Circuit Court for Baltimore City
Case No. 113310058

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1425

September Term, 2016

KENNETH JONES

v.

STATE OF MARYLAND

Kehoe,
Shaw Geter,
Battaglia, Lynn A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: July 8, 2019

Kenneth Jones was indicted on seventeen criminal counts and was convicted on six of them after a jury trial in the Circuit Court for Baltimore City, the Honorable Timothy J. Doory presiding. He appeals his convictions and raises nine issues, which we have rephrased and reordered as follows:

> 1. Did the trial court err by admitting a second set of photographs of Jones's tattoos into evidence?
>
> 2. Did the trial court err in allowing Detective Smith to testify as an expert witness about the Black Guerilla Family?
>
> 3. Did the trial court err in amending the verdict sheet during trial?
>
> 4. Did the motions court err in denying Jones's Motion to Dismiss Counts One and Two for double jeopardy?
>
> 5. Did the trial court err in overruling Jones's objections to the introduction of alleged hearsay evidence?
>
> 6. Did the trial court err in allowing James Cornish and Christopher Meadows to testify about the Black Guerilla Family?
>
> 7. Did the trial court err in ruling that the State had established a proper chain of custody for certain firearm and ballistic evidence?
>
> 8. Did the trial court err by allowing Detective Lloyd to testify about the recovery of the firearm used to kill Gregory Rochester?
>
> 9. Did the trial court err by overruling Jones's objection to the State's comments about Jones's attorneys made in its closing argument?

We will affirm the convictions.

Background

The State charged Jones with a number of crimes arising out of his alleged role as an enforcer for the Black Guerilla Family (the "BGF"), a criminal gang in Baltimore City. Among the witnesses who testified at Jones's trial were an alleged victim, former members of the BGF, and law enforcement officers. All linked Jones to the BGF and to the crimes he was alleged to have committed. The jury convicted Jones of conspiracy to establish and entrench a gang through unlawful means; knowing participating in a criminal gang in violation of Criminal Law Article § 9-804; first-degree murder; attempted first-degree murder; use of a handgun in a crime of violence; and possession of a handgun by a prohibited person.

Jones does not challenge the sufficiency of the evidence, so it is not necessary for us to provide a detailed statement of the evidence adduced at trial. *See Washington v. State*, 180 Md. App. 458, 461 n. 2 (2008).

Jones's Role in the BGF

Jones's convictions arise out of his involvement with the BGF, a nationwide criminal gang that operates through smaller "regimes" in cities and prisons across the country. One such "regime" operates in and around the Greenmount area of Baltimore City, and engages in drug dealing, robbery, extortion, and murder. The BGF has a constitution and bylaws,

known as "22s and 33s;" which require its members to take an oath[1] and pay dues;[2] and is managed by a hierarchy of officers.[3]

At trial, several witnesses testified that Jones was a member of the BGF. Baltimore City Police Detective Phillip Smith was admitted as an expert in gang identification, organizational structure, and activities. Detective Smith testified that members of the BGF can be identified by tattoos depicting symbols unique to the BGF, and by the use of codewords borrowed from the Swahili language. The State showed photographs of Jones's tattoos to Detective Smith, and, over defense counsel's objection, the photographs were admitted into evidence. The photographs showed tattoos of "276,"[4] with "jamaa"[5] written inside of the "6;" a shotgun and sword crossed as an "X," and a black dragon, all of which,

[1] That oath is: "Should I ever be untrue or forsake the children . . . the oath shall kill me. Shall ever I become lax in discipline in times of strike or neglect my brother, this oath shall kill me. If ever I sought to do harm or allow harm to come to my brother, this oath shall kill me. If ever, at any time, I refuse . . . assistance to this oath or reject my brother, this oath shall kill me. If ever I reveal the sworn secrecy of this oath, this oath shall kill me."

[2] The dues are used to send money to BGF members in prison, post bail, purchase weapons, and fund cookouts.

[3] The officers are, in order of rank: the commander, lieutenant commander, minister of justice, minister of defense, minister of finance, minister of education, field marshal, field general, sergeant at arms, and secretary.

[4] The numbers "2-7-6" are the numerical equivalents of the letters "B-G-F."

[5] "Jamaa" is the Swahili word for "family."

according to Detective Smith, are indicative of membership in the BGF. Detective Smith indicated that members of the BGF would "terminate on sight" any person displaying these tattoos who was not a member of the BGF.

Detective Smith's testimony was corroborated by Christopher Meadows, James Cornish, and Lamontae Smith, all of whom claimed to have been members of the BGF at the same time as Jones. Although Meadows and Jones joined the BGF together, Meadows eventually left the gang when people started "getting each other killed." Cornish, who has known Jones since the fourth grade, joined the BGF in 2006 while he was incarcerated. He testified that Jones was also a member of the BGF and that Jones had "a lot of pull which means he knows a lot of people in high places in the gang[.]" Lamontae Smith also testified that he and Jones were both members of the BGF. All three referred to Jones as "Slay," his nickname within the BGF.

Meadows, Cornish, and Smith also testified that Jones played a significant role in merging the Young Guerilla Family (the "YGF") with the BGF. Detective Smith described the YGF, by way of analogy, as:

> The minor league baseball team of the BGF. Those were the younger people who weren't already BGF members. So they was pretty much using the kids straight out of what we call "baby book 'em." They would use them at a young age. They would do the work and they was all a part of the YGF. And then they graduate and they come into BGF.

Meadows testified that he and Jones were founding members of the YGF, which, like the BGF, operated in the Greenmount area, and that they merged with the BGF in the mid-2000s.

The Murder of Gregory Rochester

Gregory Rochester, a.k.a "Craig Mack," was found dead on January 11, 2007, in the home of Gerald Johnson, a.k.a "Geezy" or "GZ" or "Big Geez."[6] Rochester had been shot a total of nine times, four of which were in the head. Detective Joseph Landsman, of the Baltimore City Police Department, testified that because Gerald Johnson was a high-ranking member of the BGF, the police investigated Rochester's murder as a gang-related murder.

Cornish and Meadows confirmed that Rochester's murder was gang-related. Meadows told Detective James Lloyd, a sergeant with the Baltimore City Police Department's Homicide Section, that the BGF ordered Jones to kill Rochester because Rochester was "snitching" on other members of the gang. Meadows related that Jones and Charles Pace, a.k.a. "Foo,"[7] shot and killed Rochester in "Geezy's" house, and that Jones shot Rochester first. Meadows also gave a description of one of the guns used to shoot Rochester, and that weapon was later recovered from Jones's cousin.

Sandra Bohlen, a supervisor of the Firearms Examination Unit for the Crime Laboratory of the Baltimore City Police Department, testified that, based on the ballistics evidence found at the scene, Rochester had been shot with at least two guns. A firearm was

[6] Gerald Johnson is referred to by all of these nicknames in the record.

[7] Shortly after Gregory Rochester was murdered, Charles Pace was also murdered.

later recovered from a separate investigation, and, after testing the firearm, Supervisor Bohlen concluded that the recovered firearm was one of the guns used to shoot Rochester.

The Attempted Murder of Perry Johnson

On the night of April 11, 2011, Perry Johnson was involved in an altercation with at least five other people on North Avenue in Baltimore City. The altercation was observed by Baltimore Police Officer Austin Sailor who was patrolling the area in his vehicle. After hearing gun shots, Officer Sailor saw Jones running away from the group while holding his waistband. Jones was apprehended and a stolen handgun and four spent casings were found in his pants.

Meanwhile, Perry Johnson was taken to the hospital as a result of gunshot wounds he suffered from the altercation. There, Detective Christopher Wade read Johnson his *Miranda* rights and conducted a recorded interview. Johnson told Detective Wade that Jones was a high-ranking member of the BGF, that Jones was the shooter, and that Jones shot first but that Johnson fired back. Johnson believed he was targeted by the BGF because someone accused him and his wife of being "rats" by cooperating with the police. Additionally, Johnson told Detective Wade that the BGF had previously tried to kill him in 2006. At trial, the State called Johnson as a witness. When Johnson's memory failed him on the witness stand, the court found Johnson's lack of memory contrived and allowed the prosecution to play Johnson's previous statements to the police to the jury.

Angelique Petty, Johnson's wife, was present at the altercation, and was also interviewed and recorded by Detective Wade. From a photo array, Petty identified Jones

as the shooter. The State also found it necessary to play Petty's prior statements from the recorded interview to the jury at trial.

