Circuit Court for Baltimore County
Case No. 3K-15-3410

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1332

September Term, 2016

DUSTIN FITZGERALD SCOTT

v.

STATE OF MARYLAND

Graeff
Berger,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.
Dissenting Opinion by Battaglia, J.

Filed: July 5, 2018

A jury in the Circuit Court for Baltimore County convicted Dustin Fitzgerald Scott, appellant, of first degree assault, use of a firearm in the commission of crime of violence, and possession of a regulated firearm by a prohibited person.[1] The court imposed a sentence of 25 years' incarceration on the conviction for first degree assault, to be served consecutively to the sentence of 10 years' incarceration imposed on the conviction for use of a firearm in the commission of a crime of violence (the first five years without parole). The court also imposed a sentence of 5 years' incarceration, concurrent, for the conviction of possession of a firearm by a prohibited person.

On appeal, appellant presents five questions for this Court's review:

1. Was the evidence sufficient to sustain appellant's convictions?
2. Did the trial court err in admitting testimony that the police identified appellant via a "police database"?
3. Did the trial court err in admitting lay testimony without evidence that it was based on firsthand knowledge?
4. Did the trial court plainly err in omitting the elements of an offense from its final instructions?
5. Did the trial court err in permitting the State to introduce testimony from a gang affiliation expert at sentencing?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of May 29, 2015, Donzal Carter was shot several times in the parking lot of the Oakleigh Station Bar in Parkville, Maryland. Carter, who was a

[1] The jury acquitted appellant of attempted first and second degree murder.

frequent patron of the Oakleigh Station Bar, was there that night with Earl Hines, Lewis Pearson, and someone named Tianna. Carter arrived, and left, with Hines, in Hines' white four-door Acura.

Carter testified that, when he left the bar at closing time, he was "[v]ery intoxicated." He recalled that, once in the parking lot of the bar:

> [A] fight broke out and once the fight broke out I seen smoke. It was a big crowd. I get to walking away from the crowd. Next thing I know, I looked down to my shoes and I was shot in the shoulder.
>
> * * *
>
> I didn't even know I was shot. I just knew once I looked down to my shoes, it was blood coming from my shoulder to my shoes.

After he was shot in his left shoulder, Carter walked to the front of the club and informed someone who was with him that he had been shot. Carter testified that he and Hines then went back to the white Acura. While he was seated in the car, another car pulled up, and he was shot again. Hines then drove Carter to the hospital.

Carter identified himself, in a surveillance video shown to the jury, as wearing a striped tank top while at the bar that night. He also identified Hines in the video.

Carter did not recall any sort of dispute occurring inside the bar, but he admitted that he was intoxicated that night, and his recollection of the events was "fuzzy." He could not identify the person who shot him. When he was shot, he had been looking in the other direction.

Hines, a childhood friend of Carter's, corroborated Carter's version of events. He testified that he drove Carter to the bar in a white Acura. Like Carter, he was intoxicated, and he did not remember any altercation taking place inside the bar.

When Hines and Carter left the bar, there was a crowd in the parking lot. Hines heard some "words" exchanged, heard a "shot," and noticed that Carter had been shot. Carter was walking and talking after being shot. Hines and Carter then went to the car, where Carter was shot again. Hines then drove Carter to the hospital. He could not identify Carter's shooter.

Pearson, another childhood friend of Carter's, was also at Oakleigh Station on the night of the shooting. He also wore a striped tank top that evening.

Pearson's testimony closely tracked that of Carter and Hines. Pearson left the bar around closing time, and while standing outside, he heard shots fired and noticed that Carter had been hit. Carter showed him his shoulder and then walked away. Pearson did not see the shooting, and he could not identify the person who shot Carter.

Detective Parrish McClarin, a member of the Violent Crimes Unit of the Baltimore County Police Department, was assigned to investigate the shooting. He and other police officers spoke with Carter about the shooting, as well as with a number of other individuals who had been present in the bar and the parking lot that night.

Approximately one to two days later, the police obtained surveillance video from inside the bar and outside in the parking lot. The State introduced as Exhibit 4/8A a DVD containing five surveillance video recordings from both inside and outside the bar on the

night Carter was shot.[2] The police were able to ascertain that a vehicle depicted in the surveillance video was registered to Christopher Davis. The vehicle was a black four-door Hyundai Accent, with the front passenger-side fender painted a lighter color than the rest of the car.

Detective McClarin identified appellant in State's Exhibit 6A, an image taken from the Oakleigh Station Bar surveillance video, as the person wearing a white tank top.[3] A recording from the surveillance video, labeled "camera 1 inside," showed appellant leaving the bar at 1:34.04 a.m.[4]

The video recording labeled "camera 1 outside" showed Davis' car parked in the parking lot before the shooting. The recording shows that, shortly after appellant left the bar, a tall man, with a muscular build resembling appellant, wearing a white tank top, long shorts, and black socks, walked toward Davis' car, opened the front passenger door, and leaned into the car. The man jogged off to the right, with his right arm either in his shorts pocket or held against the right side of his body. Two people appeared to attempt to restrain

[2] The exhibit is marked as both 4A and 8A and is alternatively referred to in the transcript as Exhibit 4, Exhibit 4A, and Exhibit 8A.

[3] State's Exhibit 6A shows appellant inside the bar wearing a plain white tank top, long shorts, dark socks, and a dark baseball hat with a white brim. He has a muscular build, a goatee, and many tattoos on his arms and chest. As discussed *infra*, during a videotaped interview with appellant, the police showed appellant Exhibit 6A, which appellant conceded "look[ed] like" him.

