Circuit Court for Prince George's County
Case No. CT16-0973X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1101

September Term, 2019

DEMARKO WHEELER

v.

STATE OF MARYLAND

Arthur,
Leahy,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 7, 2021

Appellant Demarko Wheeler was charged with murder, armed carjacking, use of a handgun in the commission of a felony, and other handgun and theft charges. A Prince George's County jury convicted him of first-degree felony murder, armed carjacking, use of a firearm in the commission of a felony, use of a firearm in the commission of a crime of violence, and the unlawful taking of a motor vehicle.

The court sentenced Wheeler to life imprisonment, with all but 70 years suspended, for first-degree felony murder; a concurrent 30 years, with all but 20 years suspended, for armed carjacking; a concurrent 20 years, the first five without the possibility of parole, for use of a handgun in the commission of a felony; and five years' supervised probation on release. The remaining counts merged.

In this timely appeal, Wheeler asks us to address the following questions:

> 1. Did the circuit court err in denying defense counsel's *Batson* challenge?
>
> 2. Did the circuit court err by (1) admitting photographs that were not properly authenticated and by (2) allowing a lay witness to offer her opinion that photographs of shoes from unknown sources on the Internet were consistent with burnt remains of shoes recovered by police?
>
> 3. Did the circuit court err by permitting a witness for the State to identify Wheeler in media [a surveillance video and a photograph]?
>
> 4. Did the circuit court err in imposing a separate sentence for armed carjacking?

For the following reasons, we shall affirm.

BACKGROUND

On July 20, 2016, at approximately 7:00 a.m., Alonzo Jackson, Sr., was carjacked and shot at a gas station on Marlboro Pike in Capitol Heights. Mr. Jackson died as a result of a gunshot wound to the abdomen.

Surveillance video and photographs showed that the suspect was in the area both before and during the incident. The video showed the suspect wearing a white tank top, a black hat or hood, black pants, and black and white athletic shoes. The video also showed the suspect getting into the victim's Dodge Charger after the shooting and driving towards the District of Columbia line, five or six blocks away.

On the day after the shooting, July 21, 2016, at around 11:45 p.m., officers with the Washington, D.C., Metropolitan Police Department found the victim's car, on fire, in a parking lot on Michigan Avenue, N.E., not far from the Maryland line. According to a stipulation, an expert would have testified that the car was intentionally set on fire.

In investigating the vehicle fire, the Metropolitan Police removed the screws holding the front license plate. The screws were tested for the presence of DNA, and one screw contained a mixture of DNA from two males. The DNA from that mixture was consistent with Wheeler's, with a "likelihood ratio" of 82 million, meaning that it was 82 million times more likely that the DNA came from Wheeler and another unidentified person than that it came from two randomly selected members of the population.

A witness for the State, Tanya Hall, testified she lived in an apartment complex in Southeast Washington on the day of the carjacking. She knew Wheeler because he frequented the home of one of her neighbors.

On July 20, 2016, the morning of the carjacking, Hall was walking in the neighborhood with her daughter. She saw Wheeler pacing nearby, "patting his hands, just looking from side to side." Later that day, Hall and her daughter saw Wheeler driving a black Charger. Wheeler was driving "fast" and "recklessly," and he "almost crashed" into another car. Hall had never seen Wheeler in a black Charger and had never seen that car in her neighborhood.

Four days later, on July 24, 2016, Hall was watching the news on television and heard about the shooting of Alonzo Jackson, Sr. She saw the surveillance video that the police released to the public and recognized Wheeler because he was patting his hands to his side in a familiar pattern. Hall went outside her apartment, saw Wheeler standing in the area, and called the police. She informed the police of Wheeler's location, followed Wheeler and his companions to a grocery store, and stayed in communication with the police by telephone until Wheeler was arrested later that day.

Over objection, the court admitted photographs of Wheeler wearing white and black basketball shoes. Hall identified Wheeler in one of the photographs. She also identified him in court.

During Hall's testimony, the State showed Hall a video from the gas station on the morning when the carjacking and murder occurred. Hall identified Wheeler in the video. She recognized him because of his "bumpy nipples."

Officer Kirkland Thomas of the Metropolitan Police Department testified about the photographs of Wheeler that the court had admitted. According to Officer Thomas,

the photographs depicted Wheeler as he looked when the officer encountered him in Southeast Washington on July 12, 2016, four days before the murder.

