UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0823

September Term, 2015

SKYLOR DUPREE HARMON

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Friedman,

JJ.

Opinion by Graeff, J.

Filed: February 23, 2016

Skylor Dupree Harmon, appellant, was charged in a ten-count indictment in the Circuit Court for Worcester County relating to the murder of Reginald Handy, Jr. and the attempted murder of Torrance Davis. The first trial ended in a mistrial after the jury was unable to reach a unanimous verdict.

On October 18, 19, and 20, 2011, appellant was retried by a jury and convicted of first degree murder of Mr. Handy, attempted second degree murder of Mr. Davis, and two counts of reckless endangerment (both victims). The court sentenced appellant to life imprisonment on the conviction of first degree murder, and it merged the remaining convictions.

On appeal,[1] appellant presents four questions for our review, which we have rephrased slightly as follows:

1. Did the trial court abuse its discretion in restricting appellant's cross-examination of the State's witnesses?

2. Did the trial court abuse its discretion in admitting a rifle into evidence?

3. Did the trial court abuse its discretion in admitting evidence that, a week before the shooting, in appellant's presence, appellant's uncle brought a blanket-wrapped object into a neighbor's house?

4. Did the trial court abuse its discretion in overruling appellant's objections that the State was asking leading questions of a witness?

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

[1] On May 21, 2015, as a result of post-conviction proceedings, appellant was granted a belated appeal to this Court.

FACTUAL BACKGROUND

On May 26, 2010, Mr. Handy was shot and killed outside the home of Norman Crawley, in Pocomoke City, Maryland. Mr. Handy had been standing next to Mr. Davis, his cousin, when shots were fired. Mr. Davis was not injured.

Mr. Davis explained at trial that he had known appellant for a "long time," although they "really didn't hang out." Appellant spent a lot of time with his uncle, Alexander Crippen, who had been released from prison a few months earlier. Mr. Davis and Mr. Crippen "didn't like each other," and Mr. Crippen thought Mr. Davis "was messing with Shana [Harmon]," Mr. Crippen's girlfriend.[2] A week prior to the shooting, a fight ensued; Mr. Crippen and Mr. Davis swung at each other, and Mr. Davis bit Mr. Crippen's finger. Appellant was present during the fight.

On the evening of the shooting, Mr. Davis and Mr. Handy went to Mr. Crawley's house. Mr. Davis saw Mr. Crippen in front of Shana's house. A "pole cam" video recorded what happened next, which Mr. Davis narrated.

Mr. Davis, Mr. Handy, and Mr. Crawley were standing outside 503 Laurel Street talking. Mr. Crippen, who had been standing by a telephone pole, walked toward the group and exchanged words with Mr. Handy. Mr. Davis told Mr. Handy and Lorenzo Davis ("Lorenzo"), who had joined them, "let's go in the house." Shots then rang out, a "bigger pop, then . . . a small pop, pop, pop, pop, pop," and Mr. Handy made an "uh" sound.

[2] Ms. Harmon is not related to appellant. To minimize confusion, we shall refer to her as "Shana."

Mr. Davis turned around and saw Mr. Crippen shooting and then running toward Shana's house. As Mr. Davis held Mr. Handy, who was lying on the ground, he was shooting his .45 caliber gun in the direction of Shana's house. He fired approximately five or six shots.[3]

Mr. Davis initially thought that Mr. Crippen had killed Mr. Handy. A few days after the shooting, however, Mr. Davis had a conversation with Rasheema Schoolfield, who said that she saw appellant with "a big gun" during the shooting. He was "hiding behind her" when he shot in the direction of Mr. Davis and Mr. Handy. Based on that conversation, Mr. Davis met with Sergeant Scott Brent.

Lorenzo testified that, on the night of the shooting, he was standing with Mr. Davis when he heard "pop, pop, pop, then a loud bang." He heard three or four "pops" and one loud bang. The "pops" came from "by the telephone pole on Laurel Street," but the loud bang "didn't seem like it" came from the same area. Lorenzo saw Mr. Crippen running toward Young Street, and he saw Mr. Davis pull out a handgun and fire it toward Mr. Crippen.

Ms. Schoolfield testified that she, Mr. Crippen, and Shana had been "hanging out" and drinking in the area of Shana's house on the day of the shooting. Right before the shooting, Ms. Schoolfield went to get a cigarette from Mr. Crippen, who "was on the pole."

[3] Mr. Davis stated that he carried his .45 caliber gun only in Virginia, where he had "a lot of enemies." He explained that, in Virginia, "it's a self-defense law, so if someone come at me with it, I've got a right to grab mine." He did not, however, have a license to carry a gun in Virginia. He had his gun in Maryland on the night of the shooting because, after riding dirt bikes, he had taken a back road on the border of Maryland and Virginia. He did not expect to be coming back to Maryland that night, but he carried his handgun on his person, instead of leaving it in the car, in case he was pulled over and had to run.

As she began walking back toward Shana's house, she heard "probably, like, four" shots. She then ran back to her vehicle, which was parked in the driveway at Shana's house, and left. Ms. Schoolfield had not seen appellant in the area prior to the shooting. As Ms. Schoolfield ran to her van, however, she saw appellant squatting behind her car near the driver's side door. She testified that she did not see anything in appellant's hands, and she did not say anything to him.

A few days after the shooting, Ms. Schoolfield told Mr. Davis that she "heard the shots and ran back to the car," and she saw appellant beside the house. She did not remember telling Mr. Davis that appellant had a big gun, or that he used her for cover when he was shooting the gun. She did not recall telling Mr. Davis that she saw appellant shooting the gun in Mr. Handy's direction. She did remember telling Trooper Kyle Clark that she saw appellant in the driveway.

