UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1343

September Term, 2014

MICHAEL STAHLNECKER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Woodward,
Nazarian,
JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 5, 2017

In the Circuit Court for Anne Arundel County, Michael Stahlnecker, the appellant, was charged with first degree murder, armed robbery, and use of a handgun in the commission of a crime of violence. He filed pretrial motions to suppress evidence seized during two searches of a commercial warehouse; wiretap evidence; and to disqualify the State's expert witness on cell phone tower technology, all of which were denied. At his trial, the court granted motions for judgment of acquittal on armed robbery and the lesser included offenses of robbery and theft. The jury convicted the appellant of first degree murder and use of a handgun. He was sentenced to life in prison for murder and to twenty years' incarceration for the handgun offense, the first five years to be served without the possibility of parole.

The appellant poses five questions on appeal, which we have rephrased slightly:

> I. Did the trial court err by denying the appellant's request for a *Franks* hearing to challenge the warrant authorizing the first search of the warehouse?
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> II. Did the trial court err by denying the motion to suppress evidence seized during a second search of the warehouse?
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> III. Did the trial court err by denying the motion to suppress wiretap evidence?
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> IV. Did the trial court abuse its discretion by qualifying Agent Richard Fennern as an expert witness on cell phone tower technology?
>
> V. Did the trial court err by admitting, as consciousness of guilt evidence, testimony that the appellant advised witnesses to obtain counsel during the murder investigation?

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

FACTS AND PROCEEDINGS

On the morning of Wednesday, November 28, 2012, John Ryan disappeared. His body was found five days later in the trunk of his car, which was parked in a parking lot off of Somerville Drive, in Rockville, near the Shady Grove Metro station. Also in the trunk were $1,000 in cash and approximately one pound of marijuana. He had sustained two gunshot wounds to the right side of his head, as well as a blunt force injury to his head.

The appellant was charged with Ryan's murder and related crimes. The case against him was tried to a jury over 16 days between January 30, 2014, and February 26, 2014. The State called 32 witnesses and introduced over 80 exhibits. Its theory of prosecution was that the appellant killed Ryan because of a dispute over the management of their marijuana trafficking and distribution operation. We summarize the relevant evidence adduced at the trial.

At all relevant times, Ryan lived with his wife, Sarah Ryan ("Sarah"), and their two children in a house in Frederick. Ryan and his wife owned and operated a home remodeling and contracting company. Ryan was the head salesperson and Sarah managed the books and wrote proposals.

For at least ten years, Ryan also had been selling marijuana on the side. Since 2010, he had been importing marijuana from California. In 2012, the appellant joined Ryan in this endeavor. The appellant ran two legitimate businesses: Computer Power Cable Corporation ("CPC"), an electrical generator business he had run for many years,

and Levitating Sports, a new sports memorabilia company. By 2012, CPC was struggling financially, however, and the appellant was in serious debt.

In January 2012, Ryan and the appellant traveled to Cotati, California together where the appellant entered into a lease for a 1,100 square foot commercial warehouse ("the California warehouse") for $900 per month. The evidence suggested that, thereafter, they used the California warehouse to store large quantities of marijuana and package it for transport and eventual distribution.

In Maryland, the appellant and Ryan used a large commercial warehouse and office space located at 3356 Fort Meade Road, Laurel, Anne Arundel County ("the Maryland warehouse") as their base of operations. The Maryland warehouse was leased by the appellant for his businesses. He owed more than $40,000 in back rent, however.

The evidence further suggested that Ryan and the appellant used CPC as a front to traffick marijuana. They used hollowed out electrical generators from CPC to ship cash by truck to California. The cash was used to purchase large quantities of high grade marijuana, which was then packaged into one-pound heat-sealed packets at the California warehouse and stuffed inside the same hollowed out electrical generators.[1] The marijuana-filled generators were shipped back to the Maryland warehouse by truck. The

[1] There was evidence from the wire tap that Ryan asked an associate in California, Max Escudar, to purchase a heat sealer. Ryan also visited Escudar while he was in California in October 2012. One of Escudar's business cards was found in the appellant's house after Ryan went missing.

marijuana was stored there and at several self-storage units Ryan leased in and around Frederick.

Ryan was in charge of the distribution arm of the partnership. He sold to the appellant; to his best friend, Michael Betman; and to more than ten others, including: Corey Sewell, Matthew Thompson, and Prashant Kunjeer. He kept track of the amounts sold and the money owed to him on tally sheets that he emailed to himself. The last tally sheet, dated October 10, 2012, showed that the appellant, denoted as "Stahl," owed $9,900.

In July 2012, the Frederick County Narcotics Taskforce ("the Taskforce") received an anonymous tip that Ryan was trafficking large quantities of marijuana from California or Colorado to Maryland. The Taskforce comprised more than 35 members from the Frederick County Sheriff's Office ("FCSO"), the Maryland State Police ("MSP"), the FBI, and the United States Department of Homeland Security ("DHS"). Detective Brian Elliot with the FCSO obtained a pen register[2] for Ryan's primary cell phone.[3] On October 5, 2012, Detective Elliott obtained a warrant for a wiretap of Ryan's primary cell phone. The Taskforce also began surveilling Ryan's movements.

[2] A pen register allows the police to see the phone numbers of persons called or text messaged from a phone, but not the substance of those calls or text messages. It also provides cell tower information for calls and text messages.

[3] As we shall explain, the police obtained a pen register for the cell phone they knew to be used by Ryan. He also was using numerous disposable "drop phones," however, of which they were then unaware.

Through the wiretap and surveillance, the Taskforce learned that Ryan was making frequent trips to California. From October 9 through October 15, 2012, Ryan traveled to San Francisco for a week. Two members of the Taskforce flew to San Francisco to surveil Ryan during his trip. They observed him driving around with a man they were able to identify as the appellant.

On October 30, 2012, the appellant went to New York City to work on several CPC projects. Robert Klimek, an electrical engineer employed by CPC, was with him in New York. The appellant remained in New York until November 24, 2012.