Officer Thomas testified that in one of the photographs Wheeler was wearing "Charles Barkley 34, CB34s," a brand of athletic shoes. Officer Thomas also testified, without objection, that Wheeler was wearing "the same black sweatpants and white tank top with the Charles Barkley 34's" in a surveillance video of the gas station on the morning of the murder. Officer Thomas testified, similarly, that Wheeler was wearing "the same outfit" "with the same sneakers" in another surveillance video of the gas station on the morning of the murder. Like Hall, Officer Thomas observed what he called Wheeler's "pattern mannerism," an apparent reference to his habit of patting his hands on his side. The officer remarked that in the surveillance video, Wheeler was displaying that mannerism.

Three days after the murder, on July 23, 2016, the police recovered evidence from behind the apartment complex in Southeast Washington where Wheeler had been staying. The evidence included the burnt remains of what, according to a State witness, appeared to be a "Charles Barkley 34" or "CB34" basketball shoe.

The State presented forensic evidence from the crime scene, the autopsy, and an apartment in Southeast Washington. This evidence included: a .22 caliber bullet that was recovered from the victim's body; a Browning .22 caliber long-rifle cartridge case that was collected from the crime scene; and a Taurus PT22 semi-automatic pistol and a .22 caliber long rifle and magazine that were found at the residence in Southeast Washington that Wheeler frequented in July 2016. An expert concluded that the cartridge case was

fired from the Taurus PT22. We shall include additional detail in the following discussion.

DISCUSSION

I.

During jury selection, Wheeler objected that the State was exercising its peremptory strikes to exclude African-American jurors. In accordance with *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial court required the State to come forward with race-neutral explanations for its strikes. After hearing the State's explanations, the court denied Wheeler's objections.

Later, when the clerk asked Wheeler whether the defense was satisfied with the jury, he did not renew his objections or say that he was satisfied, subject to his objections. Instead, he answered, twice, and without equivocation, that he was satisfied with the jury.

Wheeler challenges the trial court's conclusion that the State offered an adequate, race-neutral justification for the strikes. As Wheeler recognizes, however (Brief at 15), "[w]hen a party complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury." *Gilchrist v. State*, 340 Md. 606, 618 (1995). Because Wheeler waived his *Batson* challenge, we do not consider it.

Wheeler argues that we should consider his unpreserved *Batson* challenge under the doctrine of plain error. "'Appellate invocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v.*

State, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). Before an appellate court will reverse for plain error, four conditions must be met:

> 1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.
>
> 2. The error must be clear or obvious, and not subject to reasonable dispute.
>
> 3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.
>
> 4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston, 235 Md. App. at 567 (citing *Newton v. State*, 455 Md. 341, 364 (2017)) (additional citations omitted).

"Meeting all four conditions is, and should be, difficult." *Winston v. State*, 235 Md. App. at 568 (citing *Givens v. State*, 449 Md. 433, 469 (2016)). "[T]he appellate court may not review the unpreserved error if any one of the four [conditions] has not been met." *Id*. at 568.

Plain-error review is unavailable in this case. Wheeler did not merely fail to preserve an objection; he affirmatively waived it, twice, when he unequivocally stated that he was satisfied with the jury. While "[f]orfeited rights are reviewable for plain error, waived rights are not." *State v. Rich*, 415 Md. 567, 580 (2010).[1]

[1] Even if Wheeler had not waived his *Batson* challenge, we would find no error, much less plain error. The record reflects that the State proffered race-neutral justifications for its strikes, that Wheeler did not challenge the justifications, and that the (continued)

II.

Wheeler poses two, related evidentiary challenges. First, he challenges the admission of images of CB34s that were taken from the internet. Second, he challenges the admission of testimony that the tread pattern on the shoes depicted in the images was "consistent" with the tread pattern of the burnt shoe remnants that were found behind the apartment building where he was staying at the time of the murder. Wheeler argues that the images of the CB34s were not properly authenticated and that the testimony amounted to improper lay opinion.

A. Background

The State called Amy Michaud, an employee of the Bureau of Alcohol, Tobacco, Firearms and Explosives who examines the impressions left by footwear. By agreement of the parties, Michaud testified as a lay witness. The purpose of her testimony was to establish a link between Wheeler and the shoes worn by the suspect in the videos of the crime.

The State asked Michaud to identify Exhibits 73 through 76. Exhibit 73 is a photograph of the burnt remains of the shoe found outside the apartment where Wheeler was staying at the time of the murder. Exhibits 74, 75, and 76 are images of CB34 shoes.