The Attempted Murder of Lamontae Smith

On October 5, 2013, Lamontae Smith, a.k.a "Chop," was shot near Greenmount Street in Baltimore City. Three weeks after the shooting, Baltimore City Police Detective Brian Lewis interviewed Smith. During that interview, Detective Lewis showed Smith a photo array from which Smith identified Jones as the person who shot him. According to Smith, the shooting was the result of an internal dispute within the BGF, of which Smith and Jones were on opposing sides. Smith testified that he did not initially tell the police who shot him because he believed that if he did so, Jones would attempt to kill him again.

Alexis Roberts, a.k.a "Big Baby," was interviewed by Baltimore City Police Detective Frank Gaskins in connection to Smith's shooting. Roberts told Detective Gaskins that "Slay [Jones] shot Chop [Smith]." Roberts's memory also failed at trial, and her prior recorded statements to the police were played for the jury.

The Trial

Jones was charged with the murder of Gregory Rochester; the attempted murder of Lamontae Smith; conspiracy to establish and entrench a gang through unlawful means; knowingly participating in a criminal gang in violation of Md. Code (2002, 2012 Repl. Vol.) Criminal Law Article ("Crim. Law") § 9-804; use of a handgun in a crime of violence; and possession of a handgun by a prohibited person. Jones, however, was not charged with the attempted murder of Perry Johnson. (We will address the significance of this fact in

part 4 of our analysis.) The jury found Jones guilty of all charges. Jones was sentenced to life in prison for first-degree murder; life in prison for attempted first-degree murder, to be served consecutively; five years in prison without the possibility of parole for the use of a handgun in a crime of violence, to be served consecutively; five years in prison for participating in a criminal gang, to be served consecutively; and five years in prison for conspiracy, to be served concurrently with the sentence for participating in a criminal gang. Jones timely appealed his convictions.

Analysis

1. The Fruit of a Poisonous Tree

As we have related, the State introduced photographs of some of Jones's tattoos as evidence of his affiliation with the BGF. On appeal, Jones argues that the trial court erred in doing so.

A.

Some additional information is necessary to provide context for the parties' appellate assertions.

Prior to trial, two sets of photographs were taken of Jones's tattoos. The first were taken on December 2, 2015, while Jones was in pretrial detention. Jones filed a motion *in limine* to exclude this first set of photographs. No evidence was presented at the hearing; instead, the parties and the court proceeded upon a statement of facts by defense counsel, which was not challenged by the State:

> [T]he State sent the Defendant a notice of an attempt to use photos taken from my client's person while incarcerated[.] Then the photos were taken without a warrant, that the Defendant was told by a correctional police officer and he told them that he refused to allow them to take any photos of himself and his person . . . . The police told him that . . . he would be maced, if he did not acquiesce to them taking photos of him.

Defense counsel argued that the photographs constituted an illegal search of his person under the Fourth Amendment. Defense counsel conceded that correctional officers may invade the privacy of inmates for the legitimate security interest of the detention facility.[8] However, counsel asserted that the photographs in question were not taken for security purposes but rather "for pure general investigatory purposes for this trial [by] virtue of the detective in this case going to DOC[.]" In any event, counsel asserted that the photographs of his tattoos should be excluded because of their prejudicial nature.

The State responded that the photographs were admissible because photographing a pretrial defendant's appearance is not intrusive, and is, in fact, within the State's power. The State cited to *Browne v. State*, 215 Md. App. 51 (2013), in which this Court held

[8] *See Sparkman v. State*, 184 Md. App. 717, 731 (2009) (holding that jail officials have the right to open mail to an inmate without violating the Fourth Amendment).

that taking a buccal swab of a pretrial detainee did not violate the Fourth Amendment.[9] The State reasoned that if DNA could be taken from a pretrial detainee, then something less intrusive, such as photographing a defendant's appearance, would also be permissible.

The motions court saw the case differently than did either party. The court framed the issue as one concerning the admissibility of evidence as to Jones's appearance, rather than the applicability of the Fourth Amendment. The court noted that Jones's arguments pertained to bodily searches of and taking DNA from a criminal defendant, when, in actuality, the focus of the photographs at issue in the present was the appearance of a criminal defendant. The court concluded—and Jones conceded—that even if the photographs were excluded, Jones could not hide his appearance from witnesses and the jury.

Nevertheless, because of the allegations made by Jones, the motions court issued the following ruling (emphasis added):

> I understand the arguments the parties are making, and I am prepared in an abundance of caution to grant Defendant's motion because these photographs were taken . . . *as a result of a threat by Department of Corrections employees*. There's no proof of that, but that's the allegation and I'll operate with that allegation.

[9] Specifically, we held that "It is now established law that obtaining a buccal swab DNA sample from a person under arrest for a violent crime is not a violation of that person's Fourth Amendment rights." *Browne*, 215 Md. App. at 77 (citing *Maryland v. King*, 569 U.S. 435 (2013)).

> I'll grant the Motion to Suppress these photographs, but *I do not in any way, shape, or form grant a motion to exclude from the trial the appearance of the Defendant*.

Then the court offered two alternatives: either the police could re-photograph Jones's tattoos, or the court could order Jones to remove his shirt at trial so that the jury could view the tattoos. The State chose to have the photographs retaken, to which defense counsel responded: "That's fine." At no point did Jones's counsel object to the court's suggestions or the State's decision to have Jones re-photographed.

After the motions court made its ruling, defense counsel addressed the question of preservation:

> [DEFENSE COUNSEL]: Could we reserve on the use of —
>
> THE COURT: On its relevance?
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: Absolutely. I will rule upon the relevance at the moment that their admission is sought. We're talking about the method of obtaining the evidence, and that's all we're talking about.
>
> [DEFENSE COUNSEL]: Okay, Your Honor. Just please note our objection to the (indiscernible) [sic][10] argument as to exclusion going forward for new evidence.

[10] We do not know what was said by defense counsel that was "indiscernible" to the court reporter. We will not assume that defense counsel's missing words were "fruit of the poisonous tree." This is because an appellant "has the burden of producing a sufficient factual record for the appellate court to determine whether error was committed." *Black v. State*, 426 Md. 328, 337 (2012); *see also Mora v. State*, 355 Md. 639, 649–50 (1999) (same); *Malaska v. State*, 216 Md. App. 492, 510 (2014), *cert. denied*, 439 Md. 696 (2014), *cert. denied*, 135 S. Ct. 1162 (2015) ("[T]he record fails to provide any insight into the

THE COURT: Understood.

[DEFENSE COUNSEL]: Thank you, Your Honor.

At trial, the State moved to admit the second set of photographs into evidence. Defense counsel objected to the photographs, referring to his prior arguments to the motions court. The trial court admitted the photographs into evidence. Then Detective Smith opined that Jones's tattoos—which depicted a shotgun and sword in an "X" position, the numbers 276, the word "jamaa," and a black dragon—are symbols associated with the BGF. From these tattoos, taken together, Detective Smith was "able to identify [Jones] as a member of the BGF."

On appeal, Jones argues that the second set of photographs should have been excluded from evidence. He asserts that the second set of photographs is based on the existence of the first set of photographs, and that, because the first set was tainted, the second set should be excluded as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471 (1963). More specifically, Jones asserts:

> Pursuant to *Wong Sun*, the Court erred in admitting evidence derived from the State's violation of Mr. Jones' Fourth Amendment rights. When the sole source of knowledge of the evidence is tainted, then the "fruits" of the source, too, are tainted through the State's unlawful acts, and the Court cannot rely on such evidence. The State tainted the source when correctional officers entered Mr. Jones' cell without a warrant, lacking probable cause and ordered him to undress. Because the sole source of knowledge of the tattoos, i.e. the

---

subject matter of the inaudible parts of the transcript. . . . Faced with such uncertainty, it was Malaska's burden to have the record supplemented or corrected.").

> pictures, through the Court's own findings, were tainted, then the Court erred in relying on this tainted source and ordering Mr. Jones to disrobe.
>
> * * *
>
> Here . . . the only source of the Court's knowledge of the tattoos derived from the exact pictures the Court found tainted. . . . Accordingly, the Court's subsequent order for Mr. Jones to disrobe and allow photographs or risk having to undress in front of the jurors, like the finding of the drugs in *Wong Sun*, came at by the exploitation of the illegality because without the photographs, the Court had no untainted basis for the order.

(Cleaned up.)

B.

