Circuit Court for Howard County
Case No. 13-K-17-057423

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1728

September Term, 2017

KENNETH FRIZZELL DIGGS, JR.

v.

STATE OF MARYLAND

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*Wright,
Kehoe,
Friedman,

JJ.

Opinion by Wright, J.
Concurring Opinion by Friedman, J.

Filed: December 6, 2019

*Wright, J., now retired, participated in the conference of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

On July 2, 2016, Amanda Duer and Derik Henderson were shot. Ms. Duer did not survive, but Mr. Henderson lived to identify the shooter as appellant Kenneth Frizzell Diggs, Jr.

After a five-day trial, a jury in the Circuit Court for Howard County convicted Diggs of first and second degree murder, attempted first and second degree murder, first-degree assault, and related handgun offenses.[1] Diggs presents the following multifaceted questions for our review:

> 1. Did the trial court err in admitting Derik Henderson's prior photo array identification of Diggs and other of Henderson's statements made in connection with that identification procedure, as well as the audio recording made of that identification procedure?
>
> 2. Did the trial court err in admitting the testimony (and report) regarding gunshot residue?
>
> 3. Did the trial court err in admitting the cell phone evidence?
>
> 4. Did the trial court err or abuse its discretion in allowing Joseph Coiro to testify as an expert?

We shall affirm Diggs's convictions, based on the following determinations:

I. The trial court did not err or abuse its discretion in admitting evidence of Henderson's extrajudicial photo array, under the hearsay exception for statements of identification, Md. Rule 5-802.1(c), because:

   A. Allowing the State to present evidence of that identification through the detective to whom it was made did not violate Diggs's Sixth Amendment right to confront the witnesses against him, given that Henderson testified at trial and was subject to cross-examination regarding the identification;

[1] For the murder, Diggs was sentenced to life without the possibility of parole; for the remaining crimes, he was sentenced to consecutive terms of life, twenty-five years (without the possibility of parole), twenty years (the first five without the possibility of parole), and fifteen years (the first five without the possibility of parole).

B. Allowing the detective to testify about statements made by Diggs during the photo array fell within the exception; and

C. Admitting a recording of the photo array did not violate the rule or "unfairly bolster" the detective's testimony.

II. The trial court did not err or abuse its discretion in admitting the challenged testimony that gunshot residue was found on clothing allegedly worn by Diggs during the shootings and recovered from the residence of Snowden, because:

A. Police did not violate the Fourth Amendment by searching the apartment and seizing the clothing in question, after Snowden consented to their requests to re-enter her home and to take the clothing; and

B. Allowing gunshot residue analyst Joseph Coiro to testify, based on his independent examination of samples taken from that clothing, that gunshot residue was present did not violate Diggs's Sixth Amendment right to cross-examine the analyst who created the samples he reviewed.

III. The trial court did not err or abuse its discretion in admitting the challenged evidence obtained from a cell phone recovered during the warrant search of Ms. Roseborough's residence, because:

A. The use of a cell site simulator in locating Diggs did not trigger the exclusionary rule under the Fourth Amendment, given that police obtained an order expressly authorizing its use, the search warrant was predicated on independent grounds for probable cause to believe Diggs and/or a cell phone with information relevant to the shootings would be found in the apartment, and police executed that warrant in good faith; and

B. Evidence of internet searches related to Henderson, performed on that cell phone, was relevant and not unfairly prejudicial.

IV. The trial court did not err or abuse its discretion in accepting Mr. Coiro as an expert in gunshot residue analysis.

BACKGROUND

At trial, the State's theory of the case was that after Ms. Duer "set up" Diggs to be robbed by falsely accusing him of stealing money she earned as a prostitute, Diggs retaliated by murdering Ms. Duer and shooting Henderson. Shortly after the shootings, two eyewitnesses – Henderson and Muriel Ledbetter – identified Diggs as the person who came to the door of their motel room and fired. The State's forensic evidence, much of which resulted from warrant searches of two different apartments, included gunshot residue ("GSR") on clothing tied to Diggs through surveillance video, and Internet search histories from a cell phone recovered where Diggs was arrested. Because the issues raised on appeal relate to the admission of this evidence, and Diggs does not contend the evidence is insufficient to convict, our summary of the trial record focuses on the challenged evidence.

Ms. Duer and Ms. Ledbetter were heroin users and prostitutes. Even though they were not related, and Ms. Ledbetter had a biological daughter named Nicky, Duer called Ledbetter "Momma." After Diggs "rescued" Ms. Ledbetter and Nicky from the streets two months before the shootings, the two women relied on Diggs for "protection." Ledbetter referred to him as "Daddy." About two days before the shootings, she introduced him to Ms. Duer.

In the early morning hours of July 2, 2016, Ms. Duer, Ms. Ledbetter, and Henderson were in Room 11 of the Turf Motel on Washington Boulevard in Laurel. Earlier that night, Ms. Duer, Ms. Ledbetter, and Nicky had been in Room 214 at the

Super 8 motel down the street. During that time, Diggs came and went from the motel several times.

Over the course of the evening, Ms. Duer "was working" and accused Diggs of stealing money from her. When he heard Ms. Duer's complaint, Henderson "went down" to the Super 8 to get her money back "and robbed" Diggs. Shortly afterward, Ms. Ledbetter learned that Ms. Duer lied about the theft and instead had used her money to buy heroin.

Derik Henderson testified, after being granted use immunity, that at the time of the shootings, he had just started "dating" Ms. Duer. That evening, Henderson sought to recover the money he believed Diggs had stolen from her. Accompanied by two friends, he went to Room 214 at the Super 8 Motel and, in a confrontation, took Diggs's wallet. Henderson then went to Room 11 at the Turf Motel, where Ms. Duer and Ms. Ledbetter were.

Ms. Ledbetter and Henderson gave consistent accounts of the shootings that followed. Ms. Ledbetter testified that she was in the motel room with Duer and Henderson, when Diggs suddenly appeared at the open door, asking "where's my bread?" Diggs then leaned forward "into the room[,]" pulled out a gun, and fired three times, hitting Henderson first, then Ms. Duer. As Henderson ran into the bathroom, Diggs shot Ms. Duer in the "dead center of her chest." Ms. Ledbetter recalled that Ms. Duer said, "oh, Momma, he shot me," then "grabbed her chest" and "made this sound that never stopped."

At trial, Henderson testified that "a black male" about "5-8, 5-9" appeared at the open door of Room 11, asking, "Now, where's my money?" There were three gunshots. Henderson was "hit in the leg[,]" then ran into the bathroom.

Shortly before 4:30 a.m., Howard County Police Corporal Mark Reid arrived at the scene of the shootings. Ms. Ledbetter was "screaming, Kenny did it. He shot her." Ms. Duer lay on the floor of the motel room, fatally wounded. Henderson was screaming from the bathroom that he had been shot in the leg.

Ms. Ledbetter described "Kenny" as "a black male, bald head, in his 40s" and told the officer that he might be in Room 214 of the Super 8 Motel. Later that day, she identified Diggs's photo in an array, but also misidentified another person's photo as one of Diggs. At trial, she again identified Diggs as the person who shot Ms. Duer and Henderson.

Two days after the shootings, Henderson also identified Diggs from a photo array conducted while he was at Shock Trauma. When selecting Diggs's photo as the person who shot him and Ms. Duer, Henderson told Sergeant Matthew Tanis,[2] "[t]hat's him all day." Henderson signed the photo he selected. Both the array and an audio recording of the identification procedure were admitted into evidence over defense objections.

The accounts of the shootings given by Ms. Ledbetter and Henderson were consistent with what Diggs told Robert Jones while both were inmates at the Howard

[2] The spelling of Sergeant Tanis's last name varies in the briefs and record. We shall use the spelling from the sergeant's handwritten signature on the form containing instructions for the photo array.

County Detention Center. Diggs claimed that the shootings took place after two men robbed him of money he collected from prostitutes, Nicky and Amanda, "who set him up." According to Jones, Diggs told him that he "grazed" two people and shot "Amanda" "right in the chest," seeing her fall back and hearing her "gurgling."

Investigators developed forensic evidence that corroborated the testimony about Diggs's involvement in the shootings. Four days after the shootings, on July 6, 2016, Detective Matthew Mehrer[3] executed an arrest warrant at the apartment of Ms. Snowden, who had a longstanding "romantic" relationship with Diggs. After failing to find Diggs there, Detective Mehrer left. However, Mehrer later returned, and Ms. Snowden let him in and allowed him to seize a pair of shorts and a t-shirt that she identified as what Diggs was wearing when he arrived at the residence on the day of the shooting. Over defense objections, Mr. Coiro testified as an expert in gunshot residue analysis, and indicated that samples taken from both items had gunshot residue on them.

On October 25, 2016, while Diggs remained at large following the shooting, investigators were able to connect him to Shana Roseborough through phone calls and social media. They then obtained an order authorizing them to obtain "real-time" cellular location site information by using a cell site simulator. Two days later, on October 27, police obtained a warrant to search her apartment on Hillsdale Road in Washington, D.C.

[3] The spelling of Detective Mehrer's last name also varies in the briefs and record. We shall use the spelling from the trial transcript, which matches previous unreported opinions of this Court, identifying the detective by his position.

When that warrant was executed via a forced entry, Diggs was arrested in her apartment. During the search, a cell phone was found in a backpack on a bunkbed. Pursuant to a warrant to search the contents of that phone, police extracted its "web history," which showed internet searches for Henderson.

We shall add facts in our discussion of the issues raised by Diggs.

DISCUSSION

I. Identification Challenges

Diggs contends that "the trial court erred in admitting Derik Henderson's prior photo array identification of Diggs and other of Henderson's statements made in connection with that identification procedures, as well as the audio recording made of that identification procedure." We address each type of identification evidence in turn, explaining why the trial court did not err in admitting that evidence.

A. Henderson's Extrajudicial Identification

Diggs first challenges the trial court's decision to allow Sergeant Tanis to testify that Henderson identified Diggs in a photo array conducted on July 2, 2016. We conclude that the court did not err.

Standards Governing Extrajudicial Identification

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

against him . . . ."[4] The "main and essential purpose" of the Confrontation Clause is to ensure that the defendant has an opportunity for effective cross-examination of adverse witnesses, "which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110 (1974). "During an in-person cross-examination, 'the accused has an opportunity, not only of testing the recollection and sifting the conscience of witnesses, but of compelling him to stand face to face with the jury in order that they may look at him, and judge his demeanor upon the stand and in the manner in which he gives his testimony whether he is worthy of belief.'" *Taylor v. State*, 226 Md. App. 317, 332 (2016) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S. Ct. 337, 339 (1895)).

"In the landmark case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), the Supreme Court redefined many of the core principles for evaluating whether a criminal defendant has the right to require the prosecution to produce the declarants of

[4] "In Maryland, the constitutional right of confrontation predates the federal Constitution." *Taylor v. State*, 226 Md. App. 317, 332 (2016). Specifically,

> Article XIX of the Maryland Declaration of Rights of 1776 declared that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him[ ] . . . [and] to examine the witnesses for and against him on oath[.]" Identical language is currently embodied in Article 21 of the Maryland Declaration of Rights. Maryland's confrontation right is interpreted to "generally provid[e] the same protection to defendants" as its federal counterpart.

Id. at 332-33 (citations omitted).

extrajudicial statements so that the defendant can confront and cross-examine them." *Taylor*, 226 Md. App. at 317. The reasoning and opinion in *Crawford* "'rewrote confrontation clause analysis[,]'" *State v. Norton*, 443 Md. 517, 524 n.8 (2015) (quoting 6A Lynn McLain, *Maryland Evidence: State and Federal* § 800:5 (3d ed.2013)), prohibiting admission of an out-of-court statement by a non-testifying witness if the statement is presented for its truth and is "testimonial" in nature. *See Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006); *Derr v. State*, 434 Md. 88, 106-07 (2013); *Taylor*, 226 Md. App. at 333.

Maryland Rule 5-802.1(c), the hearsay exception for extrajudicial identifications, protects a criminal defendant's right to confront the declarant of an out of court identification provided that such evidence is "admissible as substantive proof of guilt, if it is reduced to writing, adopted by the witness, and the witness is subject to cross-examination at trial." This protection applies even when evidence of the identification comes into evidence through a third party. As Diggs concedes, this Court long ago held:

> evidence of an identification at a pretrial confrontation or viewing of photographs is admissible as substantive, independent evidence of identification or as corroborative of a judicial identification, not only when received through the testimony of the out of court declarant, but also when received through the testimony of a police officer or some third party observing the extra-judicial identification, when the out of court declarant is present at the trial and subject to cross-examination.

Dorsey v. State, 9 Md. App. 80, 85 (1970); *see also Smith and Samuels v. State*, 6 Md. App. 59, 63-64 (1969) ("testimony by a police officer or some third party as to an extrajudicial identification by an eye-witness was admissible when made under

circumstances precluding the suspicion of unfairness or unreliability, where the out of court declarant was present at the trial and subject to cross-examination").

The Court of Appeals has held that, when the person who made an extrajudicial identification denies having done so or claims no memory of it, as happened in this case, a third party may present evidence of the identification, as long as the identifying witness is subject to cross-examination about the identification. In *Bedford v. State*, 293 Md. 172, 173-74 (1982), an elderly couple who were robbed and beaten identified Bedford in a photo array conducted just after the crime, but neither could identify him at a pretrial motions hearing. *See id*. at 173-74. At trial, the State did not ask either witness to identify Bedford, instead relying on their extrajudicial identifications. *Id*. at 174. The Court held that those extrajudicial identifications were admissible as substantive evidence, even though neither victim was able to identify Bedford at trial. *Id*. at 185. In *Nance v. State*, 331 Md. 549, 563-64 (1993), the Court of Appeals extended this principle to a witness who recanted.

Relevant Record

After asking Henderson whether he had been shown a photo array, the prosecutor proffered that the State would not be asking Henderson whether he identified Diggs as the shooter, prompting the following colloquy:

> [PROSECUTOR]: And were [you] taken to the hospital eventually?
>
> MR. HENDERSON: Yeah, eventually . . .
>
> [PROSECUTOR]: During that July 4th, 2016 interview that you had with Detective Immer, were you shown a series of photographs?

Your Honor, may I approach?

THE COURT: Yes.

BENCH CONFERENCE

(Counsel approached bench, and the following occurred:)

[PROSECUTOR]: I'm going to ask him if he was shown. I'm not going to ask him about what the result was.