The State introduced text messages exchanged between Mr. Davis and Ms. Schoolfield. Mr. Davis asked: "So I'm the only one you told you seen [appellant] by the house with [a] gun?" Ms. Schoolfield's texted reply was: "[Y]es, who else am I gonna tell?" In court, however, Ms. Schoolfield stated that, "for the record, I didn't see nothing with no gun, I don't know, I didn't see that part so I don't know." She testified that she had "[a] lot" to drink on the day of the shooting.

Preston Townsend, a neighbor, testified that, "[m]ost of the time" Mr. Crippen was in the neighborhood, appellant was with him. Approximately thirty minutes prior to the shooting, Mr. Townsend saw Mr. Crippen and appellant on Shana's porch. When Mr. Townsend heard gunshots, he ran out of his house and saw "a bright flash" between

Shana's house and the house beside it. He turned to look in the direction of the flash and saw appellant "standing there" in the driveway near a van. It looked to Mr. Townsend as if appellant had "something . . . pressed up against his leg." Mr. Townsend could not tell what the object was, but it looked "long."

Approximately a week before the shooting, Mr. Townsend saw Mr. Crippen and appellant on Shana's front porch. Mr. Crippen picked up a large, blanket-wrapped object and brought it into Shana's house. Mr. Townsend also was present when Mr. Davis and Mr. Crippen got into a fight, and he observed appellant run toward the fight to help Mr. Crippen.

Officer Zina Means testified that, when she arrived at the scene of the shooting, Mr. Handy was lying on the ground on his back gasping for air. Officer Means asked where the shooter was, and someone in the crowd of 40 to 50 people surrounding the scene stated that the shooter had fled. Officer Means did not recognize Mr. Handy, but she did recognize Mr. Davis "[f]rom previous encounters." Officer Means also knew Mr. Crippen from "[p]revious encounters," but he was not at the scene. Officer Means knew appellant as well, stating that she had seen him earlier in the day when "he walked up to [a] scene that [she] was at." She did not, however, see him at the scene of the shooting.

The day after the shooting, Officer Means was dispatched to Shana's residence to canvas the area for an assault rifle after police received a tip that the rifle was being stored in the area. Officer Means observed the weapon wrapped in a blanket in a grassy area behind a fence. Officer Means also found a single shell casing of .223 ammunition.

Mr. Crippen's house was approximately 65 yards from Shana's driveway, and there were no obstructions impeding the field of vision between the two locations.

Detective Dale Trotter, testified that, during the execution of a search warrant at Shana's house, he recovered the weapon, a Bushmaster AR-15 rifle, which was located "right on the very corner of the fence inside the weeded area." The rifle held a ten-round magazine, but there were only eight rounds in the magazine and one in the chamber, suggesting that one shot had been fired from the rifle. During his investigation, Detective Trotter learned that the rifle had been stolen from Somerset County a few weeks prior to Mr. Handy's murder. No usable DNA was recovered from the rifle.

In addition to the rifle, Detective Trotter recovered four .45 caliber casings, which were fired from a single weapon, and a .45 caliber bullet, which either fell from the weapon or was misfired. Three .45 caliber bullets were found lodged in Shana's house. The police also recovered six .380 caliber shell casings, also fired from a single weapon. Neither the .45 caliber gun nor the .380 caliber gun were found; the only weapon recovered was the AR-15 rifle.

After observing the pole cam video, which showed Mr. Crippen firing six rounds, Detective Trotter thought that Mr. Crippen was the individual who shot Mr. Handy. Later, however, evidence revealed that Mr. Handy died from a single bullet.[4] Although the bullet recovered from Mr. Handy's body could not be identified as coming from a specific weapon because it was severely damaged, it was consistent with having been fired from a

[4] The bullet entered Mr. Handy's back and hit his spine, which caused the bullet to fragment and tear his aorta into two pieces.

Bushmaster AR-15 model rifle, and inconsistent with having been fired from either a .380 or a .45 handgun.

Trooper Clark testified that, following the results of the ballistics examination on the bullet fragments recovered from Mr. Handy, the investigation changed focus. He interviewed Ms. Schoolfield and asked her whether anyone else had been in the area on the side of Shana's house near Ms. Schoolfield's van. Ms. Schoolfield told Trooper Clark that nobody else had been in the area aside from appellant, who was standing behind Ms. Schoolfield's vehicle.

On May 28, 2010, at 2:30 a.m., Detective Trotter responded to the Traveler's Motel in Delmar, Maryland to execute a search warrant. Appellant and Mr. Crippen were present in the room. Aside from a cell phone belonging to Mr. Crippen, no other personal items were found in the room.

After appellant and Mr. Crippen were located at the motel, they were brought to the Maryland State Police Barrack in Salisbury. Appellant was advised of his *Miranda*[5] rights and then interviewed. He stated that, at the time of the murder, he was standing near Mr. Crippen in front of Mr. Crippen's house. Mr. Crippen did not have a gun. When asked who had guns on that street on the night of May 26, appellant responded that "everybody had guns," but he later told Trooper Clark that "was just a joke." Appellant stated that, after the shooting, he and Mr. Crippen fled the scene.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

As indicated, appellant was convicted of murder and related crimes. This appeal followed.

DISCUSSION

I.

Cross-Examination of State's Witnesses

Appellant first contends that the court erred in restricting, on multiple occasions, his cross-examination of Officer Means and Mr. Davis. We will address each of his arguments, in turn.

A.