[4] The time stamp on the video was 00:32:04, but Detective McClarin testified that the time stamps on the inside videos were one hour and two minutes slower than real time and the time stamps on the outside videos were 12 minutes faster than real time.

the man, but the man walked away, holding his right arm by his side. He did not swing his right arm, as he did with his left arm.

Less than a minute later, the man approached a group of people and leaned into the group, at which point the people began to run away. The man then walked back to the passenger side of Davis' car, again holding his right arm to his right side, and got into the front passenger seat. Shortly thereafter, another man got into the driver's seat and drove away.

The video recording shows that, a couple of seconds later, a person, identified as Carter, was walking with his tank top in his hand. Approximately one minute later, Davis' car is seen pulling up to the passenger side of a white vehicle, stopping for approximately eight seconds and then driving away.

Detective McClarin testified that the information from the surveillance video was "put into a police data base." As a result of the police investigation, the police developed two suspects: appellant and Davis, the registrant of the vehicle.

Appellant and Davis were arrested. The same car depicted in the surveillance video was parked outside Davis' home the day he was arrested. No firearms, cartridge casings, or any other physical evidence were collected that tied appellant, or Davis, to the shooting.

Both appellant and Davis were interviewed at police headquarters. During the interview, which was played for the jury, Detective McClarin asked appellant where he was, and what he did, on the evening of Thursday, May 28, 2015. Appellant stated that he

thought he spent the evening with a girl named Sierra. He repeatedly denied that he had been at any bar, club, or restaurant.

The police eventually showed him a surveillance photograph, taken inside the Oakleigh Station Bar on the night of the shooting, which appellant acknowledged "look[ed] like" him. At that point, appellant acknowledged that he and Davis (his roommate at the time) were at the bar on the evening of May 28, 2015, and the early morning of May 29, 2015. Appellant explained that he rode as a passenger to the bar in Davis' black four-door car. He stated that they did not stay at the bar until closing time, they did not observe any altercation or argument at the bar, and he had not been involved in any altercation or argument. When confronted with the fact that the detectives observed him on the video recording arguing with another man, appellant maintained that he did not have any problems with anyone while at the bar. He stated that, when he and Davis left the bar, everything was fine, and the two drove home.

Anthony Jenkins, Jr., a security guard at the Oakleigh Station Bar, was working on the night of the shooting with his father, Anthony Jenkins, Sr., and two other security guards. Jenkins, Jr. testified that there may have been a "little scuffle" inside the bar on the dance floor that night at approximately 11:30 p.m., but it did not concern him because everybody seemed to calm down. He did not witness the altercation, but he saw the "aftermath" and helped to calm everyone down.

Regarding a "second incident" in the parking lot later on, Jenkins, Jr. stated:

> [T]here was an altercation outside. I broke up the, the fight. One of the gentlemen went to the car. I told the other people that they were fighting with not to go over there. The people ended up going over there anyway.
>
> Next thing you know – I told all the rest of the customers not to go over cause the guy went to the car and the next thing you hear is gunshots.

Jenkins, Jr. stated that when he heard the gunshots, he saw people "scatter."

Jenkins, Jr. said that he did not know the names of the persons involved in the altercations, but he knew their faces because they all were frequent customers. With respect to the parking lot incident, he identified the people involved in the fight by the clothes they wore. One of the participants wore a white tank top, which Jenkins, Jr. referred to as a "beater." The other participant wore a striped tank top.

After Jenkins, Jr. broke up the fight in the parking lot, he said that one of those involved in the fight, the man in the "beater," went to his car. He identified a photograph of appellant as the person he saw walking to the car. Jenkins, Jr. stated that the man walking to his car was "not necessarily a good thing," noting that "[u]sually when somebody walks to their car, they are going back to get a weapon." Typically, if someone left the bar and went to their car, they were not permitted to come back inside the bar.

Jenkins, Jr. did not "see the shooting per se." He did not see what, if anything, was retrieved from the car. He "just heard the gunshots. . . . I just seen two groups of guys getting ready to fight and all you hear is gunfire."

After Jenkins, Jr. heard the gun shots, he saw the "guy with the beater on" with a weapon. He told the police that the man was a lighter skinned African American,

approximately six feet tall with a muscular build, who was a regular at Oakleigh Station Bar. Jenkins, Jr. was asked in court if the person who wore the white tank top was in the courtroom, and he said no.

Jenkins, Sr., who was in charge of security at the bar, testified that there was no altercation inside the bar on May 29, 2015, but there was one outside in the parking lot, which involved people "fussing, going back and forth," and "somebody [was] shot." The altercation "started out with just two people and one group was trying to calm one person down and we were trying to calm other people down." Although Jenkins, Sr. believed that the incident was under control, the man in the striped shirt, Carter, just kept "running his mouth." Appellant was trying to ignore Carter, but eventually, "they all start[ed] going back and forth." Jenkins, Sr. did not see the shooting or see anyone holding a gun.

Additional facts will be included, as necessary, in the discussion that follows.

DISCUSSION

I.

Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to support his conviction because the State "failed to introduce sufficient evidence of identity." He asserts that the sole evidence demonstrating that he was the shooter was "blurry surveillance footage of the parking lot, which did not make clear who was shown or what they did, and a single comment from Jenkins, Jr.," which he asserts was unreliable and "too self-contradictory to sustain a conviction." Appellant argues that, at most, "the evidence only supported the

conclusion that [he] was one of multiple men involved in an argument with Carter's group before Carter was shot."