Evidence obtained by government officials in violation of the Fourth Amendment "'is excluded under the exclusionary rule—a judicially imposed sanction,' which serves to 'deter lawless and unwarranted searches and seizures by law enforcement officers.'" *Cox v. State*, 194 Md. App. 629, 653 (2010) (quoting *Myers v. State*, 395 Md. 261, 282 (2006)); *see also Mapp v. Ohio*, 367 U.S. 643, 657 (1961). One aspect of the exclusionary rule is the "fruit of the poisonous tree" doctrine, which requires the exclusion of "direct and indirect evidence that is a product of police conduct in violation of the Fourth Amendment." *Cox v. State*, 421 Md. 630, 651 (2011) (cleaned up).

In *Gibson v. State*, 138 Md. App. 399, 404 (2001), this Court explained:

> A defendant seeking shelter under the umbrella of the "fruit of the poisonous tree" doctrine has to prove each of two propositions: 1) the primary illegality, to wit, that the tree was poisonous; and 2) the cause and effect relationship between the primary illegality and the evidence in issue, to wit, that the evidence was, indeed, the identifiable fruit of that particular tree.

The fruit of the poisonous tree doctrine is not unvaryingly applicable, however. There are three circumstances which can purge unlawfully obtained evidence of taint:

> First, evidence obtained after initial unlawful governmental activity will be purged of its taint if it was inevitable that the police would have discovered the evidence. Second, the taint will be purged upon a showing that the evidence was derived from an independent source. The third exception will allow the use of evidence where it can be shown that the so-called poison of the unlawful governmental conduct is so attenuated from the evidence as to purge any taint resulting from said conduct.

Kamara v. State, 205 Md. App. 607, 623 (2012) (quoting *Cox*, 421 Md. at 652).

C.

Jones's argument is not a basis for appellate relief because it is not preserved for appellate review. Md. Rule 8-131(a) provides that, other than jurisdictional issues, "[o]rdinarily [an] appellate court will not decide any other issue unless it *plainly* appears by the record to have been *raised in* or *decided by* the trial court[.]" (Emphasis added.) As Chief Judge Mary Ellen Barbera has observed, Rule 8-131(a) means exactly what it says: "[a]s the text states, the 'issue' must 'plainly appear' by the record to have been 'raised in' the trial court or 'decided by' the trial court. *Ray v. State*, 435 Md. 1, 20 (2013). And just as in *Ray*, "[n]either option in the slightest, let alone 'plainly,' appears in the record" of the case before us. *Id.*

At trial, the State moved to admit Exhibit 33A into evidence, the first of a series of photographs of Jones's tattoos:

> [THE PROSECUTION]: The State is going to move into evidence 33A.
>
> [THE COURT]: 33A will be received. . . .

> [DEFENSE COUNSEL]: *Your honor, this is what—pretrial motions*.
>
> [THE COURT]: Very well. *Pursuant to your motions beforehand, 33D and 33A are being received over objection*.

(Emphasis added.)

Later, when the State moved to admit additional photographs of Jones's tattoos, defense counsel renewed its previous objection:

> [THE PROSECUTION]: State is going to move into evidence 33B.
>
> [DEFENSE COUNSEL]: *Same objection*, your honor.
>
> * * *
>
> [THE PROSECUTION]: State is going to move into evidence 33C, your honor.
>
> [DEFENSE COUNSEL]: *Same objection*, your honor. *I'll continue to object*.[11]

(Emphasis added.)

The transcript is clear that defense counsel did not object to the photographs on the basis of fruit of the poisonous tree, as Jones now does on appeal. Rather, the objection was based on Jones's "pretrial motions," a reference to the defense's motion *in limine*. As we have explained, in that motion, and at the hearing on the motion, Jones raised two issues: *first*, that the court should exclude the first set of photographs because, according to Jones,

[11] The trial court granted the request for a continuing objection.

those photographs were the result of an illegal search and seizure under the Fourth Amendment; and *second* that the new photographs would be irrelevant. In neither his motion *in limine* nor in his argument to the court at the motions hearing did defense counsel raise a fruit of the poisonous tree argument, and he certainly did not articulate the contention at trial. It is equally clear that a fruit of the poisonous tree contention was not addressed by the court either at trial or during in the *in limine* hearing. Therefore, Jones has not preserved this argument for appellate review.[12]

In any event, looking past the preservation problem and assuming for purposes of analysis that Jones satisfied the threshold requirement of demonstrating "the cause and effect relationship between the primary illegality and the evidence in issue," *Gibson*, 138

[12] Application of Rule 8-131(a) in this case is particularly appropriate. As the Court of Appeals has explained, one purpose of the preservation rule is "to prevent the unfairness that could arise when a party raises an issue for the first time on appeal, thus depriving the opposing party from admitting evidence relating to that issue at trial." *Wilkerson v. State*, 420 Md. 573, 597 (2011). The fruit of the poisonous tree doctrine is not unvaryingly applicable. There are three circumstances which can purge unlawfully obtained evidence of taint. *See Kamara v. State*, 205 Md. App. 607, 623 (2012) (quoting *Cox v. State*, 421 Md. 630, 652 (2011).

Had Jones raised a fruit of the poisonous tree argument to the trial court, the State would have had an opportunity to present argument, and perhaps evidence, that the doctrine was inapplicable in the present case. Because the State has used tattoos to tie criminal defendants to the BGF in other cases, *see, e.g., Burris v. State,* 435 Md. 370, 381–82 (2013), and the State had already indicted Jones with participating in the BGF, it is quite conceivable that the prosecutor would have attempted to demonstrate that there was an independent source for its knowledge that Jones had gang-related tattoos.

Md. App. at 404, we conclude that the attenuation doctrine supports admission of the tattoo evidence. The attenuation doctrine is applicable:

> when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence.

Utah v. Strieff, ___ U.S. ___, 136 S. Ct. 2056, 2061 (2016).

The purpose of the attenuation doctrine is to "balance the interests of society in deterring unlawful police conduct with the interest of ensuring juries receive all probative evidence of a crime." *Williams v. State*, 372 Md. 386, 410 (2002). Application of the attenuation analysis involves a three-step analysis:

> First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct."

Sizer v. State, 456 Md. 350, 375–76 (2017) (quoting *Strieff*, 136 S. Ct. at 2062, and citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)).

For the purposes of analysis, we will assume that the first two factors weigh in Jones's favor. But the third, which is the most significant, weighs very heavily against him, because the alleged official misconduct in this case did not rise to a constitutional level. *See Ashford v. State*, 147 Md. App. 1, 51 (2002) (The "fruit of the poisonous tree [doctrine] . . . does not even come into play until there is established the so-called primary taint, to wit, a constitutional violation calling for the exclusion of the direct evidence."). As a pre-trial

detainee, Jones's Fourth Amendment rights were circumscribed. *See Hudson v. Palmer*, 468 U.S. 517, 526 (1984); *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). The State unquestionably had the right to take photographs of his tattoos for purposes of detention facility safety. *See Bell*, 441 U.S. at 538-39. The State has the right, as part of routine criminal discovery, to take photographs of a defendant without the necessity of obtaining a search warrant. *See* Md. Rule 4-263(f).[13] Moreover, although Maryland's appellate courts have not yet addressed the issue in a reported opinion, the Oregon Supreme Court has held that detention facility personnel may require an inmate to remove his shirt so that they can photograph gang-related tattoos for purposes of an on-going criminal investigation. *State v. Tiner*, 340 Or. 551, 563, 135 P.3d 305, 312 (Or. 2006). ("[T]he United States Constitution [does not] require[] a search warrant or its equivalent before the state may take pictures of or inspect defendant's torso because, once defendant became a prisoner, he enjoyed few rights regarding his privacy.").

[13] Md. Rule 4-263 states in pertinent part:

> (f) Person of the Defendant.
> (1) On Request. On request of the State's Attorney that includes reasonable notice of the time and place, the defendant shall appear for the purpose of:
> (A) providing fingerprints, photographs, handwriting exemplars, or voice exemplars;
> (B) appearing, moving, or speaking for identification in a lineup; or
> (C) trying on clothing or other articles.

We do not condone the actions of the police in by-passing the procedure by which photographs of Jones should have been taken. However, the fact remains that, as recognized by the *in limine* court, the State had the right to present evidence of Jones's physical appearance to the jury.

2. Expert Testimony Regarding the BGF

Jones's second contention is that the trial court erred by allowing Detective Phillip Smith to testify as an expert on gangs, particularly the BGF, because (1) Detective Smith's methodology was unreliable; and (2) the State failed to provide the bases for Detective Smith's conclusions in discovery.

A.

As to the first argument, Jones asserts that the State failed to comply with discovery requests seeking Detective Smith's methodology, leaving defense counsel unprepared for trial. According to Jones, Detective Smith's own testimony revealed that the methodology was inadequate because Detective Smith could not develop an "accurate conclusion" about whether an individual was a member of a gang.

