Circuit Court for Baltimore County
Case No. C-03-CR-22-003139

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1794

September Term, 2023

STEVEN LOUIS SANTIAGO

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Shaw,

JJ.

Opinion by Nazarian, J.

Filed: April 2, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Quenten Branch[1] was murdered on January 9, 2022, while driving his car in Towson, Maryland. After an extensive investigation, Steven Santiago was charged in an eighteen-count indictment with various murder, assault, firearm, and robbery offenses. On June 9, 2023, the jury returned a verdict convicting Mr. Santiago of first-degree premeditated murder, second-degree murder, first-degree assault, and use of a firearm in the commission of a crime of violence.

Mr. Santiago appeals the admission of three pieces of evidence at trial: a November 17, 2022, jail call recording; a text message from an unidentified sender found on Mr. Santiago's phone; and testimony from the lead detective identifying Mr. Santiago in a surveillance photo. We reverse Mr. Santiago's convictions because the text message was inadmissible hearsay and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

At 4:23 a.m., January 9, 2022, the Baltimore County 911 Center received a call that a man had been shot at the intersection of Goucher Boulevard and Colbury Road in Towson. Officers from the Baltimore County Police Department ("BCPD") responded to the scene and found Mr. Branch lying in the road next to the open driver's side door of his Mercedes Kompressor with a single gunshot wound to the back of his head. The passenger-side window of his car was rolled down despite the cold, snowy weather. The

[1] Some of the trial transcripts contain different spellings of Mr. Branch's name. We will use this spelling, which tracks the Criminal Indictment charging Mr. Santiago with Mr. Branch's murder.

car also appeared to be on but not running even though the key was missing from the ignition. First responders approached Mr. Branch to render aid but he had no pulse.

The lead detective, Detective Jason Blevins, arrived on the scene at approximately 5:30 a.m. He directed crime lab personnel to photograph and collect various items, including Mr. Branch's phone. After notifying Mr. Branch's family of his death, Detective Blevins obtained a court order for Mr. Branch's cellular records. He also requested a "tower dump"—information from T-Mobile, AT&T, and Verizon on all cellular devices used in a specific area during a certain date and time range—for the area surrounding the Goucher/Colbury intersection between 3:00 a.m. to 4:45 a.m. that day. He requested Google Geofence data—location information for a cellular device—for Mr. Branch's cell phone as well.

While awaiting those results, detectives searched the area for cameras that might have captured the events that led to Mr. Branch's death. They found surveillance cameras at the Loch Raven Plaza Shopping Center, which sits directly across from the intersection on Goucher Boulevard, and obtained footage covering 3:30 a.m. to 4:45 a.m. on January 9, 2022.

The final results of the Geofence request arrived in March 2022. Using this data, Detective Blevins determined that Mr. Branch reached the Goucher/Colbury intersection sometime between 4:16 a.m. and 4:18 a.m. Detective Blevins then reviewed the Loch Raven Plaza footage and saw a white Toyota Prius drive away from the Goucher/Colbury intersection at approximately 4:18 a.m.

In addition to the Geofence data, Detective Blevins obtained surveillance footage from a 7-Eleven in Baltimore City in relation to a different offense. That footage showed a white Toyota Prius parked in front of the 7-Eleven approximately one hour before Mr. Branch's death. Detective Blevins observed that at least three individuals were inside the Prius when it left the 7-Eleven. Two of those individuals were visible on the security camera when they entered the 7-Eleven, one wearing a sweatshirt with the words "No Days Off" printed on the front. Detective Blevins recorded the Prius's license plate number and sent a request to the Maryland Coordination and Analysis Center for information on the Prius's direction of travel that morning. The results confirmed that the Prius had passed a plate reader heading northbound (*i.e.*, towards Towson) at approximately 3:56 a.m., then passed another reader going southbound (*i.e.*, away from Towson) at the Harbor Tunnel Thruway at 4:29 a.m.

Further research revealed that the Prius had been the subject of a separate investigation in Prince George's County. Detective Blevins learned that the registered owner of the Prius lived in Prince George's County, that the Prius had been reported stolen in late 2021, and that the Greenbelt City police recovered it on January 10, 2022 (the day after Mr. Branch's murder). Greenbelt police had swabbed the car for DNA and collected a tablet and a clear baggie containing leafy matter from the car. Detective Blevins retrieved the DNA swabs and had the Prius, tablet, and clear baggie tested for latent fingerprints.