Meanwhile, back in Maryland, Ryan needed access to the Maryland warehouse. On October 31, 2012, Ryan made numerous calls to the appellant's cell phone, but the appellant did not pick up. That same day, the Taskforce monitored a call between Ryan and Betman. Ryan asked Betman, who lived in Philadelphia, if he or anyone he knew could drive to New York City and get a set of keys from his "home boy." Betman was unable to help Ryan.

On November 3, 2012, Klimek traveled to Maryland from New York City to reset the CPC computer servers. Klimek had keys to the Maryland warehouse and he also had a unique passcode for the alarm system. The appellant was the only other person with keys and he also had a unique passcode. At 2:53 p.m., Klimek used his passcode to disarm the alarm at the Maryland warehouse. Later that night, Ryan showed up unannounced at the Maryland warehouse and spoke to Klimek. The two men had never met before. Ryan told Klimek he needed to speak to his (Klimek's) boss. Klimek called

the appellant and Ryan grabbed the phone. Ryan told the appellant that he needed keys to the Maryland warehouse. The appellant directed Klimek to give Ryan keys and a passcode for the alarm.

Ryan left the Maryland warehouse and met Betman at a nearby restaurant. Afterwards, they returned to the warehouse and were observed moving a large cardboard box to Betman's car. Betman testified that over 125 pounds of marijuana were inside an electrical generator in the warehouse. Betman purchased 25 pounds for $75,000. Ryan also took some for himself that night, according to Betman.[4]

Around that time, the Taskforce applied for and received permission to install a pole camera on a utility pole outside the warehouse. The camera was not installed until November 30, 2012, however, two days after Ryan went missing.

On November 7, 2012, the Taskforce was granted a pen register for the appellant's cell phone.

Later that month, the Taskforce learned that Ryan was planning to make another trip to California, departing November 30, 2012, and returning December 5, 2012. Four days before he was scheduled to depart, on November 26, 2012, Ryan and the appellant met at the Maryland warehouse for five hours.

The next night, Ryan told Sarah that on the morning of November 28, 2012, he was "going to meet Mike and the truck." Sarah understood Ryan to be referring to the

[4] Members of the Taskforce were surveilling Ryan and Betman at the warehouse and the restaurant. They planned to arrest Betman after he left the warehouse, but he took an unexpected route back to Philadelphia and they lost him.

appellant. She had been begging Ryan to stop selling marijuana. She became angry when Ryan told her he was meeting the appellant in the morning. Rather than discuss the issue further, she went to sleep.

On the morning of November 28, 2012, at 6:38 a.m., the alarm at the Maryland warehouse was disarmed using the appellant's passcode. The State's cell phone expert, Agent Fennern, testified about the cell tower data associated with the appellant's cell phone, Ryan's primary cell phone, and two other "drop phones" they believed Ryan had used on that day. That data was consistent with the appellant's cell phone being in the vicinity of the Maryland warehouse from 6:44 a.m. through 9:17 a.m. Also at 6:44 a.m., one of the drop phones texted the appellant's cell phone and, one minute later, the appellant texted the drop phone back. (The substance of those text messages was not known.) Just six minutes later, the cell tower data associated with the other drop phone showed it to be moving away from Frederick in an easterly direction. By 7:47 a.m., Ryan's primary cell phone was in the vicinity of the Maryland warehouse. It remained in that area at 7:53 a.m., when the final outgoing call was made from that phone.

The Taskforce was conducting surveillance of Ryan's movements that morning using cell tower data from the wiretap. FBI Special Agent Jeff Stewart and MSP Trooper First Class Michael Cartner were directed to go to the Maryland warehouse. Special Agent Stewart arrived at the Maryland warehouse around 9 a.m. He could not see any cars parked in front of the warehouse. The gate to the back of the warehouse was closed and he could not see whether any cars were parked in back. Around 9:40 a.m., Special

Agent Stewart and Trooper Cartner drove to the Suburban Airport, a private airport near the warehouse, to look for Ryan's car. He also was not located there. Special Agent Stewart then received information that Ryan's cell phone was moving in the direction of Rockville, Montgomery County. He drove along Route 198 from Laurel to Rockville and attempted to locate Ryan's car, but was unable to do so.

At 10:25 a.m. and 10:26 a.m., the appellant made calls to a number associated with a taxicab company owned by Cornell Epps. Agent Fennern testified that the cell tower data associated with those calls was consistent with the appellant's phone being in the vicinity of the shopping center parking lot where Ryan's car later was found. By 11:00 a.m., the appellant's phone was back near the Maryland warehouse.

Meanwhile, Ryan's father and Sarah were trying to get in touch with him. Incoming calls to his cell phone at 8:55 a.m., 9:55 a.m. and 10 a.m. went unanswered. Ryan failed to show up for a haircut appointment at 1:30 p.m. Sarah called Ryan seven more times between 5:58 p.m. and 11:25 p.m. None of the calls were answered.

On November 29, 2012, three unanswered calls were made to Ryan's cell phone before 10 a.m. At 12:48 p.m., Ryan's cell phone was shut off and it never was reactivated after that date. This was the only time Ryan's cell phone had been shut off since the wiretap was activated.

Also on November 29, 2012, Sarah began calling Ryan's friends and acquaintances to try to locate him. She feared that Ryan was either in danger or in jail. The Taskforce was surveilling the Maryland warehouse that day and observed the

appellant arrive at the warehouse around 1 p.m. About an hour later, Sarah drove into the parking lot at the Maryland warehouse. She knocked on the front door of the warehouse, but the appellant did not answer. She walked around and knocked on a side door, but still received no answer. She then left.

Sarah called the appellant later that day. He told her that Ryan had not shown up for their meeting on November 28, 2012, and that he had not "spoken with [Ryan] recently." He told Sarah he had been in New York until November 27, 2012, and had not seen Ryan since he had returned. In fact, he had returned from New York on November 24, 2012.