[DEFENSE COUNSEL]: I object.

THE COURT: Ultimately, the, the question is going to be whether or not the photo array itself is admissible independent of whether they go through it with him on the witness stand.

[DEFENSE COUNSEL]: I don't believe that it is.

THE COURT: And, and why?

[DEFENSE COUNSEL]: Because it's, it's a (indiscernible) statement. It's confrontational. And if the State isn't allowed to call him on direct and ask about it, then we are deprived of cross-examination.

THE COURT: He's here to be cross-examined.

[DEFENSE COUNSEL]: That, that requires that we allow, that we withdraw our objection to allowing him to testify. So we have to allow the State to use subterfuge to put his previous statements in, so. That's not accurate. It only comes in under 5-802.1(c). It says, it talks about a statement.

THE COURT: What subtitle, subsection?

[DEFENSE COUNSEL]: . . . . The intro to the Rule. It doesn't say a witness who testifies. It says a statement is – it talks about a specific statement. So the fact that the witness testifies has nothing to do with whether they're cross-examined on an issue concerning a particular statement. The statement is what's . . . at issue.

So if the . . . Court limits the . . . State's ability to impeach him with his prior inconsistent statement, we haven't had an opportunity to cross-examine him on that particular statement.

THE COURT: Well, the State's about to ask him whether he participated in the photo array. And I suspect whether or not he was able to identify anyone?

[PROSECUTOR]: **I'm not going to ask him that. It's only whether he participated. He's subject to cross-examination on that photo array. It's up to the defense to make a decision about when they want that to come out. And his statement of identification i[s] not hearsay. It's specifically excluded by the law. And it can come in by somebody else . . .**

[DEFENSE COUNSEL]: That's, that's right. But . . . the lead into the Rule says the following statements made previously by a witness who testifies at the trial or hearing who is subject to cross-examination concerning the statement. **So if . . . he's not asked about it on direct, the . . . scope of the cross is limited to . . . what's asked on direct.**

[PROSECUTOR]: Which would be the first time in history the defense has confined themselves to the direct of a State's witness.

They can cross-examine, subject to cross-examination means that he is available for cross-examination. **There's nothing to keep the defense from asking about any result of any photo array and going so far as to introduce the topic, which would open the door to any questions the defense may or may not want to ask about that photo array.** The statement is one that he made ultimately to Sergeant Tanis about identifying who the shooter was.

[DEFENSE COUNSEL]: I think that at this point, . . . the Court should make a ruling on whether it's . . . going to allow the testimony by a . . . witness independent of Mr. Henderson to testify as to the photographic array identification procedure that was done. Because . . . the State is suggesting that I be put in a position where if I don't cross-examine him, that may or may not come in. If it comes in, obviously, we will want to cross-examine him. If . . . it doesn't come in, then I'm . . . not going to ask him any questions about it.

So I think . . . in fairness, the Court has to make a ruling as to whether it's going to allow the State to have another witness testify regarding whether Mr. Henderson selected someone from the photo array.

THE COURT: Any thoughts about that? . . . .

[PROSECUTOR]: That's fine. I guess the Court would have to do it on a proffer or a bit of a proffer. You know, the defense had chosen not to challenge the array pre-trial, so there is no issue as to suggesting this or anything like that that come up.

So, if it's . . . the defense's contention that only Mr. Henderson can testify about his previous statement, that's just absolutely wrong. The whole point of having a photo array and having this exception is to allow the State to call the police officer who administered it, and then they can testify about a statement of identification as it says in the Rule.

So based on that, if the Court wants to make a ruling, I would invite the Court to do so just so the defense knows what he is to expect.

THE COURT: **I think one of the exceptions is a prior identification in terms of the photo array. I . . . would not prevent the State from introducing the array independent of . . . Mr. Henderson's testimony about the array. But I'd also invite you, if you want to, to cross-examine him about the array. I think the State's indicated that there the door is wide open if you want to do that.**

I don't want you to be denied your right to cross-examination. But I do see the array coming in appropriately through [Sergeant Tanis]. . . .

[DEFENSE COUNSEL]: **And on that topic, I believe that that statement would be a . . . confrontation issue that would be a testimonial statement. And it it's not testified to on direct here, then the Defendant is deprived of his constitutional right to cross-examine the witness concerning his statement.**

THE COURT: **The door's wide open if you want to cross-examine him about his photo array,** about the photo array. It can be up to the counsel. I'm not going to stop you. Okay?

[PROSECUTOR]: Thank you.

[DEFENSE COUNSEL]: Thank you.

BENCH CONFERENCE CONCLUDED

(Counsel returned to trial tables and the following occurred in open court:)

> [PROSECUTOR]: Mr. Henderson, I'll . . . repeat my last question in case you've forgotten it. While you were at the Shock Trauma Center on July 4th, 2016, and you met with Detective Immer and possibly the other officers, were you shown a series of photographs?
>
> MR. HENDERSON: Correct.
>
> [PROSECUTOR]: Yes. Thank you, Mr. Henderson. I have no further questions, Your Honor.
>
> (Emphasis added.)

Although defense counsel was free to cross-examine Henderson about the photo array, counsel sought to establish that Henderson was heavily medicated when he viewed the photo array, as illustrated by the following colloquy:

> [DEFENSE COUNSEL]: And that pain medication was administered through the 4th of July, correct?
>
> MR. HENDERSON: Yeah.
>
> [DEFENSE COUNSEL]: When you were shown a series of photographs, is it fair to say that you were not in a sober state?
>
> MR. HENDERSON: Well, I really wasn't, but I guess, yeah.
>
> [DEFENSE COUNSEL]: You really were not sober, you mean?
>
> MR. HENDERSON: No, I was kind of sleepy, tired. . . .
>
> [DEFENSE COUNSEL]: And when you were shown the photo array, were the detectives suggesting who to select?
>
> MR. HENDERSON: Well, they showed me a, a portfolio. It had about six people in it, maybe seven. I went through it, and I told him I wasn't 100 percent sure about anybody that I'd seen up there. And then they started to walk off, and then they came back with like his picture on top. I was like – they said, "Is this the guy?" And I was like, "It could be."
>
> [DEFENSE COUNSEL]: When . . . they said is this the guy, were they pointing to the photograph?
>
> MR. HENDERSON: Yeah.

> [DEFENSE COUNSEL]: Were they tapping the photograph with their finger?
>
> MR. HENDERSON: I don't remember. I just remember they showed me some like really various people. It was like—they came back and like with his photograph on top. I looked at it, and then there was another fat guy, there was another fat guy, and then it was like, it was like, anything? And then they went back to his picture. Is this the guy? And I don't know, probably. It should be recorded. They recorded everything.

On redirect, the prosecutor asked Henderson, "do you recall when you were shown those photos whether you signed any of the photos or not?" Henderson replied that he did not recall and did not "remember signing a photo at all."

Diggs's Challenge

Diggs argues that the introduction of Henderson's extrajudicial identification through the testimony of Sergeant Tanis ran afoul of the Confrontation Clause requirement that Henderson must be available for cross-examination regarding that identification. In Diggs's view, that requirement was not satisfied because

> Henderson never testified on direct examination that he made a pretrial photo identification of [a]ppellant as the shooter. The State obviously avoided producing that evidence through Henderson in order to insulate Henderson from cross-examination about it. That was the State's prerogative. But because the State never adduced the extrajudicial identification in its direct examination of Henderson, he was not subject to cross-examination on that extrajudicial identification; and, therefore, the admission of the identification via a third party witness—Sergeant Tanis—violated [a]ppellant's constitutional right of confrontation. The trial court also violated [a]ppellant's due process rights by effectively shifting the burden to the defense to first adduce the evidence through Henderson in order to cross-examine Henderson about it. And it is, of course, axiomatic that a criminal defendant bears no such burden at trial.

The State counters that Henderson's extrajudicial identification was properly admitted as substantive evidence, "regardless of whether [the State] asked Henderson at

trial either about the prior array, or to identify [Diggs]." Nothing in Md. Rule 5-802.1(c) or its progeny "conditions" the admissibility of such evidence "upon the declarant's explanation for his refusal . . . to repeat the statement on the stand." Nor is the State required to supply

> a reason for not eliciting the identification on direct, or a reason that Henderson would not identify Diggs at trial. The State had every right to leave that question out, and nothing stopped Diggs either from posing it on cross-examination or recalling Henderson in his case-in-chief. He did neither. The fact that he opted not to pursue that avenue does not render the array, the recording, or the sergeant's related testimony inadmissible.

We agree that it was not necessary for the State to ask Henderson about the photo array on direct examination. As long as the defense had an opportunity to question Henderson about his extrajudicial identification, Diggs has no Confrontation Clause complaint. The record shows that defense counsel had that opportunity.

As the excerpted transcript shows, the trial court resolved defense counsel's concern that he would not be able to question Henderson about the photo array, ruling that even though the prosecutor elected not to ask Henderson about it on direct, defense counsel was free to question Henderson on that subject during his cross-examination. In fact, defense counsel did so, eliciting what the State correctly characterizes as "a recantation of sorts," when Henderson gave an equivocal account of the procedures and outcome of that photo array. In these circumstances, Diggs's confrontation of Henderson regarding the extrajudicial identification was limited only by defense counsel's strategic decision not to pursue that inquiry.

Our conclusion is consistent *Bullock v. State*, 76 Md. App. 85, 89, 92-93 (1988), where the trial court admitted testimony of a police officer that Reinert, an eyewitness to a robbery, identified the accused in a showup conducted on the day of the robbery, after Reinert testified at trial that he could not remember having made that identification. *See id*. at 89-90. As in this case, the officer testified about the extrajudicial identification *after* the identifying witness testified, over defense objection. *Id*. at 89. This Court held that allowing the police officer to testify about the extrajudicial identification did not violate Bullock's right to confront the witnesses against him, because the identifying declarant "was available in the courtroom to be examined concerning his identification of [Bullock.]" *Id.* at 93.

Here, as in *Bullock*, the opportunity to call Henderson as a witness and question him about the identification satisfied the Sixth Amendment and due process. Nothing in the court's ruling shifted the burden of proof or production to Diggs. After the State presented Sergeant Tanis's testimony that Henderson identified Diggs as the shooter, and defense counsel cross-examined Henderson about the identification, Diggs had the opportunity to present evidence and argument to counter that identification. On this record, the trial court did not err in overruling Diggs's objections to Sergeant Tanis's testimony that Henderson identified Diggs in the photo array.

B. Statements Made by Mr. Henderson During the Photo Array

Diggs separately challenges the trial court's admission of testimony by Sergeant Tanis about "other statements made by Henderson during the photo array identification

procedure, which statements Henderson did not testify about on his direct examination."

This claim of error arises from the following testimony:

> [PROSECUTOR]: [W]here did you present [the photo array] to Derik Henderson?
>
> SGT. TANIS: This was presented at Maryland Shock Trauma, Floor six room twenty-five I think.
>
> [PROSECUTOR]: And what day did you present it to him?
>
> SGT. TANIS: On July 4th 2016. . . .
>
> [PROSECUTOR]: And can you describe for the jury his mental state as you saw it?
>
> SGT. TANIS: Very clear, lucid, was able to answer questions. Was able to look at the photo array. . . .
>
> [PROSECUTOR]: What did you say to Mr. Henderson?
>
> SGT. TANIS: We advised [him] . . . prior to the photo array . . . of Ms. Duer's death. He was not aware prior to that from what I remember. And then we presented him with the photo array, I told him we would present him with a photo array and he said he would look at it. . . .
>
> [PROSECUTOR]: Your Honor the State moves State's forty-seven into evidence.
>
> **[DEFENSE COUNSEL]: We have a continuing objection I believe.**
>
> **THE COURT: That's right,** forty-seven's admitted . . . .
>
> [PROSECUTOR]: And how did you present this photo array to Mr. Henderson?
>
> SGT. TANIS: Folder shuffle, basically all the folders were presented to him, put in a stack, he went through each of them one at a time and looked at the pictures . . . .
>
> [PROSECUTOR]: Did Mr. Henderson make a selection? . . . .
>
> SGT. TANIS: Yes, ma'am, he signed the photo of the person he recognized . . . .

[PROSECUTOR]: Did his selection ever . . . change?

SGT. TANIS: No ma'am.

[PROSECUTOR]: What did he say when . . . he made the selection? . . .

SGT. TANIS: He pointed to a photo and I said, "Who's that?" and he . . . said, "I have no idea who he is." I said, "Well, what did he do?" He said, "He shot me and Mandy." Following that, he said that he was a hundred percent sure of the suspect that shot him and then prior to looking at it he said, "Yeah that's him all day."

Diggs argues that the testimony highlighted above, recounting "other statements made by Henderson during the photo array identification procedure[,]" should not have been admitted under the Md. Rule 5-802.1(c) exception for statements of identification, because such statements go beyond the identification of Diggs as the shooter and because Henderson was not available for cross-examination about these statements given that they did not come out until after he testified, during Sergeant Tanis's testimony. The State responds that Diggs's arguments "rise and fall on the same flawed rationale that he advances for appealing admissibility of the identification in the first place."

As Diggs points out, the hearsay exception for prior statements of identification is limited to the identification itself. In *Tyler*, 342 Md. at 779-80, cited by Diggs for that proposition, the Court of Appeals held that prior testimony by a prosecution witness, Eiland, which was read to the jury, was inadmissible under Md. Rule 5-802.1(c), because it "consisted of far more than a mere identification of" Tyler, in that it included "a detailed description of Eiland and Tyler's trip to the Prince George's Plaza Mall, the events leading up to the shooting in the parking lot, and the shooting itself." The Court

of Appeals concluded that "[t]he critical portion of Eiland's testimony was not that he identified Tyler as being the other person in the car with him[,]" but rather, "that he was not the person in the Mercedes who fired the fatal shots." *Id*. at 780. Because "the crucial aspect of Eiland's testimony was not any 'prior identification' of the other person in his car; it was which of the two people in his car was the shooter[,]" the "hearsay exculpation of himself as the shooter was not admissible under the prior identification exception to the hearsay rule." *Id.*

This case is easily distinguished because of its materially different facts. Each statement challenged by Diggs relates to the photo identification and falls within the hearsay exception in Md. Rule 5-802.1(c). Patently, Henderson's statements that "[h]e shot me and Mandy" and "Yeah, that's him all day" are statements of identification in that they accuse Diggs of being the person who shot him. Henderson's ensuing statement, "that he was a hundred percent sure of the suspect that shot him[,]" adds relevant information concerning Henderson's level of certainty about that identification. None of the challenged statements contained the type of information that went beyond the identification in *Tyler*.