The State contends that there was "abundant circumstantial evidence to establish that [appellant] shot Carter." It asserts that the testimony of Carter, Hines, Pearson, Jenkins, Jr., and Jenkins, Sr., coupled with the surveillance video, and appellant's feigned lack of memory about the evening in question during his recorded interview with the police, permitted a trier of fact to draw the rational inference that appellant was the person who shot Carter. We agree.

In determining whether there was sufficient evidence to support a conviction, we apply well-settled principles of law:

> The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone. Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence. This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact. Thus, the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.

Darling v. State, 232 Md. App. 430, 465, (quotation marks and citations omitted), *cert. denied*, 454 Md. 655 (2017).

Here, there was no direct evidence that appellant shot Carter. There was, however, sufficient circumstantial evidence to permit the jury to reach that conclusion. *See Martin v. State*, 218 Md. App. 1, 35 (in assessing sufficiency of the evidence, direct evidence is no different from circumstantial evidence), *cert. denied*, 440 Md. 463 (2014), *cert. denied*, 135 S. Ct. 2068 (2015).

Although appellant initially denied that he was at the bar the night of the murder, when confronted with the surveillance video, he ultimately admitted that he was there, and that he rode to and from the bar in Davis' car. And the surveillance video from the bar showed Davis' car, which was distinct because one fender was painted a different color, in the bar's parking lot both before and after the shooting took place.

Detective McClarin identified appellant from an image taken from the surveillance video, which showed a person wearing a white tank top leave the bar shortly before the shootings occurred. The person wearing the white tank top, whose build was similar to appellant's, subsequently entered the passenger side of Davis' car, reemerged from the car, and walked with his right arm pressed against the side of his body. Moments later, Carter was shot, and people scattered. The person in the white tank top then walked back to Davis' car.

Both Jenkins, Sr. and Jenkins, Jr. identified appellant as one of the people involved in an altercation in the bar parking lot. Jenkins, Jr. identified the individuals by their clothes, referring to the participants as a man in a striped tank top (Carter) and another man

in a white tank top, which he referred to as a "beater."[5] Although Jenkins, Jr. did not witness the shooting, he testified that, after he heard the gun shots, the man who was wearing the "beater," and who was involved in the altercation, had a weapon.[6] The physical attributes Jenkins, Jr. attributed to the man in the "beater," i.e., an African American male approximately six feet tall with a muscular build who was a regular at Oakleigh Station Bar, matched the description of the man captured in State's Exhibit 6A, an image from the surveillance video, which appellant, during his videotaped interview with the police, acknowledged looked like him.

Reviewing the evidence in the light most favorable to the State, as we must, there was sufficient evidence to permit the jury to draw a rational inference that appellant shot Carter.

II.

Police Database

Appellant contends that the circuit court erred by permitting Detective McClarin to testify, over defense objection, that he identified appellant from the surveillance video by

[5] Jenkins, Jr. testified at trial that he recognized the person in "this picture" as the person involved in the altercation outside. The State argues that Jenkins, Jr. identified a picture of appellant. In context, it appears that is true, and appellant agrees, but we note that "this picture" was not identified in the transcript.

[6] Although Jenkins, Jr. was unable to identify appellant in court as "the person with the [white] tank top on," that fact presented a credibility issue for the jury to resolve. *See Wilson v. State*, 261 Md. 551, 557-58 (1971) (witness' testimony, which contradicted the statement given to the police, a fact of which the jury was well aware, was a credibility issue to be determined by the jury).

entering information into a "police database." He asserts that evidence that the police identified him by using a "police database" was irrelevant and "highly prejudicial," and therefore, it should have been excluded. Appellant further contends that, because the evidence carried the implication that he previously had committed a crime, it should have been excluded as improper "other crimes" evidence within the meaning of Md. Rule 5-404(b).[7]

The State contends that the argument that the evidence was irrelevant or improper "other crimes" evidence is not preserved for review because the only ground argued below was that the evidence was "unduly prejudicial." In any event, the State argues that the contention that the evidence was inadmissible is without merit, asserting that the premise of appellant's argument, that the police "identified" appellant through a police database, is not supported by the record. It notes that Detective McClarin testified that he *entered* unspecified information *into* a police database, but there was no evidence that appellant was identified by information from the database. Accordingly, it contends that the evidence was not unduly prejudicial.

[7] Maryland Rule 5-404(b) provides: "Evidence of other crimes, wrongs, or acts … is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."

A.

Proceedings Below

Detective McClarin testified that, as part of his investigation, he spoke with Carter, and "a couple other people," and he obtained surveillance video from Oakleigh Station. During the prosecutor's examination, the following occurred:

> [PROSECUTOR]: Okay. And at some point you were able to identify several individuals in the video that you thought might have been involved?
>
> [DETECTIVE]: Yes.
>
> [PROSECUTOR]: And you then spoke to other detectives regarding that, is that correct?
>
> [DETECTIVE]: Yes.
>
> [PROSECUTOR]: Based upon that information, the information you received, what did you do, if anything, did you do next?
>
> [DETECTIVE]: With all that information we had with the surveillance video, that information was put into a police data base.

Defense counsel objected to Detective McClarin's testimony, explaining that he was "concerned when [Detective McClarin] starts talking about police data bases, that would identify [appellant] from police data bases, and I'm sure he's not the one that pulled the information from the data base, so I think maybe he doesn't know." A further discussion ensued regarding whether the detective "said that he put the information in," after which the following occurred:

> THE COURT: But there's nothing wrong with that if that is it. And somehow it was something (inaudible) I put this in the data base.