On the evening of November 29, 2012, Sarah called 911 and reported Ryan missing. She was interviewed four times between November 29, 2012, and December 1, 2012. Initially, she did not tell the police that Ryan was a drug dealer. She did tell police that Ryan had made plans to meet "Mike" on the morning of November 28, 2012, and that she believed he was referring to the appellant. She denied knowing the appellant, but told police that she had been able to find his phone number and recounted her conversation with him. Sarah later admitted that she had met the appellant on two occasions.

Sarah also provided the police with the number for a "drop phone" Ryan had been using prior to his disappearance. That phone and another drop phone number discovered by the police both were shut off on November 29, 2012. Prior to one drop phone being shut off, someone hit the number "4" and the "send" button on the key pad. The police

were able to track the GPS signal for that phone at the time the "4" key was hit and it was pinpointed approximately 400 yards from the Maryland warehouse, in a field. The police searched the field but did not locate the drop phone.

On November 30, 2012, the Taskforce was granted a wiretap warrant for the appellant's cell phone. That same day, Corporal Jonathan Martin called the appellant. The appellant said that he and Ryan were friends, not business partners; that he had been in New York during the entire month of November, except for November 26–30, 2012; and that he had not seen Ryan for "'easily' over one month."

That same day, Betman went to Ryan's house in Frederick and tried to help locate him. He accompanied Sarah to Ryan's storage units in Frederick. They found large quantities of marijuana in one storage unit; Betman removed it. He later turned over to the police 36 pounds of marijuana, but there was evidence to suggest that he may have kept 24 pounds for himself.

Betman and another friend of Ryan's also went to Ventura Auto Shop, a repair shop located near the Maryland warehouse. Hector Ventura, the owner of the shop, permitted Betman to view video surveillance tapes from November 28, 2012. According to Betman, he observed Ryan's car driving toward the Maryland warehouse on the morning of November 28, 2012, at 7:36 a.m. Thereafter, Betman also viewed video surveillance tapes at a nearby car dealership. On that video, he believed he saw Ryan's car driving away from the Maryland warehouse around 7:39 a.m. Betman contacted Cpl. Martin and advised him of what he had seen on the tapes.

On December 2, 2012, members of the Taskforce executed a search warrant for the Maryland warehouse. Inside it they found a box of gloves, commercial grade heat sealer bags, and receipts from hotels and rental cars in California for the time period when the appellant was observed to be with Ryan. At the rear of the building were four live .38 Special rounds of ammunition and one empty casing.

The police searched an area around a large green dumpster in back of the warehouse. The pavement around the dumpster appeared to be wet, though the rest of the pavement was dry. After an officer finished searching inside the dumpster, he noticed that he was tracking blood from the bottom of his shoe. The police found two suspected blood stains on the front of the dumpster. Patches of what appeared to be congealed blood also were found on a leaf and a twig; on the pavement in front of the dumpster; on a piece of corrugated cardboard from inside the dumpster; and on a push broom propped up against the back of the warehouse. An outdoor water spigot was located near the wet pavement and it was functional. A hose was found nearby.

Testing of swabs of three of the stains on the pavement near the dumpster and from the handle and bristles of the push broom were confirmed to be blood and to match Ryan's DNA profile.

The next day, Ryan's car was located and his body was found in the trunk. The driver's side floor mat was missing. His keys, cell phone, and wallet were not found.

Swabs from the door handles, the gear shift, and other locations on the driver's side of the vehicle were tested and found to match Ryan's DNA. Swabs from the driver's

side headrest and the driver's side seatbelt and buckle contained DNA from two contributors: Ryan and an unknown person. The appellant, Sarah, and the appellant's girlfriend were excluded as contributors to those samples. The appellant's DNA and fingerprints were not found anywhere in Ryan's car.

The autopsy revealed that Ryan died from two gunshot wounds to the head. The medical examiner testified that Ryan could have died anytime between November 28, 2012, and December 1, 2012. She could not express an opinion as to whether Ryan was killed inside or outside the trunk of his car.

The State's firearms expert, Torin Suber, testified that the bullet fragments recovered from Ryan's body were from either a .38 Special, .357 Magnum, or .9 millimeter Luger. The bullets all had been fired from the same gun, but because no gun was found, Subin could not opine as to the exact caliber. The bullet fragments were consistent with the ammunition found at the Maryland warehouse.

The parking lot where Ryan's car was found was bordered on two sides by strips of stores and, on a third side, by two auto mechanical and body shops. Wilhelm Derminnassian, the owner of one of the auto shops, testified that he noticed Ryan's car in the lot on Wednesday, November 28, 2012, or Thursday, November 29, 2012. He remembered because he had checked to see if the owner of the car had dropped his or her keys at the shop for servicing.

In December 2012, the police interviewed Dara Dillree, the appellant's on-and-off girlfriend. Dillree had three guns registered in her name, including a .38 caliber Smith

and Wesson. The police asked to examine the .38 Smith and Wesson. Dillree told them that the Smith and Wesson was at her aunt's house in North Carolina. This was a lie. She later told police that her .38 Smith and Wesson had been stolen, but that she had not reported the theft to the police. Dillree made arrangements to bring her .38 caliber ammunition to the police for it to be compared to the bullet fragments found in Ryan's body. She cancelled the appointment the next day, however. A phone conversation between Dillree and the appellant was played for the jury. Dillree told the appellant that he should "marry[] [her] so [she] [didn't] have to testify." Dillree testified at trial that the appellant advised her to hire an attorney and told her she did not have to speak to the police.

On February 13, 2013, agents from the DHS executed a search warrant for the California warehouse. They seized three vacuum sealer machines, hundreds of vacuum seal bags, several boxes of dryer sheets, and two digital scales. They also found several large generators wrapped in cardboard and cellophane packaging and one that was unwrapped. The unwrapped generator contained an additional vacuum sealer machine and more vacuum seal bags and boxes of dryer sheets. Detective Elliott testified that these items all are associated with the packaging and distribution of marijuana.