Moreover, Diggs had the opportunity to cross-examine Henderson about what he told Sergeant Tanis, to cross-examine Sergeant Tanis about Henderson's statements, and to recall Henderson to question him about the statements Sergeant Tanis recounted.

Based on this record, the trial court did not err in admitting Sergeant Tanis's testimony recounting Henderson's statements during the photo array.[5]

C. Recording of the Photo Array

Diggs also challenges the trial court's ruling admitting the audio recording of Henderson's photo array. He argues that the recording was inadmissible "[f]or all of the reasons that the trial court erred in admitting Sergeant Tanis's testimony on Henderson's identification of [a]ppellant and the other statements Henderson made[.]" In Diggs's view, "the recording only served to unfairly bolster" that testimony, "as well as the already sterilized evidence of the identification as implied by Henderson's non-testimony."

The State counters that the same reasons for admitting the other identification evidence also support admission of the recording. We agree. Based on the record and reasons reviewed above, Diggs had sufficient opportunity to cross-examine both Henderson and Sergeant Tanis about the photo array, including about what this audio recording reveals. In these circumstances, the trial court did not err or abuse its discretion in admitting the audio recording.

II. Gunshot Residue Evidence

[5] Our conclusion that the challenged evidence was admissible under Md. Rule 5-802.1(c), makes it unnecessary to address Diggs's alternative argument that it was not admissible under the hearsay exceptions for prior consistent and inconsistent statements because "Henderson had given no testimony—either consistent or inconsistent—in relation to the identification." *See* Md. Rule 5-802.1(a)-(b).

Diggs next contends that "[t]he trial court erred in admitting the testimony regarding gunshot residue" ("GSR"), because that evidence was obtained by an unconstitutional search and seizure, then admitted in violation of his constitutional right of confrontation. The State responds that "[t]he testimony at the motions hearing demonstrated, and the trial court correctly found, that Ms. Snowden consented to the search, given the totality of the circumstances and her uncontradicted testimony that she allowed police to reenter her house." With respect to the GSR testimony by Mr. Coiro, the State argues that his "opinion did not present or rely on a report that was 'testimonial,' and his analysis was independent from the [initial analyst's] in any event."

We shall address – and reject – Diggs's constitutional challenges in turn.

A. Fourth Amendment Challenge

Diggs contends that "the gunshot residue evidence was obtained in violation of [his] constitutional rights against unreasonable searches and seizures." The State counters that both the search and seizure of the clothing that tested positive for GSR were consensual. For the reasons that follow, we agree with the State.

Fourth Amendment Standards

The Fourth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their . . . houses . . . and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV; *see also Thornton v. State*, 465 Md. 122, 140 (2019). At its core, it is the right of an individual to be free from unwarranted governmental intrusions, with "[t]he 'physical entry of the home [being] the chief evil against which the wording of the

Fourth Amendment is directed.'" *Turner v. State*, 133 Md. App. 192, 201 (2000) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S. Ct. 2091 (1984)).

"Fourth Amendment jurisprudence has made it clear that warrantless searches and seizures are presumptively unreasonable and, thus, violative of the Fourth Amendment." *Thornton*, 465 Md. at 141. For that reason, "[w]hen a police officer conducts a warrantless search or seizure, the State bears the burden of overcoming the presumption of unreasonableness." *Id*. (citing *Grant*, 446 Md. at 17).

A warrantless search of a residence is reasonable when an occupant consents to the search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *In re Tariq A-R-Y*, 347 Md. 484, 490 (1997). Consent to search may be granted by "a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Such authority is effective "only as to property in which the individual possesses an actual" and reasonable expectation of privacy. *Tariq A-R-Y*, 347 Md. at 491. Moreover, such consent must be "freely and voluntarily given and not . . . the product of explicit or implied coercion." *Turner v. State*, 133 Md. App. 192, 202 (2000). "Whether consent was voluntarily given is a question of fact to be determined 'from the totality of all the circumstances.'" *Id.* (quoting *Schneckcloth*, 412 U.S. at 227). Because consent to enter may be given expressly or by implication, *id.* at 207, evidence that the occupant cooperated with police may support a finding of voluntariness. *See Riddick v. State*, 319 Md. 180, 196 (1990).

"When evidence is obtained in violation of the Fourth Amendment, it will ordinarily be inadmissible in a state criminal prosecution pursuant to the exclusionary rule." *Thornton*, 465 Md. at 140. This Court reviews "a hearing judge's ruling on a motion to suppress evidence under the Fourth Amendment" by "consider[ing] only the facts generated by the record of the suppression hearing." *Sizer v. State*, 456 Md. 350, 362 (2017). "We view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the party prevailing" on the issue raised as grounds for suppression. *See id*.

"Suppression rulings present a mixed question of law and fact. We recognize that the '[hearing] court is in the best position to resolve questions of fact and to evaluate the credibility of witnesses.'" *Thornton*, 465 Md. at 139 (alteration in original) (quoting *Swift v. State*, 393 Md. 139, 154 (2006)). "Accordingly, we defer to the hearing court's findings of fact unless they are clearly erroneous[,]" but "[w]e do not defer to the hearing court's conclusions of law." *Id*. (citation omitted). Instead, "we review the hearing judge's legal conclusions *de novo*, making our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Id.* at 139-40 (quoting *Sizer*, 456 Md. at 362).

Suppression Record

In support of Diggs's motion to suppress GSR evidence, defense counsel called Ms. Snowden, in whose apartment police recovered clothing allegedly worn by Diggs on the day of the shootings, which later tested positive for GSR. Ms. Snowden testified that police came to her house at 6:00 a.m. on July 6, 2016. She recounted that "eight or nine"

officers in plain clothes, led by Detective Matthew Mehrer, knocked on her door, advised they had a warrant, and entered her residence with firearms drawn. Although she and her daughter were not restrained, they watched officers search the apartment, including under their beds and in their closets.

When Diggs was not found in the residence, police went to a nearby apartment, where Ms. Snowden's sister was living. Ms. Snowden went there because she did not want her sister's door to be broken down.

After neither of those searches yielded an arrest of Diggs, Ms. Snowden returned to her "garden level" apartment. On direct examination by defense counsel, Ms. Snowden described the return of police officers, their entry, and search as follows:

> [DEFENSE COUNSEL]: Okay. And when you got back to your apartment, what happened next?
>
> MS. SNOWDEN: I guess it was maybe a half an hour later, twenty-minutes later, they were all – all the police were in front of my building. I live on the bottom floor so I could see them out in front of my building and they were walking towards [the] house. Mehrer was, again, and knocked on [the] sliding glass door and I let him in. He asked me, could they ask me a few more questions and I said yes, whatever you want . . . .
>
> [DEFENSE COUNSEL]: And in order to get to your sliding glass door, do you have to open any doors or gates or anything like that?
>
> MS. SNOWDEN: No. Just walk right up from the parking lot.
>
> [DEFENSE COUNSEL]: And so Detective Mehrer had knocked on your sliding glass door?
>
> MS. SNOWDEN: He was walking towards so I just opened it.
>
> [DEFENSE COUNSEL]: Okay. And what transpired then?
>
> MS. SNOWDEN: He asked me could he ask me a couple more questions and I said sure.

[DEFENSE COUNSEL]: And then what happened?

MS. SNOWDEN: So, he came in and another couple officers came in with them and they started asking me questions about Kenny.

[DEFENSE COUNSEL]: Now, the other officers that came in, were these the same people that initially searched your apartment?

MS. SNOWDEN: Except for one. They said he was an FBI. I didn't see him the first time.

[DEFENSE COUNSEL]: And, did he talk to you at all?

MS. SNOWDEN: Yes.

[DEFENSE COUNSEL]: And what did he say?

MS. SNOWDEN: He asked me where I've been for the couple of days and how do I know Kenny and am I lying? Whatever I know, I need to tell him now or else I will be going to fail [sic] today. And I told him I'm not lying. I'm telling you everything I know.

[DEFENSE COUNSEL]: And then what happened?

MS. SNOWDEN: They were questioning my sister. By that time, my sister got there so they were questioning her. You know, how does she know Kenny and when was the last time she seen him?

[DEFENSE COUNSEL]: Did you ever – well, how long did the questioning take the second time?

MS. SNOWDEN: Maybe an hour.

[DEFENSE COUNSEL]: Okay, and what happened next?

MS. SNOWDEN: They said – Mehrer gave me his card and said if I heard from Kenny or anything, give me a call.

[DEFENSE COUNSEL]: And then . . . . what about the clothes?

MS. SNOWDEN: Oh, the clothes that were in there, this was like maybe a half an hour after they were already in there, forty-five minutes, and he asked me, you said that he took a shower, because I told him the last time I seen Kenny he came in the house and took a shower. And he asked where the clothes were and I said in my bedroom. So, he said, can you show me?

> So, I walked him to the bedroom and pointed to the clothes on the floor and I told him there was the clothes. I might have even picked them up and put them on my bed because it's a black t-shirt and some black khaki shorts. And he asked, could he have them? I said, sure, take anything you want.
>
> [DEFENSE COUNSEL]: Why did you say that?
>
> MS. SNOWDEN: Because I didn't want to be involved in anything that was going on. I was terrified. I didn't want him to think I'm lying or doing anything against, you know, what they wanted me to do.

On cross-examination by the prosecutor, Ms. Snowden explained that when police first came to her apartment, she asked for a search warrant, but admitted that she could not recall whether police said they had an arrest warrant or a search warrant. (M2.66) She did not know why police were looking for Diggs until they told her he was "wanted for murder."

When asked about the second police visit, Ms. Snowden testified:

> [PROSECUTOR]: And you said there were a couple officers with him including an FBI agent?
>
> MS. SNOWDEN: Yes.
>
> [PROSECUTOR]: Do you recall how many officers were with him?
>
> MS. SNOWDEN: Maybe one or two.
>
> [PROSECUTOR]: It's fair to say, Ms. Snowden, that he atmosphere of the first time was scary for you, people coming in with guns drawn?
>
> MS. SNOWDEN: Very.
>
> [PROSECUTOR]: Okay. And especially with – and the background that you had been before, so . . . . [f]air to say, then, that the second time when Mehrer came back, it was a little bit less of that?
>
> MS. SNOWDEN: Yes.

[PROSECUTOR]: When they came back the second time, did anyone have their guns drawn?

MS. SNOWDEN: No.

[PROSECUTOR]: Did they still have their guns on their person?

MS. SNOWDEN: Yes.

[PROSECUTOR]: . . . . When you came in, Detective Mehrer asked . . . if he could ask you a couple of questions?

MS. SNOWDEN: Yes.

[PROSECUTOR]: And you said that you would answer some questions?

MS. SNOWDEN: Yes. . . .

[PROSECUTOR]: All right. And was Detective Mehrer sitting, standing? Where was he –

MS. SNOWDEN: Standing the whole time.

[PROSECUTOR]: Okay. He was standing? And where were the other officers?

MS. SNOWDEN: I was sitting at this spot on the table and the other officer, the FBI agent that came in with him, he was sitting to my right.

[PROSECUTOR]: How would you describe – how would you describe how you were feeling at that time?

MS. SNOWDEN: Terrified still. Nervous.

[PROSECUTOR]: And presumably you were still nervous because of what just happened the first time when they came in?

MS. SNOWDEN: Yeah, police at my house anyway, period.

[PROSECUTOR]: Sure. So, after Mehrer gave you . . . the card and asked if you hear anything from Kenny, to give you a call [sic]. That's what you testified to?

MS. SNOWDEN: Yes.

[PROSECUTOR]: And Mehrer asked you where the clothes were. When did he ask you where the clothes were on the second time when they had come back?

MS. SNOWDEN: After they had already questioned me for a little while, they were there maybe a total of a half hour, maybe forty-five minutes in.

[PROSECUTOR]: Okay. And your response to him was, quote, "Sure, take anything you want."

MS. SNOWDEN: Yep.

[PROSECUTOR]: And you actually – you walked him back into the bedroom?

MS. SNOWDEN: Yeah, they wouldn't let me walk by myself.

[PROSECUTOR]: Okay. And you said they. How many officers came into the bedroom with you?

MS. SNOWDEN: I believe just him and another officer behind him.

[PROSECUTOR]: Okay. Any weapons drawn at this point?

MS. SNOWDEN: No.

[PROSECUTOR]: Were you ever in cuffs at all during either of these encounters?

MS. SNOWDEN: No.

Detective Mehrer, a six-year veteran of the Howard County Police Department, Warrant and Fugitive Unit, testified that the warrant execution team for the initial entry consisted of approximately "seven or eight" officers. They presented Ms. Snowden with the arrest warrant, then searched her apartment for Diggs with weapons drawn. That search "maybe took a minute, maybe two."

After proceeding to another apartment, where Diggs was not found, the detective returned to Ms. Snowden's apartment. He "[k]nocked on the [front] door and she opened

it again for" him. Another officer accompanied him inside. Although they were armed, their weapons were not drawn. They "sat at her dining room table," where she answered questions until her sister arrived. Ms. Snowden "advised that Mr. Diggs wasn't there but he had come over the weekend before, Saturday afternoon[,]" July 2, 2016. "She said he was only there for a brief time, maybe thirty, forty-five minutes. He showered, changed his clothes and left." When the officer asked "if the clothes were still in the apartment[,]" Ms. Snowden "took [them] to the back bedroom and showed [them] on the floor where the clothes were located." Ms. Snowden put the clothes into a plastic evidence bag supplied by Detective Mehrer.

The State argued that the initial entry of Ms. Snowden's residence was pursuant to a lawful arrest warrant and that the second entry, when the clothing was recovered, was a separate and consensual search and seizure, because Ms. Snowden voluntarily let them in and gave them those items. Citing *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 1791 (1968), invalidating a search consented to after an official falsely asserted he had a search warrant, defense counsel maintained that the court should not "bifurcate the two[,]" because "the encounter" that began with weapons drawn established a "coercive atmosphere" that "never really ended" and precluded voluntary consent during the second encounter. Furthermore, counsel argued, Ms. Snowden could not validly consent to police seizing the clothes because they did not "make inquiries sufficient to establish that [she] . . . ha[d] both common and mutual authority over" those items.