Pursuant to Maryland Rule 5-702, a court may admit expert testimony if it determines:

> that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

An expert's testimony should provide "useful, relevant information when the trier of fact would not otherwise be able to reach a rational conclusion; such information 'is not likely to be part of the background knowledge of the judge or jurors themselves." *Gross v. State*, 229 Md. App. 24, 32-33 (2016) (internal quotations omitted). Trial courts have "'wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony.'" *Alford*, 236 Md. App. 57, 71 (2018) (quoting *Massie v. State*, 349 Md. 834, 850-51 (1998). Thus, "[i]n the absence of an error of law or fact, we review the admission of expert testimony for abuse of discretion. Moreover, the trial court's 'action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *Id*. (quoting *Bryant v. State*, 393 Md. 196, 203, (2006)) (citations omitted). In reviewing the trial court's exercise of discretion, "'a critical test is whether the expert's opinion will aid the trier of fact.'" *Santiago v. State*, 458 Md. 140, 154 (2018) (quoting *Bryant v. State*, 393 Md. 196, 203-04 (2006)). We will reverse a circuit court's decision to allow or deny an expert witness to testify "only if the trial judge acted in an 'arbitrary or capricious manner' or if the trial judge's decision was 'beyond the letter or reason of law.'" *Santiago*, 458 Md. at 154. (citing *Garg v. Garg*, 393 Md. 225, 238 (2006)).

We conclude that the three requirements of Rule 5-702 were met in this case.

First, Detective Smith had the proper "knowledge, skill, experience, training, or education." Detective Smith testified that he has investigated gangs and criminal activity in Baltimore City for six years in his capacity in the criminal intelligence department of the Baltimore City Police. He has been assigned to task forces for the Drug Enforcement

Agency and the Bureau of Alcohol, Tobacco, and Firearms, as they relate to gangs. Prior to joining the Baltimore City Police Department, Detective Smith was in charge of the gang unit for the Maryland Department of Corrections. During his employment with the Department of Corrections, Detective Smith's duties included interviewing, investigating, and identifying gang members. He testified that gang members could be identified by clothing, tattoos, language, paperwork, or association. Detective Smith has investigated certain criminal gangs, including the BGF, and particularly the BGF regime in the Greenmount area of Baltimore City. Throughout his career, Detective Smith has attended training sessions provided by organizations providing training, education, and information sharing on gang structure, membership, and activities, and Detective Smith has taught over 1,000 of these training sessions himself. With these credentials and qualifications, there is no question that Detective Smith met the first prong of Rule 5-702.

Second, Detective Smith's testimony was an appropriate means to assist the jury "in understanding the evidence or determining a fact in issue." 6 Lynn McLain, MARYLAND EVIDENCE STATE AND FEDERAL 875 (3rd Ed. 2013) (brackets omitted). Core issues at trial included Jones's alleged involvement with the BGF and his role as an enforcer for that organization. The internal organization and methods of operation of criminal gangs are not matters of general knowledge to members of the public. Detective Smith's testimony certainly assisted the jurors in placing into context other evidence about: the BGF's activities in the Greenmount area of Baltimore City; the ways in which BGF regimes are organized and operate; the sanctions imposed upon members who cooperate with the

police; the BGF's use of code words borrowed from the Swahili language; and that members of the BGF often have BGF-specific symbols as tattoos.

Third, there was a sufficient factual basis for Detective Smith's testimony about Jones's membership in the BGF. Detective Smith testified that Jones's tattoos were BGF symbols, and that based on these tattoos, Jones was a member of the BGF. In light of his extensive history with, and knowledge of criminal gangs and, in particular, the BGF, as well as the photographs of Jones's tattoos, Detective Smith had a substantial factual basis to conclude that Jones was a member of the BGF. *See Sippio v. State*, 350 Md. 633, 653 (1998) ("A factual basis for expert testimony may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.").

Finally, we address Detective Smith's methodology. His knowledge about the BGF was based upon tattoos, clothing, language, law enforcement, paperwork, pictures, social media, informants, and self-admission by gang members. The trial court was satisfied with the methodology Detective Smith offered. In ruling that Detective Smith was qualified as a gang expert, the trial court noted that the expert testimony in this matter was not "scientific" but rather based upon experience and training. We agree and find no abuse of discretion in the court's reasoning or ruling.

B.

Jones also contends that the State refused to comply with discovery requests for Detective Smith's methodology. Specifically, Jones sought internal BGF documents, such as the 22s and 33s; publications on BGF symbols; and a "rubric" used by law enforcement to identify gang members. The "rubric" Jones seeks does not exist, which was made clear by Detective Smith on cross-examination. As to the internal BGF documents and publications on gangs, the State was not required to provide them to Jones. Maryland Rule 4-263(d)(8)(B) requires the State provide the defense "the opportunity to inspect and copy all written reports or statements *made in connection with the action by the expert* . . . ." (emphasis added). Neither the 22s and 33s nor the publications upon which Detective Smith relied were "made in connection with" the criminal charges against Jones, and so were not discoverable material.

3. The Court's Amendment of the Verdict Sheet Prior to Its Submission to the Jury

Jones argues that the trial court, over his objection, erred by amending Count One of the "charging document" because the amendment changed the substance of the crime charged. Jones is correct that amending the substance of a charging document at trial, without the defendant's consent, is impermissible. *See* Maryland Rule 4-204; *see, e.g.*, *Johnson v. State*, 358 Md. 384 (2000) (amending charging document to substitute "cocaine" for "marijuana" changed the character of the charged offense of possession with intent to distribute, and so required the defendant's consent).

But Jones mischaracterizes the trial court's action. The court amended the *verdict sheet*, not the charging document as Jones asserts. "A verdict sheet is a shorthand reference and not a formal pleading," *Rudder v. State*, 181 Md. App. 426, 468 (2008), while a charging document is designed to fulfill the constitutional requirement that the accused is informed of the accusation against him or her. *Campbell v. State*, 325 Md. 488, 493 (1992); *see* Md. Rule 4-202(a); Md. Const. Declaration of Rights, Art. 21.

Prior to its submission to the jury, the trial court amended Count One of the verdict sheet from reading "entrenchment of a gang in the area" and expanded it to read:

> Count I: Conspiracy to establish and entrench a gang by participating in the joinder of a YGF and BGF into the BGF for the purpose of committing extortions, distribution of controlled dangerous substances, assaults, robberies, murders and maiming in the use of a handgun in the commission of violent crimes.

In making the amendment, the trial court explained that it intended to:

> Focus the jury on a very, very precise issue. Not whether the BGF does those kind of things. Not whether the defendant did those kind of things. But rather, whether he participated in a conspiracy, a group, to join the two organizations for the purpose of committing these crimes.

In reviewing a trial judge's decision to use a particular verdict sheet, we apply the abuse of discretion standard. *Alford v. State*, 236 Md. App. 57, 81 (2018) (citing *S&S Oil, Inc. v. Jackson*, 428 Md. 621, 629 (2012). We will reverse only if we conclude the trial court erred and that that error prejudiced the defendant. *Id*.

Jones does not raise the propriety of the verdict sheet in his brief. Rather, Jones challenges the charging document—*i.e.*, the indictment. Other than conflate the verdict

sheet with the charging document, Jones presents no argument concerning error in amending a verdict sheet. By failing to brief the issue, Jones has waived any argument he might have. *See* Md. Rule 8-504(a)(6) (A brief shall include "argument in support of the party's position on each issue."); *Darling v. State*, 232 Md. App. 430, 465-66 (2017) (Holding that appellant waived any argument for premeditation element of first-degree murder where appellant made "only one argument to support his position that the State failed to establish premeditation[.]"); *Poole v. State*, 207 Md. App. 614, 635 (2012) (We will not consider an appellant's contention where appellant's argument is made in one sentence, in a footnote, or with no supporting argument.).

Regardless, it is difficult for us to see how Jones was prejudiced by the court's narrowing of the acts forming the basis for the conspiracy charge. The trial court's purpose for amending the verdict sheet was specificity. *See Rudder*, 181 Md. App. at 461 ("[t]he only specificity that is required of a verdict sheet, when more than one charge is submitted to a jury, is enough distinguishing or identifying language to tell one charge from another."). Jones's arguments as to prejudice are only speculative. In any event, Jones was aware of the allegation that he was complicit in joining the YGF with the BGF. Count One of the indictment against Jones contains a detailed account of how the YGF and the BGF became one organization. Thus, he was placed on notice that any evidence related to his alleged involvement in the YGF would be used against him.

