Circuit Court for Baltimore City
Case No. 112345007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 984

September Term, 2017

ANTONIO JOHNSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 10, 2018

A jury in the Circuit Court for Baltimore City convicted Antonio Johnson, the appellant, of first-degree felony murder and robbery. The court sentenced Johnson to life in prison for the felony murder conviction and merged the robbery conviction for sentencing. Johnson noted a timely appeal, presenting four questions, which we have rephrased as five:

1. Did the trial court err by refusing to hold a *Frye-Reed* hearing on the State's expert's bloodstain pattern analysis testimony?

2. Did the trial court abuse its discretion by refusing to hold a hearing on whether the State's expert's bloodstain pattern analysis testimony was admissible under Rule 5-702?

3. Did the trial court abuse its discretion by admitting testimony that there were bloodstains on Johnson's clothes when those bloodstains had not been DNA tested?

4. Did the trial court abuse its discretion by limiting the defense's questioning of the lead detective?

5. Did the trial court abuse its discretion by permitting the lead detective to testify about surveillance videos?

For the following reasons, we shall affirm the judgments of the trial court.

FACTS AND PROCEEDINGS

On November 3, 2012, Deborah Simon, age 55, went out to dinner with her parents, Gerald and Nancy Cox. Afterward, she returned to her home at 1228 Washington Boulevard, in Baltimore, where she had recently moved in. At around 7:55 p.m., she called her parents to let them know she had made it home safely. Her parents did not hear from her the next day, which was unusual. They called her and left

voicemails, but Simon did not return the calls. Finally, on November 5, after learning that Simon had failed to show up to work, her parents went to her house to check on her.

The front door to Simon's house was locked, so Mr. Cox hired a locksmith to gain access. Upon entering Simon's house, Mr. Cox found his daughter, dead, lying in a pool of dried blood on the kitchen floor. She had been stabbed 28 times and her throat had been slashed. The police determined that Simon had been murdered on the night of November 3, sometime after 9:20 p.m., when she made a two-minute call from her cell phone to Comcast. Her house had been ransacked and items of property were missing, including her HP printer, laptop, combination television-DVD player, cell phone, and a new piece of black Samsonite luggage.

At the relevant time, Johnson was living on the same block as Simon, at 1246 Washington Boulevard, with his girlfriend, Peggy Cash.[1] Between November 1 and 3, 2012, Johnson and Cash were involved in an ongoing domestic dispute. Johnson, a drug addict, had tried to sell Cash's living room furniture set for $20. He also had demanded that Cash give him money and had threatened to kill her when she refused. Cash had reported the domestic assault to the police, and a warrant had been issued for Johnson's arrest. On November 3, Cash threw Johnson out of the house. At 10:30 p.m. that night, Johnson returned to the house and knocked on the door. Cash called the police and asked for an officer to come and escort him away. Officer Dien Pham responded to Cash's

[1] In the record, Peggy Cash is also referred to as Peggy Graves and Peggy Graves Cash. We shall refer to her as Cash.

house at 11:20 p.m., but by then Johnson already had left. Cash gave Officer Pham a description of Johnson and what he had been wearing that night—a black hooded sweatshirt, jeans, and a black knit hat. Officer Pham and his partner searched the 1200 block of Washington Boulevard and the surrounding area. Around midnight, they found Johnson near 1201 Washington Boulevard. He was pulling a piece of black Samsonite luggage that still had sales tags on it.

Officer Pham stopped Johnson and explained that he had responded to Cash's allegation of domestic assault. Johnson appeared calm. Officer Pham ran Johnson's information, discovered that there was an active warrant for his arrest, and arrested him. The officer informed Johnson that he was going to be taken to Central Booking to be processed and that his luggage would not be accepted there. Johnson told Officer Pham that the luggage belonged to him and asked if Officer Pham would take it to Cash's house. Officer Pham took an inventory of the luggage contents, noting that it contained a printer, a lighter, and packs of cigarettes. He then took the items to Cash's house. Cash did not recognize the luggage but agreed to hold onto it.

On November 6, 2012, Cash found a butcher knife in her backyard. She called the police and Detective Christopher Brockdorff, the lead investigator on Simon's case, arrived at Cash's house to collect the knife. While he was there, Cash pointed out the piece of luggage Officer Pham had dropped off a few days earlier. She told Detective Brockdorff that the luggage and its contents were likely stolen. Detective Brockdorff thought that the luggage and the printer could have belonged to Simon. He confirmed

with Simon's parents that those items had been taken from her house. Detectives returned to Cash's house later that day to recover the luggage and its contents. Cash had sold all but one of the cigarette packs that were in the piece of luggage. One of Simon's fingerprints later was found on the remaining cigarette pack.

On November 9, Detective Brockdorff and his partner interviewed Johnson. The interview was audio recorded. Johnson told the detectives that on November 3, 2012, he woke up at noon, cleaned some of his neighbors' cars to earn some money, and bought some heroin and cocaine, which he smoked. Later that day, he went to his mother's house and asked her for some money, so he could stay at a shelter. He used that money to buy more drugs. After smoking those drugs, Johnson returned to his mother's house and told her the shelter was closed for the night. His mother gave him some more money. Johnson made his way to East Baltimore, near The Johns Hopkins Hospital, and then caught a bus back to the area of Cash's house. At "around 8:00/8:30" p.m., he got off the bus near Baltimore Behavioral Health ("BBH"), which is located at 1101 West Pratt Street, several blocks north of the 1200 block of Washington Boulevard. Johnson said he had found the black Samsonite luggage beside a trashcan on a pathway next to BBH. He looked inside the luggage and saw that there were cigarette packs. He took the luggage and walked south on Carey Street toward Washington Boulevard. He stopped by a few establishments and unsuccessfully tried to sell the cigarettes. Eventually, he made his way to Cash's house, where Cash saw him and called the police. He continued trying to sell cigarettes in the area until he was arrested by Officer Pham.

During the interview, Johnson admitted that he knew Simon. He said he had washed her car for money a few times and had helped move a mirror into her house three or four days before she was murdered.