The suppression court concluded that Ms. Snowden consented to the second entry of her residence and to the removal of the clothing that later tested positive for GSR, explaining:

> [T]he testimony has been that in the early morning hours of July 6th, the police arrived at Ms. Snowden's residence with an arrest warrant for Mr. Diggs. And they came with considerable force, a representation in terms of numbers of officers and some of the officers bearing rifles that were on display. And Ms. Diggs let them into the house . . . . I find Detective Mehrer's testimony to be truthful, that he never told her that he had a search warrant . . . . I think even Ms. Snowden concedes that she could have been somewhat confused based on her lack of experience and her experience being primarily watching television . . . .
>
> Detective Mehrer indicated he had an arrest warrant for Mr. Diggs and asked if he could search the house for Mr. Diggs and she let them in. They said, can we come in and search for Mr. Diggs and she said, yes. She said they were already in the house but they finished and left. She said that she complied, she says, because they had big guns, the rifles, in particular, I think, that frightened her but that they did talk calmly to her. But I don't think she's accurate when she testifies that they said they had a search warrant.
>
> So, then they go to her sister's house . . . . It's in the same neighborhood, I guess. And Ms. Snowden went over there to explain that Mr. Diggs was not there and, I guess, to hopefully prevent them from breaking down the door. In any event, the police came back to her residence. In this occasion, I think it was two, possibly three, officers but none of them bearing rifles, none of them brandishing their weapons even though they had weapons on their persons, they had handguns on their persons. And she let them in through the slider, she says. The officer said he though she let him in through the front door. And they asked if they could ask her some additional questions and she says, yes, sure, as to how she knows Kenny, the defendant. She says it was for approximately half hour. She explained that the defendant had taken a shower, I believe it was on the 2nd and left his clothes on the floor of the master bedroom and the officer said, can you show me. She walked him to the bedroom and she said – I think she said that she picked up the defendant's clothes and put them on the bed. And when the police officer asked he could have them, she said, sure . . . .

> [T]he second entry was one or two officers, she said. This time it was less scary, no guns drawn. He asked if he could ask questions in the living room. She said, sure. She said she was still nervous, that the police being at her house makes her nervous. She said she told them to take anything that they wanted. There were no restraints and no weapons drawn. But for the second entry, again, the testimony was that, from Detective Mehrer, that she wondered why they were back but she opened the door when they knocked. They asked to enter. She allowed them to enter. Said that she would be willing to answer additional questions. Advised that Mr. Diggs was not there. Again, that he had been there on July 2nd showering. And she took them back to show them the clothing. And that, in fact, she helped put the evidence in the evidence bag.
>
> So, I don't think *Bumper* is applicable because I don't think there was a representation by the police that was a lie . . . . The question for me is whether or not the State has been able to demonstrate by a preponderance of the evidence that the search – that the consent search of the house during the second entry was a valid exception to the requirement for a search warrant and whether the consent was freely and voluntarily given. If the police had come in the second time the way they came in the first time, I would agree with the Defense. But I don't think it's appropriate to merge the two entries. I also would concede that I don't think it's entirely fair to say that the second was not at all affected by the first entry. So, it's a difficult case in that regard. But the standard is preponderance of the evidence.
>
> Obviously, I'm struggling with it to some degree but I find that the second entry was, by a preponderance of the evidence a function of consent freely given by Ms. Snowden . . . . In this case, it's just pants and shirt that are out exposed and . . . they're not in a container . . . like a suitcase, that would . . . limit the police's ability to open up the suitcase. So, I find that the consent is, by the preponderance of the evidence, freely and voluntarily given . . . . I find that she had the authority to consent to that search and to allow the police to seize the pants and shirt on that day.

Diggs's Challenge

Diggs argues that although the suppression court "correctly acknowledged that Ms. Snowden did not consent to the first entry[,]" it erred in concluding "that she consented to the second entry." In Diggs's view, the "previous entry under an

authoritative show of force with an ostensible arrest warrant clearly informed Snowden's response to their return – without an independent search warrant." Because Ms. Snowden "did not expressly or impliedly consent to the subsequent search under the[se] circumstances[,]" Diggs maintains that the resulting GSR evidence should have been excluded.

We disagree. The suppression court made particularized findings in support of its determination that Ms. Snowden consented to the entry of her home and the ensuing search and seizure of the clothing that tested positive for GSR. The suppression record detailed above supports those findings.

Ms. Snowden testified that she opened the door for Detective Mehrer, agreed to answer his questions, described Diggs's visit on the day of the shooting, showed them the clothing he left behind in her room, and gave it to them. According to Ms. Snowden, the circumstances of the second entry by police differed materially from the first entry, in that there were only two or three officers who approached without weapons and with no mention of a warrant. She not only consented to police coming into her residence, she also agreed to talk with them, and to give them Diggs's clothing. Detective Mehrer corroborated that.

Ms. Snowden's cooperation with police is sufficient to establish that she freely and voluntarily consented to the search for and seizure of the clothing later tested for GSR. *See Riddick*, 319 Md. at 196. Accordingly, the hearing court did not err in denying Diggs's motion to suppress the resulting GSR evidence.

B. Confrontation Clause Challenge

As alternative grounds for reversal, Diggs contends that "[t]he gunshot residue evidence was adduced in violation of [his] constitutional right of confrontation," because the GSR test results on Diggs's clothing, were presented via the expert testimony of Mr. Coiro, with no supporting testimony by Allison Laneve, the analyst who conducted the GSR analysis and prepared a report of her findings. The State responds that "Coiro's testimony, and the nature of the Laneve report as Coiro explained it, make apparent that Coiro's opinion did not present or rely on a report that was 'testimonial,' and his analysis was independent from Laneve's in any event." For reasons that follow, we conclude that the challenged testimony reflected Mr. Coiro's independent analysis of non-testimonial information contained in Laneve's report, so that the absence of Laneve did not deprive Diggs of his right to confront a witness against him.

Sixth Amendment Standards Governing Whether Forensic Evidence Is Testimonial for *Crawford* Purposes

Generally, whether a particular statement to police is testimonial has been measured by whether it was intended as "an out-of-court substitute for trial testimony." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011); *see Derr*, 434 Md. at 114-15. Because that is a question of law, we conduct a *de novo* review of a decision to admit evidence over a Confrontation Clause objection. *See Langley v. State*, 421 Md. 560, 567 (2011).

The Supreme Court has applied the *Crawford* principle, *i.e.*, that a "testimonial" out of court statement is inadmissible against a criminal defendant who did not have an opportunity to cross-examine that declarant, to both forensic reports and expert testimony

based on forensic testing. Close votes and differing rationales in those decisions, however, have made applying the testimonial test in the forensic context a challenge for courts and counsel. *See Norton*, 443 Md. at 542. A summary of the principal lessons from pertinent Supreme Court cases and their Maryland progeny is an essential predicate for our review of the *Crawford* challenge asserted by Diggs.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009), the prosecution introduced into evidence "three 'certificates of analysis'" stating that certain plastic bags seized from the defendant had "'been examined with the following results: The substance was found to contain: Cocaine.'" The analysts who conducted the tests and wrote the certifications did not testify at trial. *Id*. at 309. Writing for a 5-4 majority, Justice Scalia applied the Confrontation Clause analysis he articulated in *Crawford*, concluding that the certificates of analysis were inadmissible without their authors, because they were essentially affidavits, which are among "the core class of testimonial statements." *Id.* at 310. The Court held that the certificates were subject to the Confrontation Clause because they gave "the precise testimony the analysts would be expected to provide if called at trial[,]" making them "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* at 310-11.

Another 5-4 decision in *Bullcoming v. New Mexico*, 564 U.S. 647, 653-54 (2011), involved the admission of a certified forensic laboratory report of the defendant's blood alcohol level. Because the analyst who performed the lab test was on leave during the trial, the prosecutor proffered the written report certifying the test results and a substitute analyst to testify in his place. *Id*. at 655-56.

The Supreme Court rejected the New Mexico Supreme Court's characterization of the original analyst as "'a mere scrivener' who 'simply transcribed the results generated by the gas chromatograph machine[,]" *id*. at 657, pointing out that the lab report stated, *inter alia*, that a certain "protocol" was followed. *Id.* at 660. Although another analyst who did not perform the testing was available to give "surrogate testimony" and to be cross-examined regarding the test procedures and results, that did not make either the report or his testimony regarding it admissible. *Id*. at 652. The analyst who authored the report had "certified that he received Bullcoming's sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number 'correspond[ed],' and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol" in accordance with "courts' rules that provide for the admission of certified blood-alcohol analyses." *Id*. at 660, 665.

Writing for the majority, Justice Ginsberg explained that the surrogate analyst "could not convey what [the original analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed." *Id*. at 661. Accordingly, "when the State elected to introduce [that analyst's] certification, [the analyst] became a witness Bullcoming had the right to confront." *Id.* at 663.

Notably, Justice Sotomayor, concurring in part, observed that among the "factual circumstances that this case does *not* present" are "a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence" and a case in which only "raw data generated by a

machine in conjunction with the testimony of an expert witness is presented to the jury." *Id*. at 673-74 (Sotomayor, J., concurring).

Those scenarios were later addressed in *Williams v. Illinois*, 567 U.S. 50 (2012). The issue in *Williams* was whether an expert's opinion that two DNA samples matched rested on testimonial evidence for *Crawford* purposes. *Id*. at 56 (Alito, J., plurality opinion). In that case, the defendant was convicted of rape in a bench trial, after DNA evidence linked him to semen on a vaginal swab from the victim. *Id*. That swab was sent to a private laboratory, Cellmark, which generated a DNA profile according to its testing protocol. *Id.* at 59. Instead of presenting testimony by individuals involved in creating the Cellmark report, the prosecutor called three different forensic experts who separately (1) confirmed the presence of semen in the vaginal swab and developed a DNA profile from that biological material, (2) developed a DNA profile from the blood sample given by Williams after an arrest in 2000, and (3) matched that DNA profile from Williams's arrest to the Cellmark DNA profile from the victim's vaginal swab. *Id.* at 60. Over Williams's objection, the third analyst testified that the Cellmark DNA profile matched the profile from his arrest. *Id*. at 62-63.

The Supreme Court of Illinois upheld the conviction, reasoning that the Cellmark profile itself was not admitted into evidence and was relied on by the testifying analyst only "to show the underlying facts and data [the analyst] used before rendering an expert opinion." *Id*. at 64. The Supreme Court affirmed in a 4-1-4 decision, reflecting agreement among five justices that an expert forensic witness may rely on nontestimonial

facts discovered by another technician or analyst, as the basis of his own independent opinion, without violating the Confrontation Clause. *See id.* at 67.

The plurality opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy and Breyer,[6] noted that "it has long been accepted that an expert witness may voice an opinion on facts concerning the events in a particular case even if the expert lacks first-hand knowledge of those facts." *Id*. at 67. The plurality reasoned that a surrogate analyst could provide an independent opinion based on uncertified lab tests performed by other forensic professionals, where the underlying report of those test results was not admitted into evidence, but merely "explain[ed] the assumptions on which that opinion rests[,]" because the test results were not admitted for their truth, but only as the premise upon which the testifying analyst relied. *See id*. at 56-58.

"As a second, independent basis for [its] decision," the plurality opinion "conclude[d] that even if the report produced by [the nontestifying Cellmark analyst] had been admitted into evidence, there would have been no Confrontation Clause violation[,]" because that report was not testimonial within the purview of *Crawford*. *Id.* at 58. In the plurality's view, the DNA profile was not testimonial because it was not generated for the "primary purpose of accusing a targeted individual." *Id.* at 85. Given

[6] Justice Breyer also wrote a concurring opinion to separately support reargument in order to refine the determination of how the Confrontation Clause applies "to the panopoly of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians[.]" *Williams*, 567 U.S. at 86 (Breyer, J., concurring).

that it "was produced before any suspect was identified" and not "for the purpose of obtaining evidence to be used against [Williams], who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose[,]" the Cellmark report "was not inherently inculpatory." *Id*. at 58.

In these circumstances, there was little danger that the trial judge, sitting as fact finder, would treat the analyst's testimony "as furnishing 'the missing link' in the State's evidence regarding the identity of the sample that Cellmark tested." *Id*. at 74. Nor was "[t]he correctness of this expert opinion, which the defense was able to test on cross-examination, . . . in any way dependent on the origin of the samples from which the profiles were derived. Of course, [her] opinion would have lacked probative value if the prosecution had not introduced other evidence to establish the provenance of the profiles, but that has nothing to do with the truth or her testimony." *Id*. at 77. In any event, "[w]hen the work of a lab is divided up[,]" with "numerous technicians work[ing] on each DNA profile . . . it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." *Id*. at 85.

Justice Thomas, who supplied the deciding fifth vote in favor of admissibility, did not join the plurality opinion. In a separate concurring opinion, he rejected the primary purpose test. *See id.* at 103-04, 108 (Thomas, J., concurring). Instead, his position was that determining whether evidence of forensic results is testimonial should be measured by whether it meets the formality threshold announced in *Crawford*, in that the challenged statement bears "indicia of solemnity." *See id*. at 104, 118. Justice Thomas distinguished the DNA profile underlying the expert testimony in Williams's case, from

the testimonial lab reports in *Melendez-Diaz* and *Bullcoming*, on the ground that, unlike those certified statements, "nowhere does the [DNA] report attest that its statements accurately reflect the DNA testing processes used or the results obtained." *Id.* at 111-12.

In dissent, Justice Kagan, joined by Justices Scalia, Ginsberg, and Sotomayor, pointed out that Justice Alito's plurality opinion is, "in all except its disposition, . . . a dissent," because "[f]ive justices specifically reject every aspect of its reasoning and every paragraph of its explication." *Id*. at 120 (Kagan, J., dissenting). The dissenters also observed that Justice Thomas's formalism test lacks precedential value because "no other Justice joins his opinion or subscribes to the test he offers." *Id.* In the dissenters' view, "[t]hat creates five votes to approve the admission of the Cellmark report, but not a single good explanation." *Id*. at 120.

The dissent concluded that the use of the Cellmark DNA report could not be distinguished from the testimonial reports that were erroneously admitted in *Melendez-Diaz* and *Bullcoming*, because "it was made to establish 'some fact' in a criminal proceeding – here, the identity of [a victim's] attacker." *Id*. at 123.