In his case, the appellant called 6 witnesses and introduced over 30 exhibits. His theory of defense was lack of criminal agency. He suggested that other individuals involved in Ryan's drug business had a motive to kill him, including Betman, Sewell, and Thompson.

The appellant attempted to cast doubt on the State's theory that Ryan was murdered on November 28, 2012, and to provide a legitimate explanation for his trip to Montgomery County on that morning. Donald Burgy testified that he was bidding out a project in Rockville around the time Ryan disappeared and that CPC was bidding on the job. Miguel Ruiz, an employee of a restaurant at the Rockville shopping center, testified that he always parked his car near where Ryan's car was found. He did not remember Ryan's car being there until a Saturday in December 2012. (December 1, 2012, was a Saturday.) The appellant's cell phone expert, Josh Brown, testified that the cell tower data associated with a phone used by Betman was consistent with his having been in Montgomery County near the location where Ryan's car was found on November 30, 2012. Defense counsel emphasized the lack of any DNA or fingerprint evidence linking the appellant to Ryan's car and the presence of an unknown DNA profile on the driver's side headrest and the driver's side seatbelt. The appellant also called two witnesses to counter the State's narrative that the appellant was struggling financially.

At the close of all the evidence, the court granted the appellant's motion for judgment of acquittal on the charge of armed robbery and the lesser included offenses of robbery and theft. The jury convicted the appellant of one count of first degree murder and one count of use of a handgun in the commission of a felony. The appellant's motion for a new trial was denied. This timely appeal followed. We shall include other facts in our discussion of the issues.

DISCUSSION

I.

As mentioned, on December 2, 2012, which was the day before Ryan's body was found, Detective Elliott and Corporal Martin applied for a search warrant for the Maryland warehouse. In the affidavit in support of the warrant application, they attested to the background of the drug investigation into Ryan, the appellant, and other associates, as well as facts relative to the investigation into his disappearance. As pertinent to the issue on appeal, the warrant application stated:

> Sarah . . . told Officers that she called [the appellant] earlier in the day (on Thursday, November 29, 2012) and he indicated that **RYAN** did not show up for their meeting [the day before] and nor ha[d] he spoken with **RYAN** recently. However, through cell tower locations active during the court authorized interceptions your affiant knows that both **RYAN**'s cell phone and [the appellant]'s cell phone were operating off the same tower in the immediate area of [the Maryland] warehouse . . . on the morning of Wednesday, November 28, 2012, at approximately 0753hrs through 0855hrs—the morning that the meeting had been scheduled to take place. In addition, investigators observed RYAN and [the appellant] at the [Maryland] warehouse together on Monday, November 26, 2012.

Sarah also told the FCSO that the appellant told her he had returned from New York on November 27, 2012, and had not seen Ryan since his return; that she thought the appellant was a "shady character"; and that she thought he had murdered her husband. The Taskforce was aware that the appellant actually had returned to Maryland from New York on November 24, 2012.

The warrant application was granted and the warrant was executed that same day. As discussed, the search revealed evidence of Ryan's blood near the dumpster at the rear

of the warehouse and on the push broom, as well as other evidence linking the appellant to the drug conspiracy.

The appellant moved to suppress the evidence seized during the search on the basis that in their warrant affidavit, Detective Elliott and Corporal Martin knowingly and intentionally misrepresented the cell tower data and knowingly and intentionally omitted material information bearing on Sarah's credibility; and that, but for the material misstatements and omissions, the warrant would not have issued. The appellant asserted that on the morning of November 28, 2012, his cell phone and Ryan's primary cell phone were not "operating off the same tower in the immediate area of [the Maryland] warehouse." Rather, his cell phone had connected to a cell phone tower located due west of the Maryland warehouse and Ryan's primary cell phone had connected to a tower located southwest of the warehouse. The tower with which Ryan's cell phone connected in the relevant timeframe was approximately 2 miles away from the Maryland warehouse, near a small airport. The appellant further complained that the warrant affidavit also omitted the fact that the affiants had "serious concerns [about] Sarah[']s . . . credibility based on her numerous inconsistent statements, implausible explanations, and misrepresentations." He listed numerous lies and inconsistencies in statements that Sarah made to the police during four interviews on November 29 and 30, 2012, and on December 1, 2012, and explained that the investigators who interviewed her had commented, outside of her presence, that they believed she was faking distress over her

husband's disappearance. The appellant attached police investigatory reports and excerpts of transcripts of Sarah's police interviews in support of his motion.

The State opposed the motion to suppress. It maintained that a search pursuant to a warrant was presumptively reasonable unless the appellant made "a "substantial preliminary showing" that the warrant affidavit contained knowing and intentional false statements that were material to the probable cause determination, entitling him to a "taint" hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). The appellant had not met that burden, in the State's view, because he presented no evidence that the alleged false statement and the alleged omission were intentionally made and, in any event, neither was material.

On July 18, 2013, the court heard argument on the motion to suppress. The appellant's counsel argued that he was entitled to a *Franks* hearing because he had shown that the police knew that the phones were operating off of different towers and that Sarah was not credible, but had chosen not to include that information in the warrant application. He asserted, moreover, that the only facts in the warrant affidavit supporting probable cause to believe that criminal activity occurred *at the Maryland warehouse* were the cell tower data and Sarah's statement that Ryan planned to meet the appellant at the warehouse on the morning of November 28, 2012. Thus, the appellant maintained, the misstatement about the cell towers, coupled with the omission concerning Sarah's credibility, were material.