Michaud identified Exhibits 73 through 76 before Wheeler had the chance to object (or perhaps simultaneously with the objection). She explained that she had taken

court "took [the prosecutor] at his word." We have no basis to conclude that the court abused its discretion in rejecting the *Batson* challenge.

the photograph of the burnt remains and that she had "grabbed" the other images "from the internet" because they depicted the type of shoe that she thought had been burned.

In response to Wheeler's objection, the following discussion occurred at the bench:

> [DEFENSE COUNSEL]: This is what I'm talking about, stuff that she took from the internet. It is not reflected in the report. I don't have any basis for this analysis other than photos. That's what I was saying.
>
> THE COURT: But she said that –
>
> [DEFENSE COUNSEL]: She said that now [she] can remember where she got them from.
>
> THE COURT: She said they were photos from the internet.
>
> [DEFENSE COUNSEL]: From the internet.
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: I think that now she's talking about sources of information that can't be documented. It can't be. These sources of information have not been documented and can't be. She's now talking about – this is something – it is like something that I saw in the newspaper. I say it's basis of testimony that's hearsay and I think the internet is the same as the newspaper.
>
> THE COURT: [Prosecutor]?
>
> [PROSECUTOR]: They're photographs. She's saying that they're photographs. Wherever she retrieved them from is irrelevant. That's not hearsay. They're photographs consistent with – that she thought in her lay opinion, which is what she's here to give, were consistent with the burnt fragments.
>
> [DEFENSE COUNSEL]: She's testified just like that and then in more detail. These are a specific kind of shoe that she read on the internet from some website, we don't know what. It is hearsay.

The court overruled the objection.

When counsel returned to their tables, the court admitted Exhibit 73, the photograph of the burnt remains of the shoe. Over another hearsay objection, Michaud testified that when she looked at Exhibit 73 "the first thing" she noticed was the Nike logo (i.e., "the Nike Swoosh").

When asked "[w]hat else" she noticed about the burnt remains, Michaud testified, without objection, that she "start[ed] searching Nike shoes," particularly "basketball shoes" because the tread pattern on the burnt remains was "pretty aggressive, which would be consistent with a basketball type shoe." She went on to say, without objection, that she quickly found "tread elements that looked similar" to the tread patterns on the burnt remains. Again, without objection, she identified the similar patterns (dots and teardrops).

At that point, the State asked: "Now based on your observations that you just pointed to, in your lay opinion were you able to find tread patterns that were consistent with what you were seeing as far as the burnt remains?" Over objection, Michaud responded, "Yes." Without objection, she identified Exhibits 74 through 76 as photographs of the tread patterns on the Nike shoes that she used as "examples."

The State moved the admission of Exhibits 74 through 76, and Wheeler objected on the ground that the "foundation" was "insufficient." The court directed the State to lay a foundation.

The State responded by establishing that Exhibits 74 through 76 were photographs of athletic shoes and that the tread patterns on those shoes were, in Michaud's lay

opinion, "consistent" with the tread patterns on the burnt remains.[2] The court admitted the exhibits over another objection to the sufficiency of the foundation.

When the State asked Michaud what was "significant" about the "Charles Barkley signature basketball shoes" depicted in Exhibit 74, Wheeler requested a continuing objection "to any questions regarding these photographs." The court granted Wheeler a continuing objection to "reference[s] to those photos."

Michaud concluded her testimony by stating that the tread elements on one of the internet images (apparently Exhibit 74) were consistent with the tread elements on the burnt remains. "I found no difference," she stated.

B. Authentication

On appeal, Wheeler has wisely abandoned the unmeritorious hearsay objections that he made at trial.[3] Instead, he argues that the State did not authenticate Exhibits 74 through 76, the digital images of the athletic shoes. The State concedes that by objecting on the ground that the "foundation" for those exhibits was "insufficient," Wheeler adequately preserved an objection to authentication.

Generally, authentication or identification is a condition precedent to the admissibility of physical evidence. Md. Rule 5-901(a). This requirement may be "satisfied by evidence sufficient to support a finding that the matter in question is what its

[2] Although the question asked for her lay opinion, Michaud responded with what she called her "expert" opinion. The court sustained Wheeler's objection to an expert opinion.