Our Court of Appeals, when called upon to interpret these differing rationales for the *Williams* decision, initially applied Justice Thomas's formalism test, considering it the narrowest. In *Derr v. State*, 434 Md. 88, 115 (2013), commonly cited as *Derr II*, a majority of the Court of Appeals held that for a statement to be testimonial under *Williams*, it must, at a minimum, include "indicia of solemnity" or "be formalized[.]" *Id*. at 115.

At issue were results from serological and DNA testing that the State used to identify Derr as the person who raped the victim. *Id.* at 98-99. At trial, an FBI expert testified that she found a match "after reviewing the 'bench work' of the DNA analysis conducted by her team and that which was performed by analysts that she did not supervise." *Id*. at 100. That "bench work" reflected testing performed in the lab by forensic technicians who "look at the items of evidence and then examine those items for blood and semen and then do the DNA testing." *Id*. at 100 n.7. According to the FBI analyst, "[t]hey give me . . . all of their results and I'm the one who does all the interpretation." *Id.*

The Court of Appeals held that results of the serological and DNA exams were "not sufficiently formalized to be testimonial." *Id*. at 118-19. In contrast to "affidavits, depositions, prior testimony, or statements made in formalized dialogue or a confession[,]" *id*. at 116, there were "no signed statements or any other indication that the results or the procedures used to reach those results were affirmed by any other analyst, examiner, supervisor, or other party participating in its development." *Id.* at 118-19.

The Court of Appeals applied this standard in a companion case, *Cooper v. State*, 434 Md. 209, 236 (2013), holding that the trial court did not err or abuse its discretion in admitting both a forensic report prepared by a non-testifying expert and testimony by an expert who relied upon that report. The nontestimonial report was "a two page document indicating . . . what items were tested, what procedures were used to develop the results, and the DNA results developed from the testing." *Id.* at 236. Nothing in the report

indicated "that the results are sworn to or certified or that any person attests to the accuracy of the results." *Id.*

The following year, this Court applied the formalism test to exclude an autopsy report in *Malaska v. State*, 216 Md. App. 492, 510 (2014), *cert. denied*, 439 Md. 696 (2014), *cert. denied*, 135 S. Ct. 1162 (2015). Because that report was testimonial, the assistant medical examiner who merely supervised the autopsy was not the proper person to testify about it. *See id*. at 502-05. We reasoned that autopsies bear statutorily prescribed indicia of solemnity, including the signatures of medical examiners and the Chief Medical Examiner for the State of Maryland and attestations regarding the requirements governing the medical examiner's investigatory procedures and protocol. *See id.* at 510-11. Given these statutorily prescribed requirements, autopsy reports are "sufficiently formalized to be 'testimonial' for purposes of the confrontation clause." *Id.* at 511.

The following year, in *State v. Norton*, 443 Md. 517, 542-43, 547 (2015), a unanimous Court of Appeals, acknowledging that the confusion created by *Williams* continued after *Derr II* and *Cooper*, supplied further guidance to courts called upon to construe those decisions in determining whether to admit forensic evidence over a *Crawford* challenge. At issue in that case was a report of DNA results from a mask used in a robbery. *See id.* at 519, 552. The *Norton* Court held that the inclusion, in a three-page "Forensic DNA Case Report," of language that its results were "within a reasonable degree of scientific certainty[,]" made the report "testimonial within the meaning of *Williams*[.]" *Id.* at 552-53.

Writing for the Court, Judge Battaglia clarified that trial courts should read the Alito and Thomas rationales in *Williams* as alternative measures of what qualifies as testimonial in the context of forensic evidence. *Id*. at 546-48. To be testimonial under Justice Thomas's "formalism" test, the forensic report must contain indicia of solemnity. *See id*. at 547-48. "Such formality does not require that the document contain specific words of attestation, but that the report, in substance, functions as a certification." *Id*. at 548. Although no bright-line rule has been established to determine when a forensic report is sufficiently "formalized," examples cited by the Supreme Court include "'affidavits, depositions, prior testimony, or statements made in formalized dialogue or a confession.'" *Id.* at 548-49 (quoting *Derr II*, 434 Md. at 116; *Williams*, 567 U.S. at 82 (Thomas, J., concurring)).

"Should there be a determination that the document in issue was not formal," the Court continued, "the next inquest would be whether the report has 'the primary purpose of accusing a target individual of engaging in criminal conduct.'" *Id*. at 548. "[T]he forensic document, to be testimonial pursuant to the *Williams* plurality, must contain a conclusion that connects the defendant to the underlying crime." *Id*.

The *Norton* Court then reviewed the forensic evidence challenged in *Derr II* through this updated analytical framework. *See id*. at 550-51. The Court affirmed that laboratory reports like the DNA reports at issue in *Derr II*, containing "no statement regarding the accuracy of the procedures the analyst had used to reach the results and . . . created before a suspect had been identified in the investigation[,]" are not testimonial under the alternative rationales forming the *Williams* majority. *Id.* at 550.

Applying this analytical framework to the report challenged by Norton, the Court of Appeals held:

> [u]nder the paradigm so articulated, the Forensic DNA Case Report at issue in the instant case is testimonial. With respect to Justice Thomas's formality inquiry, the Report contains a certification in the phrase "within a reasonable degree of scientific certainty." The inclusion of such language, "within a reasonable degree of scientific certainty," in a DNA report identifying a match between a defendant's profile with that of a perpetrator is key to the acceptance of the expert's testimony into evidence in Maryland. Without this language certifying the result, the testimony is without foundation. The phrase, then, of "within a reasonable degree of scientific certainty", constitutes such "talismanic words" that, without them, the testimony cannot cross the threshold of acceptance by the judge as gatekeeper.

Id. at 548-49 (citations and footnote omitted).

Moreover, with respect to Justice Alito's primary purpose inquiry, the DNA report was testimonial "because it was created with the primary purpose of accusing a target individual of engaging in criminal conduct[,]" *id.* at 549, as evidenced by the statement that "within a reasonable degree of scientific certainty, Harold Norton . . . is the major source of the biological material obtained from the evidence[.]" *Id.* at 549.

Relevant Record

Before the State called Mr. Coiro as an expert in GSR analysis, defense counsel objected to his testimony because Diggs had "a right to cross examine the analyst who performed the . . . gunshot residue analysis in this case[,]" and "Mr. Coiro is not that person, he is a stand in analyst."

Outside the presence of the jury, Mr. Coiro was *voir dired* about the GSR analysis he performed as a forensic analyst at a private laboratory, R.J. Lee Group. Defense

counsel elicited Mr. Coiro's testimony about how GSR is created and deposited on clothing. Mr. Coiro explained that when a gun is fired, a plume of particles "will fuse together," forming what is known as a "three component particle" containing "lead, antimony, and barium." Such particles are not visible to the naked eye.

Defense counsel then asked Mr. Coiro about the collection and analysis of GSR samples generally, prompting the following colloquy:

> [DEFENSE COUNSEL]: When R.J. Lee receives a piece of clothing, the analyst will collect a sample from the clothing?
>
> MR. COIRO: Yes.
>
> [DEFENSE COUNSEL]: You did not collect the samples from the clothing itself, correct?
>
> MR. COIRO: No I did not.
>
> [DEFENSE COUNSEL]: How was that sample collected?
>
> MR. COIRO: So the sample from the clothing would have been collected in what we call article extraction. Basically what this is is the attempt of the analyst to transfer the particles of potential gunshot residue from the item of clothing to an adhesive stub, that's about the size of a dime. Then this stub can be placed in our instrument that we used for the analysis of gunshot residue.
>
> [DEFENSE COUNSEL]: The analyst will then use a scanning electron microscope to see the particles?
>
> MR. COIRO: Yes.
>
> [DEFENSE COUNSEL]: The analyst in this case who is not here, used a scanning electron microscope in this case?
>
> MR. COIRO: Yes.
>
> [DEFENSE COUNSEL]: The analyst will look for either three component particles, or one component particle?

MR. COIRO: According to our standard operating procedure at R.J. Lee Group, we only relocate or manually confirm three components and two component particles. However we do put the number of one component particles available in there as well.

[DEFENSE COUNSEL]: The analyst also looks for the morphology and the size of the particles?

MR. COIRO: Yes.

[DEFENSE COUNSEL]: You were not able to view yourself the morphology and the size of the particles?

MR. COIRO: No.

[DEFENSE COUNSEL]: The morphology and the size of the particles are an essential part of a gunshot residue analysis?

MR. COIRO: Yes.

[DEFENSE COUNSEL]: You are relying on the analyst who did the analysis as to her conclusions that the particles exhibited the correct size and the correct morphology of gunshot residue?

MR. COIRO: Um, yes. However –

[DEFENSE COUNSEL]: Yes or no?

MR. COIRO: Yes.

[DEFENSE COUNSEL]: With the scanning electron microscope, are imageries created on a computer screen or does the analyst look through a microscope physically with her own eyes?

MR. COIRO: The images are created on the computer screen.

[DEFENSE COUNSEL]: You never viewed the images in this case?

MR. COIRO: No.

On cross-examination, the prosecutor elicited additional information that clarified Mr. Coiro's work in this case:

[PROSECUTOR]: Mr. Coiro, in this case what did you do?

> MR. COIRO: So in this case I was able to complete an independent review of Allison's case file.
>
> [PROSECUTOR]: And who is Allison?
>
> MR. COIRO: Allison Laneve is my manager. She's also a forensic scientist who completed the analysis on this case . . . .
>
> [B]asically what I did is the same thing that I would do during the technical review. So throughout our case work process, we have multiple forms of review, basically the analyst is the first review. The second review is the technical review. They make sure that everything is in line in . . . the case file. They're also able to look at what we call run sheets. These run sheets are oriented from the instrument and they have a picture of the particle that we're looking at, as well as the size and the spectrum that is present in the physical instrument itself. And agree or disagree with any of Allison's decisions on what she confirmed that a particle was.
>
> So I was able to look at all the [run] sheets. I was able to look at all the photos and information as far as notes that she collected during the processing of the evidence. A[n]d I believe that was it.

When the prosecutor asked Mr. Coiro whether "the morphology, the size of the particles[,]" is "something that's created by the SEM machine[,]" Mr. Coiro answered "no," then explained that "we would expect to see from a particle characteristic of gunshot residue, a rounded kind of molten looking particle as a result of a high heat reaction." If a particle is "jagged looking" or "broken looking, as if it was chipped off" a larger whole, he "would expect that that particle may come from somewhere else."

Mr. Coiro testified that he had done "around a hundred" GSR analyses. He reviewed the standard procedure and paperwork for "casework." This includes "chain of custody track[ing] movement of all the evidence throughout the entire time that it's at R.J. Lee Group" and "an evidence handling sheet" for recording "notes on where" the tested sample from the garments "comes from and where it goes." He explained:

> As well as for this case, Allison [Laneve] would have used a particle extraction which basically she would have documented the item of clothing, where she took samples from, any special request from the client as far was where they wanted sampled.
>
> And then we would set that up on our instrument and from there we would fill out what we call account sheets. Basically we're putting in numerical piece[s] of data to the particles that we look at. So in this case, she would have reported the amount of three component particles and the two component particles that she had found in this case on that sheet.

The prosecutor then focused on Mr. Coiro's role in analyzing the evidence in this case:

> [PROSECUTOR]: And you said a few times, Allison would have done this, Allison would have done that. Did you have an opportunity to review all of her notes?
>
> MR. COIRO: Yes, so she did do that in this case.
>
> [PROSECUTOR]: Okay. Mr. Coiro, after review of her notes, is there anything that she did that is not in compliance with what you understand to be the practice of particle extraction?
>
> MR. COIRO: No.

The trial court asked several questions to clarify that "morphology" means "just the shape" of the particles and that Mr. Coiro was not "the original analyst . . . . [t]o look at the pictures of the particles[.]" Mr. Coiro answered that "the pictures of the particles that [Ms. Laneve] had looked at are included in what we call a run sheet." That "run sheet" contains "images and spectra and sizing of the particles that are associated with that case." This shows "every particle that she went back onto the instrument and what we call relocated on[,] which is a term to describe her going on the instrument" and "specifically locating the particles that the instruments says are part of a population of

gunshot residue and her reviewing all of that information and determining whether that particle is a part of the population of gunshot residue."

On recross-examination, the prosecutor focused on how Mr. Coiro formed his opinion that there was "a population of gunshot residue" present on the clothing submitted for analysis:

> [PROSECUTOR]: And what is that based on?
>
> MR. COIRO: So that's based on my analysis of Allison's case file and the particles that I have seen in her case file that she looked at that I also looked at that I deemed as part of the population of gunshot residue.

On further re-direct, defense counsel elicited more details about Coiro's actions and opinion:

> [DEFENSE COUNSEL]: You are relying on the conclusion of Allison when you say that they have the proper size for morphology?
>
> MR. COIRO: No, because I'm able to look at the picture of the image and that that picture also comes with the size of the particle as well. So I can see what size the instrument gave that particle as well as the shape of that particle.
>
> [DEFENSE COUNSEL]: You said you never looked at the images.
>
> MR. COIRO: The images specifically on the instrument itself. I've looked at the run sheets that are associated with them.

Based on this evidence, defense counsel argued that "there is [a] subjective component to this analysis that Allison Laneve did, not Mr. Coiro." Asserting that "Mr. Coiro cannot proceed without the subjective opinion of Allison Laneve[,]" counsel maintained that

> [w]e have a right to cross-examine Allison Laneve as to the proper size and morphology of a gunshot residue particle and also as to what she physically saw.