Standard of Review

A criminal defendant has the right to "'cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely.'" *Martin v. State*, 364 Md. 692, 698 (2001) (quoting *Marshall v. State*, 346 Md. 186, 192 (1997)). A criminal defendant's constitutional right to cross-examination, however, is not boundless. *Pantazes v. State*, 376 Md. 661, 680 (2003). Trial judges have "'wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

The scope of cross-examination is within the "broad discretion" of the trial court. *Myer v. State*, 403 Md. 463, 476 (2008); *Pantazes*, 376 Md. at 681; *Washington v. State*,

180 Md. App. 458, 489 (2008). We will not disturb the exercise of that discretion in the absence of clear abuse:

> [O]ur sole function on appellate review is to determine whether the trial judge-imposed limitations upon cross examination that inhibited the ability of the defendant to receive a fair trial. . . . Consistent with that discretion, we note, however, that the trial judge, and not this Court, is in the best position to determine whether the introduction of certain impeachment evidence would enmesh the trial in confusing or collateral issues.

Merzbacher v. State, 346 Md. 391, 413-14 (1997).

B.

Officer Means

Appellant raised three issues regarding the court's restriction of cross-examination of Officer Means. As explained below, we conclude that appellant does not state a claim for relief in this regard.

1.

How Officer Means Knew Mr. Davis

Appellant first contends that the trial court erred in sustaining the State's objection to a question regarding how Officer Means knew Mr. Davis. He asserts that Officer Means was permitted to testify how she knew appellant and Mr. Crippen, and the court's failure to permit appellant to ask Officer Means how she knew Mr. Davis was unfair and violated his right to cross-examine witnesses against him.

The State argues that this contention is not preserved for review because, after the State's objection was sustained, appellant "neither put on the record what his complete question would be, nor the answer he sought to elicit." In any event, it asserts that the court

properly exercised its discretion in excluding the evidence. Finally, it asserts that, even if there was error, it was harmless error.

This claim arises from the following line of questioning during the cross-examination of Officer Means:

> Q. But you were familiar with Torrance Davis?
>
> A. I was very familiar with Torrance Davis.
>
> Q. From your duties as an officer?
>
> A. That's correct, and I'm familiar with the people that live and travel through Pocomoke City.
>
> Q. And when you refer to that element, are you referring to a criminal element?
>
> A. I'd say both, criminal and non-criminal, just passing by.
>
> Q. Well, your association with Mr. Davis was –
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

We agree with the State that the challenge to the court's ruling in this regard is not preserved for this Court's review. As we recently explained:

> "Where evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." *South Kaywood Cmty. Ass'n v. Long*, 208 Md. App. 135, 163 (2012) (quoting *Sutton v. State*, 139 Md. App. 412, 452 (2001)). *Accord Conyers v. State*, 354 Md. 132, 164 (proffer as to substance and importance of the expected answers was required to preserve issue for appeal), *cert. denied*, 528 U.S. 910, 120 S.Ct. 258, 145 L.Ed.2d 216 (1999).

Pickett v. State, 222 Md. App. 322, 345-46 (2015).

Here, when the court sustained the State's objection to the inquiry, "[w]ell, your association with Mr. Davis was --," appellant did not proffer what answer he sought to elicit or how the testimony would have been relevant and not unduly prejudicial. Under these circumstances, the issue is not preserved for this Court's review.[6]

2.

Officer Means' Interaction with Mr. Davis at the Scene

Appellant's next contention is that the court erred in restricting important cross-examination regarding whether Mr. Davis was "withholding evidence from the police." This contention arises from the following:

> [OFFICER MEANS]: . . . I said . . . you need to tell us who did this to your friend, you need to be honest and let us handle it.
>
> Q. You told him to let you handle it as opposed to –
>
> A. Let the police handle it.
>
> ***
>
> Q. As opposed to, what alternative did you think there might be?
>
> A. Possible retaliation.
>
> Q. So, when you made that statement you were afraid that Torrance Davis might withhold information because he intended to –
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

[6] We note that counsel did use the evidence that Officer Means was very familiar with Mr. Davis to argue that this showed that Mr. Davis had been in trouble. Defense counsel also argued that Mr. Davis' testimony that he carried a gun for protection indicated that "he's living the lifestyle of a person that needs to carry a gun."

Again, as the State points out, appellant made no proffer as to what answer he sought to elicit or how this answer was relevant. Accordingly, his claim of error is unpreserved. *See Pickett*, 222 Md. App. at 345-46.

In any event, even if the issue was preserved, we would find it to be without merit. The objection was properly sustained because counsel's question stated, without a basis, that Officer Means thought that Mr. Davis might withhold evidence, when that was not her testimony. She merely told him to be honest and let the police handle the situation. To the extent the question sought to elicit Mr. Davis' intent, it was not proper for her to testify to that intent. And finally, Officer Means had already testified to the alternative she believed existed to letting the police handle the situation, "[p]ossible retaliation." We perceive no basis for reversal on this claim.

3.

Question Regarding Bullet Casing

Appellant next contends that the court erred in restricting cross-examination regarding the location of the bullet casing found the day after the shooting. The questioning to Officer Means in this regard was as follows:

> Q. And the bullet casing was found on the other side of, on the front towards 502 Young Street?
>
> A. It was the front of 502 . . . it was found in the, right near the fence line alongside of 502, in between 500 and 502, in the grassy area which was closer to 502.
>
> Q. So, would it be, if the fence had continued all the way to the front, would it have been outside the fence or inside the fence?

A. I wouldn't know that unless I had a measuring, or to mark it off. I mean, I could see the fence. I'm not sure with a straight line that it would run over the bullet, or I'm not sure what you're asking.

Q. You know where the driveway is?

A. Sure.

Q. And you know where the fence was running?

A. Yes.

Q. So, was it within, if the fence had continued down, would it be within or you don't have any idea?

A. I didn't measure it, no, I didn't really look to see if the fence would be on which side of the casing.

Q. But if you were facing the house, it would've been to the left side of the driveway?

[THE STATE]: Objection.

THE COURT: Sustained. Do you have another question?

[APPELLANT'S COUNSEL]: That's it for cross, Your Honor.