Within a week of interviewing Johnson, Detective Brockdorff retraced the path Johnson claimed to have walked after getting off the bus near BBH. He attempted to collect surveillance footage from businesses along that route. He obtained video footage from two BBH cameras that were focused on the area where Johnson said he had found the luggage. The footage from both cameras lasted from a little before 8:00 p.m. on November 3 to around 12:00 a.m. on November 4. Detective Brockdorff watched all of the footage. It did not show anybody leaving luggage near a trashcan, nor did it show Johnson.

In January 2013, William Young, a serologist for the Baltimore City Police Department, examined the clothing Johnson had worn on the night of November 3, 2012. Young swabbed stains on the clothing to test for the presence of bodily fluids. On Johnson's hooded sweatshirt, jeans, and right sneaker, he found 12 stains that tested positive for human blood. Five of the 12 stains were submitted for DNA testing. Simon was the source of the major female DNA profile from four of the five blood samples. Johnson was the source of the major male DNA profile from the fifth blood sample, which was swabbed from a blood stain on the interior of his jeans.

Johnson was charged with murder and related crimes and was tried for the first time in August 2014. At trial, he testified, giving a different story from what he told

Detective Brockdorff on November 9, 2012. He stated that when he got off the bus near BBH, he walked along a path between BBH and the Social Services building. On that path, he encountered a "familiar" man whose name he did not know but who he had seen in the area "[m]aybe two times before." The man had the piece of luggage with him and was holding an apparatus used for smoking drugs. Johnson and the man shook hands and embraced. Johnson did not notice whether the man had blood on him. The man offered Johnson some drugs, and the two smoked four or five dime bags together. After they finished smoking, they decided to try to sell the cigarettes that were in the luggage. Johnson and the man wandered into bars on Carey Street and Washington Boulevard, asking patrons whether they wanted to buy cigarettes. Johnson exited one bar on Washington Boulevard without the man. Soon after that he was stopped by Officer Pham. Johnson lied to police because he did not trust them.

Johnson's first trial ended in a mistrial. He was tried again in 2015, but a second mistrial was declared. In 2017, the State tried Johnson for a third time. The trial began on January 24 and lasted for eight days. The jury found Johnson guilty of first-degree felony murder and robbery.

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

After the first mistrial, the State submitted Johnson's clothing for a bloodstain pattern analysis to determine whether the stains could have come from Johnson's contact

with the man he claimed to have encountered near BBH. Steven O'Dell, then-Director of the Baltimore City Police Department Laboratory Section, examined the bloodstains on Johnson's clothing and drafted a report. He determined that some of the stains "occurred by contact with [a] wet blood source and could be from either direct contact or blood in motion." He concluded that "[t]he contention that . . . Johnson could have these bloodstains on his clothes from casual contact by either chest bumping or handshaking, or having contact by carrying stolen property from the victim received by an unknown male is not supported by the examined physical evidence." The State intended to call O'Dell as an expert witness at trial to testify about his findings from the bloodstain pattern analysis.

Johnson hired Paul Kish, a forensic consultant and bloodstain pattern analyst, "to provide a technical evaluation of [O'Dell's] observations, opinions, and interpretations . . . ." Kish challenged O'Dell's findings, asserting that there was insufficient staining from which O'Dell could have reached the conclusions he reached. Kish also stated that O'Dell did not adequately explain in his report how he reached his conclusions because he did not remark on the physical characteristics of the stains, which is how the "mechanism of deposition of a bloodstain is largely established . . . ." Furthermore, Kish asserted that the physical characteristics of the bloodstains had been altered when they were swabbed in 2013, and that it was impossible to determine the extent to which they had been altered. Although Kish found faults with O'Dell's findings, he did not take issue with bloodstain pattern analysis as a generally accepted scientific technique.

Before the second trial, defense counsel filed a request for the court to hold a hearing on whether to preclude O'Dell from testifying about the results of his bloodstain pattern analysis. He argued that O'Dell's testimony "should be excluded pursuant to the *Frye-Reed* standard and Rule 5-702." In regard to *Frye-Reed*, he asserted that the "conclusions [O'Dell] reached fall far short of what are generally accepted in the field of bloodstain pattern analysis [because] the inadequate documentation [, *i.e.*, O'Dell's report,] includes only pictures where one cannot see the stains and conclusory assertions that far overstate what has been shown by O'Dell." Defense counsel also argued that O'Dell's opinions should be excluded under Rule 5-702, because there was not a sufficient factual basis to support them.

The State filed an opposition. It argued that the *Frye-Reed* standard applies to novel scientific techniques and that bloodstain pattern analysis, on which O'Dell based his conclusions, is generally accepted as a valid and reliable technique. The State also asserted that there was a sufficient factual basis to support O'Dell's findings under Rule 5-702.

On May 21, 2015, the circuit court, Judge Kendra Ausby presiding, held a hearing on Johnson's motion. Johnson's counsel conceded that bloodstain pattern analysis "is generally accepted." He argued, nevertheless, that an expert could not perform a proper bloodstain pattern analysis on Johnson's clothing because the shapes and sizes of the bloodstains had been altered when they were swabbed. Thus, he asserted, the court needed to hold a *Frye-Reed* hearing to determine whether there was an "analytical gap"

between O'Dell's conclusions and the underlying data. The court denied the motion, opining that whether O'Dell could testify about the results from the bloodstain pattern analysis was not a *Frye-Reed* issue and that it was unnecessary to gather more evidence for purposes of Rule 5-702:

> [W]hat I understand the defense to be saying in this argument that it's not acceptable, it would not be acceptable . . . for [O'Dell] to reach []his actual conclusion. It's an evidentiary issue. It's an issue because the Court is wanting to satisfy that there's no suggestion as to the science itself, it's not novel science[.] . . . It really is whether or not you could reach—you could actually reach this conclusion based upon the sample, and it's actually fact specific and it's specific to this particular sample in this particular case.
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> . . .
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> . . . I think this is a complete evidentiary issue for the jury. It's not a Frye-Reed issue, so a Frye-Reed hearing is not required, and it is also not an issue for which the Court needs to take independent evidence as to whether or not there's a sufficient factual basis to support the expert testimony.

Characterizing the bloodstain pattern analysis issue as a disagreement between experts, the court ruled that it was not grounds to exclude O'Dell's testimony.