Based on this new information, Detective Blevins turned to the tower dump he received in January to look for phone numbers from the Greenbelt area. He identified one

such number, which was associated with Stephen Parker, and obtained a court order for historical records and real-time location data on that device. Special Agent Michael Fowler of the FBI Cellular Analysis Survey Team analyzed the historical data. According to Agent Fowler, on January 9, 2022, the phone began traveling north from Greenbelt at about 1:12 a.m. It reached the Goucher/Colbury area just after 2:00 a.m., then traveled south towards Baltimore City between 2:25 a.m. and 2:38 a.m. The phone returned to the Goucher/Colbury area at 4:05 a.m., remained in that area until 4:18 a.m., then traveled back towards Greenbelt. Through surveillance and real-time location data, detectives confirmed on March 30, 2022, that Mr. Parker possessed that phone.

On March 31, 2022, as part of an unrelated investigation, Detective Michael Ruby from the BCPD retrieved Mr. Santiago's phone from the Prince George's County Detention Center, where he was detained at the time, and brought it to the Towson precinct. Detective Blevins contacted Detective Ruby the next day and Detective Ruby brought Mr. Santiago's phone to the homicide unit. Computer forensic examiners at the BCPD extracted data from Mr. Santiago's phone and discovered Mr. Parker's known phone number saved in his contacts as "SteveO."

The examiners then extracted two pieces of data pertinent to this appeal. *First*, they found a text message that Mr. Santiago received from an unidentified sender twelve hours after Mr. Branch's murder. Attached to the text was an Instagram post reporting on the murder. *Second*, they extracted a video that Mr. Santiago recorded on January 9, 2022, at 4:01 a.m. The video shows Mr. Santiago in a car wearing a "No Days Off" sweatshirt. The

video also shows a second individual in the car whom Detective Blevins identified later as Caleb Jackson.

On April 8, 2022, Detective Blevins and his partner, Detective James Lambert, interviewed Mr. Parker at his residence in Greenbelt. Then on April 13, 2022, the detectives interviewed Mr. Santiago at the Prince George's County Detention Center. Detective Blevins told Mr. Santiago that "[Mr. Parker] says he knows you," but he denied knowing Mr. Parker. Mr. Santiago then admitted that he remembered Mr. Parker from school but said he didn't hang out with him. When Detective Blevins showed Mr. Santiago photos from the 7-Eleven surveillance footage, he denied ever seeing the white Prius and claimed he had never been to Towson.

On April 22, 2022, a man named Jarmel Wesley traveled to BCPD headquarters and asked to speak with detectives about Mr. Santiago. Detectives Blevins and Ruby met with Mr. Wesley at the Towson precinct that evening. Mr. Wesley explained that he had been Mr. Santiago's cellmate at the Prince George's County Detention Center from April 8 to April 21, 2022, a fact the detectives confirmed through jail records. He told the detectives that while they were cellmates, Mr. Santiago disclosed to Mr. Wesley that he was at a 7-Eleven one night, left in a black Prius, then "[blew] somebody['s] head off."

On April 25, 2022, Baltimore County police arrested and charged Mr. Parker in connection with Mr. Branch's murder. A search of Mr. Parker's residence produced a .40 caliber handgun and a cell phone, among other items. Police arrested Mr. Jackson on May 23, 2022, as a second suspect in Mr. Branch's murder. After his arrest, a latent print

examiner discovered Mr. Jackson's palm print on the tablet that Greenbelt police found in the white Prius. Investigators also extracted data from Mr. Jackson's phone and found photos of Mr. Jackson and Mr. Santiago together.

Detective Blevins filed charges against Mr. Santiago on June 20, 2022.

B. Procedural Background

On July 6, 2022, a grand jury handed down an indictment charging Mr. Santiago with eighteen counts related to Mr. Branch's death. The State dismissed ten of those counts at the end of its case, leaving eight counts for the jury: first-degree murder; first-degree assault; use of a firearm in the commission of a crime of violence; armed carjacking; carjacking; theft ($1,500 to under $25,000); robbery with a dangerous weapon; and robbery. On June 9, 2023, after a four-day trial, the jury found Mr. Santiago guilty of first-degree premeditated murder, second-degree murder, first-degree assault, and use of a firearm in the commission of a crime of violence.

On October 13, 2023, the court sentenced Mr. Santiago to life imprisonment for first-degree murder and merged the second-degree murder and first-degree assault convictions with his murder conviction. Mr. Santiago also received a concurrent term of twenty years' incarceration for the use of a handgun in the commission of a violent crime. Mr. Santiago filed a timely notice of appeal on October 17, 2023.

This appeal concerns three evidentiary issues that arose during Mr. Santiago's trial. We will provide the relevant facts for each issue in our discussion below.