Appellant contends that the location of the bullet casing was of critical relevance. He asserts that, if it was found on the right side of the driveway, that was inconsistent with Ms. Schoolfield's testimony regarding how the shooting occurred, and because Ms. Schoolfield was "the only witness to connect [appellant] to the shooting," the question was "of critical importance."

As the State points out, however, Officer Means had already testified that she did not know where the bullet casing was in relation to the fence when she stated: "I didn't measure it, no, I didn't really look to see if the fence would be on which side of the casing."

Accordingly, Officer Means already testified that she did not know the answer, and the circuit court properly restricted further cross-examination in this regard. As the court recognized, the line of questioning was repetitive and was not going to elicit a response other than what Officer Means had already stated.

C.

Mr. Davis

Appellant challenges two rulings regarding his cross-examination of Mr. Davis. As explained below, we are not persuaded that the court's rulings in this regard constituted an abuse of discretion.

1.

Possession of the Rifle

Appellant contends that the circuit court erred in granting the State's motion in limine to preclude appellant from inquiring about Mr. Davis' "prior connection to the assault rifle that the State alleged was used to kill" Mr. Handy. He asserts that this testimony "was exceedingly important" because evidence that Mr. Davis possessed the rifle near the time of the shooting made it "extremely unlikely that [appellant] would have come to possess the weapon and use it to shoot the victim."[7]

The State contends that this issue is not preserved for review because appellant "acquiesced in the exclusion of the evidence during cross-examination" and asserted,

[7] Appellant states that, at the first trial, which resulted in a hung jury, the jury heard evidence that Mr. Davis obtained the rifle that was found at the scene of the shooting in exchange for crack cocaine.

instead, that he "could elicit the evidence in the defense case." In any event, the State argues that the claim is meritless because "proof that [Mr.] Davis possessed the rifle some time before the murder is not probative of whether [appellant] had the rifle on the day of the crime," noting that there was no claim that Mr. Davis fired a rifle, but rather, the evidence indicated that, after Mr. Handy was shot, Mr. Davis fired a handgun, not a rifle, in Mr. Crippen's direction.

a.

Proceedings Below

At a pre-trial hearing on June 17, 2011, appellant's counsel cited a report received in discovery regarding an investigation into stolen guns. The report suggested that, approximately two weeks before the shooting, Mr. Davis and/or Mr. Handy were involved with the theft from a home of the rifle used to kill Mr. Handy and the use of that rifle in a shootout in Virginia. The court inquired about the relevance of that information, stating: "Well, assuming [Mr. Davis] did [have possession of the rifle], if he gave it to Mr. A. and Mr. A. gave it to your client, I mean, what does that prove?" Appellant's counsel proffered that appellant and Mr. Davis did not associate with each other, and therefore, it was unlikely that Mr. Davis would have given the gun to appellant or any of his associates. The court responded that appellant's counsel could "certainly ask [Mr. Davis at trial] if he had the gun, if he gave it to anybody."

Subsequently, at trial, the State moved to preclude appellant from questioning Mr. Davis about the AR-15 rifle. After an off-the-record chambers conference, the State re-stated the motion on the record, stating:

> Your Honor, as we discussed in Chambers regarding the use immunity and its limitations regarding the scope of the State's direct examination, the State is making a motion in limine, or objecting at this point to any questions related to the AR-15 proposed or propounded to Mr. Davis.
>
> If she asks the question and then I object, the cat is out of the bag. So I'm making a motion in limine that [appellant's counsel] be precluded . . . .
>
> [APPELLANT'S COUNSEL]: Your Honor, I understand at this point that I can't mention it, but there is nothing that precludes me from calling him in our case-in-chief and asking the question.
>
> THE COURT: That's a different issue.
>
> [APPELLANT'S COUNSEL]: Do we need to address that later?
>
> THE COURT: We'll address that later. For the purpose of cross-examination I'll grant the motion.
>
> [APPELLANT'S COUNSEL]: And I won't ask any questions regarding that.

b.

Preservation/Merits

Starting first with the State's preservation argument, "[i]t has been held that a litigant who acquiesces in a ruling is completely deprived of the right to complain about that ruling." *Osztreicher v. Juanteguy*, 338 Md. 528, 535 (1995) (citing *Blaxton v. Clemens*, 415 S.E.2d 304, 306 (Ga. Ct. App. 1992)). Here, however it appears that the court had resolved the issue in chambers, deciding to grant the motion at that point, and counsel was merely stating her understanding and trying to keep the option open to elicit the evidence later. A party need not object to a ruling granting a motion in limine to exclude evidence. *Simmons v. State*, 313 Md. 33, 38, 1988. Accordingly, the issue is preserved for this Court's review.

We ultimately conclude, however, that the court properly exercised its discretion in its ruling because proof that Mr. Davis possessed the rifle at some point before the murder was not probative of whether appellant possessed the rifle on the day of the shooting. Decisions whether to admit evidence generally are left to the sound discretion of the trial court, and we will not reverse absent an abuse of discretion. *Baker v. State*, 223 Md. App. 750, 759 (2015).

Here, appellant made no claim at trial that Mr. Davis possessed or fired a rifle during the shooting. In fact, the evidence, including the videotape and Mr. Davis' own testimony, was that Mr. Davis fired several shots from a handgun in Mr. Crippen's direction after Mr. Handy was shot. Accordingly, the court did not abuse its discretion in precluding appellant from questioning Mr. Davis about any past possession of the rifle that killed Mr. Handy.

2.

Immunity

Appellant next contends that the court erroneously restricted his cross-examination of Mr. Davis "as to the scope of the immunity under which he testified," precluding appellant from determining Mr. Davis' understanding of the bounds of the immunity he was granted. The State contends that this issue is not preserved, and in any event, it is without merit because Mr. Davis had already testified that he did not have an understanding of the immunity agreement and further questioning in that regard "was badgering or harassing." The State further argues that Mr. Davis' responses to the prosecution's questions rendered any error in restricting cross-examination to be harmless.

a.