O'Dell testified at Johnson's second trial which, as stated above, resulted in a mistrial. At the third trial, the State called O'Dell to testify again. Johnson renewed his motion to preclude O'Dell's expert testimony. The court, Judge Christopher Panos presiding, denied the motion, deciding not to disturb Judge Ausby's May 21, 2015 ruling.

O'Dell was accepted as an expert in the field of bloodstain pattern analysis. He testified that he was asked to determine whether the bloodstains on Johnson's clothes could have come from "a greeting or handshake at some distance away from the scene,

anywhere from 30 minutes to hours later." O'Dell concluded that they could not have come from such a source, explaining:

> [T]he stains that are present on the clothing are not representative of the expectation of a getting [sic[2]]. There's a stain on the bottom of the shoe, for example, that loops from the front tip to underneath it. There's a stain on the very top of the shoe, a circular stain, circle and [sic] shape that sits on top of the shoelace near the top of the shoe.
>
> The pants at the time of the first examination had stains on them that could not, would not, could not be explained through casual greeting. The shirt had multiple stains on the sleeves and there was a stain on the back at that time as well, on the back of the sweatshirt. The other stains were on the front of the—on the arms of the sweatshirt to include the cuffs which, you know, in my opinion would appear to be some sort of a, like, soaking stain.

He further opined that some of the bloodstains resulted from "blood in motion," which is "blood that had taken flight and landed on" the clothing.

On cross-examination, Johnson's counsel asked O'Dell whether swabbing the bloodstains would have affected their size and shape. O'Dell acknowledged that that was possible. On redirect, he explained that regardless of that, there was sufficient staining from which he could conclude that some of the bloodstains on Johnson's clothing did not come from physical contact with a man at a location away from the crime scene.

Johnson did not call Kish or any other expert witness to refute O'Dell's findings.

On appeal, Johnson contends the court erred by denying his request for a hearing on *Frye-Reed* and on Rule 5-702. We shall take these contentions in turn.

[2] From the context, the word actually spoken was "greeting."

a.

Frye-Reed

The *Frye-Reed* doctrine is derived from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in which the United States Court of Appeals for the District of Columbia Circuit upheld the decision of a trial court precluding an expert from testifying about the results of a lie detector test that measured blood pressure. The court reasoned that the test was an experimental scientific technique, remarking that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

More than 50 years later, the Court of Appeals adopted the *Frye* "general acceptance" standard in *Reed v. State*, 283 Md. 374 (1978). There, the Court considered whether the trial court erred by allowing expert testimony based on the spectrographic method of voice identification. It explained that expert testimony should be admitted when it is helpful to the jury and acknowledged that, generally, that decision is best left to a trial judge's discretion because whether expert testimony is helpful depends on the facts of each case. The Court noted, however, that "with particular regard to expert testimony based on the application of new scientific techniques, it is recognized that prior to the admission of such testimony, it must be established that the particular scientific method is itself reliable." *Id.* at 380 (citations omitted). It went on to state:

> On occasion, the validity and reliability of a scientific technique may be so broadly and generally accepted in the scientific community that a trial

court may take judicial notice of its reliability. Such commonly the case today with regard to ballistics tests, fingerprint identification, blood tests, and the like. . . . Similarly, a trial court might take judicial notice of the invalidity or unreliability of procedures widely recognized in the scientific community as bogus or experimental. However, if the reliability of a particular technique cannot be judicially noticed, it is necessary that the reliability be demonstrated before testimony based on the technique can be introduced into evidence. . . .

The question of the reliability of a scientific technique or process is unlike the question, for example, of the helpfulness of particular expert testimony to the trier of facts in a specific case. The answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case. It is therefore inappropriate to view this threshold question of reliability as a matter within each trial judge's individual discretion. Instead, consideration of uniformity and consistency of decision-making require that a legal standard or test be articulated by which the reliability of a process may be established.

The test which has gained general acceptance throughout the United States for establishing the reliability of such scientific methods was first articulated in the leading case of *Frye* . . . [, in which the District of Columbia Circuit decided that] before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. . . .

. . .

[W]e agree with the "general acceptance" rule which the Frye Case sets forth.

Our adoption of the *Frye* standard does not, of course, disturb the traditional discretion of the trial judge with respect to the admissibility of expert testimony. *Frye* sets forth only a legal standard which governs the trial judge's determination of a threshold issue. . . . Testimony based on a technique which is found to have gained "general acceptance in the scientific community" *may* be admitted into evidence, but only if a trial judge also determines in the exercise of his discretion, as he must in all other instances of expert testimony, that the proposed testimony will be helpful to the jury, that the expert is properly qualified, etc. Obviously, however, if a technique does not meet the *Frye* standard, a trial judge will have no occasion to reach the further issues.

Id. at 380–89 (citations omitted). The Court held that the trial court had erred by admitting the expert testimony based on the spectrographic method of voice identification because the technique had not "achieved the general acceptance in the scientific community[.]" *Id.* at 399.

Since it was first adopted, the *Frye-Reed* test has evolved in two ways. *Sissoko v. State*, 236 Md. App. 676, 707–08 (2018) (citing *Savage v. State*, 455 Md. 138, 180–81 (2017) (Adkins, J., concurring, joined by Barbera, C.J., and McDonald, J.)). First, it has been expanded to apply to established, not merely novel, scientific techniques when a legitimate challenge to those techniques has been recognized within the relevant scientific community. *Id.* at 711 (citing *Savage*, 455 Md. at 186–187 (Adkins, J., concurring)). *See, e.g.*, *Clemons v. State*, 392 Md. 339, 371 (2006) (holding that expert testimony based on comparative bullet lead analysis, an established scientific technique for 40 years, was inadmissible because "a genuine controversy exist[ed] within the relevant scientific community about the reliability and validity of the" technique).