II. DISCUSSION

Mr. Santiago presents four arguments on appeal.[2] *First*, Mr. Santiago argues that the circuit court erred in admitting into evidence the November 17, 2022, jail call, which the State disclosed just three days before trial began, without first determining the level of due diligence the State had exercised in obtaining it. *Second*, Mr. Santiago argues that the

[2] Mr. Santiago phrased the Questions Presented as follows:

1. Did the trial commit reversible error by failing to exercise its discretion where the court said multiple times that it could not rule on whether to admit the State's jail call without knowing when the detective received the call, but the court nonetheless admitted the jail call over objection without receiving that information?
2. Did the trial court commit reversible error by admitting a text message sent from an unidentified sender to Santiago after the murder containing an implied assertion that Santiago was involved in or had information about the murder?
3. Did the trial court commit reversible error by allowing the lead detective to provide inadmissible lay opinion that the person depicted in the surveillance video was Santiago?
4. Does the cumulative prejudice of the errors warrant reversal?

The State phrased the Questions Presented as follows:

1. Did the trial court properly admit a "jail call" that Santiago placed on November 17, 2022, but which was not provided to the defense until the Friday before trial, and was any error harmless?
2. Did the trial court properly admit a screenshot sent to Santiago after the murder?
3. Did the trial court soundly exercise its discretion by permitting a detective's testimony identifying Santiago in a photograph, and was any error harmless?
4. Does the cumulative effect of any error remain harmless?

court erred in admitting the text message found on his phone, which contained an attachment of an Instagram post reporting Mr. Branch's murder. *Third*, Mr. Santiago claims the court erred when it allowed Detective Blevins to identify him in a still-photo extracted from a surveillance video because doing so interfered impermissibly with the role of the jury. *Finally*, Mr. Santiago contends that even if we find one of these errors harmless, the cumulative effect of the remaining errors warrants reversal.

We conclude that the text message was inadmissible hearsay because it contained an implied assertion that the sender believed that Mr. Santiago was involved in Mr. Branch's murder, and the State offered the text to prove that factual proposition. Although we reverse on this single issue, we find it important to discuss the lay testimony issue to provide guidance on remand.[3]

C. The Court Erred In Concluding That The Text Message Was Not Hearsay Because The State Offered The Text Message To Prove The Implied Assertion It Contained.

Mr. Santiago contends that the circuit court erred when it admitted into evidence a text message that an unidentified individual sent to him twelve hours after the murder

[3] At this point in Mr. Santiago's case, the question of whether the State committed a discovery violation is moot. Mr. Santiago and his counsel are aware of the jail call and are on notice of its potential use in court if the State were to retry Mr. Santiago on remand. The prejudice that this alleged discovery violation may have created—a lack of time to discuss the call with Mr. Santiago in preparation for trial—would not arise in a second trial because Mr. Santiago now has "sufficient opportunity to prepare his defense regarding" the call. *Russell v. State*, 69 Md. App. 554, 564–66 (1987) (no abuse of discretion where, in defendant's second trial, court admitted defendant's prior statement to police even though prosecution didn't disclose statement before trial because statement was presented as evidence in defendant's first trial).

occurred which contained an attachment of an Instagram post reporting on the murder. Mr. Santiago raises four issues related to this text message,[4] but for purposes of this opinion we address only Mr. Santiago's argument that the text message constitutes inadmissible hearsay under the implied assertions doctrine. He contends that even if the message wasn't offered to prove that Mr. Branch was found dead on January 9, 2022—the literal statement in the Instagram post—the State offered the text "for the truth of the implied factual proposition that the sender believed [Mr.] Santiago was involved in the murder of [Mr.] Branch."

The State counters that the text message isn't an assertion and therefore can't qualify as hearsay. Additionally, the State argues that even if the text is an assertion, the State offered it "to prove its effect on the recipient's state of mind," not to prove the truth of the matter asserted in the attached Instagram post.

We conclude that the text was inadmissible hearsay because, as utilized by the State, it contained an implied assertion that the sender believed Mr. Santiago was involved in Mr. Branch's murder and that the State offered the text to prove that proposition. The text

[4] Mr. Santiago argues that (1) the State failed to lay an adequate foundation for the text because it didn't identify the sender or establish that the sender had firsthand knowledge of Mr. Santiago's alleged involvement in the murder; (2) the text constitutes inadmissible hearsay under the implied assertions doctrine; (3) the prejudicial effect of the text outweighed its probative value; and (4) admitting the text without having the sender testify in court violated Mr. Santiago's constitutional right of confrontation. Because we are reversing Mr. Santiago's conviction based on the hearsay violation, we need not discuss the merits of Mr. Santiago's other three arguments.

should not have been admitted at trial and, because it was, we reverse the convictions and remand for further proceedings.

1. Relevant Facts

On June 5, 2022, the first day of Mr. Santiago's trial, defense counsel made a motion *in limine* to exclude the text message. The text consisted solely of an attached Instagram post written by "murder_ink_bmore." The post contained a picture of a gun with two bullets, and the caption reported briefly on Mr. Branch's death. The defense argued that the text message and attached post constituted statements for hearsay purposes and that a hearsay exception must apply for the text to be admissible. Anticipating that the State would offer the text as an adoptive admission (a hearsay exception under Md. Rule 5-803(a)(2)), defense counsel argued that Mr. Santiago didn't adopt the statements in the Instagram post because there was no evidence that Mr. Santiago read the post or the text.