Proceedings Below

At the start of the State's direct examination of Mr. Davis, the following colloquy ensued:

> [THE STATE]: . . . .When I came out and talked to you last night, is it fair to say that I explained to you that there is a procedure or a mechanism within the legal system that is called "use immunity," is that fair to say?
>
> A. Yes.
>
> Q. And I explained to you that use immunity basically means that I present an affidavit to the [c]ourt indicating that you have told me that you intend to invoke your Fifth Amendment, that you have no intention of answering questions, and I let the judge know that and I ask the judge to sign an order which grants you use immunity; did I explain that to you?
>
> A. Yes.
>
> Q. Did I also explain that use immunity means that anything you say today cannot be used against you in any kind of proceeding in the future; is that correct?
>
> A. Yes.
>
> ***
>
> Q. It's only what you say today that can't be used against you in the future.
>
> A. Yes.

On cross-examination, appellant's counsel began to question Mr. Davis about the scope of his immunity. The following transpired:

> Q. Isn't it true that you told the State's Attorney's office that you weren't going to testify?
>
> A. At first, yes.

Q. And at that point they came to you and explained something about use immunity?

A. Yes.

Q. And what is your understanding of what that means?

A. I mean, they basically told me, um, they can make me testify.

Q. And what can they do to you if you don't testify?

A. Contempt of court.

Q. And could that involve jail time?

A. I guess. I really didn't . . . .

Q. Is that what they explained to you, that's a crime?

A. Yes.

Q. Okay. So they told you they were going to make you testify whether you wanted to or not?

A. I mean, basically.

Q. Okay. And your understanding how this use immunity works, can you tell the ladies and gentlemen of the jury what you understand you can testify to and not get in any trouble?

A. Um, I mean, I guess basically whatever my statement was then, or here I guess, I'm not 100 percent sure how it works.

Q. Is your understanding that if the State's Attorney asks you questions and you admit to a crime, they're not going to prosecute you for it?

[THE STATE]: Objection.

THE COURT: Sustained.

b.

Preservation

Here, again, when the court sustained the State's objection, appellant made no proffer regarding the information he sought to elicit from Mr. Davis. *See Pickett*, 222 Md. App. at 345-46. Although we agree with appellant that a witness' understanding of an offer of immunity is relevant, given Mr. Davis' response to the State's direct examination regarding the terms of the immunity given, we believe that it was incumbent on defense counsel to proffer why additional information was relevant. Because appellant failed to do that, his claim is not preserved for review.

In any event, even if preserved, we would conclude that the circuit court properly exercised its discretion in sustaining the State's objection to appellant's question regarding Mr. Davis' understanding of the immunity agreement. As indicated, Mr. Davis testified to the terms of the immunity agreement as it was explained to him. When asked again on cross-examination, Mr. Davis answered that he did not have a clear understanding of how the immunity agreement worked, aside from his prior testimony. Under these circumstances, continuing that line of questioning served no purpose, and the court did not abuse its discretion in sustaining the State's objection to the subsequent question asked. *See* Md. Rule 5-611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses [to] make the interrogation . . . effective for the ascertainment of the truth . . . avoid needless consumption of time, and . . . protect witnesses from harassment.").

Moreover, even assuming that the court erred in restricting cross-examination, and assuming that Mr. Davis would have answered "yes" to the question whether his understanding was that if he admitted to a crime the State would not prosecute him, any error in precluding that answer was harmless. *Dorsey v. State*, 276 Md. 638, 659 (1976) (An error is harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict."). Closing argument illustrates that the defense was able to use the evidence admitted regarding the existence of the immunity agreement to its advantage. Counsel told the jury that Mr. Davis said that having immunity meant that "he was not to be prosecuted for saying that he shot off his .45 gun," he was not going to be prosecuted for "[u]nloading a gun into a house with three children inside," and with regard to "the incidents of that evening, he was free and clear." Counsel further stated that Mr. Davis had "use immunity," so "he can pretty much tell you what he wants to tell you without any prosecution." Thus, it is clear that the information appellant sought to elicit essentially was before the jury, and the error, if any, was harmless.

3.

Mr. Davis' Disagreements with Mr. Crippen

Appellant next contends that the trial court "impermissibly restricted" his cross-examination of Mr. Davis when it "sustained the State's multiple objections to questions involving [Mr.] Davis' disagreements with [Mr.] Crippen." In that regard, he argues that the court should not have sustained an objection to a question regarding: (1) Mr. Davis biting Mr. Crippen's finger; (2) Mr. Crippen telling Mr. Davis that he wanted to shoot him

"one-on-one"; and (3) Mr. Davis stating "[they] better be ready to shoot off." With respect to the first question posed to Mr. Davis on cross-examination regarding a fight, the following colloquy ensued.

> [APPELLANT'S COUNSEL]: Okay. During this particular fistfight, you say nobody really got the better of anybody but, in fact, you bit Mr. Crippen's finger, didn't you?
>
> A. Yes.
>
> ***
>
> Q. And, in fact, do you recall talking about the particular altercation and specifically saying "when he tried to grab, I had his head in my hands, so he tried to hit me right in here so I bit his finger"?
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

The State contends that the question regarding Mr. Davis biting Mr. Crippen's finger "called for inadmissible hearsay as it sought to elicit testimony from [Mr.] Davis about an out-of-court statement he made for the truth of the matter asserted – that is, testimony that [Mr.] Davis bit [Mr.] Crippen's finger," and because appellant failed to make a proffer to the court advising of a non-hearsay purpose for the statement, his argument is waived. We agree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801. Hearsay "is not admissible" unless "otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes." Md. Rule 5-802.