The State responded that the averment in the warrant affidavit concerning the cell towers was an inadvertent typographical error, but that the mistake was not material because the two towers had overlapping coverage areas and both were in the vicinity of the Maryland warehouse. With respect to Sarah's credibility, the State maintained that while the police disbelieved her about her knowledge of Ryan's drug dealing, they had every reason to believe that she was being truthful about his statements to her about his planned meeting with the appellant. Finally, the State emphasized the averments in the warrant affidavit that Ryan had been seen at the Maryland warehouse with the appellant for five hours just two days prior to his disappearance; that his primary cell phone was pinging off a cell phone tower in the area of the warehouse the morning he disappeared; that a drop phone Ryan used was tracked to a location just 400 feet from the Maryland warehouse on November 29, 2012, just prior to its being shut off permanently; that the appellant lied to Sarah and to Cpl. Martin about how long it had been since he had seen Ryan; and that the appellant did not answer the door when Sarah went to the warehouse on November 29, 2012. All of these factual averments, which were not being challenged by the appellant, supported the issuance of the warrant.

The court ruled on the "first issue, . . . about the [cell] towers" that the averment in the warrant affidavit that the appellant's cell phone and Ryan's primary cell phone were "operating off of the same [cell] tower" was likely not a typographical error, but also was not a "deliberate falsehood or reckless disregard for the truth." In any event, the court concluded that had the warrant affidavit stated correctly that the two cell phones were

operating off "two cell towers in the immediate area" that "wouldn't have changed anything . . . in regard to whether there was probable cause." This was especially so because the warrant affidavit was "full of information that does focus on either [the appellant] or [the Maryland warehouse]."

On the issue of Sarah's credibility, the court emphasized that the police often rely on people who are "not completely clean" for information and that it was not "unsettling" to the court to learn that "the police viewed [Sarah] as not being completely credible." The court found the fact that Sarah did not tell the police that Ryan was a drug dealer to be "completely insignificant." What was significant, in the court's view, was that Sarah told the police many things that were corroborated by other information already known to the police. The court found that the police did have a basis to believe Sarah when she told them that Ryan was supposed to meet with the appellant and that they were not required to include in the affidavit that they disbelieved other information she told them. For those reasons, the court ruled that the appellant failed to make a threshold showing that he was entitled to a *Franks* hearing and denied his request.

As this Court explained in *Fitzgerald v. State*, 153 Md. App. 601, 642 (2003), *aff'd on other grounds*, 384 Md. 484 (2004), "a *Franks* hearing is a rare and extraordinary exception 1) that must be expressly requested and 2) that will not be indulged unless rigorous threshold requirements have been satisfied." Those threshold criteria were enunciated by the Supreme Court in *Franks*: "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or

with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-56. If those criteria are met, the defendant is entitled to an evidentiary hearing. Even then, the warrant only must be voided if the defendant proves "the allegation of perjury or reckless disregard . . . by a preponderance of the evidence" and that, if the false averments in the affidavit are excised, "the affidavit's remaining content is insufficient to establish probable cause." *Id.*

In the case at bar, the only alleged false statement in the warrant affidavit pertained to the cell towers. As the circuit court found, however, the misstatement that the appellant's cell phone and Ryan's primary cell phone were operating off the same cell tower was not "necessary to the finding of probable cause" because the material fact was that both cell phones were operating off cell towers with overlapping coverage areas near the Maryland warehouse. Similarly, the fact that the police omitted from the warrant affidavit that they disbelieved some of the statements made by Sarah was not material because they had reason to credit her statement that the appellant and Ryan had plans to meet on the morning of November 28, 2012. Moreover, the appellant failed to show that either the false statement or the omission were intentionally made or made with reckless disregard for the truth. Having failed to satisfy either threshold criterion, the court did not err by denying the appellant's request for a *Franks* hearing.

II.

On December 11, 2012, three members of the Taskforce—Corporal Martin, Sergeant Todd Liddick, and Detective Elliott—entered the Maryland warehouse property for a second time and seized a cell phone battery found on the grounds beyond the tree line at the rear property line. The appellant moved to suppress that evidence. The facts relative to the December 11, 2012 entry were adduced at a suppression hearing spanning three days in July 2013.[5]

The State called two witnesses: Cpl. Martin and Sgt. Liddick. They testified that on December 10, 2012, Cpl. Martin spoke to Klimek by telephone. Klimek is originally from Poland and speaks English as a second language. Cpl. Martin advised Klimek that his name had come up during the investigation into Ryan's murder and that the police were interested in speaking to him. Klimek lived in Montgomery County, but he was in New York working on a CPC project. He told Cpl. Martin that he wished to speak to him "face to face" and arranged to meet with him and Sgt. Liddick the next day at the Frederick Law Enforcement Center.

Cpl. Martin and Sgt. Liddick interviewed Klimek for about two hours. The interview was recorded and a transcript was introduced into evidence at the suppression hearing. Portions of the audio of the recording also were played for the court. Klimek told the police that he had told the appellant that the police wanted to speak to him and that the appellant had become very "concerned" and had "collapsed," like "caved in."

[5] The 3-day hearing also addressed other motions filed by the appellant.

The appellant informed Klimek that he did not have to speak to the police and advised him to hire an attorney to represent him. Klimek told the appellant that he was planning to speak to the police. During the interview, Klimek agreed to call the appellant and to permit the police to monitor that call.

After the recorded interview ended, Klimek advised Sgt. Liddick that the appellant had asked him go to the Maryland warehouse that day to "complete a task." He did not know the nature of the task, however. Rather, the appellant had told Klimek to call him back for further instructions when he arrived at the warehouse. Klimek also told Sgt. Liddick that the appellant wanted him to falsify a reimbursement receipt to make it appear that he (the appellant) had been staying in New York City the entire month of November 2012.

Upon hearing this, Cpl. Martin and Sgt. Liddick became concerned about Klimek's safety. They believed Ryan had been murdered at the Maryland warehouse and they knew that the appellant was aware that Klimek had met with the police. Even though they knew that the appellant was in New York at that time, they worried that he could have arranged for others to harm Klimek. They offered to accompany Klimek to the Maryland warehouse and, according to them, he accepted their offer. Klimek drove to the Maryland warehouse and Cpl. Martin, Sgt. Liddick, and Detective Elliott followed him in unmarked vehicles. They drove by the warehouse first to see if any cars were outside. Klimek initially parked directly in front of the warehouse, but the officers

directed him to move his car. They parked a short distance away, on the opposite side of Fort Meade Road.