> Mr. Coiro never saw the images himself. He's relying completely on the analysis that Allison Laneve did and if we're not allowed to cross-examine her, our rights to confrontation are severely diminished and violated.
>
> The prosecutor responded:
>
> Mr. Coiro is not relying completely on Allison's findings. This is not a case like Counsel had argued earlier in *Bullcoming* where Mr. Coiro was coming in and saying, yes I'm a scientist, and Allison Laneve did this report and she certified it and I'm going to introduce it, and here it is, and I have nothing to look at it. I had nothing to do with it, I'm just here to present it to you all. In *Bullcoming*, the Court noted specifically that the stand[-in] analyst had no independent opinion and that was a deciding factor in that case.
>
> And Your Honor, in [*Melendez-Diaz*] *v. State*, which is what the State relies on, as the Court is aware, is that the DNA . . . was not testimonial because . . . it's not formalized enough to be testimonial. Mr. Coiro testified that he reviewed her notes. That he looked at the photos independently. That he made his own independent conclusion and [the] State believes that this is an issue of weight and not admissibility.
>
> The court denied the defense motion to exclude Mr. Coiro's testimony, ruling:
>
> [A]s I understand Mr. Coiro's testimony, he looks at the run sheets which include[] the pictures of the particles that are essentially produced in the [scanning electron microscope] . . . .
>
> I understand from his testimony that the microscope identifies the size and I think the morphology of the particle. So he has the opportunity to independently review what the other expert saw first. Assuming . . . that he has the expertise, I don't know why he couldn't offer his own opinion on GSR. Does that adequately resolve, perhaps not the one that you hoped but are you also speaking to the admissibility of the other expert's report?

After the prosecutor advised that "the State is not seeking to introduce the report into evidence[,]" defense counsel raised "the collection of gunshot residue" as "[a]nother subjective area" about which "we would have the right under the confrontation clause to cross examine Ms. Laneve[.]" Pointing out that the "garments were sent to the lab[,]"

defense counsel argued that "figur[ing] out exactly where" on the clothing "gunshot residue samples were taken" also "would require cross-examination of Ms. Laneve." When the prosecutor confirmed the court's impression that there was "some record of the approximate area from which the various samples were taken[,]" via "the markings on the shirt" and shorts, the court denied the motion to exclude Mr. Coiro's testimony.

Diggs's Challenge

Diggs contends that "*Williams* has limited application to the facts of this case[,]" while "*Bullcoming* and *Melendez-Diaz* control . . . in respect to the Sixth Amendment claim." In Diggs's view, *Williams* "is not binding precedent[,]" and "the 'formality' requirement that the Court of Appeals divined from *Williams* does not apply[,]" because it represents only "a plurality opinion" of four Supreme Court justices. Moreover, *Williams* is distinguishable because at this jury trial, "the testimony of Coiro was admitted for the truth of the results obtained by the non-testifying analyst[,]" Ms. Laneve. Alternatively, Diggs posits,

> Article 21 of the Maryland Declaration of Rights . . . provides independent authority upon which this Court should conclude that in order to satisfy that right of confrontation the analyst who actually conducts the gunshot residue analysis is required to testify at trial – under oath and subject to cross-examination – before any testimony based on such analysis is admissible in evidence.

The State counters that Mr. Coiro's testimony differs from the "signed, certified, or otherwise formalized report[s] when the author of the report is not present." Because the State "did not seek to introduce the results of Laneve's analysis," "[t]his case . . . had only to do with [Mr.] Coiro's testimony," which "was based on data, not a formalized or

testimonial report." Moreover, defense counsel "did not refer the court to any particulars of the [Laneve] report itself at the time he objected to Coiro's testimony[,]" nor has Diggs explained to either the trial court or this Court "any way that Laneve's report is 'formalized' such that its use at trial would have been improper under *Williams* and *Derr II*." "In any event," the State argues, "Coiro's testimony was not improper because he did not act as a 'surrogate' for Laneve, or present her opinions. Indeed, he made apparent that he was not a substitute for Laneve, but that his review was separate and distinct from hers."

We conclude that Mr. Coiro's testimony that there was GSR on the tested garments was not premised on a report that falls within the *Crawford* class of testimonial forensic evidence. The State explained that it was not seeking to admit Ms. Laneve's notes or report, but rather to elicit Mr. Coiro's expert testimony based on his review of the run sheets. Mr. Coiro opined that the samples taken from the two garments submitted by police had gunshot residue on them, based on his independent review of the same material analyzed by Ms. Laneve. Although Mr. Coiro did not look into the microscope, he viewed the "run sheets" with all the images and data generated by that instrument, then came to his own conclusion that the samples showed deposits of GSR.

To the extent Mr. Coiro's testimony relied on the sampling reflected in Ms. Laneve's notes and report, we are not persuaded that those notes were testimonial. To be sure, Mr. Coiro described the standard procedure at the R.L. Lee Group for creating the "stubs" that fit into the scanning electron microscope, then stated that he relied on Ms.

Laneve's records indicating that she followed that protocol and identifying where on the two garments she took samples.

This case differs from *Bullcoming* and *Melendez-Diaz* because the challenged evidence was not a forensic report written by a nontestifying analyst. Instead, as in *Williams*, the challenged evidence was the testimony of a second analyst who performed an independent examination of the same data previously reviewed by the nontestifying analyst. Here, as in *Williams*, the testifying analyst, relied on the bench notes of the nontestifying analyst about the procedures she used in creating the samples for testing. In contrast to *Bullcoming*, *Norton*, and *Malaska*, there is no indication that Ms. Laneve's report contains talismanic testimonial language attesting to that procedural protocol. Nor is there a mandatory certification for GSR testing protocol.

To the extent Mr. Coiro opined that there was gunshot residue on the garments, that testimony was premised on his independent analysis of the run sheets. To the limited but fully disclosed extent Mr. Coiro relied on the sampling information recorded in Ms. Laneve's report, that aspect of the report was not testimonial under either the Thomas "formalism" test or the Alito "primary purpose" test.

As in *Derr II* and *Cooper*, Ms. Laneve's notes do not meet the threshold for formalized testimony because there is no evidence they were accompanied by solemnities such as an attestation that the report's "statements accurately reflect the . . . testing processes used or the results obtained," *Williams*, 567 U.S. at 111 (Thomas, J., concurring), or that they were otherwise certified in accordance with a process formalized by law. *See Malaska*, 216 Md. App. at 510-11; *See, e.g., Cooper*, 434 Md. at 236

(holding that a two page report describing testing procedures and subject, but lacking certification or attestation was not testimonial)*; Derr II*, 434 Md. at 119 (concluding that a report bearing the initials of two reviewers was not testimonial, without statements "attesting to their accuracy or that the analysts who prepared them followed any prescribed procedures").

Absent any indication that Ms. Laneve's notes about the sampling protocol mentioned Diggs or otherwise linked him to the test results, the primary purpose of the sampling information provided by Ms. Laneve was not to tie Diggs to the crime. As in *Williams*, the GSR evidence was linked to Diggs only through other circumstantial evidence regarding its provenance, *i.e.*, when and where the garments were recovered and what Ms. Snowden told police about them. Nothing in the record shows that either Mr. Coiro or Ms. Laneve was aware of whose garments they were analyzing or the circumstances under which those garments were seized.

Based on this record, we conclude that the sampling procedures reviewed by Mr. Coiro were not testimonial hearsay. In turn, because Mr. Coiro testified about his independent examination of those samples, relying only on Ms. Laneve's non-testimonial description of her sampling procedures, the trial court did not err or abuse its discretion in overruling Diggs's Confrontation Clause objection to Mr. Coiro's testimony.

III. Cell Phone Evidence

Diggs next contends that the trial court erred in admitting evidence obtained from the cell phone recovered during the warrant search of Ms. Roseborough's Hillside Road residence. He asserts this evidence was (A) obtained illegally through the use of a cell

site simulator and (B) that it is "irrelevant because of the lack of any connection between [a]ppellant and the cell phone." We again address Diggs's alternative challenges in turn.

A. Use of Cell Site Simulator

Diggs asserts that police violated his Fourth Amendment right to be free of unreasonable searches and seizures by "[l]ocating [him] via a cell site simulator and the subsequent search and seizure at Ms. Roseborough's Washington, D.C. residence." A cell site simulator, in essence, is "an undercover cell tower." *State v. Copes*, 454 Md. 581, 586 (2017). Mimicking a cell tower on the network of the target phone's service provider, this device "takes advantage of the fact that a cell phone—when turned on—constantly seeks out nearby cell towers, even if the user is not making a call." *Id.* at 589 (citation omitted). When within range of the simulator, the target phone "will connect to it as though it were a cell tower." *Id*. Investigators can use this instrument in real time to "produce a fairly accurate estimate of the target phone's location." *Id*. (footnote omitted). For reasons that follow, we conclude the court did not err in denying Diggs's motion to suppress evidence obtained after police were authorized to use a cell site simulator during their search for the fugitive Diggs.

Fourth Amendment Limitations on Use of a Cell Site Simulator

In *State v. Andrews*, 227 Md. App. 350, 394-95 (2016), this Court held that "cell phone users have an objectively reasonable expectation that their cell phones will not be used as real-time tracking devices through the direct and active interference of law enforcement." For that reason, we concluded that "the use of a cell site simulator

requires a valid search warrant, or an order satisfying the constitutional requirements of warrant, unless an established exception to the warrant requirement applies." *Id.* at 395.

We also rejected the State's contention that a court order authorizing the collection of cell site location information ("CSLI"), via a pen register/trap and trace device,[7] should be treated as the functional equivalent of a warrant. *See id*. at 409-13. We reasoned that such an order "failed to meet the requirements of a warrant" because the "limited showing" necessary to obtain such an order does not require "a showing of probable cause that contraband or evidence of a particular crime will be found through the particular manner in which the search is conducted" and also "falls short of the particularity required for the issuance of a search warrant[,]" given the lack of "geographic boundaries," "reporting requirements," or "requirements that any unrelated data be deleted . . . ." *Id*. at 412.

[7] "At the time of the investigation in *Andrews*, no statute specifically addressed the use of a cell site simulator or other device to track a cell phone's location." *State v. Copes*, 454 Md. 581, 590 (2017). It was common practice then to obtain "judicial authorization to use a cell site simulator by following the established procedures for obtaining authorization to use a pen register or trap and trace device." *Id.*

"In simple terms, a pen register records the numbers dialed out from a given phone, and a trap and trace device records the numbers that dial into that phone." *Id*. Although "[t]he Fourth Amendment does not require law enforcement officers to obtain a search warrant in order to use a pen register or trap and trace device[,]" the legislature has since required police "to obtain judicial approval before using a pen register or a trap and trace device in an investigation." *Id.* at 590-91. *See* Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article (5-101 to end) § 10-4B-03(a). Since 2014, the General Assembly has "provided a specific judicial procedure to authorize law enforcement use of location tracking through cell phones," requiring a showing of probable cause. *See* Md. Code (2001, 2008 Repl. Vol.), Criminal Procedure Article § 1-203.1 *et seq.*; *Copes*, 454 Md. at 592.

When "the constitutionally tainted information" was "excised from the warrant" obtained after Andrews was located via a cell site simulator, there was "no credible argument that evidence of Andrews's presence in the home was obtained by independent lawful means" because "the only information linking Andrews and [the residence] was the fruit of the Fourth Amendment violation." *Id*. at 414-15. Applying the exclusionary rule, we held that the suppression court erred in denying the motion to suppress evidence obtained when police arrested him at that residence. *See id.* at 420.

Subsequently, in *State v. Copes*, 454 Md. 581, 586-87, 604 (2017), the Court of Appeals considered the use of a cell site simulator but declined to decide whether it constituted a Fourth Amendment search. In that case, a murder victim's cellphone was stolen and believed to be in the possession of someone with knowledge of the crime. *Id.* at 586. Police obtained an order under the pen register statute, authorizing seizure of historical and real-time CSLI regarding that cellphone. *Id*. at 594-96.

The Court of Appeals held that even if a warrant was necessary to use a cell site simulator, the evidence in this case was admissible under the exception to the exclusionary rule for police conduct undertaken in "objectively reasonable good faith," because police reasonably relied on the prior judicial authorization covering the use of a "cellular tracking device" to locate Copes's phone.[8] *See id*. at 586-87, 626-29. Although

[8] In *United States v. Leon*, 468 U.S. 877, 919-20 (1984), the Supreme Court held that evidence seized under a warrant that was subsequently determined to be invalid, may be admissible if the officers executing the warrant acted in objective good faith and reasonable reliance on the warrant. "'[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' Penalizing the officer for (continued)

the order in that case did not explicitly seek authorization to use a cell site simulator, it did authorize law enforcement to "'employ surreptitious duplication of facilities, technical devices or equipment to accomplish the use of a . . . Cellular Tracking Device, unobtrusively and . . . initiate a signal to determine the location of the subject's mobile device'" via global positioning system tracking in real-time. *See id.* at 595-96. Concluding that "[a] fair reading of this order would encompass a cell site simulator," *see id*. at 629, the Court held that "when, in addition to being sworn, the application for the order demonstrates probable cause, and the order satisfies the particularity requirement of

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the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921 (citation omitted).

The *Leon* Court reasoned that because "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," the rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id*. at 916, 919; *see also Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984) (holding that a police officer is not "required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested").

As this Court has explained,

> The Good Faith Exception was a watershed. Read in their totality, *Leon* and *Sheppard* explain that the Fourth Amendment's fundamental protection consists of taking the decision to search or to seize out of the hands of the officer, engaged in the often competitive enterprise of ferreting out crime, and entrusting it to the neutral and detached judicial figure. That location of the decision-making authority in the judge, whenever possible, is the very function and purpose of the Fourth Amendment's warrant clause.

Joppy v. State, 232 Md. App. 510, 539, *cert. denied*, 454 Md. 662 (2017) (citation omitted).

the Fourth Amendment[,] . . . it does not matter whether the order is labeled a 'warrant.' The constitutional requirements are addressed to substance, not form." *Id*. at 625.

"Given that the Supreme Court has instructed that suppression should be a 'last result' and not a 'first impulse,' this [was] an appropriate case for application of the good faith exception." *Id*. at 630. The *Copes* Court held that "it was objectively reasonable for the detectives to believe that their use of the cell site simulator pursuant to the court order was permissible under the Fourth Amendment." *Id*. at 629-30. For that reason, the "evidence obtained as a result of detectives' use of the cell site simulator should not be suppressed because of use of that device." *Id*. at 630.

The Suppression Record

On October 25, 2016, more than three months after the shootings, police sought an *ex parte* order authorizing the Howard County Police Department and United States Marshals "to use a cell site simulator to obtain real-time information for a cellular telephone" with the number 202-244-6947. In support, Howard County Police Detective George Ellis submitted an affidavit stating that he

> recently learned of a telephone number for DIGGS from a concerned citizen who has provided corroborated information in the past. The concerned citizen also advised that they have spoken to DIGGS on this telephone number on several different occasions in the last week. The telephone number is identified as 202-422-6947. Your Applicant spoke with representatives of Sprint and learned that this is an active account and all information obtained shows that as of October 9, 2016 there was activity on this account. Your Applicant knows through his training, knowledge and experience that people committing these crimes often have multiple phones and that these individuals routinely switch between telephones and share telephones with family/friends to avoid law enforcement.

