UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0960

September Term, 2014

HASAAN WILSON

v.

STATE OF MARYLAND

**Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: March 30, 2016

**Zarnoch, Robert A., J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

In another gang-related shooting, on July 23, 2013, Hasaan Wilson ("Appellant") shot Antoine Pierce, a high-ranking member of the Bloods gang who had recently stripped Wilson of his Bloods gang colors. The shooting took place outside an apartment complex off of Regency Parkway in Prince George's County, Maryland, where Pierce was standing at the time along with friend, Dionna Branch.

Wilson was indicted and charged with attempted first degree murder of Mr. Pierce and related charges, as well as first degree assault of Ms. Branch. He was tried before a jury in the Circuit Court for Prince George's County, Maryland, on April 22 and 23, 2014. The jury convicted Wilson of attempted second degree murder, first and second degree assault, use of a handgun in commission of a crime of violence, and illegal possession of a regulated firearm. In this timely appeal, Wilson presents the following questions for our review:

> I. Did the trial court err when it permitted an officer to testify to what the victim told him about the events leading up to the shooting, when the victim's statement was inadmissible hearsay?
>
> II. Did the trial court abuse its discretion when it permitted Corporal Jordan Swonger to testify as an expert witness in the field of cellular phone technology and mapping, when Corporal Swonger was not qualified as an expert?
>
> III. Did the trial court err when it permitted Corporal Swonger to testify that his work had been peer reviewed, when such testimony amounted to inadmissible hearsay that had the effect of improperly bolstering the corporal's opinion?

For the following reasons, we shall affirm.

Background

During Wilson's trial, Antoine Pierce testified that he had been a member of the Bloods since he was born because his father was a member. His rank was an "Original Gangster," ("OG"), and he had held that rank for five years. In order to distinguish themselves as members of the Bloods, members wore red bandanas. Pierce testified, due to his rank, he wore a custom-made red bandana on his head, and a "flag," in his left back pocket, symbolizing his affiliation with "west coast California."

Pierce identified Wilson in the court, and explained that, the first time Pierce had met Wilson (aka "Flame") was at a bus stop at the Suitland Station. Pierce testified that he was "flagged up, meaning I was armed, meaning I had my gear on" as a member of the Bloods at the time. Wilson "roll called," Pierce, meaning he attempted to greet him as a member of the gang. Because of his rank, Pierce "G check[ed]" Wilson, trying to check his knowledge of the history of the gang. After he spoke to Wilson, Pierce spoke to another top Blood member and found out that Wilson had given false information about a subset of the Bloods, Nine Trey Gangster, which no longer existed.

Pierce crossed paths with Wilson a second time at the Imperial Gardens apartments, located off Regency Parkway in Suitland, where Pierce resided. Wilson and Pierce got into a fistfight, and Pierce explained it was due to the false information Wilson provided the first time they met. Pierce testified "I was just trying to, you know, teach him the right way." The fight ended when Pierce took Wilson's "flag," or "paperwork," meaning colors, from Wilson's right back pocket.

On July 23, 2013, around 11:00 a.m., Pierce was at the Imperial Gardens apartments in front of the residence of his friend, Dionna Branch. About thirty to forty minutes later, Pierce saw Wilson coming towards him. When Wilson got closer, Pierce said, "What's banging, Blood?" and Wilson replied "I saw you talking, bitch as [sic] nigga." Wilson then lifted his shirt and reached for a pistol. Wilson was with another unidentified man, and Pierce heard that man say "shoot that nigga."[1] Wilson, standing just two feet away, then fired the gun and shot Pierce in the right arm and the chest. After he was shot the first time, Pierce tried to run, then stopped, and was shot a second time.[2]

Pierce first told Branch to call his fiancé. Branch asked Pierce if he wanted her to call 911, to which Pierce said no. However, Pierce changed his mind "[o]nce I see myself fading away" and Branch called 911 and the police arrived within ten minutes. Pierce was then transported to the hospital, with injuries to his back, his left arm, and his side. He recalled telling police the name of the person who shot him, and identified a photograph of Wilson as his assailant.

At trial, Pierce identified Wilson and his unidentified companion on surveillance photographs taken at the apartment complex at the time of the shooting. Pierce identified one photograph as depicting Wilson reaching for the handgun in Wilson's shirt. Another photograph depicted the moment Wilson fired the gun at Pierce. He also identified a

[1] Appellant objected to admission of this statement, and the court overruled the objection after the State asserted it was admissible as either an excited utterance or a present sense impression.

[2] No weapon was recovered in connection with this case.

surveillance video of the incident that included the moment when Wilson started firing at him.

Dionna Branch testified that she had known Pierce for over a year and that he was like a brother to her. Branch knew that Pierce was a member of the Bloods and also testified she knew Wilson as "Flame." She identified Wilson in court as well. Over a continuing objection, Branch testified that Wilson held himself out as a member of the Bloods by wearing a "flag," *i.e.*, a red bandana, in his right pocket. Wilson had also told Branch he was a member of the Bloods. She said she knew that Wilson and Pierce got into a fistfight on an occasion prior to the underlying shooting, and acknowledged that Pierce took Wilson's flag during that altercation. She explained that this was a "big deal," because it conveyed "disrespect."