Klimek disarmed the warehouse alarm using his passcode and unlocked the door with his keys. Sgt. Liddick and Cpl. Martin directed him to wait outside while they walked through the building to make sure no one was inside. They did not search for any items or seize any items inside the warehouse. Thereafter, Sgt. Liddick went outside to conduct "a perimeter search" to "make sure no one was lying in wait at the wood line."[6] While he was walking the rear property line, where it abutted the woods, Sgt. Liddick noticed a cell phone battery lying on the ground against a tree trunk. It appeared to be new because a sticker on it had not faded or peeled off. He informed Cpl. Martin, who walked to the location of the battery and seized it. The battery was a Samsung battery of the same make and model used for one of the drop phones believed to be used by Ryan.

Klimek testified at the hearing that he did not have any safety concerns about going to the Maryland warehouse and denied asking the police to accompany him. He stated that Sgt. Liddick told him that the police would accompany him and that he acquiesced. After he arrived at the Maryland warehouse, he was made to wait for 45 minutes while Sgt. Liddick, Cpl. Martin, and Detective Elliott waited for additional backup. After two more officers arrived, he was permitted to unlock the front door to the warehouse. He was ordered to wait outside. The officers all entered the warehouse with

[6] Sgt. Liddick testified that he walked the perimeter while Cpl. Martin cleared the inside of the warehouse. Cpl. Martin testified that they both cleared the inside of the warehouse first. The court credited Cpl. Martin's testimony.

guns drawn and, "after a few minutes they [said], it's clear[, . . . y]ou can go in." After Klimek was finished in the warehouse, he returned to his car. A police officer told him he could not leave yet. He sat in his car for about two hours before he was permitted to leave.

At the conclusion of the hearing, the court held the matter *sub curia*. On August 29, 2013, the court entered a memorandum opinion and order denying the appellant's motion to suppress the cell phone battery seized from the Maryland warehouse. The court did not credit Klimek's testimony that he was not fearful about going to the Maryland warehouse alone or that he did not agree to have the police accompany him. The court found that on the audiotape of Klimek's police interview, his voice sounded "anxious and distressed." He cooperated with the police throughout the interview, agreeing to make two "controlled calls" to the appellant. The court also found it not credible that Klimek would not be nervous about entering the Maryland warehouse given that the appellant had asked him to go there the same day he was speaking to the police and the police had told him they suspected the appellant had murdered Ryan there. The court credited Sgt. Liddick's and Cpl. Martin's testimony that Klimek agreed to have the police accompany him to the Maryland warehouse, never objected to their entry onto the property, and, in fact, encouraged them to do so.

The court found that the police entered the warehouse and walked the surrounding property with Klimek's consent for the purpose of protecting his safety. The court

emphasized that there was no dispute that the police spent just a few minutes inside the warehouse alone before permitting Klimek to enter.

The court denied the appellant's motion to suppress on two independent bases. First, it ruled that the property surrounding the warehouse, including the location where the cell phone battery was seized, was not an area afforded Fourth Amendment protection and, as such, the walk of the perimeter was not a "search" subject to the warrant requirement. Second, the court ruled that even if the police engaged in a search covered by the Fourth Amendment, they did so with the consent of Klimek, a person with actual and apparent authority to permit their entry. Klimek had keys to the Maryland warehouse and a passcode for the alarm. He had been directed to enter the warehouse by the appellant and had entered the warehouse by himself on multiple occasions prior to that date. Thus, the court determined that Klimek's consent authorized the police to enter the property to conduct a protective sweep and they were thus lawfully in a position to see the cell phone battery when it was discovered in plain view.

On appeal, the appellant contends the suppression court erred as a matter of law by treating the warrantless search of the property as a "protective sweep" and by ruling that the location where the battery was found was not within the business curtilage. He challenges for clear error the court's finding that Klimek consented to the presence of the police at the warehouse because the record established that, to the extent that Klimek consented, his consent was coerced.

The State responds that the suppression court correctly ruled that the cell phone battery was found in an unsecured area of a commercial property that was not afforded Fourth Amendment protection; and, moreover, the court's finding that Klimek consented to the police entering the warehouse property and conducting a protective sweep inside the warehouse and a perimeter search was not clearly erroneous and supported the denial of the motion to suppress.

"When reviewing the denial of a motion to suppress, this Court looks solely at the record of the suppression hearing, extending great deference to the factual findings of the suppression judge with respect to determinations regarding witness credibility." *McCain v. State*, 194 Md. App. 252, 267 (2010). We will not "disturb [the suppression court's] determinations [on first-level facts] or the weight given to them, unless they are shown to be clearly erroneous." *Longshore v. State*, 399 Md. 486, 498 (2007). "We will review the legal questions *de novo* and based upon the evidence presented at the suppression hearing and the applicable law, we then make our own constitutional appraisal." *Wilkes v. State*, 364 Md. 554, 569 (2001).

It is well-established that "[a] search conducted pursuant to valid consent, *i.e.*, voluntary and with actual or apparent authority to do so, is a recognized exception to the warrant requirement." *Jones v. State*, 407 Md. 33, 51 (2008). In the case at bar, the suppression court credited the testimony of Cpl. Martin that the police offered to accompany Klimek to the Maryland warehouse and to conduct a security sweep of the premises for his safety and that Klimek willingly agreed. The court disbelieved Klimek's

testimony to the contrary and, as such, it is not relevant to our analysis. *See State v. Funkhouser*, 140 Md. App. 696, 705 (2001) (on review of a ruling on a motion to suppress, we accept the version of events found by the trial court, unless clearly erroneous, and "utterly disregard[]" contradictory testimony not credited by the court).