The State argued that the text wasn't hearsay at all because sending an attachment is not an "assertion." Furthermore, the State claimed the text was relevant, not for the truth of the matter asserted (*i.e.*, the accuracy of the Instagram post's caption) but because the existence of the text on Mr. Santiago's phone twelve hours after Mr. Branch was murdered contradicted Mr. Santiago's later statements to Detectives Blevins and Lambert denying any connection to Mr. Parker or the Towson area. Notably, the State claimed the text was significant because "[t]here would be no reason for someone to send him this posting unless they have reason to believe that he had some connection to it or some involvement in it."

The court reserved ruling on the text message and prohibited the State from using the text in its opening statement the following morning.

The next day, the court agreed with the State that sending an attachment, without more in the text, was not a statement and did not constitute hearsay. The court asked the State to explain how the *Instagram post* was not hearsay, though. The State said it was only offering the text and the attached post as "data," not to prove the truth of the statements in the post. Citing *Sykes v. State*, 253 Md. App. 78 (2021), the State suggested the text message was admissible to show that Mr. Santiago possessed a phone that contained information on Mr. Branch's murder. The court said it was inclined to deny the State's request to admit the text, but that it would reserve ruling on it until it read *Sykes*.

Argument resumed on the third day of trial. The court agreed with the State that there was no hearsay issue; however, the court found the probative value of the text and attached post "in their present form" substantially outweighed by unfair prejudice and the risk of misleading the jury. The court provided a redacted version of the State's exhibit and said it would consider admitting the exhibit "in that form identically or in a substantially similar form." Defense counsel maintained their objection to the redacted text message and post as inflammatory and prejudicial.

On the fourth day of trial, the court incorporated and overruled defense counsel's prior objections to the redacted text message exhibit. The court also overruled defense counsel's additional objection that the exchange leading up to the text at issue should be included for context. The forensic examiner that extracted the text message from Mr.

Santiago's phone testified as to the extraction and content of the text message exhibit. After this testimony, defense counsel moved to make one more redaction. The court granted this motion and admitted an updated version of the exhibit.

2. Hearsay Violation

Ordinarily, we review a trial court's decision to admit evidence for abuse of discretion. *Gordon v. State*, 431 Md. 527, 533 (2013). When reviewing a trial court's rulings on hearsay, however, we take a "two-dimensional approach": we review the court's factual determinations about the challenged statement for clear error, and we review *de novo* the court's legal conclusion about whether the statement constitutes hearsay. *Id.* at 538; *see also Bernadyn v. State*, 390 Md. 1, 8 (2005) ("Whether evidence is hearsay is an issue of law reviewed *de novo*.").

Determining whether words constitute hearsay involves a two-pronged analysis: (1) do the words at issue constitute a "statement"; and (2) did the party offer that statement for the truth of the matter asserted? *Stoddard v. State*, 389 Md. 681, 688–89 (2005). The words at issue must satisfy both prongs to be excluded as hearsay. *Id.* at 689.

On the first question, Maryland Rule 5-801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." We are dealing here with the admissibility of a written declaration. Although the text message itself contains no words, only the attached Instagram post, the text message takes the form of a typed communication that may be subject to the rules of hearsay. Just as responding with an emoji, sending a gif, or "liking" a text message

communicates something to the recipient, a text message that forwards an attachment, even if no words accompany it, is a communication that can constitute a "statement" for hearsay purposes if it is an assertion and is intended as such.

The Maryland Rules don't define "assertion," leaving the courts to develop that definition through case law. *See* Md. Rule 5-801 committee note ("[Rule 5-801] does not attempt to define 'assertion,' a concept best left to development in the case law."). The Maryland Supreme Court began this process by adopting the English common law doctrine of implied assertions in *Waters v. Waters*, 35 Md. 531, 545 (1872). *See also Stoddard*, 389 Md. at 695–96 (discussing history of implied assertions doctrine in Maryland). This doctrine "holds that where a declarant's out-of-court words imply a belief in the truth of X, such words are hearsay if offered to prove that X is true." *Id.* at 692. So "[i]n determining what is an 'assertion,' for purposes of [Md. Rule 5-801], we look not only to 'the declaration's literal contents,' but also, . . . to 'the implications or inferences contained within or drawn from an utterance.'" *McClurkin v. State*, 222 Md. App. 461, 480 (2015) (*quoting Stoddard*, 389 Md. at 689–90).