[3] Ordinarily, a photograph or (digital image) cannot be hearsay, because an image is neither an oral or written assertion nor nonverbal conduct that is intended as an assertion. *See State v. Pruett*, 638 N.W.2d 809, 817 (Neb. 2002) (collecting cases).

proponent claims." *Id.* Methods of authentication or identification include direct testimony from a witness with firsthand knowledge of an item, circumstantial evidence about the appearance or characteristics of an item, and evidence describing a process or system used to produce the exhibit or testimony and showing that the process or system produces an accurate result. Md. Rule 5-901(b).

The burden of proof for authentication is "slight" (*Jackson v. State*, 460 Md. 107, 116 (2018)) and "undemanding." *Winston v. State*, 235 Md. App. at 566. "[A] '[c]ourt need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.'" *Jackson v. State*, 460 Md. at 116 (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006)) (emphasis in original). Thus, "to authenticate a piece of evidence, a party need not rule out every theoretical possibility that the evidence is something other than what he or she says it is; the party need only present a sufficient basis for a jury to find that the evidence is what he or she says it is." *Winston v. State*, 235 Md. App. at 566. "We review a trial court's decision regarding authenticity for an abuse of discretion." *Darling v. State*, 232 Md. App. 430, 456 (2017). A court abuses its discretion when its decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *See, e.g.*, *North v. North*, 102 Md. App. 1, 14 (1994).

On the merits, Wheeler acknowledges Michaud's testimony that she, personally, "grabbed" the digital images from "the internet." But although Michaud's testimony was based on her own firsthand knowledge, Wheeler argues that it was insufficient to

authenticate the images. He complains that Michaud did not say where she found the images on the internet. He also complains that Michaud did not detail the method that she used – i.e., that she did not say whether she used a search engine, or whether she browsed a store's website, or whether she looked at a basketball fan's blog. Finally, he contrasts the proof of authentication in this case with the proof in other cases, such as *Jackson v. State*, 460 Md. at 117-20, which involved the authentication of video surveillance footage. Because the State's proof was less substantial here than it was in *Jackson*, he argues that the proof was insufficient.

We disagree. Michaud worked as a footprint examiner for a federal agency. She observed patterns on the tread of the burnt remains of the shoes, as well as the Nike logo. To find Nike shoes with similar tread patterns, she employed a process that is familiar to tens of millions of Americans: she went on the internet. She looked for images of Nike shoes that she thought would have tread patterns similar to those on the burnt remains. She found the images right away. Contrary to Wheeler's assertion, one can tell where she found them: two of the images (Exhibits 74 and 76) indicate that they came from sneakernews.com; the third (Exhibit 75) uses the same type face, font size, and caption as Exhibit 74, and thus, inferentially, came from sneakernews.com as well.[4] In these

[4] Both Exhibit 74, which says that it came from sneakernews.com, and Exhibit 75, which does not, have the following caption above the images of the shoe:

> 16NO321(1)
> ALM
>
> Nike Air/Air MAX CB34 – Charles Barkley Signature Series Basketball Shoes.

circumstances, the State met its undemanding burden of authenticating the images. In other words, the State adduced sufficient evidence for the jury to find that the exhibits were what they purported to be: digital images of CB34 athletic shoes.

On the issue of authentication, the question is not whether the State could have done more; the proponent of an exhibit can almost always do more. The question is whether the State did enough. In our judgment, the State did enough. The trial court did not abuse its discretion in admitting the images.

C. Lay Opinion

Wheeler challenges the court's decision to permit Michaud to offer her lay opinion that the tread patterns on the burnt remains were "consistent" with the tread patterns on the shoes depicted in Exhibits 74 through 76. The State responds by arguing, among other things, that the contention is unpreserved and that the court, in any event, did not abuse its discretion in allowing the testimony.

We turn first to the issue of preservation. During Michaud's testimony, Wheeler based most of his objections on the specific grounds of hearsay and the lack of a sufficient foundation; thus he has "forfeited all other grounds for objection on appeal" (*Perry v. State*, 229 Md. App. 528, 541 (2016)), as to the questions to which he interposed those objections. On a handful of occasions, however, Wheeler made a general objection, which "ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence." *Boyd v. State*, 399 Md. 457, 476 (2007). He made one general objection when the State asked Michaud whether she was, in her "lay opinion," "able to find tread patterns that were consistent" with the patterns on

the burnt remains. He made a second general objection when the State asked whether the digital images were, in her "lay opinion," "consistent with the tread patterns" on the burnt remains. He later asked for and obtained a continuing objection, which arguably encompasses the general objections that he had made moments before. In these circumstances, Wheeler did enough to preserve the issue.[5]

On the merits, Wheeler's contention concerns Maryland Rule 5-701, which governs "lay opinion" testimony. It 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.