4. Double Jeopardy

Jones next argues that his right against being placed in double jeopardy was violated when the motions court denied his motion to dismiss Count One, conspiracy to entrench a gang, and Count Two, participation in a criminal gang in violation of Crim. Law Article § 9-804. To prove Counts One and Two, the State showed that Jones committed specific, predicate criminal acts. Jones asserts that, in doing so, the State violated his double jeopardy rights.

Pursuant to a 2013 plea agreement between Jones and the State, the State agreed to *nolle prosequi* a charge of attempted murder of Perry Johnson, and Jones pled guilty to possession of a handgun. According to Jones, one of the predicate acts the State relied on for Counts One and Two was the attempted murder of Perry Johnson. Jones asserts that using a *nol prossed* charge as a predicate act for different crime violates the Fifth Amendment's protection against double jeopardy. As an alternative argument, Jones argues the double jeopardy clause applies because attempted murder and the gang offenses share the same elements.

A motion to dismiss an indictment is governed by Md. Rule 4-252. Subsection (d) of that rule provides:

> A motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time. Any other defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial.

A motion to dismiss an indictment "attacks the sufficiency of the indictment, not the sufficiency of the evidence. *Bailey v. State*, 289 Md. 143, 150 (1980). In *Bailey*, the Court of Appeals explained:

> a motion to dismiss the indictment will properly lie where there is some substantial defect on the face of the indictment, or in the indictment procedure, or where there is some specific statutory requirement pertaining to the indictment procedure which has not been followed.

289 Md. at 150.

One basis to challenge an indictment is that one or more of its counts violate the constitutional prohibition against double jeopardy. Double jeopardy "looks to a final judgment on the merits of guilt or innocence in a trial by the same parties of the "'same offense.'" *Burkett v. State*, 98 Md. App. 458, 464 (1993). The Fifth Amendment, applicable to the states through the Fourteenth Amendment, contains the Double Jeopardy Clause which "forbids multiple convictions and sentences for the same offense." *Khalifa v. State*, 382 Md. 400, 432 (2004). This Clause affords defendants with three constitutional protections:

> [P]rotection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; (3) and multiple punishment for the same offense.

Parks v. State, 287 Md. 11, 14 (1980).

We first address Jones's argument that a *nol prossed* charge cannot be used as a predicate offense for separate charge. A criminal defendant may be separately charged with both a conspiracy offense and a predicate offense for that conspiracy. When the General

Assembly enacted Crim. Law § 9-804,[14] it included a provision that the penalty for violating the statute "may be separate from and consecutive to or concurrent with a sentence for any crime *based on the act establishing a violation of this section*." Crim. Law § 9-804(f)(2)(i) (emphasis added). Thus, the plain language of Crim. Law § 9-804 expressly authorizes the State to charge a defendant with both the substantive offense and predicate offense. If Jones's theory was correct, then § 9-804(f)(2)(i) would be meaningless, and the State would be compelled to make a choice between charging a defendant with either the substantive crime or the predicate offense, but not both. The

[14] Crim. Law § 9-804 states in pertinent part:

> (a) A person may not:
>
> (1) participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity; and
>
> (2) knowingly and willfully direct or participate in an underlying crime . . . committed for the benefit of, at the direction of, or in association with a criminal gang.
>
> • • •
>
> (f)(2)(i) A sentence imposed under paragraph (1)(i) of this subsection for a first offense may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing a violation of this section.
>
> (ii) A sentence imposed under paragraph (1)(i) of this subsection for a second or subsequent offense, or paragraph (1)(ii) of this subsection shall be separate from and consecutive to a sentence for any crime based on the act establishing a violation of this section.
>
> • • •

General Assembly clearly did not intend to place the State in such a predicament. Further, both the United States Supreme Court and Maryland courts have consistently held the Double Jeopardy Clause does not bar prosecutions for both conspiracy and the substantive crime for that conspiracy.[15]

Regardless, the attempted murder of Perry Johnson was irrelevant to the conspiracy charge (Count One) because, as we have already discussed, the theory of the State's was that the conspiracy in question was to entrench the BGF by consolidating the YGF and BGF into one gang. The State relied on the testimony of Christopher Meadows to prove this charge. Meadows testified that he was a member of the YGF at the same time as Jones, and that both were inducted into the ranks of the BGF together. Meadows's testimony, along with Detective Smith's testimony about the YGF, was all the jury needed to find Jones guilty of Count One, as amended on the verdict sheet. Thus, the jury did not need to consider any evidence surrounding the attempted murder of Perry Johnson.

[15] *See, e.g., U.S. v. Felix*, 503 U.S. 378, 390-91 (1992) (holding that conspiracy to commit the offense and the offense itself are separate offenses for double jeopardy purposes.); *Pinkerton v. U.S.*, 328 U.S. 640, 643 (1946): ("[T]he commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."); *Rouse v. State*, 202 Md. 481, 490 (1953) (holding that pleading guilty to violating Maryland Lottery Laws did not prohibit later charging defendant with conspiracy to violate same Lottery Laws.); *Jones v. State*, 9 Md. App. 370, 379-80 (1969) (holding that possession of narcotics and conspiracy to possess hypodermic syringe or similar paraphernalia were separate offenses.); *Whittlesey v. State*, 326 Md. 502, 525 (1992) (holding that although robbery is a predicate offense to felony-murder, defendant could be charged with both.); *Khalifa v. State*, 382 Md. 400, 434-35 (2004) (holding that the offense of child detention is separate and distinct from conspiracy to commit child detention under the required evidence test.).

We turn to Jones's argument that the crimes of gang conspiracy, gang participation, and attempted murder share common elements, and that charging him with all three crimes violates double jeopardy. The test to determine if two offenses are identical for double jeopardy purposes is the required evidence test. *See Blockburger v. United State*, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."). Maryland adopted the required evidence test in *Thomas v. State*, in which the Court of Appeals explained:

> The required evidence is that which is minimally necessary to secure a conviction for each statutory offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not, the offenses are not the same for double jeopardy purposes even though arising from the same conduct or episode. But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other, the offense are deemed to be the same for double jeopardy purposes. And of course if both statutes have exactly the same elements, the offenses are also the same within the meaning of the prohibition against double jeopardy, and successive prosecutions are barred.

277 Md. 257, 266-67 (1976). *See also Scriber v. State*, 437 Md. 399, 408 (2014) (holding that for two charges to represent the same offense for double jeopardy purposes, they must be the same "in fact" and "in law.").

For these reasons, resolving Jones's contention hinges on whether the crime of attempted murder has the same elements as the crimes of conspiracy to entrench a gang and participating in a criminal gang. Murder is:

> the killing of one human being by another with the requisite malevolent state of mind and without justification, excuse, or mitigation. These qualifying malevolent states of mind are: 1) the intent to kill, 2) the intent to do grievous bodily harm, 3) the intent to do an act under circumstances manifesting extreme indifference to the value of human life (depraved heart), or 4) the intent to commit a dangerous felony.

State v. Earp, 319 Md. 156, 162 (1990) (quoting *Ross v. State*, 308 Md. 337, 340 (1987) (footnotes omitted)). Additionally, attempt "consists of a specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation." *Earp*, 319 Md. at 162.

Conspiracy is founded in common law. "A criminal conspiracy is the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means." *Hall v. State*, 233 Md. App. 118, 138 (2017) (internal quotations omitted).

Meanwhile, gang participation is found in Crim. Law § 9-804. Specifically, Jones was charged and convicted of subsection (a) of § 9-804, which makes it illegal to "participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity[,]" or to "knowingly and willfully direct or participate in an underlying crime, or act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of, or in association with a criminal gang."

Viewing the elements of the three offenses in light of the required evidence test, it is clear that the elements of attempted murder do not share any common elements with

conspiracy to entrench a gang and participation in a criminal gang. The State's prosecutorial strategy in this case did not violate the Double Jeopardy Clause.

5. Hearsay Testimony

Jones contends that the trial court erred in admitting what he asserts were multiple instances of hearsay testimony relating to the structure and organization of the BGF, and that he was prejudiced at trial as a result. Jones categorizes these statements into (1) hearsay due to an unavailable declarant; (2) hearsay within hearsay; and (3) testimony based on hearsay.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" and is generally not admissible. Md. Rules 5-801(c), 5-802. A number of exceptions to the hearsay rule allow otherwise inadmissible evidence into evidence, and those applicable to this case are discussed in more detail below. Hearsay "must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or "is permitted by applicable constitutional provisions or statutes.'" *Bernadyn v. State*, 390 Md. 1, 8 (2005) (quoting Md. rule 5-802). Because evidence of hearsay is an issue of law, the standard of review is *de novo*. *Bernadyn*, 390 Md. at 8; *Morales v. State*, 219 Md. App. 1, 11 (2014).