Stoddard offers further guidance in applying the implied assertions doctrine. *See State v. Young*, 462 Md. 159, 171 (2018) (recognizing *Stoddard* as the "seminal Maryland case on implied assertion"). In that case, the State charged Mr. Stoddard with the murder of a three-year-old child. *Stoddard*, 389 Md. at 683. Mr. Stoddard was the only one watching the victim, the victim's brother, and the victim's eighteen-month-old cousin during part of the timeframe in which, according to the medical examiner, "[the victim]

received the fatal blow." *Id.* at 684. At Mr. Stoddard's trial, the State called the cousin's mother to testify about the cousin's behavior after the victim's death. *Id.* When the State asked if the cousin had spoken about the case, the mother testified that the cousin had asked "if [Mr. Stoddard] was going to get her." *Id.* at 685.

Defense counsel objected to this testimony as hearsay and moved for a mistrial. *Id.* The State said it wasn't hearsay because it was a question (not an assertion) and because the State offered it to prove the cousin's state of mind, not that Mr. Stoddard was going to "get" the cousin. *Id.* at 685–86. The court overruled the objection and denied the defense's motion. *Id.* at 686. Later, during its closing argument, the State argued that the mother's testimony was evidence that the cousin saw Mr. Stoddard murder the victim:

> There was an eyewitness in this case. . . . [the cousin] asked [her mother], "Is [Mr. Stoddard] going to get me" Why? She was afraid of [Mr. Stoddard]. . . . Why? Because she saw. She was the eyewitness. She saw what happened to [the victim] that day and she was scared to death it was going to happen to her, too.

Id.

On appeal, this Court held that the cousin's testimony was a "non-assertive verbal utterance," (not hearsay) and affirmed Mr. Stoddard's convictions. *Id.* at 687. The Supreme Court of Maryland reversed, concluding that the cousin's question, as utilized by the State, fell under the implied assertions doctrine:

> [T]he State offered the words as evidence of a fact the State sought to prove, *i.e.*, that [the cousin] had witnessed [Mr. Stoddard] assault [the victim]. The words in and of themselves contain no information about an assault or about someone [with the victim's name]. The implied assertion doctrine arises

> in this case because [the cousin]'s question is relevant only in that, by asking it, [the cousin] may have revealed, by implication, a belief that she had witnessed [Mr. Stoddard] assaulting [the victim].

Id. at 689. More broadly, the Court held that, "where the probative value of words, as offered, depends on the declarant having communicated a factual proposition, the words constitute an 'assertion' of that proposition." *Id.* at 703.

The Court reached the same conclusion about a *written* assertion in *Bernadyn v. State*, 390 Md. 1 (2005). In *Bernadyn*, officers from the Harford County Sheriff's Office executed a search and seizure warrant at 2024 Morgan Street, one of two residences the officers had been investigating for drug-related activity. 390 Md. at 3–4. The officers seized several items from the residence, including marijuana, a marijuana pipe, men's clothing, and a Johns Hopkins Bayview Physicians medical bill dated August 16, 2001 (thirteen days prior to the date of the search) that read, "Responsible party: Michael Bernadyn, Jr., 2024 Morgan Street, Edgewood, Maryland 21040." *Id.* at 4.

The State sought to admit the medical bill into evidence at Mr. Bernadyn's trial for drug-related offenses. *Id.* Defense counsel objected on hearsay grounds. *Id.* The court didn't ask the State to explain why it was offering the bill as evidence, nor did the court articulate the basis of its decision when it overruled the defense's objection and admitted the bill into evidence. *Id.* Then, during its closing and rebuttal arguments, the State argued to the jury that the medical bill served as evidence that Mr. Bernadyn lived at 2024 Morgan Street. *Id.* at 5–6. The jury convicted him on all counts and he appealed. *Id.* at 7.

This Court affirmed Mr. Bernadyn's convictions on direct appeal. *Id.* at 7. The Supreme Court of Maryland granted his petition for writ of *certiorari* to determine whether the bill, which stated Mr. Bernardyn's address as 2024 Morgan Street, was inadmissible hearsay when offered to prove that he lived at 2024 Morgan Street. *Id.* Comparing this case to *Stoddard*, the Court concluded that the bill, as utilized by the State, was inadmissible hearsay under the implied assertions doctrine:

> In order to accept the words "Michael Bernadyn, Jr., 2024 Morgan Street, Edgewood, Maryland 21040" as proof that Bernadyn lived at that address, the jury needed to reach two conclusions. It needed to conclude, first, that Bayview Physicians wrote those words because it believed Bernadyn to live at that address, and second, that Bayview Physicians was accurate in that belief. As used, the probative value of the words depended on Bayview Physicians having communicated the proposition that Michael Bernadyn lived at 2024 Morgan Street.

Id. at 11 (footnote omitted).