The court's findings were not clearly erroneous and are entitled to substantial deference on appeal. The appellant does not dispute that Klimek had apparent and actual authority to enter the Maryland warehouse on December 11, 2012. The scope of that consent was to conduct a protective sweep. The court also made non-clearly erroneous factual findings that the walk of the perimeter of the warehouse property was part of that sweep and that the location where the cell phone battery was found was an area "where a person could hide." Thus, because the police had consent to enter the Maryland warehouse property and did not exceed the scope of that consent by conducting a walk of the perimeter of the property to ensure that there were no persons lying in wait to harm Klimek, the court did not err by denying the appellant's motion to suppress. In light of this holding, we need not decide whether the cell phone battery was found in "open fields" not protected by the Fourth Amendment or within a protected area of "business curtilage."[7]

[7] Were we to consider that issue, we would hold that the suppression court correctly applied the four factors set out in *United States v. Dunn*, 480 U.S. 294, 301 (1987), to determine that the rear property line at the Maryland warehouse was not within protected curtilage. The court found that the perimeter of the Maryland warehouse was not near a home; was not within an enclosure, like a fence or wall; was on land used solely for commercial purposes; and was not protected from pedestrian foot-traffic. On (Continued…)

III.

As mentioned, on November 30, 2012, two days after Ryan went missing, the police applied for an *ex parte* wiretap warrant for the appellant's cell phone. The Maryland wiretap statute, codified at Md. Code (1973, 2013 Repl. Vol.), sections 10-401–10-412 of the Courts and Judicial Proceedings Article ("CJP"), enumerates certain criteria for the grant of an *ex parte* application for a wiretap. The applicant must show that there is "probable cause [to believe that the target] is committing, has committed, or is about to commit [a murder, kidnapping, felony drug offenses, or other offenses enumerated elsewhere in the wiretap statute]" and that the wiretap will yield information about those offenses and that "[n]ormal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous." CJP § 10-408(c)(1).

The affidavit in support of the application for the wiretap was completed by MSP Sergeant James Deater. Sgt. Deater averred that he had probable cause to believe that the appellant had committed, was committing, or was going to commit murder, kidnapping, and drug offenses based upon the following facts:

- Ryan was the target of the Taskforce's narcotics investigation.

(…continued)
this basis, the court properly concluded that the rear property line was within the nature of an "open field," and while the police may have been trespassing on the appellant's property, they did not violate the Fourth Amendment by walking the property line and seizing the cell phone battery.

- The appellant was known to the Taskforce as Ryan's "partner in the illegal transportation and distribution of marijuana."

- Ryan went missing on November 28, 2012. His cell phone was powered off that day and he did not show up for a 1:30 p.m. haircut appointment.

- According to Ryan's wife, he had a meeting with the appellant the morning that he disappeared. This was consistent with the cell site data, which showed that appellant's cell phone and Ryan's primary cell phone were operating off a cell tower "in the immediate area of the [Maryland warehouse]."[8]

- The appellant lied and told Sarah he hadn't seen Ryan for weeks when, in fact, he had spent five hours with the appellant on November 26, 2012.

- The appellant did not answer the door when Sarah came to the Maryland warehouse looking for Ryan on November 29, 2012.

With respect to exhaustion, Sgt. Deater averred that "time [was] of the essence," that the investigation into Ryan's disappearance was "at a virtual standstill," and that "conventional investigative techniques" had been tried and failed, were reasonably likely to fail, and/or were too dangerous to try. By then, the Taskforce had surveilled Ryan's home and the homes of all of his known associates and were continuously surveilling the Maryland warehouse using the pole camera, but it could only capture a "limited view of the exterior of the warehouse." Sgt. Deater averred that it was unlikely that the appellant would cooperate with the police because he already had lied to Sarah and that interviews with other associates and friends of Ryan had not yielded any actionable information. Likewise, the Taskforce had not identified any possible co-conspirators in the suspected

[8] As discussed, *supra*, this averment only is partially correct. The appellant unsuccessfully sought a *Franks* hearing with respect to the application for the wiretap warrant. He does not challenge the denial of his request for a *Franks* hearing on appeal.

kidnapping and/or murder of Ryan, and it would not be advisable at that time to make the drug co-conspirators aware of the Taskforce investigation because it could "result in the destruction of . . . evidence." Finally, a grand jury investigation would be too time consuming under the circumstances and a search warrant would not be fruitful because the police did not know where Ryan was located. For all those reasons, Sgt. Deater asserted that a wiretap would likely yield evidence of the appellant's involvement in Ryan's disappearance and assist them to locate him quickly and that other investigative methods were not possible or unlikely to succeed.

The wiretap was granted and was active for thirty days. The appellant filed a pre-trial motion to suppress evidence obtained from the wiretap on two bases: 1) the police failed to "exhaust the normal investigative remedies prior to seeking the wiretap" and to "sufficiently articulate why normal investigative measures were either not taken or were too dangerous to undertake" and 2) the warrant application did not aver facts giving rise to probable cause.

The court heard argument on the appellant's motion on January 22, 2014, and held the matter *sub curia*. On January 28, 2014, it issued a memorandum opinion and order denying the motion. On the issue of probable cause, the court emphasized that there was evidence from multiple sources that the appellant was the last person to see Ryan before he stopped answering calls on his cell phone and that the appellant had lied about his contacts with Ryan leading up to his disappearance. These facts, coupled with the evidence that Ryan and the appellant were coconspirators in a large scale marijuana

trafficking operation, supplied probable cause to believe that the appellant had committed or was committing a murder or kidnapping.

With respect to exhaustion, the court found that the police had utilized multiple normal investigative techniques in an attempt to locate Ryan and/or discover evidence of the appellant's involvement in his disappearance. The court noted that while the wiretap statute did not include an "exigency . . . exception," the court was required to employ a "common sense approach" to assessing the reasonableness of the investigative steps taken by the police. Thus, the court concluded that, in assessing exhaustion, it could consider the fact that Ryan was missing, that "time was of the essence" as the police attempted to locate him, and that all of the tools used thus far had failed. In light of these facts, the court determined that the affidavit satisfied the exhaustion requirement.