[DEFENSE COUNSEL]: If -- **I think it's unduly prejudicial**. He's, of course, now putting [appellant] as being in a police data base which, of course, is not a good thing. And I think maybe –

THE COURT: No I -- you know, I, I can't see that. I mean, he's talking about something that he actually did, the input of information.

[DEFENSE COUNSEL]: Into -- I guess maybe he can say, you know, into a data base versus into a police data base.

THE COURT: Okay. You're –

[DEFENSE COUNSEL]: I know I'm being –

THE COURT: -- you're stretching it.

[DEFENSE COUNSEL]: I know I'm splitting hairs, but --

THE COURT: Yeah.

[DEFENSE COUNSEL]: -- it's just -- I don't want him to -- (inaudible) and that's

THE COURT: And that would be the end of the trial, wouldn't it?

[DEFENSE COUNSEL]: Right. Yes.

THE COURT: So Mr. Reilly knows that. Okay. Thanks, gentlemen.

[DEFENSE COUNSEL]: Thank you.

(Emphasis added).

The prosecutor then asked Detective McClarin if, as a result of his investigation, he was able to develop a suspect. Detective McClarin answered in the affirmative and stated that the suspect was appellant.

B.

Preservation

We address first the State's preservation argument, i.e., that appellant's arguments that the evidence was irrelevant and improper other crimes evidence is not properly before this Court. Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." The "rule limiting the scope of appellate review to those issues and arguments raised in the court below 'is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice.'" *In re Kaleb K.*, 390 Md. 502, 513 (2006) (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)).

This Court has made clear that, "'[w]here a party asserts specific grounds for an objection, all other grounds not specified by the party are waived.'" *Webster v. State*, 221 Md. App. 100, 111 (2015) (quoting *Thomas v. State*, 183 Md. App. 152, 177 (2008)). Indeed, "'when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.'" *Gutierrez v. State*, 423 Md. 476, 488 (2011) (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004)).

Here, defense counsel expressly stated that the basis of his objection was that he thought the use of the phrase "police database" was "unduly prejudicial." He did not argue that the evidence was irrelevant or improper other crimes evidence. Accordingly, those

arguments are not preserved for review, and we will not address them. We thus turn to the argument that has been preserved for appeal, i.e., whether Detective McClarin's testimony regarding entering information into the "police database" was unduly prejudicial.

C.

Undue Prejudice

Maryland Rule 5-403 provides that evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." A decision to admit evidence over an objection that the evidence is unfairly prejudicial is a matter for the trial court's discretion and "'will not be reversed absent an abuse of discretion.'" *Carter v. State*, 374 Md. 693, 705 (2003) (quoting *Merzbacher v. State*, 346 Md. 391, 405 (1997)).

We agree with the State that the premise of appellant's argument is not supported by the record. Appellant states that Detective McClarin testified that he "identified" appellant, and "found" his information, from a police database. As set forth, *supra*, that was not the testimony before the jury. Detective McClarin merely testified that "information was put into a police database." No further testimony was given to the jury regarding the information put into the database, and no testimony was given to the jury that the police identified appellant from information obtained from the police database.

The evidence admitted here was not prejudicial, much less "unduly prejudicial."[8] The circuit court did not abuse its discretion in admitting the evidence.

[8] We further note that the jury was aware that appellant had a prior criminal record because he stipulated that he previously had been convicted of a crime that prohibited him from possessing a regulated firearm.

III.

Jenkins, Jr.'s Testimony

Appellant next contends that the "trial court erred in admitting lay testimony without evidence that it was based on first-hand knowledge." Specifically, he argues that the court erred in permitting Jenkins, Jr. to testify that, "[u]sually when somebody walks to their car, they are going back to get a weapon." He interprets this testimony as indicating that, "when [a]ppellant walked to a car, he was likely getting a gun," and he asserts that the evidence was inadmissible under Md. Rules 5-602[9] and 5-701[10] because there was no evidence that the testimony was based on anything Jenkins Jr. had personally observed, as opposed to hearsay or speculation.

The State responds in three ways. First it contends that appellant's claim is not preserved because he failed to object to similar testimony given by Jenkins, Jr. at other times during the trial. Second, the State argues that, even if the claim is preserved, the circuit court properly exercised its discretion in permitting the testimony for the "purpose of demonstrating that Jenkins, Jr.'s attention was focused on what was going on in that part

[9] Maryland Rule 5-602 provides: "Except as otherwise provided by Rule 5-703, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony."

[10] Maryland Rule 5-701 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."

of the parking lot and to explain why he told Carter and his friends not to go toward the car." Finally, the State asserts that any error was harmless.

A.

Proceedings Below

During the State's direct examination of Jenkins, Jr., the following occurred:

> [PROSECUTOR]: Now, as the, as the altercation occurred as they were leaving, what did you do?
>
> [JENKINS, JR.]: Broke up -- so the altercation happened right out front. I broke the altercation up and once I broke it up, one of the – some -- one of the people walked to their car and we -- when you are in security, the first thing you, you want is if anybody walks to their car, then that's not necessarily a good thing.
>
> [PROSECUTOR]: And why is that?
>
> [JENKINS, JR.]: Because more times than not if somebody walks –
>
> [DEFENSE COUNSEL]: Objection.
>
> [JENKINS, JR.]: -- walks to their car –
>
> THE COURT: Hold on one second please, sir. Overruled. Go ahead. You can continue, sir.
>
> [JENKINS, JR.]: Usually when somebody walks to their car, they are going back to get a weapon. That's why if anybody usually walks out of the club, that's why everybody gets their head down, and at that time nobody gets to walk back in the club after they go to their car.