As in both of those cases, the outcome here turns on how the State used the text message, whatever it may have argued and whatever its earlier intentions. In this case, the State told the circuit court that it would offer the text and its attached Instagram post to prove, by implication, that Mr. Santiago was connected to Mr. Branch's murder (the exact opposite of the position the State asserts on appeal):

> [T]he fact that [the attached Instagram post] exists in the defendant's phone is of some significance because this defendant is attempting to eliminate any connection between himself and this crime occurring. *There would be no reason for someone to send him this posting unless they have reason to believe that he had some connection to it or some involvement in it.*

(Emphasis added). Then, during closing argument, the State referred to the text message and Instagram post as evidence that Mr. Santiago was involved in Mr. Branch's murder:

> Why would this defendant have an Instagram post about Quenten Branch's murder? Why? This Instagram post was sent to him less than 12 hours after Quenten was executed. Why would that be in his phone? *Why would anyone send him that if he was not involved? And we know he's involved.*

(Emphasis added).

The actual use of the text message at trial mirrors the use of the cousin's question in *Stoddard* and the medical bill in *Bernadyn*. To accept the text message as evidence that Mr. Santiago was involved in Mr. Branch's murder, the jury would have to conclude that (1) the sender sent Mr. Santiago the Instagram post because they believed Mr. Santiago was involved in the murder, and (2) the sender was accurate in that belief. *See Stoddard*, 389 Md. at 711; *Bernadyn*, 390 Md. at 11. That's textbook hearsay as an implied assertion. *See Bernadyn*, 390 Md. at 14 ("The use of a statement to prove the truth of the matter asserted almost always involves this two step inference, *i.e.* that the declarant believes the matter apparently asserted, and that the declarant's belief is accurate."); *see also* Lynn McLain, *Maryland Evidence State and Federal* § 801:6 at 195 (3d ed. vol. 6A 2013) ("[E]vidence of words spoken or written is hearsay if offered to prove both that (1) the declarant *believed* a particular fact to be true *and* (2) that that fact *was* true.").

The State argues that it offered the text message not to prove any actual or implied matter asserted in the text but to prove its effect on Mr. Santiago's state of mind—*i.e.*, that Mr. Santiago knew about the murder before his interview with police in which he denied

any connection to Mr. Parker or Towson. But in reality, the State in fact offered the text to prove the implied assertion. The record reveals that the State *also* offered the text as evidence that Mr. Santiago knew about the murder before his interview with the detectives:

> [W]e're not offering [the text] to prove that the contents of what is depicted in that image. We're not offering that to prove that Quinton [sic] Branch was murdered on January 9, 2022, or any of the other contents of the image posting. *The importance of that is that it is contained inside of the defendant's phone. The defendant has information regarding this specific case after he tells detective* [*"*]*I don't have any connection to the Towson area or anything of that nature.*[*"*]

(Emphasis added). We see no relevant connection between the Instagram post and Mr. Santiago's interview that would bring the text message under the state of mind exception.

"Out-of-court statements that are relevant because a particular person heard or saw them and therefore are offered for the limited purpose of proving their effect on the hearer or reader are nonhearsay." Lynn McLain, *Maryland Evidence State and Federal* § 801:10 at 243–44 (3d ed. vol. 6A 2013) (footnotes omitted); *see, e.g.*, *Gray v. State*, 53 Md. App. 699, 714–15 (1983) (note found in escapee's cell was nonhearsay in part because it showed that he knew the escape plan, and his "awareness that he was being aided and abetted by others was a necessary ingredient in the aiding and abetting"; "the fact that he received the message contained in the note is the thing that was significant"); *Ashford v. State*, 147 Md. App. 1, 77 (2002) (officer told defendant that wife implicated him in crime, after which defendant admitted to involvement; nonhearsay when officer testified about wife's statement to police because statement was offered to prove its effect on defendant (*i.e.*, hearing it convinced him to confess)). In an effort to invoke this "state of mind" exception,

the State suggests that Mr. Santiago's knowledge of the murder before his interview proves that he lied to the detectives. The State asserts that it "offered the screenshot [of the Instagram post] on the theory that it tended to negate [Mr.] Santiago's subsequent denials."

During his interview, the detectives asked Mr. Santiago questions about Mr. Parker, the white Prius, Baltimore, and Towson. Mr. Santiago denied knowing Mr. Parker, claimed he hadn't seen him since high school, and said he didn't know much about Mr. Parker or his friends. When shown the surveillance photos from the 7-Eleven, Mr. Santiago said he wasn't the person in the photo. He also denied having ever seen or been in the Prius when detectives showed him photos of that car. When the detectives said the pictures were from Baltimore and asked Mr. Santiago if he had ever been to Towson, Mr. Santiago said he hadn't been either to Baltimore or Towson.

The information in the Instagram post doesn't connect with any of Mr. Santiago's statements during his interview. The redacted text message exhibit that the court admitted into evidence contained little to no details about Mr. Branch's murder:

> **Man found fatally shot in Towson**
>
> A 35-year-old man is dead following a shooting Sunday morning in Towson. According to police, Quenten Branch was found dead on Colbury Road just before 4:30 a.m. Baltimore County detectives are asking anyone with information on the incident to contact them by calling 410-307-2020. Callers may remain anonymous.