Here, the question called for inadmissible hearsay as it sought to elicit testimony from Mr. Davis about an out-of-court statement he made, and it was offered for the truth of the matter asserted, i.e., that he bit Mr. Crippen's finger. Because appellant did not make a proffer to the court of a non-hearsay purpose for the statement, the circuit court's ruling cannot be said to be an abuse of discretion. *Braxton v. State*, 57 Md. App. 539, 549-50 (1984) ("refusal to permit an answer to a question which on its face called for hearsay . . . is not error where trial counsel fails to show that the purpose of the question is to elicit non-hearsay or evidence which would be considered as an exception to the hearsay rule"), *cert. denied*, 300 Md. 88 (1984).

We turn next to appellant's contentions that the court erred in sustaining the State's objection to a question regarding Mr. Crippen telling Mr. Davis that he wanted to shoot him "one-on-one." Cross-examination in this regard was as follows:

> [APPELLANT'S COUNSEL]: . . . . When you had your altercation with Mr. Crippen and you two were fighting, isn't it true that he told you he wanted to shoot you one-on-one?
>
> [THE STATE]: Objection.
>
> THE COURT: What grounds?
>
> [THE STATE]: It's hearsay.
>
> THE COURT: Sustained.
>
> [THE STATE]: Move to strike.
>
> [APPELLANT'S COUNSEL]: It's a statement against penal interest, Your Honor.
>
> THE COURT: Sustain the objection. Strike it from the record.

Appellant asserts that the answer to the question was admissible as a statement against penal interest, and in any event, its exclusion violated his due process right to a fair trial.

We begin with appellant's due process argument. This argument was not raised below, and therefore, it is not preserved for review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court."). *Accord Goldman, Skeen & Wadler, PA v. Cooper, Beckman & Tuerk*, LLP, 122 Md. App. 29 49-50 (1998) (declining to consider whether a hearsay statement was admissible under Md. Rule 5-802.1(b) because, at trial, appellant argued only the past recollection recorded exception).

We next address appellant's argument that the statement was admissible as a statement against penal interest. Md. Rule 5-804(b)(3) provides that a statement against interest is not excluded by the rule against hearsay if the declarant is unavailable. A statement against interest is defined as:

> A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Md. Rule 5-804(b)(3).

In *Jackson v. State*, 207 Md. App. 336, 348-49, *cert. denied*, 429 Md. 530 (2012), we explained:

> For a statement to be admissible under Rule 5-804(b)(3), the proponent of the statement must convince the trial court that "'1) the

> declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement.'" *Stewart v. State*, 151 Md. App. 425, 447, (2003) (quoting *Roebuck v. State*, 148 Md. App. 563, 578 (2002)). "The proponent of the declaration has the burden 'to establish that it is cloaked with 'indicia of reliability[,]' . . . mean[ing] that there must be a showing of particularized guarantees of trustworthiness.'" *Id.* (quoting *West* [*v. State*], 124 Md. App. [147], 167 [(1998)]) (other citations omitted).

Moreover, the trial judge must "'be satisfied that the statement was in fact against the declarant's interest and that the declarant actually understood that his statement could indeed cause him [or her] a loss of property, money, or liberty.'" *Id.* at 350 (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 802[E] (4th ed. 2010)).

Here, the alleged statement by Mr. Crippen that he wanted to shoot Mr. Davis "one-on-one" did not constitute a statement against a penal interest. Even if the statement could be construed as a threat sufficient to support a conviction for second-degree assault, there was no showing that Mr. Crippen actually understood that his statement could lead to a criminal conviction. Under these circumstances, the circuit court did not abuse its discretion in sustaining the State's objection to the question.

Appellant's final contention regarding the trial court's restriction of cross-examination of Mr. Davis arises from the following:

> [APPELLANT'S COUNSEL]: Okay. So earlier in the day when you were in the area, do you recall saying to anyone "when I get back the niggers better be ready to shoot off"?
>
> [THE STATE]: Objection. And I move to strike.
>
> THE COURT: Strike it from the record.
>
> [APPELLANT'S COUNSEL]: It's his own statement, Your Honor.

Appellant contends that the testimony was necessary to show that Mr. Davis threatened to shoot Mr. Crippen, and that Mr. Davis had a motive to testify falsely against appellant because he had a lethal disagreement with appellant's uncle.

Even assuming, arguendo, that the issue is preserved and has merit, any error was harmless. There was an abundance of evidence of the bad blood between Mr. Davis and Mr. Crippen. Mr. Davis testified regarding the falling out between him and Mr. Crippen, and the fight where he bit Mr. Crippen's finger. Moreover, evidence of animosity between the two helped both the State (in its effort to prove the motive of Mr. Crippen's nephew, appellant, for shooting at Mr. Davis and killing Mr. Handy, who was standing nearby) and appellant (in his effort to suggest that there were other people who may have had a motive to shoot at Mr. Davis, and fire the shot that killed Mr. Handy). Thus, the exclusion of additional evidence about the animosity between the two men, if error, "was unimportant in relation to everything else the jury considered in reaching its verdict." *Dionas v. State*, 436 Md. 97, 118 (2013). Accordingly, the error, if any, was harmless error that does not require reversal of appellant's convictions.

II.

Admission of the AR-15 Rifle

Appellant next contends that the trial court erred in admitting the AR-15 rifle into evidence because the State failed to establish the chain of custody of the weapon. He asserts, briefly and without citation to authority, that the State could not introduce the rifle through Detective Trotter because he "did not recover the weapon, nor did he testify when he came into possession of the weapon."

The State contends that appellant's claim of error is unpreserved, asserting that the chain of custody argument below related to whether the rifle had been tampered with after its recovery, and not, as he argues on appeal, because Detective Trotter initially did not recover the weapon. We are not persuaded. Appellant objected below on the ground that the State had not established the chain of custody of the rifle, and he sufficiently preserved his argument for this Court's review.