The same day, a judge of the Circuit Court for Howard County issued an order granting such authorization.

On October 27, 2016, a Metropolitan District Police detective in the District of Columbia obtained a warrant from the Superior Court for the District of Columbia, authorizing the search of Ms. Roseborough's residence, based on an application that included the following information:

> **INVESTIGATION**
>
> * * * *
>
> 8. On July 3, 2016, an arrest warrant was issued by a judicial officer . . . charging Mr. Kenneth Frizzell Diggs Jr. with First Degree Murder (Warrant D160467915). Members of the US Marshals Regional Fugitive Taskforce assumed responsibility for locating and arresting Mr. Diggs.
>
> 9. Information was been obtained that Mr. Diggs Jr. has been using a telephone number (202) 422-6947. *Cell site records and GPS precision location* has located the telephone (202) 422-6947 in the immediate area of 4649 Hillside Road SE since October 18, 2016 and had currently been in the area on today's date October 27, 2016.
>
> 10. Call detail records obtained for the number (202) 422-6947 have been in contact within the last ten days with the telephone number (202) 425-0628. The telephone number is the second most called number according to cell phone records. The number (202) 425-0628 is associated with a Ms. Shanna Roseboro [sic] through social media. Ms. Shanna Roseboro [sic] resides at 4649 Hillside Road SE Apartment #4. This was verified by a landowner at the apartment building as well as neighbors who also reside in the apartment building located at 4649 Hillside Road SE. The investigation has revealed that Shanna Roseboro [sic] is an associate of Mr. Diggs Jr.
>
> 11. Members of the Capitol Area Regional Fugitive Task Force responded to 4649 Hillside Road SE to attempt to locate Mr. Diggs Jr. The apartment building . . . has five apartment units. Apartments #1, 2, 3, 5, were checked and Mr. Diggs was not found in any of the apartments. Law enforcement knocked several times on Apartment #4 and no one answered the door.

> **PROBABLE CAUSE:**
> 12. Based on your affiant's training, knowledge and experience, and the previously described facts, your [affiant] submits that there is probable cause to believe that the fugitive, Kenneth Frizzell Diggs Jr., is inside of the target residence.
>
> 13. . . . Your affiant also knows that evidence of the crime can be in the form of communication between the suspect and co-conspirators of this crime and that such communication can be stored on . . . cellular telephones . . . .
>
> **DESCRIPTION OF ITEMS TO BE SEIZED:**
> 14. Your affiant therefore prays that a search and seizure warrant be issued for said premises, granting permission to enter the residence, search for, and seize . . . [c]ell phones . . . which may have GPS capabilities and place Diggs at the scene of the crime and which may contain communications about the crime . . . .
>
> **REQUEST:**
> 16. The residence is currently surrounded by police officers, pending the issuance the issuance of this warrant. Given the nature of this crime and Diggs criminal history (currently on parole for murder), it is imperative that the fugitive be apprehended without delay. We therefore make application for an after-hours emergency search warrant.

Before trial, Diggs moved to suppress evidence of the cell phone recovered in the Ms. Roseborough's apartment, during the warrant search conducted on October 27, 2016, after Diggs was arrested there. At the hearing on that motion, Detective Mehrer testified that in attempting to locate Diggs, he subpoenaed Diggs's cell phone records; linked that phone to Ms. Roseborough; reviewed her social media; "put up some cameras;" "used different websites . . . to locate IPA;" and did "a lot of sitting and watching." Although he was aware that the United States Marshals had a cell site simulator, Detective Mehrer testified that he did not know whether they actually used that technology to find Diggs.

The hearing court denied Diggs's motion to suppress the cell phone evidence, stating that Diggs had "not demonstrated standing" to object to the warrant to search Ms. Roseborough's residence and that "[j]ust by virtue of the cellphone being tracked to that location I would say does not give him standing to contest a search of that location."

Diggs's Challenge

Relying solely on *Andrews* for the proposition that a warrant is required before police may use a cell site simulator, Diggs ignores *Copes* and does not address the good faith exception in the analogous circumstances presented by this case. He simply contends that the suppression court erred in failing to exclude evidence from the cell phone recovered at Ms. Roseborough's apartment because "the evidence at the motions hearing demonstrated that police had used cell site simulators to track [him] in real time and that is reflected in the affidavit and application for the warrant."

The State counters that Diggs "could not show that police relied on cell site simulator technology," and that the record shows that police established probable cause based on evidence developed through an "investigation independent of such technology." In the State's view, because "the phone was properly seized pursuant to a valid search warrant" supported by probable cause predicated on information that was not generated by the cell site simulator, "[t]his case presents the very opposite of *Andrews*[,]" where "police relied exclusively" on information generated by the cell site simulator technology. In support, the State cites "[a]ll the information contained in paragraph 10, and confirmed by Detective Mehrer," as independent grounds for the warrant to search Ms. Roseborough's apartment. Although the suppression court "did not explicitly follow

this path in reasoning that Diggs lacked standing, this Court can affirm on a ground not articulated by" that court. *See Robeson v. State*, 285 Md. 498, 502 (1979) ("where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm"). *Cf. Thornton v. State*, 465 Md. 122, 141 (2019) (resolving suppression issue not addressed by hearing court where record was sufficient for appellate court to make its own independent constitutional evaluation).

The independent investigation rule reflects that "[t]ainted information in a warrant affidavit does not vitiate an otherwise valid warrant issued upon probable cause set out in an affidavit[.]" *Williams v. State*, 372 Md. 386, 419 (2002). In such cases, we ask "whether, after constitutionally tainted information is excised from the warrant, the remaining information is sufficient to support a finding of probable cause." *Id*.

As set forth in paragraph 10 of the warrant affidavit, the detailed call records over the ten days preceding October 27, 2016 established an active pattern of communication between the phone number known to be used by Diggs and Ms. Roseborough's known phone number. Detective Mehrer recounted that police watched Ms. Roseborough and her residence. As set forth in paragraphs 10 and 11, when police went to Ms. Roseborough's apartment on October 27, 2016, no one answered their knocks.

Moreover, to the extent that that warrant, which was issued by the District of Columbia court, was premised on paragraph 9 detailing information that may have been obtained via a cell site simulator, "it was objectively reasonable for [the detective] to believe that [any] use of the cell site simulator pursuant to the court order was

permissible under the Fourth Amendment" and, therefore provided a lawful basis for issuance and execution of the search warrant. *See Copes*, 454 Md. at 629-30. Although the suppression court did not expressly determine that the search warrant was sought and executed in good faith, *see id.* at 601, this record establishes that police engaged in objectively reasonable law enforcement activity when they executed the warrant.

Here, as in *Copes*, the use of a cell site simulator in locating Diggs did not trigger the exclusionary rule under the Fourth Amendment because (1) police obtained a particularized court order supported by probable cause and expressly authorizing its use, (2) the search warrant was predicated on independent grounds for probable cause to believe Diggs and/or a cell phone with information relevant to the shootings would be found in Ms. Roseborough's apartment, and (3) police executed that warrant in good faith. Accordingly, the hearing court did not err or abuse its discretion in denying Diggs's motion to suppress.

B. Relevancy Challenge

Diggs alternatively challenges the admission of the cell phone evidence on the ground that it "was irrelevant because of the lack of any connection between [him] and the cell phone." We again conclude that neither the law, nor the record supports his challenge.

Relevancy Standards

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

it would be without the evidence." Md. Rule 5-401. "Evidence that is not relevant is not admissible." Md. Rule 5-402.

Even if "relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. "[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in [Md.] Rule 5-403." *Odum v. State*, 412 Md. 593, 615 (2010). Instead, "[p]robative value is outweighed by the danger of 'unfair' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Id.* (quotations and citations omitted).

The burden of establishing relevance falls on the proponent of the challenged evidence, but it "is generally a low bar." *State v. Simms*, 420 Md. 705, 727 (2011). The appellate

> standard of review on a relevancy question depends on whether the "ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law." "When the trial judge's ruling involves a weighing, we apply the more deferential abuse of discretion standard." When the trial judge's ruling involves a legal question, however, we review the trial court's ruling *de novo*.

Parker v. State, 408 Md. 428, 437 (2009) (citations omitted). A trial court's determination that evidence was not unfairly prejudicial "requires review of the trial judge's discretionary weighing and is thus tested for abuse of that discretion." *Simms*, 420 Md. at 725.

Relevant Record

Before Howard County Police Detective Clate Jackson testified about recovering the cell phone from Ms. Roseborough's residence, defense counsel objected to any "testimony which would be the Internet searches from that phone." Pointing to previous testimony that Diggs was not found in the bedroom where "the phone was located in a bedroom, top bunk, in a backpack[,]" defense counsel argued that there was no evidence to connect Diggs to that phone or to that apartment, other than that Diggs "was arrested there . . . . just inside the door." Counsel also argued that the information on the cell phone was unduly prejudicial under Md. Rule 5-403, because it invited jurors to speculate "about these Internet searches[,] which would be outweighed by any probative value."

The prosecutor proffered the extraction report from the cell phone, explaining that Detective Jackson would testify

> that during this forensic examination of this phone, he was able to retrieve and recover deleted and active Internet searches related to Derik Henderson on White Pages. There were searches related to Derik Henderson on White Pages. There were searches related to or at least stories reviewed regarding the reporting of this case in I think it was WUSA Television, there may be some Washington Post articles, other media that were searched for and viewed on this phone.
>
> [Defense counsel] states that there's nothing connecting the Defendant to this phone. Well the fact of the matter is that that's correct in the traditional sense. There is nothing in evidence that would say that the phone number is subscribed to by him. It wasn't in his pocket.
>
> However it was in an apartment in Southeast D.C. at least forty five minutes from Howard County that just so happens to have Internet searches relating directly not only to this case in general, but to one of the witnesses, the surviving witnesses to that shooting. And it's not even just searches

> having to do with news stories, there's actually White Pages searches and what the State would attempt to find Derik Henderson, and where he be. [Sic]
>
> So it's one thing to say that he just happens to be in this apartment. Well, he's in the apartment and I believe Detective Mehrer testified that he was in a living room that was just inside the door. But there is also this phone that contains all of this information or searches in close proximity. . . . I don't believe Detective Mehrer [said] it was a very big apartment. That his phone just happens to be in that same apartment, forty five minutes away from where the shooting occurred with a prime suspect in this case.
>
> So the relevance is . . . . that on this phone are searches directly related to this case. And the relevance and the probative value and certainly the argument of the State, would be that this is not a mere coincidence that he just happened to be interested in not only the shooting in general which I suppose could be argued to some extensive [sic] he did know Amanda Duer, but there were specific searches on White Pages in an attempt to locate Derik Henderson.
>
> So the probative value is actually very great in this case and given his proximity to the phone, not only immediate proximity in the same apartment, but even in the geographic location of where this phone is in Southeast D.C., the State feels that it is very probative and while prejudicial, not unfairly so.

Defense counsel countered that the extraction report shows "two types of extractions[,]" with the first "deleted browser history which doesn't have a date and then there was browser history that appeared to be in tact [sic] that is dated." Because the intact history is dated July 31, 2016, but "[t]he phone was recovered from that apartment in . . . late October[,]" and "the State has presented or advanced no evidence that [Diggs] was near that phone on July the 31st[,]" "the proximity doesn't coincide with the timeliness of the searches[.]" Defense counsel maintained that "the relevance is diminished by that."

The trial court overruled the relevancy objections, explaining:

> Well, I think it is circumstantial, clearly. There's no direct connecting of the dots, if you will . . . . I think it's the type of circumstantial evidence that the finder of fact is entitled to weigh and consider in terms of its probative value . . . . [I]t's for the jury to decide just how coincidental it is that this phone with these queries is in the vicinity of the Defendant when he's found in the apartment in D.C. many months later.
>
> It may be just an unfortunate coincidence for Mr. Diggs, or it could be very revealing. But I think that's for the jury to determine. So I would deny the Motion to Suppress the extraction report.

After the court granted a continuing objection, Detective Jackson testified that he "deployed multiple key words for this device[,]" yielding "hits" relating to the crime, including "Derik" and "Henderson":

> DETECTIVE JACKSON: So the hits led me to the web history where I observed that they were pointing to Henderson. Upon further review of Henderson, I also know that the first name in these web history hits [were] for Derik Henderson, for Derik.
>
> [PROSECUTOR]: The web history hits, were they active, deleted, or something else?
>
> DETECTIVE JACKSON: It was a mixture of both.
>
> [PROSECUTOR]: All right and explain how it is that deleted searches are able to be extracted?
>
> DETECTIVE JACKSON: So as initially noted in the way that hard drives or flash drives store data, when you initially delete something, it may not necessarily be deleted. In the cases where they are not deleted, they're merely pushed to the side and a processor of the device blocks them out to where you will no longer see them but they may still be in a device in either unallocated space or foul slack. That content becomes fragmented, certain items may be removed such as the date and time. Other items may remain, such as a small part of the web search history.

In explaining how to read the extraction report, Detective Jackson pointed out that there was "a query in Spokeo for Derik Henderson[,]" conducted in July. On cross-examination, the detective acknowledged that the phone was seized on October 27, 2016,

but the date on the intact search for Henderson was July 31, 2016. Detective Jackson did not have GPS information, such as cell tower data, indicating where the phone was when it made that search. Nor did he have enough knowledge of the case to tell whether email, Twitter, text messages, and photographs on the phone were associated with Diggs.

Diggs's Challenge

Diggs argues that "[t]here was no evidence ever produced or adduced that the cell phone, with a number of 202-425-0628, which was *not* [a]ppellant's cell number, was in any other way connected to [a]ppellant, let alone held, handled, or used in any way by [a]ppellant." Moreover, the "internet searches related to Henderson were subject to far too many equally plausible innocent interpretations, thus forcing the jury to speculate as to their meaning in relation to [a]ppellant." Alternatively, "for the same reasons – the tenuous connection of [a]ppellant to the cell phone and the myriad possibilities that the search contents information was contained within – any probative value of the search contents was far outweighed by the potential for prejudice and/or confusion they could generate[.]"