At no point during Mr. Santiago's interview did the detectives mention a murder investigation, let alone an investigation relating to a shooting or to Mr. Branch. That was all the information that the Instagram post provided: that Mr. Branch was shot and killed

in Towson before 4:30 a.m. on a Sunday. The questions and statements elicited during Mr. Santiago's interview involved information *not* contained in the Instagram post. If Mr. Santiago had seen the Instagram post before his interview—which remains unproven—his knowledge that Mr. Branch was found dead in Towson wouldn't disprove or negate his statements to the detectives. Thus, the Instagram post's effect on Mr. Santiago's state of mind was irrelevant to proving the truth or falsity of his statements during the interview.

Moreover, non-hearsay use of a statement doesn't negate or cure the harm of a simultaneous, prohibited use of the statement as hearsay:

> [E]vidence can serve more than one purpose. If the proponent of a statement claims to offer the evidence for a purpose other than its truth, but also offers the statement to prove the truth of a matter asserted therein, the court should either exclude the evidence or make clear that the evidence is admitted for a limited purpose.

Bernadyn, 390 Md. at 15. Here, the court neither excluded the text message nor limited it to a non-hearsay purpose. The hearsay violation remained even if the State had used the text message in a separate, non-hearsay manner, and this error compels us to reverse the convictions and remand for further proceedings.

D. The Court Did Not Abuse Its Discretion In Allowing Detective Blevins To Identify Mr. Santiago In The Surveillance Photo Because Detective Blevins's Testimony Was Helpful To The Jury.

Although we have reversed the convictions based solely on the improper admission of the text message, we will address Mr. Santiago's claim regarding Detective Blevins's identification testimony since this issue is likely to recur on remand.

Mr. Santiago argues that the court erred when it allowed Detective Blevins to identify him in the 7-Eleven surveillance photo because doing so interfered with the province of the jury. The State counters that this was a proper exercise of the court's discretion because Detective Blevins, as a result of the extensive investigation he conducted, was better situated than the jury to identify Mr. Santiago correctly. We see no abuse of discretion in the court's decision to admit this testimony.

1. Relevant Facts

On the first day of trial, the court addressed the State's motion *in limine* to admit several still photos from the 7-Eleven surveillance footage. During this process, the State proffered that the photos identified Mr. Santiago at the 7-Eleven because when viewed in conjunction with the video extracted from Mr. Santiago's cell phone, in which he is wearing the same "No Days Off" sweatshirt, the detectives were able to identify the person in the photo as Mr. Santiago. The court admitted the surveillance photos into evidence.

Detective Blevins testified for the first time on the third day of trial. During his testimony, the State showed him photos from the 7-Eleven footage and asked him to identify the individuals in the photos. He identified Mr. Santiago as the person wearing the "No Days Off" sweatshirt. During its closing argument, the State argued to the jury that Mr. Santiago was the individual in the photos because he was wearing the same "No Days Off" sweatshirt that Mr. Santiago wore in the cell phone video. The State didn't discuss Detective Blevins's identification of Mr. Santiago during its closing argument.

2. No Lay Testimony Violation

We review a trial court's decision to admit evidence for abuse of discretion.

Moreland v. State, 207 Md. App. 563, 568–69 (2012). A court abuses its discretion when its decision "is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id.* at 569 (*quoting Gray v. State*, 388 Md. 366, 383 (2005)). We will not disturb the circuit court's decision to allow Detective Blevins to identify Mr. Santiago in the photo unless his testimony was "'plainly inadmissible under a specific rule or principal of law . . . .'" *Id.* at 568–69 (*quoting Decker v. State*, 408 Md. 631, 649 (2009)).

Detective Blevins provided opinion testimony as a lay witness when he identified Mr. Santiago in the photo. Generally, "a lay witness is not qualified to express an opinion about matters 'which are . . . within the scope of common knowledge and experience of the jury . . . .'" *Washington v. State*, 179 Md. App. 32, 56 (2008), *rev'd on other grounds*, 406 Md. 642 (2008) (*quoting Bey v. State*, 140 Md. App. 607, 623 (2001)). Lay opinion testimony will be admissible at trial only if it is "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. "If the proffered opinion does not meet this test, the lay witness's testimony must be confined to the facts that led her to form the opinion." Lynn McLain, *Maryland Evidence State and Federal* § 701:1 at 840–42 (3d ed. vol. 6, 2013).