B.

Preservation

We address first the State's preservation argument. The State contends that appellant did not preserve this argument for our review because there were several instances where Jenkins, Jr. testified, without objection, that he believed it unwise, and/or

unsafe, to follow someone to their vehicle in the parking lot. For example, soon after defense counsel's objection, Jenkins, Jr. testified that he informed Carter and his friends not to follow the person going to the vehicle, stating that "dude has gone to his car, don't go over there because you don't know what he's getting out of the car." Later, he testified that he "told everybody to stay back because it was never a good idea to go chasing after somebody that goes to their car, and that's logic 101." And, although he later stated that he did not see what, if anything, the person retrieved from the vehicle, he stated, without objection, that he was "not one to follow somebody to their car. That's just not safe to me."

The State acknowledges that the unobjected-to testimony did not explicitly reference a weapon, but it argues:

> [T]he only logical safety concern clearly implied by each of these passages was that a person who goes to his car after an altercation at a club frequently does so to retrieve a weapon. By failing to object to other references to the security concerns associated with a person going to his car after an altercation, [appellant] forfeited his right to raise this claim on appeal.

We agree. Maryland Rule 4-323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." "'[W]hen evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection.'" *Wilder v. State*, 191 Md. App. 319, 346 (quoting *Williams v. State*, 131 Md. App. 1, 26 (2000)), *cert. denied*, 415 Md. 43 (2010). *Accord Tichnell v. State*, 287 Md. 695, 716 (1980) (same).

Here, as the State notes, Jenkins, Jr. testified repeatedly, without objection, that there were security concerns in following a person who goes to his car after leaving the club, stating at one point that it was not a good idea to follow someone going to his vehicle because it is not clear what that person is "getting out of the car" and stating at another point that it was not safe to follow someone to his car. Appellant's failure to object to this testimony, which clearly indicated the concern that a person going to a car was going to get a weapon, constitutes a waiver of his complaint that it was error to admit testimony that, "[u]sually when somebody walks to their car, they are going back to get a weapon." The issue is not preserved for this Court's review.

C.

Lay Opinion Testimony

Even if the issue was preserved for review, we would conclude that it is without merit. This Court reviews a circuit court's decision to admit lay witness testimony for abuse of discretion. *Prince v. State*, 216 Md. App. 178, 198, *cert. denied*, 438 Md. 741 (2014).

Appellant contends that Jenkins, Jr.'s testimony was inadmissible under Md. Rules 5-602 and 5-701 because there was no evidence that the testimony was based on anything Jenkins Jr. had personally observed. He asserts that there was no evidence that the testimony "was based on first-hand knowledge."

The State argues that the court properly exercised its discretion in permitting the testimony. It asserts that the testimony is "properly understood to mean he *believed*, based

on his personal observations and his four years as a security guard at the Oakleigh Station bar, that [appellant] *might* be retrieving a weapon." And it argues that this testimony was relevant to show that "Jenkins, Jr.'s attention was focused on what was going on in that part of the parking lot and to explain why he told Carter and his friends not to go toward the car."

Jenkins, Jr.'s testimony, taken in context, supports a finding that it was based on personal knowledge. Jenkins, Jr. testified that "more times than not," and "usually," "when somebody walks to their car, they are going back to get a weapon." This testimony, and his testimony that he had been a security guard for four years at Oakleigh Station, in addition to the testimony that the bar had a policy that "nobody gets to walk back in the club after they go to their car," indicates that he was testifying based on his personal experience as a security guard. On this record, we cannot say that the circuit court abused its discretion in admitting the evidence.

IV.

Failure to Instruct the Jury

Appellant contends that the trial court plainly erred in omitting the elements of the offense of use of a firearm in the commission of a felony or crime of violence from its final instructions to the jury. Conceding that the claim is not preserved for appeal, he requests that we find plain error.

Although the State acknowledges that the court failed to give any instruction to the jury on the offense of use of a firearm in a crime of violence, it contends that failing to

instruct the jury on the "simple and straight-forward nature of the crime" did not prejudice appellant and does not present "the kind of rare, compelling, and extraordinary circumstance that warrants plain error review." It asserts that the simple nature of the offense, "coupled with the jury's verdicts convicting [appellant] of first-degree assault and possession of a regulated firearm, make clear that the jury found that the State had established, beyond a reasonable doubt, each of the elements of the offense."

Maryland Rule 4-325(e) governs appellate review of unpreserved instructional error and provides as follows:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

The purpose of the preservation requirement embodied in Md. Rule 4-325(e) is to provide the trial court "an opportunity to correct the instruction before the jury starts to deliberate." *Allen v. State*, 157 Md. App. 177, 183 (2004).

Although the rule contemplates plain error review, "[i]t is 'rare' for the Court to find plain error." *Newton v. State*, 455 Md. 341, 364 (2017), *cert. denied*, 138 S. Ct. 665 (2018). Indeed,

> [b]efore we can exercise discretion to find plain error, four conditions must be met: (1) "there must be an error or defect – some sort of 'deviation from a legal rule' – that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he

> must demonstrate that it 'affected the outcome of the district court proceedings'"; and (4) the error must "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."

Id. (quoting *State v. Rich*, 415 Md. 567, 578 (2010)). "Plain error review is 'reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial,'" *id.* (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)), and may be appropriate where "the error was 'so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial.'" *Id.* (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)).