We thus proceed to address the claim on the merits. As this Court recently explained:

> Chain of custody evidence is necessary to demonstrate the "ultimate integrity of the physical evidence." *Best v. State*, 79 Md. App. 241, 256, *cert. denied*, 317 Md. 70 (1989). In most cases, an adequate chain of custody is established through the testimony of key witnesses who were responsible for the safekeeping of the evidence, i.e., those who can "'negate a possibility of 'tampering' . . . and thus preclude a likelihood that the thing's condition was changed.'" *Jones v. State*, 172 Md. App. 444, 462 (quoting *Wagner v. State*, 160 Md. App. 531, 552 (2005)), *cert. denied*, 399 Md. 33 (2007). What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case. *Best*, 79 Md. App. at 250. The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law. *See Jones*, 172 Md. App. at 463 (upholding the admission of the evidence, but noting that the gaps in the State's chain of custody supported defense counsel's remarks in closing that the jury should discount its value).

Easter v. State, 223 Md. App. 65, 75, *cert. denied*, 445 Md. 488 (2015).

Generally, there is a presumption that a piece of physical evidence continues to remain in the same condition unless it is contaminated or degraded due to tampering or inadequate preservation from the natural effects of the environment and the passage of time. *Levine v. State*, 93 Md. App. 553, 565 (1992). This presumption, however, may vary depending on the nature of the real evidence. *Id.* (the presumption varies with the nature

of the evidence, the circumstances, and the length of time that has passed). *See Best*, 79 Md. App. at 250 ("Arguably, controlled substances are more vulnerable to tampering or to commingling than would be, for instance, a stolen portrait or a valuable diamond necklace."). Testimony regarding the circumstances under which an item of evidence was kept during the period between the crime and the trial must support a finding only that a "reasonable probability" exists that the evidence is authentic and materially unaltered. *See Jones*, 172 Md. App. at 462 ("The circumstances surrounding [the] safekeeping [of the item of evidence during that time] need only be proven as a reasonable probability.") (quoting *Wagner*, 160 Md. App. at 552). *Accord Hawkins v. State*, 77 Md. App. 338, 347 (1988) (the test "in examining the sufficiency of the chain of custody, is whether there exists the 'reasonable probability that no tampering occurred'") (quoting Breeding v. State, 220 Md. 193, 199 (1959)). "A reasonable probability that no tampering occurred does not require a foreclosing of every possibility as a prerequisite to admissibility of evidence." *Van Meter v. State*, 30 Md. App. 406, 414, *cert. denied*, 278 Md. 737 (1976).

Here, contrary to appellant's assertion, Detective Trotter testified that he recovered the rifle during the execution of the search warrant at Shana's house. He testified that, other than the magazine and scope having been removed, the rifle was in substantially the same condition at trial as when he found it. Under these circumstances, the circuit court did not abuse its discretion in admitting the rifle.

III.

Admission of Evidence that Mr. Crippen Brought a Blanket-Wrapped Object into Shana's House

Appellant next contends that the trial court erred in admitting evidence that Mr. Crippen was seen in possession of an unidentified object wrapped in a blanket a week before the shooting. He asserts that the evidence was not relevant because it "failed to show that what was under the blanket was in any way related to [appellant] or the shooting," and it could have been any item under the blanket. He continues that the jury "should not have been permitted to wildly speculate what was under the blanket without any connection between that object and [appellant] and the crime."

The State argues that the circuit court properly exercised its discretion in admitting evidence that, a week before the shooting, appellant's uncle, in appellant's presence, brought a rifle-sized, blanket-wrapped object from the porch into Shana's house. It asserts that this evidence was relevant because, combined with evidence that appellant was near Shana's house at the time of the shooting, it made it more probable than without that evidence that appellant had access to a rifle that he used to shoot Mr. Handy.

A.

Proceedings Below

During Mr. Townsend's testimony, the following was elicited.

> [THE STATE]: So, let's talk about a date approximately a week prior to the shooting, okay? Were you there when the shooting occurred?
>
> ***
>
> A. Yes.

Q. A week prior to that, approximately a week prior to that, did you have the occasion to see Alex Crippen and [appellant], on Shana Harmon's front porch?

A. Yes.

Q. Did you see something on that –

[APPELLANT'S COUNSEL]: Objection, Your Honor. This is all so leading. Why can't he just ask him what did you see that day, why does he have to go –

THE COURT: Let him finish the question.

[THE STATE]: Did you see something on the front porch that Mr. Crippen picked up at that time?

A. Yeah.

Q. Can you describe the dimensions of what he picked up and how it appeared? Dimension is the size, describe the size.

A. I don't know, maybe this big –

[APPELLANT'S COUNSEL]: Objection, Your Honor, as to the relevance of any of this.

THE COURT: Overruled.

A. Maybe about this big, a little bit bigger maybe, give or take. (Indicating.)[8]

Q. And did you see what it was?

A. No.

Q. Why not?

A. It was wrapped up.

[8] Although the transcript does not specifically describe Mr. Townsend's gestures, the State described the object, in closing, without any objection, as a "long object. Approximately this big. Wrapped in a blanket."

Q. What was it wrapped up in?

A. A quilt. Like, a blanket.

Q. Who was it that picked up the item?

A. [Mr. Crippen].

Q. Where was [appellant] when [Mr. Crippen] picked it up?

A. He was sitting there, I believe, on the porch.

***

Q. Do you remember how he held the item? You saw him pick it up, how was he holding the item?

[APPELLANT'S COUNSEL]: Objection, Your Honor, again as to the relevance –

***

THE COURT: Overruled. You can answer, sir.

THE WITNESS: Well, he picked it up, bent down and picked it up with one hand, and then the other hand he picked it up like this, and he walked in.