We discussed the permissibility of a lay witness identifying a person in a picture or video in *Moreland v. State*, 207 Md. App. 563 (2012). There, we agreed with the majority of courts in other jurisdictions that "'a lay witness may testify regarding the identity of a

person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury.'" *Id.* at 572 (*quoting Robinson v. People*, 927 P.2d 381, 382 (Colo. 1996)). Although the witness need not be "'"intimately familiar" with the defendant,'" to identify the defendant in a photo or video, "'the witness must be in a better position than the jurors to determine whether the image captured by the camera is indeed that of the defendant . . . .'" *Id.* at 572–73 (*quoting Robinson*, 927 P.2d at 384). In *Moreland*, we concluded that the trial court didn't abuse its discretion when it allowed the witness, who happened to be a police officer but didn't work on the defendant's investigation, to identify the defendant in a surveillance video. *Id.* at 568, 573. The fact that the witness had known the defendant for about forty years put the witness in a better position to identify the defendant, especially given the defendant's change in appearance (*i.e.*, weight loss and physical symptoms of paralysis). *Id.*

The witness need not be as familiar with the defendant as the witness in *Moreland* was with Mr. Moreland to provide useful and admissible identification testimony, though. In *Robinson v. People*, 927 P.2d 381 (Colo. 1996)—the case that this Court turned to in *Moreland* for the majority view on lay witness identification testimony—the Supreme Court of Colorado found no abuse of discretion in the trial court's decision to allow a detective to identify the defendant as the perpetrator of a robbery in a surveillance photo. *Id.* at 384. The court noted that the robber in the surveillance photo was wearing a hat and sunglasses, and his identity was unclear from the photo alone. *Id.* The detective was

"personally familiar" with the defendant in that he had previous "face-to-face" contact with him, even if only once. *Id.* at 382, 384. The court found this level of familiarity sufficient to make his testimony helpful to the jury. *Id.* In reaching this conclusion, the court explained that "the lay witness need only be personally familiar with the defendant, and the intimacy level of the witness' familiarity with the defendant goes to the weight to be given to the witness' testimony, not the admissibility of such testimony." *Id.*

Here, Detective Blevins based his testimony on his own perception of Mr. Santiago. In other words, his testimony wasn't based on "uninformed speculation, conjecture, [or] guesses." Lynn McLain, *Maryland Evidence State and Federal* § 701:1 at 842–43 (3d ed. vol. 6 2013); *see also* Md. Rule 5-701; *Moreland*, 207 Md. App. at 572.

Detective Blevins's testimony also was helpful to the jurors and to the determination of a fact in issue. The question of whether Mr. Santiago was the person in the 7-Eleven surveillance photos absolutely was relevant—that identification placed Mr. Santiago in the white Prius on the night of Mr. Branch's murder. To be sure, Detective Blevins had only seen Mr. Santiago once in person, when he interviewed him on April 13, 2021. Otherwise, his knowledge of Mr. Santiago's appearance was grounded in the 7-Eleven video (which was not admitted into evidence), the still photos extracted from that video, the cell phone video, and the photos found on Mr. Jackson's phone (which were not admitted into evidence). Even so, his single previous encounter allowed him to observe Mr. Santiago in a setting and manner that the jury hadn't. In addition, Mr. Santiago was wearing a hood and a mask that covered most of his face in the surveillance photos and his identity was

unclear. Although the jury had the cell phone video to consider, Mr. Santiago's sweatshirt (the main factor connecting the video with the photos) was obstructed for much of the video.

The court instructed the jurors, appropriately, that they were "the sole judges of whether a witness should be believed":

> In deciding whether a witness should be believed, you should carefully consider all of the testimony and evidence, as well as whether the witness's testimony was affected by other factors.
>
> You should consider such factors as the witness's behavior on the stand and manner of testifying, whether the witness appeared to be telling the truth, the witness's opportunity to see or hear the things about which testimony was given, the accuracy of the witness's memory, whether the witness has a motive not to tell the truth, whether the witness has an interest in the outcome of the case, whether the witness's testimony was consistent, whether any other evidence that you believe supported or contradicted the witness's testimony, whether and the extent to which the witness's testimony in court differed from the statements made by the witness on any previous occasion, and whether the witness has a bias or prejudice.
>
> You are the sole judge of whether a witness should be believed. You need not believe any witness, even if the testimony is uncontradicted. You may believe all, part, or none of the testimony of any witness.
>
> * * *
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> In deciding what testimony to believe, you should rely on the quality of the evidence that was presented.

The jury could, then, decide whether to credit Detective Blevins's testimony after they viewed the evidence for themselves. *Tobias v. State*, 37 Md. App. 605, 616–617 (1977) (no abuse of discretion in letting detective identify defendant in video for jury; "The jury saw the tape[] and could judge for itself what it showed and whether [the detective's]

identifications were accurate."). We see no abuse of discretion in the court's decision to allow Detective Blevins to identify Mr. Santiago in the surveillance photos.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED AND CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. BALTIMORE COUNTY TO PAY COSTS.