Here, the court's failure to instruct the jury on the crime of use of a firearm in the commission of a felony or crime of violence clearly was error. In the context of this case, however, this error was not so exceptional to compel us to find plain error.

The error did not prejudice appellant. As the State notes, the elements of the crime "are easily understood by the name of the offense itself." *See State v. Daughtry*, 419 Md. 35, 73 n. 20 (2011) (use of firearm in a crime of violence is "readily understandable from the charge itself"). And as appellant acknowledges, "the elements of the offense that were omitted here, use of a firearm in a crime of violence, were encapsulated by the instructions on other offenses that Appellant was convicted of – possession of a firearm and first degree assault." Because the jury found appellant guilty of the charges of first degree assault, a crime of violence pursuant to Md. Code (2017 Supp.) §5-101(c)(3) of the Public Safety

Article ("PS"), and possession of a firearm, the jury necessarily determined that appellant used a firearm in the commission of a first degree assault, a crime of violence.[11]

On this record, we cannot conclude that the error affected the outcome of the case. It does not present the rare, extraordinary circumstances that persuade us to find plain error.

V.

Sentencing

Appellant's final contention is that the "trial court erred in permitting the State to introduce testimony from a gang affiliation expert at sentencing." He asserts that "[g]ang affiliation expert testimony may not be used to enhance a defendant's sentence" absent a showing that "the defendant has committed or will commit crimes on behalf of a gang." Moreover, he argues that the testimony was impermissible because the State violated Md. Rule 4-342 and Md. Rule 4-402 by: (1) waiting until the "last minute" to notify him of its intent to call the gang expert; and (2) failing to disclose the basis of the expert's findings.

A.

Proceedings Below

Approximately one week prior to sentencing, a pre-sentence investigation ("PSI") report was issued to both the State and defense counsel. In the PSI report, appellant admitted that he previously was a member of a gang, specifically the Black Guerilla Family ("BGF"), but he stated that he had left the gang when invited to do so by the leader of the

[11] We further note that the prosecutor in closing argument outlined the elements of the crime for the jury.

BGF. On August 4, 2016, after receiving the PSI report, the State notified defense counsel via electronic mail that he intended to call Detective Chris Hodnicki, a member of the gang unit of the Baltimore County Police Department, as a gang expert.

At the outset of the sentencing hearing, on August 9, 2016, the State reasserted its intent to call Detective Hodnicki as an expert. The court responded: "[Appellant] admitted in the PSI that he was a member of the Black Guerilla Family. He said that he left the gang." The State responded that the question was "not really whether or not he was a member at the time but whether he is still a member and what affect that should" have on the court's sentencing.

Defense counsel objected, noting that, although the State was "relying on a Court of Special Appeals case, Oscar Cruz-Quintanilla versus State," that might not be the last word on the issue.[12] Counsel also referenced an injury to appellant's face, stating this was received from a group attack in jail, which "wouldn't have happened if he was still involved in gang life."

The court permitted the State to call the detective. Detective Hodnicki testified that he had interviewed appellant's co-defendant, Davis, who "indicated that [appellant] was a high ranking member" of BGF.

Defense counsel again objected, this time asserting that he had just received notice that the State intended to call Detective Hodnicki. Counsel then "asked [the State] to

[12] *Cruz-Quintanilla v. State*, 228 Md. App. 64 (2016), subsequently was affirmed by the Court of Appeals, 455 Md. 35 (2017).

provide all information that formed the basis for this witness' opinion other than the resume of the witness," noting that he had "not received one bit of information as to how this witness formed his opinion." He asked the court not to consider the detective's testimony, asserting that it was "going to be difficult for [him] to cross examine [this] witness." Counsel further argued that, "if there's any report made by an expert witness, that's required to be disclosed on a discovery ruling," and the State's "last minute try to shoehorn it in [was] unfair." The State responded that appellant had already admitted to his membership with BGF.

The court stated that, according to appellant, "he was a member of the Black Guerilla Family but has since left the gang," but the court did not know the time frame in which appellant left the gang. The court continued: "But if the point of calling the detective is to prove that the gentleman was in a gang, I know he was in a gang. If you are going to elicit he's currently in a gang, I guess that's a different issue. . . . I don't – honestly, I have a lot of information." It stated to defense counsel: "[T]o the extent that you are basically saying this gentleman can't testify at all, that's denied."

Detective Hodnicki then continued, explaining that BGF started as a "political rights" movement in the California prison system. By the late 1960s, or early 1970s, however, BGF split into two different factions, the Cambone, or political movement, and the criminal wing, the Black Entrepreneurs Network (BEN). He continued:

> Under BEN there are crimes that are permissible in order to generate money and revenue for the political functions of the gang. So one hand sort of washes the other. Cambone allows BEN to operate in criminal enterprises

> and then BEN contributes some of their earnings in theory to the political functions of Cambone.

Detective Hodnicki explained that BGF was active in Maryland prisons and that BGF used violence, both inside and outside of prison, to maintain territory and "status in whatever venues and ventures they enter into." BGF also used violence between gang members as discipline for any breaches of the gang's internal rules. Detective Hodnicki further explained that, although drug dealing was the principal "money maker" for BGF, they also were involved with prostitution.