Second, the *Frye-Reed* standard has been expanded to be used to assess the reliability of general scientific theories and conclusions. *Sissoko*, 236 Md. App. at 708; *see also Savage*, 455 Md. at 181 (Adkins, J., concurring). In *Blackwell v. Wyeth*, 408 Md. 575, 596 (2009), for example, the Court held that an expert's testimony that thimerosal in childhood vaccines causes autism was not admissible, even though it was based on an established methodology, because "[g]enerally accepted methodology . . . must be coupled with generally accepted analysis" for testimony about a scientific theory

based on that methodology to be accepted. *Id.* at 608. The Court adopted the "analytical gap" concept that federal courts have applied under the *Daubert* test.[3] The expert in *Blackwell* used a differential diagnosis method to conclude that thimerosal causes neurological defects. The Court determined that the expert had misapplied that method because he did not consider unknown genes, the most prevalent cause of autism, in his analysis. As such, his analysis was not generally accepted as reliable in the scientific community and his testimony based on that analysis was inadmissible. *See also Chesson v. Montgomery Mut. Ins. Co.*, 434 Md. 346, 380 (2013) (employing analytical gap concept in holding that expert's testimony that exposure to mold caused a cluster of symptoms was "not shown to be generally accepted in the relevant scientific community[.]")

Although the *Frye-Reed* standard has evolved since it was first adopted in 1978, some principles inherent in the standard have not changed. Specifically, the *Frye-Reed* standard is not case specific. *Reed*, 283 Md. at 381 ("The answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case."). In other words, when a scientific technique or theory is determined to be generally accepted as reliable in one case, it should be deemed reliable

[3] Federal courts apply the *Daubert* standard, named after *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), when determining the admissibility of expert scientific testimony. For a more in-depth discussion about *Daubert* and its progeny see *Savage v. State*, 455 Md. 138, 175–79 (2017) (Adkins, J., concurring, joined by Barbera, C.J., and McDonald, J.).

in another case assuming that consensus in the scientific community has not shifted. Moreover, and especially pertinent here, "'[i]t is . . . well settled . . . that if the relevant scientific community is in general agreement that a properly conducted scientific test will produce an accurate result, the *Frye-Reed* test does not operate to exclude conflicting expert opinions based upon such a test.'" *Savage*, 455 Md. at 159 (quoting *Giddens v. State*, 148 Md. App. 407, 416 (2002)).

With the above background in mind, we turn to Johnson's appellate contention. He concedes that "[o]pinions based on bloodstain pattern analysis are generally accepted as reliable in the forensic community." He argues, however, that a bloodstain pattern analysis could not have been properly conducted in the present case because the bloodstains on his clothing had been swabbed, thereby affecting their sizes and shapes. He maintains that a *Frye-Reed* hearing was necessary to determine whether O'Dell could have reached the conclusions that he reached based on a bloodstain pattern analysis given the alteration to the bloodstains caused by swabbing. He is wrong.

As noted, the circuit court denied Johnson's request for a *Frye-Reed* hearing because there was no dispute that bloodstain pattern analysis is generally accepted as reliable within the relevant scientific field. Johnson's challenge was specific to the facts of the case, not to the facts underlying the theory and the techniques upon which bloodstain pattern analysis is based. O'Dell used the generally accepted scientific technique of bloodstain pattern analysis to examine bloodstain patterns on Johnson's clothes and determine from that analysis whether the blood on Johnson's clothes could

have resulted from his supposed interactions with a man away from the crime scene. The fact that another expert witness disagreed about the results of O'Dell's analysis did not create a *Frye-Reed* issue.

Johnson's reliance upon *Wilson v. State*, 370 Md. 191 (2002), is not helpful to him. He argues that under *Wilson* a court is not required to accept conclusions derived from generally accepted scientific techniques. That is an oversimplification of the holding in *Wilson*. In that case, the State's experts testified that they used the product rule, a method generally accepted in the field of statistics, to determine that it was improbable for two Sudden Infant Death Syndrome ("SIDS") deaths to occur in one family. The *Wilson* Court held that the trial court erred by admitting that testimony because the product rule did not account for the fact that SIDS may be linked to genetics. Because the product rule presupposed that SIDS deaths within the same family were independent events,[4] the statistical technique was not generally accepted within the scientific community to reliably calculate the likelihood of intra-family SIDS.

The *Wilson* decision did not open the door for *Frye-Reed* hearings on case-specific conclusions that are based on scientific techniques that are generally accepted in the *relevant* field. It merely demonstrated that techniques that are generally accepted for one purpose may not be accepted for another. *Wilson* is distinguishable from the case at bar

[4] The Court noted that there was widespread disagreement "concerning the role of genetics in SIDS." *Wilson v. State*, 370 Md. 191, 209 (2002). Therefore, it was not generally accepted that SIDS was genetically related, and conversely, it was not generally accepted that SIDS was genetically unrelated.

because O'Dell used bloodstain pattern analysis to examine bloodstains on Johnson's clothes and to determine how the blood got onto them. It is generally accepted in the field of forensics that bloodstain pattern analysis can be used for this purpose.

Our opinion in *Markham v. State*, 189 Md. App. 140 (2009), supports the conclusion that *Frye*-Reed was not applicable in this case. In *Markham*, we opined that it was unnecessary for the trial court to hold a *Frye-Reed* hearing to determine whether the ACE-V methodology of fingerprint analysis is generally accepted in the scientific community. The defendant had not challenged the science underlying fingerprint analysis, a technique Maryland courts have held to be reliable, but instead had challenged the way in which the expert performed the analysis in that case. We adopted the State's argument that

> "[the defendant's] challenge to fingerprint evidence does not go [to] the underlying scientific basis of the evidence—that the pattern of friction ridges on an individual's hand or finger is unique to that individual, and that one can therefore compare a latent print to a known sample from an individual to form an opinion as to whether that individual left the latent print or not. His complaint, rather, is that the methods of comparison used in this case were not objective enough to allow an expert to form the opinion that the two prints matched. While this may be a legitimate attack on the credibility of the witness or her opinion in this particular case, it does not form the basis for a *Frye–Reed* attack on the admissibility of the evidence per se."

Id. at 164. We held that the defendant's concerns about *how* the fingerprint analysis had been conducted were properly left for cross-examination.

Here, as in *Markham*, Johnson only challenged the manner in which the expert conducted a reliable scientific technique, not the reliability of the technique itself. He

had the opportunity to cross-examine O'Dell about his performance of the bloodstain pattern analysis on swabbed stains and, in fact, did so. The circuit court correctly denied Johnson's request for a *Frye-Reed* hearing.

b.

Rule 5-702

Rule 5-702 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.