[THE STATE]: He held it with two hands and walked in the door?

A. Uh-huh.

B.

Admissibility of Relevant Evidence

Maryland Rule 5-401 defines "relevant evidence" as "evidence having 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." "[R]elevant evidence is admissible, under Maryland Rule 5-402, subject to the court's exercise of discretion to exclude it, under Maryland Rule 5-403, 'if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Odum v. State*, 412 Md. 593, 615 (2010). Evidence that is not relevant is inadmissible. Md. Rule 5-402.

The Court of Appeals explained in *State v. Simms*, 420 Md. 705, that the appellate court reviews a trial court's decision to admit evidence for abuse of discretion, but we conduct an independent analysis of whether evidence is relevant:

> "It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.'. . . Maryland Rule 5-402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence. . . . [T]he 'de novo' standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not 'of consequence to the determination of the action.'"

Id. at 724-25 (quoting *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619-20 (2011)). *Accord Donati v. State*, 215 Md. App. 686, 708-09, *cert. denied*, 438 Md. 143 (2014).

As appellant notes, however, "[i]t is not enough . . . for evidence to be relevant. Under Maryland Rule 5-403, the trial court should exclude relevant evidence if the probative value of the evidence 'is substantially outweighed by the danger of unfair prejudice.'" *Smith v. State*, 218 Md. App. 689, 704 (2014). In determining "whether a particular piece of evidence is unfairly prejudicial," we balance "the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Id.* at 705.

Here, we agree with the State that evidence that a week prior to the shooting appellant's uncle, Mr. Crippen, in appellant's presence, put a covered, rifle-sized object in

Shana's house, combined with the evidence that appellant was near Shana's house at the time of the shooting, was circumstantial evidence that made it more probable than without that evidence that appellant had access to a rifle that he used to shoot Mr. Handy. Appellant does not dispute this, but rather, he takes issue with the assertion that we can infer from the record that object in the blanket was the size of a rifle. To be sure, it would have been better for the State to have made a better record for appeal by getting a more detailed description or stating what the witness meant by "this big." Nevertheless, based on the State's closing argument, the record is sufficient to support the State's argument that the evidence presented permitted the jury to infer, based on the size of the item, and the way Mr. Crippen held it, that the item was a rifle. The circuit court did err in admitting this evidence.

IV.

Objections to State's Leading Questions

Appellant's final contention is that the trial court abused its discretion in permitting the State to ask Ms. Schoolfield leading questions. Specifically, he focuses on the following two questions:

> Q. And do you see, as you're going to your car, do you see [appellant] in the area of your vehicle?
>
> Q. Do you remember telling Mr. Davis during that same conversation that [appellant] used you as cover when he shot the gun?

Appellant asserts that the State "put words in" Ms. Schoolfield's mouth by stating that she saw appellant near her car, and there was "no reason" for the court to permit leading questions.

> Leading questions are addressed in Maryland Rule 5-611(c), which provides:
>
> The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be allowed (1) on cross-examination or (2) on the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party.

A leading question is "'one that suggests to the witness the answer desired by the examiner.'" *Clermont v. State*, 348 Md. 419, 461 (quoting MCCORMICK ON EVIDENCE § 6 at 17 (4th ed.1992), *cert. denied*, 523 U.S. 1141 (1998). This Court has clarified, however, that

> [n]ot every question embodying a material fact to which a yes and no answer may be given is leading, *Baltimore & O. R. R. Co. v. Black*, 107 Md. 642, 654, 69 A. 439, 72 A. 340 [(1908)]; JONES ON EV[IDENCE] § 816 [(4th ed. 1938)], but is only so when it offers, rather than seeks, information.

Harward v. Harward, 173 Md. 339, 350 (1938). Leading questions are improper if they rise to the level of the prosecutor testifying as a witness or injecting improper or untrue facts into the trial in the form of a question, or if they otherwise transform the prosecutor into a witness who cannot be cross-examined by the defendant. *Easter*, 223 Md. App. at 75.

Here, with respect to the first question: "[D]o you see, as you're going to your car, do you see [appellant] in the area of your vehicle?," the question was asked to establish where and when Ms. Schoolfield had seen appellant after the shooting. It did not rise to the level of the prosecutor testifying as a witness or injecting improper or untrue facts into the trial in the form of a question, or otherwise transform the prosecutor into a witness who cannot be cross-examined by the defendant. *See Easter*, 223 Md. App. at 75. Under these

circumstances, the trial court did not abuse its discretion in allowing Ms. Schoolfield to answer the question.

The second question: "Do you remember telling Mr. Davis during that same conversation that [appellant] used you as a cover when he shot the gun?," was a leading question. It was not, however, improper because it was used to impeach Ms. Schoolfield's testimony. On direct examination, Ms. Schoolfield testified that the only thing she had told Mr. Davis about the shooting was that she "just heard the shots and [she] ran back to the car and [she] seen [appellant] beside the house. And that's it." The State then sought to, and did, impeach that testimony with Mr. Davis' testimony that Ms. Schoolfield told him that she saw appellant with "a big gun" during the shooting, and that appellant was "hiding behind her" when he shot in the direction of Mr. Davis and Mr. Handy. To lay the foundation for the impeachment, the State had to first disclose to Ms. Schoolfield the content of her statement to Mr. Davis and give her an opportunity to explain or deny it. *See* Md. Rule 5-613 ("A party examining a witness about a prior . . . oral statement made by the witness . . . [must] before the end of the examination . . . disclose[] to the witness . . . the contents of the statement and the circumstances under which it was made . . . and . . . [give] the witness . . . an opportunity to explain or deny it."). That is precisely what the State did when it asked Ms. Schoolfield whether she remembered what she had told Mr. Davis. The court properly exercised its discretion in allowing Ms. Schoolfield to answer the question. We perceive no error.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.