For varying reasons, none of Jones's hearsay contentions are persuasive.

A. Meadow's Testimony About the Merger of the YGF and the BGF

Christopher Meadows testified that in 2005, he became a member of the YGF, which operated in the Greenmount area of Baltimore. Then, Meadows testified that he joined the BGF in either 2006 or 2007 when the BGF's Greenmount regime and the YGF merged into one gang. Meadows explained that this was the subject of a meeting between the two gangs at which he was present. He further added that, at the time, the BGF only wanted to take nine members of the YGF into its ranks. Defense counsel objected to Meadows's statement that "BGF only wanted nine members of the YGF" as inadmissible hearsay. The court overruled that objection. On several more occasions, Meadows reiterated that, at first, the BGF wanted to only take nine members of the YGF. Meadows then testified that the BGF eventually took all members of the YGF into its ranks.

Jones challenges the court's rulings on Meadows's assertion that the BGF originally planned to recruit only nine members of the YGF. Assuming, *arguendo*, that Meadows's testimony as to what the BGF members said during the meeting about their negotiating goals was admitted for the truth of the matter asserted, and that the court erred in admitting it into evidence, we conclude that any suppositional error on the trial court's part was harmless, and therefore not a basis to reverse Jones's convictions. *See Williams v. State*, 462 Md. 335, 352 (2019) (Reversal of a conviction is not required if the error did not influence the verdict.).

The harmless error standard in Maryland is well-established:

> When an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Dionas v. State, 436 Md. 97, 108 (2013) (cleaned up).

Meadows's statement that the BGF originally wanted only nine members of the YGF had nothing to do with any of the elements of the crimes of which Jones was charged. Additionally, Jones does not assert that this testimony had any other prejudicial effect upon him. We conclude beyond a reasonable doubt that the evidence as to the BGF's negotiating strategy did not affect any of the verdicts returned against Jones.

B. The Testimony of Cornish

Cornish testified about the organizational and command structure of the BGF. Cornish stated that as a member of the BGF, he was required to learn the BGF's history and recite its oath (which he recited, in full, at trial). Cornish testified that he had dealt with people in the chain of command and knew the titles of those people. Even though he had never held one of those positions, the titles were listed in the BGF's paperwork, copies of which were provided to him when he became a member. This paperwork included the 22s and 33s, which, according to Cornish, sentenced to death those who betrayed the BGF. Cornish also attended BGF meetings with Jones, in which they "frequently got together and talked a lot." These meetings occurred at a "park or bar, barbershop, anywhere, and we would talk." Although the BGF required its members to pay dues, Cornish indicated that he was

exempt from this rule because he was unable to afford it. Cornish testified it was his understanding that you needed permission to sell drugs in a BGF-held area of Baltimore City, and if permission was not sought, you could be robbed or even killed. The trial court also permitted Cornish to testify "about [his] ability to recognize another member of the Black Guerilla Family as to specific experiences [he'd] had." Cornish stated that he could recognize BGF members by their tattoos or use of Swahili phrases, and explained what those tattoos were. Finally, Cornish testified that his life is in danger because the BGF is "violent" and that "death" was imposed on members who testify against the gang. Jones contends that these statements were either oral or written assertions by unavailable declarants or constituted hearsay within hearsay, and thus were inadmissible.

Jones's assertions to the contrary notwithstanding, this testimony was not hearsay. Cornish testified about the BGF and its *modus operandi* based upon his personal experiences as a member of the organization, a point made particularly clear because the trial court, in response to repeated objections from defense counsel, instructed Cornish to limit his answers to matters known to him through personal experience. In the same vein, Cornish's testimony that he was "fearing for his life," is clearly not hearsay. *See* Md. Rule 5-801(c) (defining "hearsay" as "a statement, *other than one made by the declarant while testifying at the trial* or hearing. . . ." (emphasis added)).

C. The Testimony of Detective Landsman[16]

Detective Landsman testified that he took otherwise unspecified "investigative steps" regarding the Perry Johnson shooting, and that, based on this investigation, he concluded that crime "occurred in the area that the [BGF] operated and the suspect identified was Kenneth Jones." Jones contends that Detective Landsman's testimony was hearsay because it was not based on his first-hand knowledge, but was instead based upon information obtained from third parties. The short answer to Jones's argument is that Detective Landsman did not testify about any statements that might have been made to him during his investigation. Therefore, his testimony was not hearsay. Moreover, even if Detective Landsman had testified as to the substance of any hypothetical statements made to him—and he did not—such testimony would not be hearsay unless the statements were offered for the truth of the matters asserted therein. *See, e.g.*, *Payne & Bond v. State*, 211 Md. App. 220, 260 (2013), *vacated on other grounds sub nom. State v. Payne*, 440 Md. 680 (2014) ("[A]n interviewee's statements to an investigating police officer are not 'hearsay' unless and until they are offered into evidence for their truth."); *Daniel v. State*, 132 Md. App.

[16] In his brief, Jones incorrectly refers to Detective Landsman as "Landsome."

576, 589 (2000) (same).[17]

D. Perry Johnson's Testimony About His Assailant

Jones also takes issue with Perry Johnson's testimony. When Johnson's memory failed him at trial, the State played a tape recording pursuant to Rule 5-802.1(a) containing Johnson's prior statements to the police. In that recording, the police asked Johnson what happened at North Avenue on the evening of April 11, 2011. Johnson responded that "the families on 904 20th Street got in an altercation with me and my girlfriend to where they're calling us rats, saying we're snitching." Johnson continued: "The dude in the house, the dude called—they gang-related. They called BGF." Then, Johnson indicated that Jones shot him and that he had seen Jones in the area earlier that day.

Perry Johnson's recorded statements fall within Md. Rule 5-802.1. That Rule states, in pertinent part,

> The following statements previously made by a witness who testifies at trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:

[17] In his reply brief, Jones cites *Smith v. State*, 182 Md. App. 444, 491 (2008), for the proposition that a police officer's testimony as to the results of an investigation is inadmissible if it is not based upon first-hand information, but rather upon inadmissible hearsay statements made to the witness during the course of his or her investigation. The difference between *Smith* and the case before us is that in *Smith*, the witness testified "that his opinion was not based upon first-hand knowledge, but rather on information he had learned from third parties," and that information was described in detail to the jury. *Id.* In contrast, when Detective Landsman was asked for the basis of his conclusion, Jones objected, and the objection was sustained by the trial court.

> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement;
>
> * * *
>
> (c) A statement that is one of identification of a person made after perceiving the person[.]

Because Johnson's testimony at trial differed from his previous statements to the police, the State was permitted play the recording of Johnson's previous statements pursuant to Md. Rule 5-802.1(a) as a prior inconsistent statement. *See, Belton v. State*, 152 Md. App. 623, 632 (2003) (permitting victim's audiotaped statement to the police to be played as a prior inconsistent statement hearsay exception when victim's trial testimony differed from his previous testimony to police.). At trial, Johnson stated that the only attacker he recognized was Jones; that he couldn't remember the full name of the person he lived with; and that his attack was caused by "an act of God," but could have been a result of a fight he had with his housemate's children. These statements contradicted what Johnson had previously told the police, namely that "Joe" also attacked him; that his housemate's name was Lawrence; and that he was attacked because he was "snitching" on

members of the BGF. His testimony at trial was clearly inconsistent with his previous recorded statements, falling within the confines of Rule 5-802.1(a).[18]

E. Meadows's Testimony About "L & B"

According to Jones, Meadows testified that two people named "Lanvale and Barclay" "told Jones that Rochester was 'snitching.'" [19] Jones alleges that "Lanvale and Barclay" made this statement in the presence of Meadows, Jones, and "Foo." Jones maintains that because this statement was not made to Meadows himself, whatever "Lanvale and Barclay" said is inadmissible hearsay evidence. The contention is meritless. It is clear from the transcript that Meadows was relating a conversation that *Jones* had with him. Because the out-court-court declarant was Jones, the statement was admissible. See Md. Rule 5-803(a)(1) (An out-of-court statement by a party-opponent is not excluded by the prohibition against hearsay.).

6. Do Civil Discovery Rules Apply to Criminal Cases?

Jones argues that the trial court erred by permitting James Cornish and Christopher Meadows to testify about the organizational structure of the BGF because the two witnesses

[18] Johnson's pre-trial statement was not inadmissible because he referred to "families . . . calling us rats, saying we're snitching," because his statement was not introduced to prove that Johnson was "snitching" to police.