Defense counsel asked Detective Hodnicki if he was aware of "any alleged rule infraction that [appellant] may have committed." Detective Hodnicki replied in the affirmative. Defense counsel next asked Detective Hodnicki if he was familiar with the injuries appellant had recently sustained from the prison attack, to which the detective likewise responded affirmatively. Defense counsel then objected, stating:

> Your Honor, I'm going to renew my objection again. I've – the rules regarding expert witnesses require that the State [] provide information that forms the basis for the expert's opinion.
>
> Again I feel I'm at a disadvantage in now having this information that I have requested prior to today.

The court responded as follows:

> But I'm a little confused. I haven't, I haven't heard anything that I – no offense, but that I don't already know. So you probably know it, too. Like I don't, I don't really know – your objection is overruled. I don't think you're at a disadvantage. You – I, I don't know that I have heard any information specific to your client other than the fact that he was in the Black Guerilla Family, which he says himself.

Defense counsel then stated that it had no further questions. The court asked whether "there [was] something [it was] missing," and defense counsel said "No."

Following Detective Hodnicki's testimony, the State made a proffer to the court regarding appellant's prior convictions for distribution of controlled dangerous substances ("CDS") and two crimes of violence, both involving handguns. The State also recounted the facts of the instant case.

Appellant's mother wrote a note to the court regarding his sentencing. Defense counsel then provided information regarding appellant's education and upbringing. Appellant also requested that the court be merciful, stating: "I'm much more than what is on paper. I'm a son, a friend, and, most importantly, a father."

Prior to imposing sentence, the court stated:

> Okay. Well, obviously I need to consider punishment, rehabilitation and public safety, and I am taking all that into account.
>
> This is a particularly serious and concerning event. People go to a club for an enjoyable evening and there shouldn't be shots fired on the parking lot. And [appellant] certainly, he seems to have a history of involvement with violence and with weapons.
>
> I did think that you spoke very eloquently just now and I hope that this is behind you, but certainly the evidence that I have is that you have led quite a violent life. I sort of agree, frankly, with your summation, and I think your mom's, that it is unfortunate that you chose to leave school. I think you probably are the things that your mom said you are.
>
> * * *
>
> Certainly with her I bet you are a kind hearted gentleman when you are with her. But this, this life that you have led, that you have chosen to lead certainly brings to the forefront of my concern public safety, and I know that you understand that.

As indicated, the court sentenced appellant to 25 years' imprisonment for the conviction of first degree assault, to be served consecutively to the 10-year sentence that the court imposed on the conviction for use of a firearm in the commission of a crime of violence (the first five years without parole), and concurrently with the 5-year sentence the court imposed on the conviction for possession of a firearm by a prohibited person.

B.

Admissibility of Gang Affiliation Testimony

We address first appellant's argument that the admission of the expert testimony of the gang expert was erroneous because "[t]rial courts may not increase a defendant's sentence based on his exercise of constitutional rights." The State initially contends that, to the extent that appellant is arguing that the sentencing court could not consider at all his affiliation with the Black Guerilla Family" gang ("BGF"), that claim is not preserved for appellate review.

As previously discussed, Maryland Rule 8-131(a) provides that an "appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." Here, although appellant's argument was not a model of clarity, he did refer to *Cruz-Quintanilla v. State*, 228 Md. App. 64, 68-69 (2016), *aff'd* 455 Md. 35 (2017), which addressed whether the admission of gang affiliation testimony at sentencing was a violation of a defendant's First Amendment rights, the crux of his claim on appeal. We will consider the claim on its merits.

The State contends that the gang affiliation testimony was admissible because it bore on appellant's violent character. Alternatively, it argues that any error in admitting the testimony was harmless and "reversal is not required because the court's comments make clear that it did not consider [the] testimony in sentencing [appellant]."

The Court of Appeals recently addressed the issue whether a trial court may admit gang membership evidence in a sentencing hearing when the gang membership is unrelated to the convictions. *Cruz-Quintanilla v. State*, 455 Md. 35 (2017). The Court initially noted that a "'sentencing judge is vested with virtually boundless discretion' in devising an appropriate sentence." *Id.* at 40 (quoting *Smith v. State*, 308 Md. 162, 166 (1986)). It noted:

> "[H]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." [*Smith*, 308 Md. at 167] (citation omitted). So it is that, in exercising that discretion, the sentencing judge may take into account the defendant's "reputation, prior offenses, health, habits, mental and moral propensities, and social background." *Jackson v. State*, 364 Md. 192, 199, 772 A.2d 273 (2001) (citation omitted). "The consideration of a wide variety of information about a specific defendant permits the sentencing judge to individualize the sentence to fit 'the offender and not merely the crime.'" *Smith*, 308 Md. at 167, 517 A.2d 1081 (quoting *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)). Given the broad discretion accorded the sentencing judge, "generally, this Court reviews for abuse of discretion a trial court's decision as to a defendant's sentence." *Sharp v. State*, 446 Md. 669, 685, 133 A.3d 1089 (2016).

Id. at 40-41.

The Court agreed that membership in a gang is subject to First Amendment protection, but it stated that "such protection is not absolute and does not render

inadmissible any and all evidence relating to the gang." *Id.* at 48. The Court noted that, in *Dawson v. Delaware*, 503 U.S. 159, 166 (1992), the United States Supreme Court held that evidence of a defendant's "membership or association in an organized gang is relevant and admissible during sentencing *if* the State establishes that the gang's purposes and objections are criminal in nature." *Cruz-Quintanilla*, 455 Md. at 45 (emphasis in original). That is because gang association evidence may be relevant to show whether a defendant represents a future danger to society. *Id.* The Court of Appeals noted that cases decided after *Dawson* had reaffirmed that "a sentencing court may consider a defendant's gang membership as relevant to the imposition of a proper sentence so long as the evidence presented goes beyond the abstract beliefs of the gang." *Id.* The Court ultimately held that the sentencing court properly admitted gang association evidence, stating:

> We therefore agree with the Court of Special Appeals that, "the evidence regarding MS–13 was not limited to the constitutionally protected beliefs of the gang" and "[i]t would be reasonable to infer from the evidence that as a documented member of MS–13, [Cruz–Quintanilla] endorses not just MS–13's beliefs, but also its criminal activities."