In deciding whether Rule 5-702 is satisfied, the trial court exercises discretion, and its discretionary rulings "'will not be disturbed on appeal unless clearly erroneous.'" *Bomas v. State*, 181 Md. App. 204, 208 (2008) (quoting *Wilson*, 370 Md. at 200). Indeed, "[t]he court's action in admitting or excluding such testimony seldom constitutes ground for reversal." *Bryant v. State*, 163 Md. App. 451, 472 (2005) (citing *Deese v. State*, 367 Md. 293, 302–03 (2001)).

Johnson argues that the court should have held an evidentiary hearing to determine whether there was a sufficient factual basis to support O'Dell's testimony under Rule 5-

702(3).[5] He cites no authority to support his argument that a court must hold an evidentiary hearing before exercising its discretion under 5-702(3), nor have we found any. Moreover, it is clear that Judge Ausby acted within her discretion when she denied Johnson's motion to preclude O'Dell's testimony.

Under subsection (3) of Rule 5-702, expert testimony must be based on an adequate supply of data and a reliable methodology. *Rochkind v. Stevenson*, 454 Md. 277, 286 (2017) (citing *Roy v. Dackman*, 445 Md. 23, 42–43 (2015)). "The data supporting an expert's testimony 'may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.'" *Id.* (quoting *Sippio v. State*, 350 Md. 633, 653 (1998)). The second subfactor—reliable methodology—overlaps with the *Frye-Reed* standard. *See Sissoko*, 236 Md. App. at 713 (citing *Savage*, 455 Md. at 184 (Adkins, J., concurring)). For a methodology to be reliable, the expert "must be able to articulate . . . how she reached her conclusions." *Rochkind*, 454 Md. at 287 (citing *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 481–82 (2013)).

When Judge Ausby ruled that O'Dell's testimony was admissible, she had before her O'Dell's report, in which he explained how he had concluded that the bloodstains on

[5] Johnson does not contend that O'Dell was unqualified or that his testimony was inappropriate under subsections (1) and (2) of Rule 5-702.

Johnson's clothes did not come from contact with a man away from the scene of the crime. The report explained what O'Dell had relied on:

> The observations and opinions concerning the bloodstain pattern analysis are derived from examination of the serology report findings, accompanying worksheet sketches, collaboration of serology reporting with the visual examination conducted of the physical evidence (i.e., clothing), DNA report findings, and statement received from Assistant State's Attorney regarding subject testimony.

For each stain, O'Dell explained his reasoning for determining how the stain got onto the clothing. In reaching his conclusions, O'Dell used bloodstain pattern analysis, a methodology that the parties agree is reliable. The fact that Kish had faulted some of O'Dell's findings does not mean that there was an insufficient factual basis for those findings; rather, it means that two experts interpreted the same facts differently. It is noteworthy that although Kish expressed the view that O'Dell overstated the significance of some stains, he also concluded that "[t]he bloodstain evidence located on the black hooded sweatshirt, black denim jeans, and right black Fila shoe are consistent with these items being in the vicinity of, in contact with, a fluid source(s) of blood some of which have been confirmed to be Deborah Simon's."

In sum, Judge Ausby did not abuse her discretion when she decided that there was a sufficient factual basis to support O'Dell's expert testimony, and therefore an evidentiary hearing was not necessary.

II.

As stated above, Young, a serologist, found 12 stains on Johnson's clothes that tested positive for blood. Seven of the 12 stains were on Johnson's hooded sweatshirt:

four on or near the cuff of the right sleeve, two on or near the cuff of the left sleeve, and one on the left rear side of the sweatshirt. Three of the 12 stains were on Johnson's jeans: two on the front right leg and one on the inside of the leg. And two of the 12 stains were on Johnson's right shoe: one on the shoelace and one on the tip of the shoe.

Five of those 12 bloodstains were tested for DNA: one stain on the right cuff of the hooded sweatshirt, one stain on the right pant leg, the stain on the interior pant leg, and both stains on the shoe. All but one tested positive for Simon's DNA. The one that did not was taken from the interior of Johnson's pant leg. It tested positive for Johnson's DNA. Johnson stated that the stain was likely from a sore on his leg that he had scratched.

Before his first trial, Johnson moved "to exclude testimony . . . [about] the positive findings of blood where no DNA testing was performed." He argued that the bloodstains that were not tested, and thus were not shown to have come from Simon, were irrelevant. Alternatively, he argued that even if these bloodstains were relevant, they had little probative value and were outweighed by the risk of unfair prejudice. Johnson's counsel argued that

> it's purely speculative as to whether the blood found at the other locations was Ms. Simon's blood or Mr. Johnson's blood resulting from an unrelated event, or somebody else's blood resulting from an unrelated event. . . .
>
> It would simply be improper to let the jury know that blood was found at the other locations without having any idea whose blood it was. And it would certainly be improper to ask the jury just to infer or to assume that that blood must have originated from Deborah Simon, because, again, there's no evidence of that.

The court, Judge Jeffrey Geller presiding, denied Johnson's motion, explaining that the issue was one of weight and that the probative value of the untested bloodstains was not outweighed by any danger of unfair prejudice.

In June 2015, Terri Labbe, a serologist for the Baltimore City Police Department, reexamined Johnson's jeans after an examination with an infra-red camera uncovered further staining. She performed a leucomalachite green test on portions of the jeans and discovered seven more stains that tested positive for the presumptive presence of blood. Those stains were not tested for DNA. At Johnson's third trial, the State called Labbe to testify about the results of the leucomalachite green test.

Before the trial and before Labbe was called as a witness, Johnson renewed his motion to exclude testimony about the presence of untested bloodstains on his clothing. The court decided to abide by Judge Geller's ruling denying the motion but allowed a continuing objection to that line of testimony. During the trial, the State's witnesses, including Young and Labbe, testified that there were bloodstains on Johnson's clothes but that the source of some of those stains had not been determined by DNA testing.

On appeal, Johnson makes the same arguments he did below—that evidence of the bloodstains that were not DNA tested was irrelevant, and if it was it should not have been admitted under Rule 5-403 because its probative value was substantially outweighed by the risk of unfair prejudice.