[19] In his initial brief, Jones asserted "Lanvale and Barclay" were individuals. In reality, however, the term referred to an intersection (East Lanvale Street and Barclay Street) located in the Greenmount neighborhood of Baltimore. Appellant conceded as much in his reply brief.

were not designated as either "corporate designees" of the BGF or as "custodians of corporate records" of the gang. For this assertion, Jones relies on Md. Rule 2-412(d), which states, in pertinent part (emphasis added):

> A party may in a notice and subpoena *name as the deponent* a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or other persons who will testify *on its behalf* regarding the matters described and may set forth the matters on which each person designated will testify.

Additionally, Jones looks to the "collective entity doctrine," which provides that "a custodian of the records of a corporation or other collective entity, acting as the representative of that entity, cannot refuse on Fifth Amendment grounds to produce corporate records, even if the contents would personally incriminate the custodian." *Jung Chul Park v. Cangen Corp*., 416 Md. 505, 518 (2010); *see also Braswell v. United States*, 487 U.S. 99, 104–05 (1988); *Bellis v. United States*, 417 U.S. 85, 90 (1974). Jones asserts that both Rule 2-412(d) and the collective entity doctrine require that a certain level of knowledge is required by a witness to speak on behalf of a corporation in either a civil or criminal case.

Jones attempts to link the civil sphere with the criminal sphere through Crim. Law § 9-801(c)(3), which provides that (emphasis added):

> (c) "Criminal gang" means a group or association of three or more persons whose members:
>
> * * *
>
> (3) have in common an overt or covert *organizational or command structure*.

Jones interprets this language to mean that the legislature intended to treat criminal gangs as corporations.

Jones's contentions are not persuasive. First, this argument was not preserved for our review. Jones objected only to Cornish's testimony (and not Meadows's), on the basis of Cornish's "lack of personal knowledge as to the organizational structure" of BGF. Because he provided a basis for his objection, he cannot now assert an entirely different argument as to why the testimony should not have been admitted. *See McNeal v. State*, 200 Md. App. 510, 522–23 (2011), *aff'd*, 426 Md. 455 (2012) (citing *von Lusch v. State*, 279 Md. 255, 263 (1977)). Moreover, by failing to object at all to Meadows's testimony on this subject, he has waived his right to object to Cornish's. *See, e.g.*, *Williams v. State*, 2016, 231 Md. App. 156, 194-95 (2016), *certiorari granted*, 452 Md. 3, *certiorari dismissed as improvidently granted* 452 Md. 47 (2017).

Regardless, Jones's contention is without merit. Md. Rule 2-412, like the rest of Title 2 of the Maryland Rules, applies to civil, and not to criminal, actions. Md. Rule 1-101(b). Jones has not cited any authority—not surprisingly because it doesn't exist—that either the Court of Appeals (by adopting Md. Rule 2-412(d)) or the General Assembly (by enacting Crim. Law § 9-801(c)(3)) intended to limit evidence about the inner workings of a criminal organization to the testimony of designees appointed by that organization. Finally, neither Cornish nor Meadows testified "on behalf of" the BGF. Rather, each testified *against* the BGF and its criminal activities.

7. The Chain of Custody

Jones argues that the trial court erred entering into evidence shell casings that were recovered from the scene of Gregory Rochester's murder, as well as the firearm used to commit that murder. He contends that the State failed to prove the chain of custody because the State did not produce the officer who actually recovered those items at trial. For the casings and the firearm evidence, the State offered as witnesses Detectives Bolen, Badgujar, and Lloyd, who, according to Jones, could not establish with a reasonable probability that no tampering occurred. Because the State did not produce everyone in the chain of custody, Jones contends that he was denied his confrontation rights, could not effectively challenge the credibility of the State's theory of the case, and as a result, was prejudiced.

"Chain of custody evidence is necessary to demonstrate the 'ultimate integrity of the physical evidence.'" *Easter v. State*, 223 Md. App. 65, 75 (quoting *Best v. State*, 79 Md. App. 241, 256 (1989)). The State must establish a chain of custody for certain items of evidence "in order to assure that the particular item is in substantially the same condition as it was when it was seized." *Wagner v. State*, 160 Md. App. 531, 552 (2005) (citing *Lester v. State*, 82 Md. App. 391, 394 (1990)). In order to establish a chain of custody, the State must provide the testimony of witnesses "who were responsible for the safekeeping of the evidence, i.e., those who can 'negate a possibility of tampering . . . and thus preclude a likelihood that the thing's condition was changed.'" *Easter*, 233 Md. App. at 75 (some quotations omitted) (quoting *Jones v. State*, 172 Md. App. 444, 462 (2007)). "What is

necessary to negate the likelihood of tampering or of change of condition will vary from case to case[,]" and "[t]he existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Id*. In *Amos v. State*, 42 Md. App. 365, this Court provided the rule for the chain of custody for physical evidence. We explained:

> To be admissible, however, this "real evidence" must be in substantially the same condition that it was in at the time of the crime and must be properly identified. 3 Wharton's Criminal Evidence s 635 (13th ed. C. Torcia). Although there is a natural inference or presumption of continuance in the same condition, that inference varies in each case with the nature of the subject matter and the time element. *Nixon v. State*, 204 Md. 475, 482 (1954); 2 Wigmore, Evidence s 437(1) (3d ed.).
>
> Whether real evidence is in the same condition as at the time of the crime so as to permit admissibility is not entirely a discretionary matter with the court, *Nixon, supra* at 483, 105 A.2d 243; although the circumstances surrounding its safekeeping in that condition in the interim need only be proven as a reasonable probability. *Breeding v. State*, 220 Md. 193, 199 (1959). The proof negating the probability of changed conditions between the crime and the trial, is spoken of as proving the chain of custody, and in most instances is established by accounting for custody of the evidence by responsible parties who can negate a possibility of "tampering" and thus preclude a likelihood that the thing's condition has changed.

Amos, 42 Md. App. at 370.

A trial court's evidentiary rulings, including rulings that an adequate chain of custody has been established, are reviewed under the abuse of discretion standard. *Taneja v. State*, 231 Md. App. 1, 11 (2016); *Easter*, 223 Md. App. at 74-75 (2015); *Accord Nixon v. State*, 204 Md. 475, 483 (1954). We will conclude that a trial court has abused its discretion "only when no reasonable person would take the view adopted by the trial court, or when

the court acts without reference to any guiding rules or principles." *Easter*, 223 Md. App. at 75 (cleaned up).

Detective Lloyd testified that he recovered shell casings from the scene of Rochester's murder, and he was able to identify those casings from photographs shown at trial. Detective Lloyd also identified ballistics evidence regarding the bullet recovered from Rochester's autopsy, for which he was present.

Detective Anand Badgujar assisted Detective Allen in recovering a firearm from Jones's cousin's residence. Detective Badgujar testified that, although he did not recover the firearm himself, he was present for its recovery and witnessed Detective Allen bag the firearm. When both officers returned to the police station shortly thereafter, Detective Allen transferred the firearm, still in its bag, to Detective Badgujar, who packaged and submitted it to the evidence control unit.

Sandra Bohlen, supervisor at the Firearms Examination Unit for the Baltimore City Police Department, testified that she received five bullet specimens from Rochester's autopsy. Supervisor Bohlen tested the bullet specimens against the firearm recovered by Detectives Badgujar and Allen and was able to conclude that the bullets from Rochester's autopsy were fired from that firearm.

The combined testimony of Detective Lloyd, Detective Badgujar, and Supervisor Bohlen was sufficient to negate the probability of changed conditions between the moment the evidence was recovered and the trial. Detective Lloyd testified that he personally recovered the shell casings from the scene of Rochester's murder, and was present when

the ballistics evidence was removed in Rochester's autopsy. This evidence was transferred to Supervisor Bohlen, who tested the ballistics evidence herself. Thus, there were no "gaps" in the chain of custody for the ballistics evidence. We are cognizant of Jones's concern that Detective Badgujar did not recover the firearm himself and the brief period of time he was away from the firearm. These criticisms, however, go to the probative weight, and not the admissibility, of the evidence in question. *See Easter*, 233 Md. App. at 75.

8. The Identity of a Deceased Suspect to the Murder of Gregory Rochester

Jones next argues that the trial court erred by allowing the State to question Detective Lloyd about the identity of Donatello Fenner, from whom the other firearm used to kill Gregory Rochester was recovered. Defense counsel sought to show that the person from whom the firearm was recovered was never charged for Rochester's murder. (No charges were brought against Fenner but that was because he was also murdered.) The State asked Detective Lloyd, on redirect examination, if the murder weapons was recovered from "Mr. Fenner." Defense counsel objected, arguing that he never mentioned Donatello Fenner's name during cross-examination, and that he "was very specific not to say that at all." The trial court disagreed, ruling that defense counsel opened the door for the State's question about the firearm being recovered from Fenner.