"We review a circuit court's ruling on the admissibility of lay testimony for an abuse of discretion." *Randall v. State*, 223 Md. App. 519, 577 (2015). We discern no abuse of discretion in this case.

In challenging Michaud's lay opinion, Wheeler largely reiterates his arguments about the putative failure to authenticate the digital images of the CB34s. For example, Wheeler argues that Michaud's opinion (that the tread patterns on the burnt remains was

[5] Citing *Jordan v. State*, 246 Md. App. 561, 589 (2020), the State correctly observes that a continuing objection "does not become a wild card" that "widen[s] the breadth of the objection." The last objection before the request for a continuing objection concerned the sufficiency of the foundation, which might suggest that the continuing objection should be confined to that ground. At the time of the continuing objection, however, the situation was sufficiently fluid that the request for a continuing objection could legitimately be interpreted to encompass all of the grounds previously stated, including the two general objections to lay opinion testimony. We shall proceed on that premise.

"consistent" with the tread patterns on the images) was not helpful "to a clear understanding of the witness's testimony or the determination of a fact in issue," Md. Rule 5-701, because, he says, the images came from "unknown websites." We reject that argument for the same reasons that we rejected his challenge to the authentication of the images.

In a separate argument, Wheeler relies on *Hutt v. State*, 70 Md. App. 711, 715-16 (1987), which held that expert testimony is not necessary to establish the correspondence between footprints found in connection with a crime and the print made by the shoe of the accused, and that lay opinion testimony will suffice. In *Hutt* this Court affirmed the admission of lay opinion testimony concerning the similarity of the bootprints that were found at three different crime scenes.

In upholding the admission of the lay opinion testimony in *Hutt*, our predecessors stated that "shoeprint patterns are often 'readily recognizable and well within the capabilities of a lay witness to observe.'" *Id*. at 716 (quoting *State v. Hairston*, 396 N.E.2d 773, 775 (Ohio App. 1977)). "'No detailed measurements, no subtle analysis or scientific determination is needed.'" *Id*. (quoting *State v. Hairston*, 396 N.E.2d at 775). Thus, when "there is both physical evidence of the print, such as a photograph or cast, and the shoe itself, the trier of fact is ordinarily as capable as any witness of examining the evidence and noting any similarities or dissimilarities." *Id*.

Wheeler seizes on *Hutt*'s reference to "the shoe itself." He observes that in this case, unlike in *Hutt*, the State "did not introduce anything remotely resembling a shoe." He seems to contend that the State must introduce a fully intact shoe before the court can

entertain lay opinion akin to the testimony in *Hutt*. From that premise, he argues, the court should not have permitted Michaud to testify about that the tread patterns on the burnt remains of a shoe were "consistent" with those on the digital images of a CB34.

We are unpersuaded by Wheeler's attempted distinction of *Hutt*. In this case, the State may have been unable to introduce an entire shoe (because Wheeler unsuccessfully attempted to destroy it), but the State was still able to introduce the portions of the shoe that were relevant to the witness's testimony: the tread, with the Nike logo and the distinctive patterns. Nothing in *Hutt* prohibited Michaud from offering her lay opinion about the similarities between the burnt remains of the shoe and the digital images of a CB34.

Michaud's testimony was helpful to the jury, as it illustrated how the tread patterns on the digital images were similar to those on the burnt remains. The court did not abuse its discretion in permitting that lay opinion testimony.

III.

Wheeler asserts the trial court erred by permitting Tanya Hall to identify him in a surveillance video of the gas station where the carjacking occurred and in a photograph. He relies on *Moreland v. State*, 207 Md. App. 563, 573 (2012), for the proposition that "[l]ay witness identifications of people in video or photographic evidence . . . are permissible only when the witness has 'substantial familiarity' with the subject." He contends that Hall lacked the requisite degree of familiarity with him and, hence, that she should not have been permitted to identify him.

"The admissibility of evidence ordinarily is left to the sound discretion of the trial court." *Moreland v. State*, 207 Md. App. at 568 (Md. Rule 5-104(a)). We will not disturb a trial court's evidentiary ruling "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Decker v. State*, 408 Md. 631, 649 (2009) (quoting *Thomas v. State*, 397 Md. 557, 579 (2007)); *accord Moreland v. State*, 207 Md. App. at 568.