On appeal, the appellant asserts that the court erred in assessing the exhaustion and probable cause criteria for the same reasons argued before the circuit court. Our review of the circuit court's ruling on exhaustion is deferential. *See Cantine v. State*, 160 Md. App. 391, 401–02 (2004) ("We give '"considerable deference" to the [trial] court's determination that "exhaustion" has been shown.'" (quoting *U.S. v. Oriakhi*, 57 F.3d 1290, 1298 (4th Cir. 1995) (citation omitted))). In order to satisfy the exhaustion prong of the wiretap statute, the State need not show that it "exhaust[ed] every conceivable investigative possibility before seeking a wiretap." *Salzman v. State*, 49 Md. App. 25, 33 (1981). Rather, it must show only that "normal investigative techniques" have been tried and failed *or* that they "reasonably appear unlikely to succeed." *Id*. Moreover,

exhaustion is assessed in a "practical and common sense fashion" in keeping with the purpose of the requirement, which is to ensure that wiretapping is not used as an "initial step" where other, normal investigative techniques would suffice. *Id*. at 32-33 (citations omitted).

Here, the State established that it had employed normal investigative techniques, including in-person and camera surveillance and multiple interviews with associates of the victim, but had uncovered no information about Ryan's whereabouts. Given that Ryan had been missing for over 48 hours and that the State had no information about his whereabouts, despite surveilling all known associates and interviewing them, the court plainly did not err in determining that the State had exhausted all practical means prior to applying for the wiretap.

The court also did not err in its ruling on probable cause. In reviewing that ruling, we do not "substitute [our] judgment [for that of the issuing court], but need only determine if there was a substantial basis for the . . . determination of probable cause." *United States v. Fauntleroy*, 800 F. Supp. 2d 676, 681 (D. Md. 2011).[9] Here, the factual

[9]As the Court of Appeals has explained,

> [a]lthough, in a few aspects, Maryland's wiretapping statute is more protective of individual privacy rights than Title III of the Federal Omnibus Crime and Safe Streets Act of 1968 ("Title III"), generally the Maryland statute is an "offspring" of Title III [and appellate courts] have read analogous provisions in our statute to be *in pari materia* with Title III, as interpreted by federal courts.

Davis v. State, 426 Md. 211, 214 (2012).

averments showed that Ryan and the appellant were known drug associates, Ryan disappeared on a day when he was meeting with the appellant, the last known location of Ryan's cell phone was in the vicinity of the Maryland warehouse, and the appellant lied about his contacts with Ryan in the days prior to his disappearance. These facts plainly amounted to more than a substantial basis for the issuing court's probable cause determination.

IV.

The appellant contends the circuit court abused its discretion by qualifying FBI Special Agent Fennern as an expert in historical cell cite analysis. The State responds that Agent Fennern's "experience and training was more than adequate to qualify him as an expert."

The appellant moved *in limine* to exclude Agent Fennern as an expert, and the court held an evidentiary hearing on the motion. Agent Fennern testified, and his curriculum vitae was admitted into evidence. The testimony and evidence established that Agent Fennern had completed the FBI's three-day introductory course on cell phone mapping in 2011. He subsequently joined the FBI's Cellular Analysis Survey Team ("CAST"), a thirty member specialized team. In order to join CAST, Agent Fennern was required to take a two-week training course on "radio frequency," a one-week course on the different types of cellular phone networks, and four weeks of training on using software to measure radio frequency strength and the ways that different networks operate. Agent Fennern was certified as a CAST member in August 2013. He now acts

as an assistant teacher for the introductory course on cell phone mapping. At the time of the motions hearing, he had testified in court as an expert in historical cell cite data analysis on one prior occasion.

The appellant cites to those cases holding that expert testimony is necessary to explain historic cell cite data, *see, e.g.*, *Payne & Bond v. State*, 211 Md. App. 220, 242 (2013), and then argues, in a conclusory fashion, that this Court should hold that the trial court abused its discretion by permitting Agent Fennern to be qualified as an expert and that this error was not harmless beyond a reasonable doubt. He does not make any argument as to why Agent Fennern's training and experience is not sufficient, however. Having failed to make any argument on this issue, we decline to consider it on appeal. *See* Md. Rule 8-504(a)(6) (a brief must contain "[a]rgument in support of the party's position on each issue"). Even if considered, we would hold that Agent Fennern's extensive training and experience clearly satisfied the threshold for qualification as an expert witness.

V.

In his final contention of error, the appellant argues that the circuit court erred by admitting, as consciousness of guilt evidence, testimony that he had advised Dillree and Klimek to obtain counsel during the course of the murder investigation. We agree with the State that this issue is not preserved for review, and we decline to address it. We explain.

On direct examination, the prosecutor questioned Dillree about a text message she sent to the appellant telling him that she had hired an attorney. The prosecutor asked Dillree why she felt the need to hire an attorney, questioning whether it was because she had lied to the police. Dillree replied, "He [the appellant] suggested I get an attorney." Defense counsel interjected, "Your Honor, I'm going to have to object as to why someone receives counsel. I think that's getting into an impermissible area." The court overruled the objection.

The State subsequently played recordings of phone calls between Dillree and the appellant in which he told her she should speak to his lawyer. Defense counsel did not object to that evidence. He also did not object, except on the ground that the evidence was cumulative, when Klimek testified that the appellant told him, "you need a lawyer," or to Klimek's testimony that the appellant repeated this advice numerous times and even offered to pay for his attorney. "When 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." *Williams v. State*, 131 Md. App. 1, 26 (2000). Having failed to object on multiple occasions when the State elicited testimony that the appellant encouraged material witnesses to seek independent counsel or to speak to his attorney for advice, the appellant has waived this contention of error on appeal.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.