We have explained that

> "[o]ur standard of review on the admissibility of evidence depends on whether the 'ruling under review was based on a discretionary weighing of

> relevance to other factors or on a pure conclusion of law.'" *Perry v. Asphalt & Concrete Services, Inc.*, 447 Md. 31, 48, 133 A.3d 1143 (2016) (quoting *Parker v. State*, 408 Md. 428, 437, 970 A.2d 320 (2009)). We generally review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Id.* (quoting *Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 619, 17 A.3d 676 (2011)). We apply a *de novo* standard of review, however, when deciding whether evidence is relevant because "we determine whether evidence is relevant as a matter of law." *Id.* (citing *State v. Simms*, 420 Md. 705, 725, 25 A.3d 144 (2011)). To state it differently, "[a]lthough trial judges have wide discretion 'in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence.'" *Id.* (quoting *Simms*, 420 Md. at 724, 25 A.3d 144).

Boston v. State, 235 Md. App. 134, 152 (2017).

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. Unless an exception exists, "all relevant evidence is admissible." Md. Rule 5-402.

Testimony that there were bloodstains on Johnson's clothes was relevant as a matter of law, even though those bloodstains were not DNA tested. Johnson was accused of murdering Simon. She had been stabbed 28 times. The fact that Johnson had multiple bloodstains on his clothes, which may have been from Simon, tended to make it more probable that he was involved in the bloody attack.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Md. Rule 5-403. Johnson insists that the probative value of the bloodstains in this case was scant and that the potential for prejudice "was overwhelming[] as the jury

was likely to draw the unwarranted and unsupported inference that the stains were Ms. Simon's blood." He states that the blood could have been from an unrelated event. The State counters that it would have been rational for the jury to conclude that the untested blood came from Simon. It also argues that "[t]he fact that evidence is susceptible to an interpretation consistent with the State's theory of guilt does not make the evidence 'unfairly' prejudicial[.]" We agree with the State.

Just because evidence hurts a party's case does not make it excludable as being prejudicial. The type of evidence that Rule 5-403 is designed to exclude is evidence that is *unfairly* prejudicial. "[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) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)).

The circuit court did not abuse its discretion by ruling that the probative value of the untested bloodstains was not substantially outweighed by the risk of unfair prejudice. The bloodstains were highly probative of the fact that Johnson was involved in Simon's murder. *See id.* ("The more probative the evidence, . . . 'the less likely it is that the evidence will be unfairly prejudicial.'" (quoting *Odum*, 412 Md. at 615)). Although not all the stains were DNA tested, reasonable jurors could infer that the bloodstains on the exterior of Johnson's clothing came from Simon because all the stains on the exterior of the clothing that were tested were positive for Simon's DNA. We fail to see how admission of the bloodstain testimony could have led the jurors to "'disregard the

evidence or lack of evidence . . . .'" *Id.* (quoting *Odum*, 412 Md. at 615). The bloodstain evidence was properly admitted.

III.

During a pre-trial hearing before the third trial, Johnson's counsel proffered that Detective Brockdorff had interviewed Cash in February 2013, after she informed the police that she had received some letters from Johnson. Cash told Detective Brockdorff that in his letters Johnson had said he had gotten the stolen luggage from a man named Mike, who was six feet tall, in his late 40s/early 50s, had an average build and brown skin, wore glasses, sold DVDs in the street, and "h[ung] out near Pratt and Carey." Cash told the police she had destroyed the letters containing this information. Detective Brockdorff sent an email with Mike's description to other officers, stating that he was attempting to locate the individual. He was unable to do so, however.

Johnson's lawyer wanted to question Detective Brockdorff about the investigative steps he had taken after he had spoken with Cash about Johnson's letters. He said he did not intend to elicit the testimony for the truth of the statements—that Johnson had received the stolen luggage from Mike—but to show that the police had not conducted an adequate investigation. The prosecutor moved to preclude this evidence, expressing "concern [about] the defense being able through questioning about these letters . . . [to] get in hearsay statements of [Johnson] of the nature that the State believes to be false exculpatory information without the State then having an opportunity" to cross-examine Johnson. The court granted the State's motion. It explained: "This Court does find that

even if [the statements made by Cash and Johnson] were not offered for the truth, the prejudice visited upon the State outweighs the probative value of the examination in that it would mislead the jury." The court doubted that the jury would be able to sufficiently comprehend that the statements about Mike were not offered to prove that Johnson had received the luggage from him.

On appeal, Johnson contends the trial court erred by not allowing defense counsel to question Detective Brockdorff about the investigative steps he took after speaking with Cash. He asserts that the testimony would have been of a "highly probative nature" and that "the court misapprehended the prejudice the State would suffer if the evidence was introduced."

Because the court exercised its discretion to preclude this evidence after weighing its probative value against its negative effect, we must determine whether the court abused its discretion. *Boston*, 235 Md. App. at 152 (citations omitted). A circuit court abuses its discretion when "'no reasonable person would take the view adopted by the'" court or "'when the court acts without reference to any guiding rules or principles.'" *Kusi v. State*, 438 Md. 362, 386 (2014) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005)) (some citations omitted).

The court acted within its discretion by precluding the defense from questioning Detective Brockdorff about the investigative steps he took in response to Cash's information. The questions would have required Detective Brockdorff to testify about two out-of-court statements made by Cash and Johnson that, if used substantively, would

be inadmissible hearsay. *See* Rule 5-802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, [out-of-court statements offered for the truth of the matter asserted are] not admissible."); *see also Marquardt v. State*, 164 Md. App. 95, 123 (2005) ("Generally, hearsay is inadmissible as evidence because of its inherent untrustworthiness." (citing *Parker v. State*, 365 Md. 299, 312 (2001)).

Even though Johnson's counsel represented that he planned to use the testimony for a non-hearsay purpose, that is, to show that the police conducted an inadequate investigation, the court had discretion to decide whether the nature of the testimony would be such as to create a danger that the jurors would use it for an improper hearsay purpose. *Holmes v. State*, 236 Md. App. 636 (2018), illustrates this point. There, the defendant sought to question an investigating detective about the steps she took after reading a DNA report. The DNA report contained findings that were favorable to the defense, but the person who drafted the report was not called to testify about them. Defense counsel argued that he wanted to question the detective about the report as part of his inquiry into the investigation she conducted. The trial court concluded that the defense was attempting to admit the out-of-court statements for their truth, through the "backdoor." *Id.* at 667. We agreed, holding that the trial court did not abuse its discretion. We explained:

> The court resisted defense efforts to get hearsay DNA test results into evidence, first as impeachment evidence, and then through the proverbial "backdoor" by questioning [the investigating detective] about them. Although the trial court allowed defense counsel to question the detective

> about her investigation, it refused to allow questions about how she responded to those test results, because that line of questioning sought marginally relevant evidence that would have confused the jury, by suggesting that the mystery DNA contributor committed the crime for which appellant was on trial.