Id. at 49-50 (quoting *Cruz–Quintanilla*, 228 Md. App. at 69).

Here, Detective Hodnicki's testimony went well beyond "the abstract beliefs of the gang." *Id*. at 45. Rather, his testimony made clear that BGF's purposes and objectives are criminal in nature, noting that BGF's principal "money maker" was drug dealing, but it also was involved in prostitution. Detective Hodnicki also testified that BGF was active in Maryland prisons and that it used violence, both inside and outside of prison, to "maintain their status in whatever venues and ventures they enter into" and to maintain territory.

From this testimony, it would be reasonable to infer that a BGF member endorses the criminal enterprises in which BGF is involved, and that appellant presented a danger to society. Thus, the circuit court did not abuse its discretion in determining that the evidence was relevant for sentencing purposes.

C.

Discovery Violation

Appellant also contends that the expert's testimony should have been stricken, or sentencing postponed, because the State violated the notice requirements of Maryland Rule 4-342(d) when it failed to disclose its intent to call Detective Hodnicki as an expert witness until the "last minute." The State concedes that it failed to make a timely disclosure, and the court erred in failing to postpone the sentencing hearing.

Maryland Rule 4-342(d) provides:

> Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.

"'The purpose of Md. Rule 4-342(d) is to notify the defendant of the information the State will present against him or her at the sentencing hearing and afford the defendant a reasonable opportunity to investigate the State's information in order to prepare for sentencing.'" *Lopez*, 231 Md. App. at 469 (quoting *Dove*, 415 Md. at 739). The rule is mandatory and requires a postponement where the State fails to timely comply. Md. Rule 4-342(d).

Here, the State did not advise appellant of its intent to call an expert until August 4, 2016, five days before the sentencing hearing. We note, however, that the PSI report was not completed until July 29, 2016, and it was not provided to the parties until approximately one week before the sentencing hearing. To the extent that the testimony was presented to counter appellant's statement in the PSI that he was no longer in the gang, the State would not have known to disclose the expert at an earlier time.

Even if, arguendo, the State failed to make a timely disclosure, and the court erred by failing to postpone the sentencing hearing, that would not automatically require reversal of appellant's sentence. We still must address whether the court's acceptance of the expert testimony, without granting a postponement, was harmless error. *See Dove*, 415 Md. at 732-33 (harmless error properly applied to violation of Maryland Rule 4-342(d)).

A "defendant's actual knowledge of the information that is, in fact, adduced at a sentencing hearing and relied upon by the sentencing court may be relevant in determining whether a rule violation prejudiced the defendant or amounted to no more than harmless error." *Lopez*, 231 Md. App. at 470. If the record contains cumulative evidence that tends to prove the same point as the evidence resulting from the discovery violation, it is possible that the "'cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded.'" *Dove*, 415 Md. at 744 (quoting *Ross v. State*, 276 Md. 664, 674 (1976)). In this regard, a sentencing court's decision can assist in this Court's determination whether

an error was, in fact, harmless because, "[u]nlike a jury verdict, the sentencing judge may explicitly state what evidence he or she relied upon in reaching a decision." *Id.* at 750.

Here, appellant admitted in the PSI that he had been a member of the gang. The court stated, multiple times, that Detective Hodnicki's testimony did not provide any information of which it was not already aware. In fact, in response to defense counsel's final objection on the topic, the court stated:

> But I'm a little confused. I haven't, I haven't heard anything that I – no offense, but that I don't already know. So you probably know it, too. Like I don't, I don't really know – your objection is overruled. I don't think you're at a disadvantage. You – I, I don't know that I have heard any information specific to your client other than the fact that he was in the Black Guerilla Family, which he says himself.

When the court asked defense counsel if "there [was] something [it was] missing," defense counsel said: "No."

These comments, indicating that the court did not hear anything from the testimony that it did not already know, show that the testimony did not impact the court's sentencing decision.[13] Moreover, in sentencing appellant, the court did not reference appellant's membership in BGF, but rather, it focused on appellant's "history of involvement with violence and with weapons," as well as the serious nature of the crime. Under these circumstances, any error in admitting Detective Hodnicki's testimony was harmless and does not require reversal of appellant's sentence.

[13] We recognize, as appellant notes, that there was additional evidence adduced that was not in the pre-sentence investigation ("PSI") report, such as the testimony that Davis said appellant was a "high ranking member" of the gang. The circuit court's comments, however, make clear that this was not something of significance to the court.

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

Circuit Court for Baltimore County
Case No. 3K-15-3410

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1332

September Term, 2016

DUSTIN FITZGERALD SCOTT

v.

STATE OF MARYLAND

Graeff
Berger,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Battaglia, J.

Filed: July 5, 2018

I join the majority opinion on four of the five issues. With respect to the fourth issue, however, the failure to instruct the jury on the elements of the offense of use of a firearm in the commission of a felony or crime of violence, I dissent. I conclude that the court's error in this regard constitutes plain error and requires reversal of appellant's conviction on that offense.