To this Court, Jones asserts that he did not "open the door" during cross-examination for the State to ask such a pointed question. According to Jones, defense counsel questioned Detective Lloyd only about the firearm being recovered from Jones, and highlights his question to Detective Lloyd: "And to be clear, no gun was found in possession of Kenneth

Jones, right?" According to Jones, "[e]ven a complete look at the transcript concerning the Defense's questioning of Lloyd does not reveal any questions about 'specifically was the [gun] recovered from' Fenner." Jones is wrong—the transcript tells a very different story.

During his cross-examination of Detective Lloyd, defense counsel explicitly mentioned Donatello Fenner's name, in addition to making multiple references to Fenner. Defense counsel asked Detective Lloyd if "Donatello Fenner" was ever charged for Rochester's murder.[20] The colloquy between defense counsel and Detective Lloyd

[20] On cross-examination, the exchange proceeded:

> [DEFENSE COUNSEL]: The person that was found in possession of the firearm that killed Gregory Rochester of course you charged them with the murder of Gregory Rochester, right?
>
> [DETECTIVE LLOYD]: I didn't.
>
> [DEFENSE COUNSEL]: But they had the gun that killed the man?
>
> [DETECTIVE LLOYD]: I beg your pardon?
>
> [DEFENSE COUNSEL]: I said but they were the one in possession of the gun that killed Gregory Rochester.
>
> [DETECTIVE LLOYD]: Sir, unfortunately also [sic] involved in that case he was murdered.
>
> [DEFENSE COUNSEL]: But the person who had the gun wasn't the person who was charged?
>
> [DETECTIVE LLOYD]: Sir, I can assure you based on the investigations he would have been charged.
>
> [DEFENSE COUNSEL]: I guess I'm confused. You said you can assure me that the person—
>
> [DETECTIVE LLOYD]: Uh-huh.

demonstrates that defense counsel "injected the issue" into the case, thereby "opening the door" for the State to question Detective Lloyd about Fenner. *See Clark v. State*, 332 Md. 77, 85 (1993) ("In sum, 'opening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'").

9. Improper Closing Argument

Jones's final appellate contention is that the trial court erred in permitting the State, over his objection, to make reference to Jones's attorneys during its closing rebuttal argument. Jones takes issue with the State's exhortation to the jury that it "look at the Defendant and see past the . . . expensive suit and four attorneys flanking him . . . . [S]ee

---

> [DEFENSE COUNSEL]: --who was in possession of the gun would have been charged?
>
> [DETECTIVE LLOYD]: He would have been charged as well, sir—
>
> [DEFENSE COUNSEL]: Was he char—
>
> [DETECTIVE LLOYD]: --in conjunction with the investigation.
>
> [DEFENSE COUNSEL]: Was he charged?
>
> [DETECTIVE LLOYD]: Unfortunately sir, he's dead and gone, he can't be charged.
>
> [DEFENSE COUNSEL]: He died in 2010 though, correct?
>
> [DETECTIVE LLOYD]: I can't recall exactly what year, sir.
>
> [DEFENSE COUNSEL]: I'm saying the person who had the gun died in 2010, right?
>
> * * *
>
> [DEFENSE COUNSEL]: And Donatello Fenner was never charged with the murder of Gregory Rochester, correct?
>
> [DETECTIVE LLOYD]: Correct, sir.

the wolf in sheep's clothing." Jones contends that these statements were unfairly prejudicial because the jury could have interpreted them to mean that he was guilty because his "ability, desire, and purpose in hiring his 'four attorneys' was due to his predatory nature and criminal involvement in BGF," and requests that we reverse his convictions on this basis.

Although the State recognizes that it is impermissible to imply that a defendant is guilty on the basis that he or she consulted an attorney, it disputes Jones's contention the statements made by the prosecutor amounted to such conduct. Rather, the State maintains that the prosecutor "asked the jury not to be fooled by Jones's expensive suit and multiple attorneys, and see through the façade to the gang member[.]"

Attorneys "are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). Although there are limits to what an attorney may say in closing arguments, "not every improper remark [] mandates reversal." *Degren*, 352 Md. at 430. Instead, "'[w]hat exceeds the limits of permissible comment depends on the facts in each case,'" *Id*. at 430-31 (quoting *Wilhelm v. State*, 272 Md. 404, 415 (1974)), and "[r]eversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Id*. at 431. (quoting *Jones v. State*, 310 Md. 569, 580, (1987)). Because trial courts are "in the best position to evaluate the propriety of a closing argument," *Ingram v. State*, 427 Md. 717, 726 (2012), the "determination of whether the prosecutor's comments

were prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court." *Degren*, 352 Md. at 431.

Generally, "evidence of consultation with an attorney is not probative of a defendant's guilt." *Martin v. State*, 364 Md. 692, 706 (2001). "Evidence of a criminal defendant's consultation with an attorney is highly prejudicial, as it is likely to give rise to the improper inference that a defendant in a criminal case is, or at least believes himself to be, guilty." *Martin*, 364 Md. at 708. Regardless of whether a defendant sought counsel before or after judicial proceedings had begun, "[a]n individual has an independent right to seek legal advice or representation at anytime, on any matter, and for any reason, that is protected by the Fourteenth Amendment due process clause and its state counterpart, the Maryland Declaration of Rights, Art. 24." *Waddell v. State*, 85 Md. App. 54, 63 (1990). As an example, in *Martin v. State*, the prosecution stated in its closing argument:

> See what the Defendant did that night. . . . He talked to an attorney and chose to resign. Again, just as His Honor instructed you, you cannot look in a person's mind, but you can look at what they did afterward and before to give you intent.

Id. at 707, n. 6. The Court of Appeals held that this statement should not have been admitted because "the danger of unfair prejudice presented by introduction of this evidence substantially outweighed any probative value[.]" *Id*. at 709.

Returning to the case before us, the State's remarks during its closing rebuttal did not amount to the kind of prejudicial statements prohibited in *Martin*. In its closing rebuttal, the State suggested to the jury, in relevant part:

> So the defense in opening asked you to look at the Defendant and they asked you to look at him. I think it's fitting in closing, the State asks you to do the same. You know, look at the Defendant and see past the, you know, expensive suit and the four attorneys flanking him . . . see the wolf in sheep's clothing. See the person whose sole mission for the last number of years has been to prey on his community.
>
> See the loss of life. Gregory Rochester is no longer breathing, no longer walking this earth because they believed he was talking to the police and he was summarily executed. See Perry Johnson, a man who lost his eye because he spoke to the police to say, hey I saw him (indiscernible) the consequence for that? Oh, I'm taking your eye from you.
>
> See Lamontae Smith. He's part of the same organization. He's not doing anything good either, but you don't have the right to solve your internal beef with gunfire. There are no names on the bullets. Multiple rounds were fired, we know that. There were casings found on that street. Those bullets, one of them – or two of them – strike that – two of them hit Lamontae Smith, the other two, we couldn't find them. But there are people that live in that area. The testimony was it's a residential neighborhood.
>
> * * *
>
> See Slay. That's his name, the name that literally means to kill. Look at the photo that's in evidence of the Defendant in the photo of him where you see his whole person, he has a gun tattooed on his hip. He's always got his gun on him, this innocent guy.
>
> See the shooter, see the gang member, see the murderer for who and what he is.

Clearly, the State's theme throughout its closing rebuttal was that the jury should "see" Jones as a murderer through the evidence provided throughout the trial. The State did not suggest that Jones sought counsel as a result of any criminal conduct that Jones was alleged to have committed, as had occurred in *Martin*. In mentioning Jones's attorneys, the State merely noted defense counsels' presence when it asked the jury to "see past . . . the four attorneys flanking him." In fact, this statement contradicts Jones's assertion that the State

wanted the jury to focus its attention on Jones's attorneys because the State wanted the jury to *avert its attention* from the presence of the attorneys. This is evident by the phrase "see *past* . . . ." (emphasis added). In sum, the State's reference to Jones's attorneys was not an impermissible comment upon Jones's availing himself of his right to counsel, but merely an example of the kind of "oratorical conceit[s] or flourish[es]" that are permitted in closing argument. *Wilhelm*, 272 Md. at 412–13. The trial court did not abuse its discretion in overruling Jones's objection.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANT TO PAY COSTS.