Id. at 670–71.

Similarly, in this case, we conclude that the trial court did not abuse its discretion. The thoroughness of Detective Brockdorff's investigation of this matter was marginally probative of whether Johnson committed the crime. On top of that, the jurors likely would have been confused by receiving second- and thirdhand statements (from a letter that Cash allegedly destroyed) that Johnson received the luggage from a man named Mike while at the same time being told that they could not consider those statements for their truth.

IV.

As noted above, Detective Brockdorff sought to recover footage from various surveillance cameras in the areas where Johnson claimed to be on the evening of November 3, 2012, after he got off the bus near BBH. The detective went to ten locations, most of which were businesses, and recovered footage from three of them: the BBH, the Family Dollar store at 1231 West Pratt Street, and a panning CCTV camera on Carey Street. Detective Brockdorff reviewed the footage from the three locations but did not see Johnson in any of the recordings.

a.

At trial, the State did not introduce the footage from the Family Dollar store or the CCTV camera into evidence. It did, however, question Detective Brockdorff about whether he had viewed footage other than footage from the BBH and whether that had had an impact on his investigation. Defense counsel objected to that line of questioning, arguing 1) that having Detective Brockdorff testify about videos not in evidence would violate the best evidence rule, and 2) that the footage was irrelevant because the Family Dollar store footage was not from the relevant time period and the CCTV footage was from a panning camera that may not have captured Johnson.[6] The court sustained the objection in part and overruled it in part:

> THE COURT: [T]he objection as I understand it is sustained only to the—that the officer will not offer any testimony about what he purportedly saw or didn't see in any cameras other that the BBH mounted surveillance cameras. . . .
>
> . . .
>
> . . . Detective Brockdorff will certainly be permitted to answer any question toward the end of as you investigated along the path according to the version of events that Mr. Johnson gave you, how many, if any, cameras were you able to observe. And he's going to answer that question. And were you able to further your attempt to confirm or dispel Mr. Johnson's version of the events on his walking path based on those cameras. . . .

[6] The Family Dollar store footage was from 7:45 p.m. to 8:45 p.m. It is unclear whether that would have been the correct time period. Johnson claimed to have gotten off the bus at around 8:00 p.m. As noted, Simon was murdered sometime after 9:20 p.m., when she made an outgoing phone call.

. . .

. . . [I]t's just three things [that the State is permitted to ask]. It's no leading questions. It's obviously whether [Detective Brockdorff] was able to confirm or dispel based upon the version of events given to him by Mr. Johnson. Whether there were any other cameras in the area that assisted him in confirming or dispelling the version of events given to him by Mr. Johnson as to Mr. Johnson's walking path. And the answer is going to be what the answer's going to be.

[Defense counsel]: I'm sorry, so the State's going to be permitted to ask whether or not by viewing the cameras he was able to confirm or dispel the path that Mr. Johnson took? Because I—

THE COURT: Well, what the State's going to be able to ask him is whether in the course of that investigation, whether anything with regard to those cameras, was able to affirmatively confirm or dispel what Mr. Johnson told him.

[Defense counsel]: Your Honor, again, I would respectfully object, because—

THE COURT: He investigated. I note your objection. That part of it is overruled, he's allowed to be asked what he did. He's allowed to be asked what if anything he learned based upon what he did. He's not being asked what did you see or not see on the cameras. Because nobody's here to support those cameras as to their proper working conditions, to authenticate them, et cetera.

It's not being offered to prove the truth of the matter contained on the images, if any, depicted by the camera, whether in, you know, real time video or in stills from them. It's being offered for the purpose of what his investigation is and what he wasn't able to learn or what he was able to learn.

[Defense counsel]: But the clear inference is that he viewed the other video camera footage and that Mr. Johnson was not on those video cameras. Even if he doesn't specifically say that—

THE COURT: I don't know that. No, that's not the inference.

. . .

That's not the inference at all. I don't know what he's going to say. We'll find out and if there's something that's inappropriate I'll consider a motion to strike it.

The State then questioned Detective Brockdorff about his attempts to locate footage and what impact that footage had on his investigation, which led to the following exchange:

[Prosecutor]: . . .[I]n terms of your efforts in walking the rest of Mr. Johnson's path were you able to either confirm or not confirm specific portions of what he had told you?

[Defense counsel]: Objection.

THE COURT: Noted. And pursuant to the ruling, noted for the record. Overruled. You may answer the question.

DETECTIVE BROCKDORFF: Based on what I was able to look at, I—

[Defense counsel]: Objection.

THE COURT: Noted. Overruled. You may finish answering the question. Thank you.

DETECTIVE BROCKDORFF: Based on what I was able to look at I was not able to confirm what he gave me.

[Defense counsel]: Objection. Move to strike.

THE COURT: Clarification as to look at without referencing the videos. Overruled. You may ask the question again, but rephrase it consistent with the Court's ruling at the bench please. Thank you.

[Prosecutor]: Other than the B[BH] cameras, were there other cameras in that area that assisted you as to confirming or not confirming Mr. Johnson's walking path?

[Defense counsel]: Objection.

THE COURT: Noted. Overruled.

DETECTIVE BROCKDORFF: Yes.

[Prosecutor]: What was the result of that portion of your investigation?

[Defense counsel]: Objection.

THE COURT: Noted. It's overruled. You may answer the question.

DETECTIVE BROCKDORFF: What I saw on the video did not match with that [sic] he told me.

[Defense counsel]: Objection.

THE COURT: Sustained.

[Defense counsel]: Move to strike.

THE COURT: Stricken. The jury shall disregard the reference to what was seen on any other videos.

The State thereafter ended its line of questioning regarding the non-BBH footage.