In *Moreland* this Court followed the "'significant majority of jurisdictions'" that permit a lay witness to "'testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury.'" *Moreland v. State*, 207 Md. App. at 572 (quoting *Robinson v. People*, 927 P.2d 381, 382 (Colo. 1996)). We observed that, under this majority rule, "'a lay witness who has substantial familiarity with the defendant, such as a family member or a person who has had numerous contacts with the defendant, may properly testify as to the identity of the defendant in a surveillance photograph.'" *Id.* (quoting *Robinson v. People*, 927 P.2d at 383). "'[T]he intimacy level of the witness' familiarity with the defendant goes to the weight to be given the witness' testimony, not the admissibility of such testimony.'" *Id.* (quoting *Robinson v. People*, 927 P.2d at 384).

In this case, the circuit court did not abuse its discretion in permitting Hall to identify Wheeler in the surveillance video and the photograph. Hall testified that, although she never became one of Wheeler's "acquaintance[s]," she knew him from the neighborhood. Hall explained that Wheeler was often with a man named Khalil Gibbs,

who lived with his mother in the same neighborhood. Hall knew that Wheeler visited Gibbs because she would go to Gibbs's apartment to buy individual cigarettes from his mother at his mother's apartment. Furthermore, Hall was familiar with Wheeler's telltale mannerisms (patting his hands on his side), his physique (his "bumpy nipples"), and the clothes that he usually wore (sweatpants and a tank top). In these circumstances, the court had "some basis" to conclude that Hall was more likely to correctly identify Wheeler from the videos and the photograph than the jury.

Wheeler argues that in *Moreland* the witness was more familiar with the defendant's appearance than Hall was with Wheeler's. He is correct. In *Moreland* the witness had known the defendant for decades, though he had not seen the defendant for several years before the trial. *Moreland*, however, does not establish a floor, below which no lay witness is permitted to identify a defendant in a video or photograph. As long as the court had "some basis" to conclude that the witness was more likely to correctly identify the defendant than the jury, as the court did here, the extent of the witness's familiarity with the defendant goes to the weight, not to the admissibility, of the evidence. *Id*. (quoting *Robinson v. People*, 927 P.2d at 384).

IV.

Wheeler argues that he received an illegal sentence for armed carjacking. Because carjacking was the underlying felony in his felony murder conviction, Wheeler argues that the sentence for carjacking should have merged with the sentence for felony murder. He relies primarily on *Newton v. State*, 280 Md. 260, 269 (1977), which held that double jeopardy usually bars the imposition of separate sentences for felony murder and the

underlying felony because the two crimes constitute the "same offense" under the *Blockburger*[6] or "required evidence" test.

Newton recognized, however, that "the legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test." *Id*. at 274 n.4; *accord Whack v. State*, 288 Md. 137, 149-50 (1980) (holding that the General Assembly intended to impose separate punishments for robbery and using a handgun in the commission of a felony or a crime of violence); *Price v. State*, 111 Md. App. 487, 502 (1996) (stating that "even when the required evidence test would normally preclude multiple punishment[s] for the same offense," the imposition of multiple punishments "will not be deemed to be a violation of the Fifth Amendment" "when the legislature specifically permits it because of aggravating circumstances").

In the carjacking statute, Md. Code (2002, 2012 Repl. Vol., 2020 Supp.), § 3-405 of the Criminal Law Article, "the General Assembly made it clear that sentences separate and apart from any other offense are permitted." *Price v. State*, 111 Md. App. at 501. Section 3-405(e) of the Criminal Law Article states that "[a] sentence imposed under this section may be separate from and consecutive to a sentence for any other crime that arises from the conduct underlying the carjacking or armed carjacking."

[6] *Blockburger v. United States*, 284 U.S. 299 (1932).

Through this language, the General Assembly "clearly and unequivocally provided" that any sentence for carjacking may be "separate from and consecutive to a sentence for any other offense arising from the conduct underlying the offenses of carjacking or armed carjacking." *Harris v. State*, 353 Md. 596, 607 (1999). "[T]he broad aim of the statute was to enhance the penalties applicable to individuals who use force or threat of force or intimidation to obtain possession or control of a motor vehicle and to make it easier for prosecutors to obtain convictions for carjacking." *Id.* 608-09 (footnotes omitted).

In this case, Mr. Jackson's death arose directly from Wheeler's action of stealing his car at gunpoint (i.e. carjacking him) and shooting him. The sentences do not merge.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE ASSESSED TO APPELLANT.