value. *Id.* at 592.

"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) (quoting *Johnson v. State*, 303 Md. 487, 502 (1985)). "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).

Because "[p]hotographs are inherently cumulative, whether used to illustrate testimony or . . . in support of a stipulation[,]" they "need not possess 'essential evidentiary value' to be admissible." *Broberg*, 342 Md. at 565. Maryland courts "tend to hold that photographs do have probative value as corroborative of the prosecution witnesses' testimony, that photographs will be more persuasive and have a greater 'moral effect' on the jury than will dry testimony . . . and that the prosecution is entitled to seek this greater impact[.]" 5 Lynn McLain, *Maryland Evidence*, *supra*, § 403:5. Even when the photographs in question are "more graphic than other available evidence," appellate courts have "seldom found an abuse of a trial judge's discretion in admitting them in evidence." *Hunt v. State*, 312 Md. 494, 505 (1988).

We are not persuaded that Peoples's stipulation that Sketers had a photograph of Peoples on her cellphone eliminated the photograph's probative value. As the State correctly noted, the challenged photograph does not depict Peoples in a criminal act, thus materially distinguishing this case from *Banks*, where the photo showed the defendant in criminal possession of a handgun. Moreover, the challenged photo was helpful to the jury as a visual connection between Peoples and Sketers. The State was entitled to present what it believed to be more persuasive evidence of the close personal relationship between the

two. Accordingly, the trial court did not abuse its discretion in denying Peoples's motion to exclude the photo.

## VI. Admission of Photo Array

Peoples's final challenge is to the photo array admitted as State's Exhibit 16.[11] "The use of photographic displays by the police to identify suspects has been used widely in the United States, and when conducted properly, has been held to be admissible in evidence." *Jones v. State*, 395 Md. 97, 107 (2006). Before trial, Peoples moved *in limine* to exclude an array containing his photograph, on the grounds that it was suggestive of a "prior criminal history" and that "there really isn't an issue of identification that needs to be bolstered with the introduction of this photo – this mug shot." The State opposed the motion, arguing that "[t]hese photographs are not classic side shots combined with front shots," but merely "face shots" that "could be MVA photos. They could be anything." As for the necessity of admitting the photo array in light of Watts's anticipated identification of Peoples in court, the prosecutor pointed out that "an in court identification is recognized . . . as a very suggestive form of identification" because "a witness is almost expected at some point to pick out the person sitting at the defense table."

The trial court denied the defense motion. While the trial judge initially said that the picture "does appear to be a mug shot," he promptly changed his mind:

> The Court has considered the arguments and looking at this it . . . It's just a picture of the defendant, and actually three of the mug shots are wearing similar or the same white T-shirts, and it's just pretty much a headshot with part of the neck and neckline of the T-shirt and part of the

[11] The State also declined to address this issue in its brief.

> shoulders, and that's for the three bottom people. The top has a person in a red shirt, and a green shirt.
>
> When you look at these photos, there is no indication that they are, in fact, mug shot type of photos. And the Court has considered the arguments. And the Court feels there may be an issue with identification, especially seeing that there may be an issue with Ms. Karr's motive to – concerning the matter.
>
> So, therefore, the Court is going to deny the motion. The Court feels that the probative value outweighs any prejudice. In fact, it is – there is a variety of reasons why somebody would have been photographed. So, the Court is going to deny that motion *in limine* as well.

At trial, the trial court admitted the photo array over defense counsel's renewed objection, ruling that, because "there's no indication that these are in fact mugshots," the exhibit was not "overly prejudicial."

Relying on *Arca v. State*, 71 Md. App. 102, 103-06 (1987), Peoples contends that the trial court abused its discretion in admitting the exhibit. In that case, we held that the trial court erred in admitting a photo array containing a "sanitized" mug shot of the accused, who had admitted to killing the victim but claimed self-defense, because the pretrial identification of the accused was not relevant to the contested issues and also prejudicially depicted him in "the front and profile views commonly associated with police 'mug shots.'" *Id.* at 106.

The decision and rationale in *Arca* establishes that evidence that a defendant has committed other crimes is generally inadmissible because of the "'fear that jurors will conclude from evidence of other bad acts that the defendant is a 'bad person' and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking[.]'" *Behrel v. State*, 151 Md. App. 64, 124

(2003) (quoting *Harris v. State*, 324 Md. 490, 496 (1991)); *see* Md. Rule 5-404(b). Using a photograph that is recognizable as a mug shot may improperly influence jurors to convict. *See Arca*, 71 Md. App. at 106 (where defendant admitted he was assailant, trial court abused discretion by admitting photo array with defendant's mug shot).

Nevertheless, "the decision of a trial court to admit mug shots of a defendant as substantive evidence will not be reversed absent a showing of clear abuse of discretion." *Straughan v. State*, 297 Md. 329, 334 (1983). In *Straughan*, the Court of Appeals held that the trial court did not abuse its discretion in admitting a photo array with "masked" mug shots showing front and side views, with serial numbers covered. *Id.* at 336-37; *see also Hof v. State*, 97 Md. App. 242, 303 (1993) ("[w]here identification is an issue and the mug shot that was selected pretrial helps . . . to bolster the subsequent in-court identification, the probative value" of a "sanitized" mug shot showing front and side views of the accused "has been established"), *aff'd on other grounds*, 337 Md. 581 (1995); *Cobey v. State*, 73 Md. App. 233, 246 (1987) (trial court did not abuse discretion in admitting mug shots that "were 'sanitized' by cutting off the chest plates Peoples was holding in them" where assailant's identity and lack of facial hair were at issue).

*Arca* is inapposite, because here the identity of the assailant was contested, Watts's identification of Peoples was critical to the State's case, and, most importantly, Peoples's photo was not identifiable as a mug shot. Watts picked out Peoples, who was previously a stranger, from among six photos of men with similar physical appearances. That identification is highly relevant evidence on the contested issue of whether Peoples kidnapped and shot Watts. As the Court of Appeals has recognized, the photo array

identification remained relevant regardless of whether Watts could identify Peoples at trial, because pretrial identifications typically have greater probative value than in-court identifications. *See Bedford v. State*, 293 Md. 172, 184 (1982) (recognizing that "an extrajudicial identification made but a short time after the incident 'has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind'") (citation omitted).

Moreover, we agree with the trial court that the challenged array did not indicate that Peoples had a prior criminal history. Unlike the combined front and side views used in *Straughan* and similar cases that upheld the use of mug shots in a photo array, nothing in Peoples's photo array indicates that his photo is a "mug shot." There is no material difference between Peoples's photo and the other five photos. All six are front-facing "head shots" with plain backgrounds. Peoples and four others are wearing crew-neck t-shirts; the shirts worn by Peoples and two others are white. The sixth photo shows a man wearing a white sleeveless shirt. There is no writing visible on any of the shirts, in the foreground, or in background of any photo.

Because Watts's identification of Peoples was relevant evidence on the contested issue of whether Peoples shot Watts, and there is nothing to mark the photo of Peoples as a "mug shot," the trial court did not abuse its discretion in admitting the photo array.

**JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**