On appeal, Johnson argues that Detective Brockdorff's testimony that he did not see Johnson on the non-BBH footage violated the best evidence rule. That rule, which is set forth in Rule 5-1002, provides, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statue." The problem with Johnson's argument is that the court granted his motion to strike and told the jury to disregard what Detective Brockdorff had said about viewing the footage. Accordingly, there was no non-stricken testimony purporting to prove the contents of the video and, therefore, no violation of the best evidence rule.

Furthermore, even if Detective Brockdorff had testified that he was unable to confirm or disprove what Johnson had told him after seeking out footage, which he did not do, that would not have violated the best evidence rule. Such testimony would not have been offered to prove the contents of the video but to explain his investigative steps.

Johnson's second argument—that the testimony about the unadmitted surveillance footage was irrelevant—also fails. He maintains that the Family Dollar store and CCTV footage were irrelevant because, respectively, it was taken from a time period before Simon was believed to have been murdered and was taken by a panning camera that was not guaranteed to have captured him. As explained above, however, the testimony about the footage was not offered to prove the contents of the footage. It was offered to show the investigative steps the detective took. It was relevant for that purpose. At trial, Johnson argued that he was charged with Simon's murder because the police failed to conduct a proper investigation. The State was permitted to challenge that assertion.

b.

The State moved the footage from the two BBH cameras into evidence. Johnson objected to Detective Brockdorff testifying about "any opinion he has as to who or who may not be in the videos." He stated, "[i]t's obviously up for the jury . . . to mak[e] a decision as to whether or not somebody is . . . identifiable in a particular video." The court overruled the objection, explaining

> [Detective Brockdorff] is able to say what he thought was going on during the course of his investigation as his information evolved, or devolved. Right? Let's say hypothetically he came into possession of information that he believed turned him away from Mr. Johnson as a suspect, or not. Or

> took him further toward Mr. Johnson. And one of those pieces of information was a video he looked at from BBH. . . .
>
> . . .
>
> . . . [W]hile it is up to the jury to decide who's on the video, it's not up to the jury to decide whether this officer in the investigation should be interested or not with a person he sees on a video as to who he believes the person is. And there's a difference. . . .
>
> . . .
>
> . . . [F]or the record, this Court is not as part of that ruling invading the province of the jury to take away the jury's fact-finding function. The jury is quite the contrary permitting this detective to testify about the steps in his investigation and on what information he relied based upon his firsthand knowledge, observation that was developed during the course of the investigation. His theories as the investigation involved [sic], or devolved. And what action, if any, he took based upon what he learned.
>
> The Court is not ruling that it's the detective's job to identify for the jury whether the person on the video is [Johnson]. It's the detective's job to investigate and that is the leeway the State has with regard to this line.

The State asked Detective Brockdorff whether he had seen anything from the BBH footage "that was consistent with what Mr. Johnson had told" him. He answered in the negative.

Johnson contends the court abused its discretion by allowing Detective Brockdorff to testify that he did not see anything on the BBH footage consistent with what Johnson had told him. He asserts that Detective Brockdorff's testimony on the matter was lay witness opinion testimony that was improper under Rule 5-701. That rule provides,

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2)

> helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

"[T]he decision to admit lay opinion testimony lies within the sound discretion of the trial court." *Thomas v. State*, 183 Md. App. 152, 174 (2008) (citing *Robinson v. State*, 384 Md. 104, 118–19 (1997)).

Johnson directs our attention to *Payton v. State*, 235 Md. App. 524, 540 (2018), which states, in dicta, that "[a]s a general rule [pursuant to Rule 5-701], caution should be exercised by the trial court when determining whether to permit a police officer to narrate a video when the officer was not present during the events depicted therein." In *Payton*, we cited favorably to *Ragland v. State*, 385 Md. 706 (2005), in which the Court of Appeals described lay opinion testimony as

> testimony that is rationally based on the perception of the witness. . . .
>
> > The prototypical example . . . relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. . . . Other examples of this type of quintessential [lay opinion] testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the value of one's property.

Id. 717–18 (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196–98 (3rd Cir. 1995)). Although lay opinion testimony includes the identification of an individual, such testimony is not *per se* inadmissible. Indeed, under Rule 5-701 lay opinion testimony is admissible when it is rationally based on the perception of a witness

and is probative. *Paige v. State*, 226 Md. App. 93, 125 (2015) (quoting *State v. Payne*, 440 Md. 680, 698 (2014)); *see also Moreland v. State*, 207 Md. App. 563 (2012) (upholding trial court's decision to allow an officer to identify the defendant from surveillance footage where the officer, who knew the defendant for more than 40 years, would be more likely than the jury to correctly identify the defendant).

In this case, we need not consider whether Detective Brockdorff's testimony regarding the BBH footage was admissible lay opinion testimony because his testimony did not contain an opinion. As the circuit court explained, Detective Brockdorff's testimony was not admitted for the purpose of identifying who was in the video but for the purpose of explaining how his investigation into Simon's murder progressed. Contrary to Johnson's characterization, Detective Brockdorff did not narrate the video and did not identify who or what he saw in the video. He merely acknowledged that he did not see anything in the BBH footage that was consistent with what Johnson had told him. The footage was admitted into evidence and the jurors could watch and decide for themselves whether it depicted Johnson or the luggage. In short, Detective Brockdorff did not usurp the fact-finding role and therefore did not invade the province of the jury. The court acted within its discretion by allowing Detective Brockdorff to make his limited comment about the BBH footage as it related to his investigation.[7]

[7] We note that even if Detective Brockdorff's testimony was impermissible lay opinion testimony, its admission was harmless. In *Washington v. State*, 179 Md. App. 32, 60–61 (2008), *rev'd on other grounds*, 406 Md. 642 (2008), a detective identified an

(Continued…)

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

(…continued)
individual wearing a head garment in one photograph as the same individual not wearing a head garment in another photograph taken an hour and a half later by a security camera. The detective, who was not present on the scene, based his opinion on viewing the photographs. The defendant challenged the admission of the detective's identification testimony on appeal. We explained:

> The State claims that the detective's testimony was helpful to the jury because the detective explained his observations in reference to his investigation. [Defendant], however, insists that, in light of the videotape and photographs shown during the trial and also available during deliberations and considering that [defendant] was seated in the courtroom, the jury possessed the knowledge and skill to draw its own inferences from the photographs. It is for this same reason, however, that the detective's testimony was harmless.

Id. at 61. The same reasoning applies here.