The State counters that evidence of the "Henderson searches" performed on the cellphone was relevant to "connect a simple series of dots[,]" as follows:

> ● A phone in Ms. Roseborough's apartment was used to search for Henderson.
>
> ● There appears to be no specific reason anyone would search for Henderson; he was not a prominent individual, nor did it appear he had a profile on social media. (Diggs describes him on appeal as having "a previous robbery conviction and a pending possession with intent to distribute case," and disparagingly as a "star witness" for the State.) Differently put, there was no obvious reason that anyone would perform a

search on him. Thus, the jury could conclude that the searches were conducted in connection with the shooting.

● Diggs was arrested in Ms. Roseborough's apartment.

● Given that Henderson had identified Diggs, it was reasonable to conclude that Diggs was trying to find Henderson either to get him to recant his testimony (which it appears he ultimately did), or to eliminate him.

We conclude that the trial court did not abuse its discretion in admitting the extraction report and testimony regarding the internet search found on the cell phone, over defense objections. Although circumstantial, the "dots" identified by the State could reasonably be connected to draw an inference that Diggs and/or the associate with him when he was arrested, Ms. Roseborough, conducted the searches listed on the extraction report, which were related to the shootings. In particular, the White Pages search on July 31, 2016, twenty-nine days after the shootings, seeking a home address for the surviving eyewitness, Henderson, on a phone that was found in the residence of Diggs's associate, located forty-five minutes away from the site of the shootings but just steps away from where Diggs was arrested, makes it more likely that Diggs was involved in the shootings of Ms. Duer and Henderson. As the trial court explained, that meets the standard for relevance because it was up to the jury to determine whether to draw that or any other inference from the searches found on that cell phone.

Nor are we persuaded that there was anything unfairly prejudicial about admitting evidence of those searches. *See generally Carter v. State*, 374 Md. 693, 705 (2003) (explaining that an appellate court reviews decisions to admit evidence over a Md. Rule 5-403 objection for abuse of discretion). The internet searches in question were not the

equivalent of graphic images or unrelated threats that could inflame the jury. Nor does Diggs otherwise assert that they so distracted the jury as to render them unfairly prejudicial. *Cf. Stevenson v. State*, 222 Md. App. 118, 142 (2015) (affirming admission of photographs, noting that, "aside from being helpful to the State's case, Mr. Stevenson does not explain in what way the photographs were unfairly prejudicial"). In these circumstances, the trial court did not abuse its discretion in overruling Diggs's relevancy objections to the search history evidence.

IV. Expert Qualification

In his final assignment of error, Diggs argues that "the trial court erred or abused its discretion in allowing Joseph Coiro to testify as an expert" in the forensic analysis of gunshot residue. Based on the record reviewed below, we discern no error or abuse of discretion in the trial court's acceptance of Mr. Coiro as an expert in GSR analysis.

Standards Governing Expert Qualification

Testimony by experts is governed by Md. Rule 5-702, which provides:

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

The Court of Appeals

> has held that "the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal . . ." A circuit court's decision to allow an expert witness to testify will be

> reversed 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 v. State, 458 Md. 140, 153-54 (2018) (citations omitted).

Evidence regarding cellular phone technology generally must be presented by an expert witness. *See, e.g., State v. Payne*, 440 Md. 680, 701-02 (2014) (holding that the trial court erred in admitting police officer's non-expert testimony regarding location of co-defendants based on cell phone and cell tower records). "To qualify as an expert, one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will probably aid the trier [of fact] in his search for the truth." *Thanos v. State*, 330 Md. 77, 95 (1993). The Court of Appeals repeatedly has explained that "an expert may be qualified to testify if he [or she] 'is reasonably familiar with the subject under investigation'" and such "familiarity can come from 'professional training, observation, actual experience, or any combination of these factors.'" *Levitas v. Christian*, 454 Md. 233, 245 (2017) (citations omitted); *see also Donati v. State*, 215 Md. App. 686, 742 (2014). Generally, "'[o]bjections attacking the expert's training, expertise or basis of knowledge go to the weight of the evidence and not its admissibility.'" *State v. Taylor*, 431 Md. 615, 630 (2013).

Relevant Record

The expert *voir dire* of Mr. Coiro was conducted immediately after the trial court denied Diggs's motion to exclude him on Confrontation Clause grounds. *See supra* Part II.B. This was the first time Mr. Coiro, who had worked as a GSR analyst for less than a year, was called to testify as an expert in a judicial proceeding.

Mr. Coiro testified that he was a "forensic scientist" employed by the "R. J. Lee Group[,]" which "is a material characterization company" with an accredited forensics department conducting primarily gunshot residue analysis, which makes up "ninety-five percent of [the company's] cases." Mr. Coiro earned a "bachelor's degree in biology in 2015 from Duquesne University with a minor in biochemistry as well as [a] master's degree in forensic science and law in 2016." His coursework included "trace evidence, trace evidence labs, analytic chemistry, physical chemistry, a number of chemistry courses that had prepared [him] to do" gunshot residue analysis.

Mr. Coiro testified that he "completed R.J. Lee's Group training program in regards to gunshot residue analysis." Beginning work after graduation, in August 2016, he became a forensic scientist in September 2016. He was assigned his own cases in December 2016, which was about six months before trial. Before that, he "followed around and learned from an analyst currently carrying out gunshot residue analysis[,]" who "taught [him] how to do all the paperwork, how to carry out the physical analysis." As part of his training, he "was required to look at two hundred and fifty samples of gunshot residue," then compare his results against the analysts assigned to each case. He "was competency tested . . . to ensure that [he] was . . . able to carry out the gunshot residue analysis testing."

At trial, Mr. Coiro's professional membership in Phi Sigma Lambda, "the forensic science professional fraternity," was pending approval. He had never written any information or research articles for publication in this field. His professional

presentations were limited to one guest lecture to students at Duquesne University and another at a high school.

Defense counsel "object[ed] to Mr. Coiro's expertise." Pointing out that GSR analysis "is a very, very technical area of science[,]" defense counsel argued that Mr. Coiro's lack of experience made him unqualified to render an expert opinion in this case. In counsel's view, "having never done it before ever, [I] think it creates a pretty big danger that the Court is going to . . . expose the jury to unreliable evidence [in] at a very technical field . . . and a subject of evidence that . . . has a major impact on the outcome of this trial." Over that objection, the trial court "accept[ed] Mr. Coiro as an expert in the field of forensics and in particular with respect to GSR gunshot residue."

Diggs's Challenge

Diggs contends that "the trial court made *none* of the necessary findings required by Maryland Rule 5-702, which was itself error and, given Coiro's patent lack of experience, took on even greater import, particularly for purposes of appellate review." "In any event, given the state of the record, Coiro was obviously woefully unqualified to testify as an expert[.]"

The State responds that "the trial court properly exercised its discretion in accepting Mr. Coiro as an expert in the forensic analysis of GSR." In support, the State characterizes Mr. Coiro's qualifications as "extensive" and argues that even though "[n]o rule or case requires a trial court to articulate the basis for its acceptance of an expert[,]" "the basis for the court's ruling was readily apparent."

Although Md. Rule 5-702 identifies three factors bearing on whether a proffered expert should be accepted by the court, the record set forth above establishes that defense counsel challenged only the first of those factors: "whether the witness is qualified as an expert by knowledge, skill, experience, training, or education . . . ." Consequently, the trial court did not err in failing to expressly address the other two factors – "the appropriateness of the expert testimony on the particular subject" and "whether a sufficient factual basis exists to support the expert testimony."

Nor was the court required to place its factual findings on the record. In the absence of any language in Md. Rule 5-702, or any precedent construing that rule to require an on-the-record finding, we decline to impose one. *Cf. McLain v. State*, 425 Md. 238, 252 (2012) ("[Md.] Rule 5-802.1, unlike some other Rules, does not require explicitly that findings be placed on the record, and we decline to read into the Rule such a requirement.").

The court, applying the correct legal standards, did not abuse its discretion in accepting Mr. Coiro as an expert in GSR analysis. Notwithstanding his lack of previous trial experience, Mr. Coiro's specialized education, training, and experience provided a substantial basis for the court's determination that his testimony would be helpful to the jury. Mr. Coiro testified that he had a bachelor's degree in biology, with a minor in biochemistry, plus a master's degree in forensics and law. His education included coursework in chemistry-related subjects relevant to his work in GSR analysis. In addition, Coiro completed training and passed competency tests, as a result of which he had been approved as a forensic scientist by his employer, R.J. Lee Group, whose

materials identification work consists of 95% GSR analysis. His training included a six-month period of shadowing a forensic scientist as GSR was examined and identified. During his employment, he reviewed two hundred fifty cases before independently performing approximately one hundred GSR analyses in cases when he served as the analyst. In addition, he regularly reviewed the work of other analysts, as part of his duties in conducting technical reviews. Mr. Coiro's description of the analytical methodology governing his examination of GSR, in the course of the *voir dire* testimony he had just given in regard to the defense motion to exclude his testimony on Confrontation Clause grounds, further evidenced his knowledge of and skill in GSR analysis.

The fact that this was Mr. Coiro's first attempt to qualify as an expert in a judicial proceeding was merely one factor for the court to consider. *Cf. Donati*, 215 Md. App. at 743 ("Although Detective Heverly did not have post-graduate degrees in computer science, and he had not testified previously, the qualifications he did have supported the circuit court's decision to accept him as an expert witness."). Given his knowledge, education, training, skill, and experience in GSR analysis, Mr. Coiro's lack of courtroom experience did not disqualify him. *See id*. Because the trial court's decision to accept Mr. Coiro as an expert in GSR analysis was neither made in an "arbitrary or capricious manner," nor "beyond the letter or reason of law[,]" *Santiago*, 458 Md. at 154, the trial court did not abuse its discretion in admitting his expert testimony that there was gunshot residue on the clothing allegedly worn by Diggs during the shootings.

JUDGMENTS OF CONVICTION AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Circuit Court for Howard County
Case No. 13-K-17-057423

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1728

September Term, 2017

KENNETH FRIZZELL DIGGS, JR.

v.

STATE OF MARYLAND

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*Wright,
Kehoe,
Friedman,

JJ.

Concurring Opinion by Friedman, J.

Filed:

*Wright, J., now retired, participated in the conference of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

I concur in the judgment and almost every bit of the reasoning that leads my colleagues in the majority to that judgment. Because I disagree with one small (and in my view unnecessary) bit of their reasoning, however, I feel compelled to write separately.

In Section III, the majority affirms the admissibility of evidence seized from a cell phone found in Ms. Roseborough's residence. Slip op. at 54. The majority reaches its holding based on three separate grounds: two grounds that were relied upon by the suppression court, and a third that the majority finds on its own:

> (1) police obtained a particularized court order supported by probable cause and expressly authorizing its use, (2) the search warrant was predicated on independent grounds for probable cause to believe Diggs and/or a cell phone with information relevant to the shootings would be found in Ms. Roseborough's apartment, and (3) police executed that warrant in good faith.

Slip op. at 64. I have no quarrel with the first two grounds and would thus affirm the decision of the suppression court.

I disagree, however, that we should decide whether there was good faith on the part of the officers in executing the warrant. *First*, I don't understand the need to reach beyond the finding of the suppression court. *Second*, the determination of officers' good faith is often a factual question, which should generally be decided by a trial court in the first instance. *See State v. Jacobs*, 87 Md. App. 640, 650 (1991) (noting that upon review of a trial judge's determination of factual underpinnings for a finding of good faith, it is for the reviewing court "to determine the legal significance of those facts—whether they

demonstrate that the officer acted in good faith").[9] I don't know why we would reach to find it ourselves here. And, *third*, I continue to remain concerned about the problem of institutional bad faith in these cases: the decisions by police departments and prosecutors to enter nondisclosure agreements specifically to avoid judicial supervision of law enforcement's use of cell site simulators.[10] This Court found this type of bad faith on the

[9] I recognize that appellate courts can—and in the appropriate context do—decide good faith, *see McDonald v. State*, 347 Md. 452, 470 n.10 (1997) (noting that the question of good faith is a "legal issue" and can be addressed for the first time on appeal if the "record is adequate"), but I don't think we need to do so here.

[10] In our constitutional system, it is the function of courts to ensure that law enforcement does its work within constitutional limits. *See Carpenter v. United States*, 138 S.Ct. 2206, 2214 (2018) (noting that it is the judiciary's role to implement the Fourth Amendment and "place obstacles in the way of a too permeating police surveillance") (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). For prosecutors and law enforcement to enter into a nondisclosure agreement by which they agree, in advance, to hide their law enforcement tactics from courts, mislead judges, and dismiss cases rather than answer legitimate judicial questions, is an evasion of our system, and, to me, most assuredly, unconstitutional. Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99, 103-109 (2016) ("[T]he people surely are entitled to govern policing practices like Sting[R]ays …. Secrecy and democratic governance are fundamentally incompatible."); Shawn Marie Boyne, *Stingray Technology, The Exclusionary Rule, and the Future of Privacy: A Cautionary Tale*, 119 W. VA. L. REV. 915, 921-25 (2017) (describing the judiciary's difficulty in negotiating law enforcement's use of StingRay technology when bound by these nondisclosure agreements as a "shell game"); Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. 101, 120 (2017) ("When new surveillance technologies are kept secret because of nondisclosure agreements, they cannot be challenged by criminal defendants and those challenges can't be decided by judges—whatever the merits of the defendants' claims."). If this bad faith conduct does not fit neatly within one of *Leon*'s four categories, *United States v. Leon*, 468 U.S. 897, 923 (1984) (describing four categories of situations in which the exclusionary rule is appropriate), it doesn't follow that law enforcement's conduct was acceptable and entitled to be considered "in good faith." Rather, it suggests that the misconduct in entering these nondisclosure agreements was beyond the *Leon* Court's powers of foresight and imagination.

part of the Baltimore Police Department and the State's Attorney for Baltimore City for entering these nondisclosure agreements in *State v. Andrews*, 227 Md. App. 350, 376-77 (2016). And while this species of bad faith was not addressed in *State v. Copes*, 454 Md. 581, 626-630 (2017), it is not foreclosed by that case. Here, there was no evidence received to suggest whether or not the Howard County Sheriff's Office and the Howard County State's Attorney entered such a nondisclosure agreement governing the use of the cell site simulator. Given the prevalence of such agreements, however, without evidence to suggest that they did not, I am unwilling to assume that they did not. Therefore, I am unwilling, as my colleagues do, to assume the existence of good faith here.