Branch confirmed that on July 23, 2010, at 11:00 a.m., she and Pierce were outside her apartment building on Regency Parkway when Wilson approached them. Wilson, who was with an unknown individual, said "what's up you fuck ass nigga," and Pierce replied "I don't have time for that shit." Branch testified she reminded Wilson that there were surveillance cameras nearby, and she also testified that the unknown individual "[j]ust told him not to."

When Wilson was about a foot away from Pierce, Branch saw Wilson reach for a black handgun from his waistband and then shoot Pierce. After Branch and Pierce ran back into the building, Branch called the police and told them, during that call, that "Flame" was the shooter. Branch identified Wilson's photograph in a photo array and also told police that Wilson shot Pierce.

Like Pierce, Branch also identified Wilson in surveillance photographs taken at around the time of the shooting. She testified that one photograph showed Wilson reaching for his gun, and that another showed him shooting Pierce.

Detective Darryl Wormouth of the Prince George's County Police Department responded to the scene of the shooting. As he approached the apartment building where the shooting occurred, he saw gunshot holes through the glass in the front of the building. Opening the door, Wormouth saw blood all over the floor near the entrance. Then Pierce approached him with blood on his front and back, and on his hands. Detective Wormouth observed an apparent gunshot wound, center mass, in the Wilson's torso area. Wormouth testified that Pierce's demeanor at this point was "[a]gitated. He was in pain. Didn't really seem to be too focused, I guess, initially."

After medical personnel arrived, Pierce was removed to an ambulance area for treatment. Detective Wormouth testified "that's where EMS personnel began to evaluate the victim in a better conducive environment to talk to him one-on-one and basically get his version of the story of what happened." Wormouth testified, over objection, that he then spoke to Pierce who told Wormouth that "Flame" shot him. Over an additional objection, Detective Wormouth testified that Pierce also told him that several months prior to the shooting, Wilson and Pierce got into a physical altercation concerning whether Wilson was actually a member of the Bloods. After Pierce stripped Wilson of his colors, the two men fought, and Pierce "whooped on the gentleman. He beat him up."

Detective Erika Person, of the Prince George's County Police, testified that Wilson was arrested on July 25, 2013, two days after the shooting. After waiving his rights

pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), Wilson agreed to make a statement. Wilson admitted that he knew Pierce as "New Orleans," and told the police that Pierce was a "bitch ass." Wilson also provided police with his cell phone number.

Detective Swonger, accepted at trial as an expert in cell phone technology, obtained cell phone records for the same cell phone number provided by Wilson during the interview. These records allowed Detective Swonger to create a report determining what cell phone tower was used whenever this particular cell phone made a call. Over objection, Detective Swonger testified that this report was peer reviewed.

As part of his investigation, Swonger analyzed four calls made by the cell phone number provided by Wilson on the day of the shooting between 10:34 a.m. and 12:53 p.m. According to the surveillance records, the shooting occurred at 11:48 a.m. on July 23. The phone call at 10:34 a.m., and a second phone call, made at 10:59 a.m., used the same cell phone tower. This tower was located approximately two miles from the scene of the shooting. A third call, at 12:50 p.m., and a fourth call, made at 12:53 p.m., both used a different tower. That tower was located near FedEx Field and was approximately five and a half miles north of the crime scene.

At the conclusion of the State's case-in-chief, the court granted Wilson's motion for judgment of acquittal with respect to the charges involving Branch. On June 17, 2014, the court sentenced Wilson to 30 years for attempted second degree murder, with all but 15 years suspended, to be followed by a consecutive sentence of 20 years, with all but 15 years to be suspended, and a concurrent sentence of 5 years for the illegal possession of a

regulated firearm, for an aggregate sentence of 30 years incarceration. Wilson was also sentenced to 5 years supervised probation upon release and given credit for time served.[3]

We include additional facts in the discussion relevant to the issues there examined.

Discussion

I.

Wilson first contends the court erred in permitting Detective Wormouth to testify before the jury about the statements Pierce made to him at the scene of the shooting under the present sense impression exception to the rule against hearsay.[4] In response, the State concedes that Pierce's statements to Wormouth about why he was shot were hearsay, but contends they were admissible as excited utterances and that any error in admitting the statements was harmless beyond a reasonable doubt. Wilson, however, asks us not to review the statements under the excited utterance exception because, it was not so clear

[3] The docket entries and commitment record inaccurately reflect the court's disposition. At sentencing, the court gave appellant a consecutive sentence for the use of a handgun in commission of a crime of violence conviction. The docket entries and commitment erroneously indicate this sentence is to be served concurrently. The commitment record should be corrected in this case as, ordinarily, when the docket entries and the transcript conflict, the transcript of the proceedings controls. *Savoy v. State*, 336 Md. 355, 360 n. 6 (1994); *see Gatewood v. State*, 158 Md. App. 458, 481-82 (2004) (when there is a variance between the transcript and the docket entries, "[t]he transcript of the trial, unless shown to be in error, takes precedence over the docket entries") (citation omitted), *aff'd on other grounds*, 388 Md. 526 (2005); *see also Scott v. State*, 379 Md. 170, 190-91 (2004) (observing that correction of commitment records is governed by Maryland Rule 4-351 (a)).

[4] The present sense impression exception to the rule against hearsay is codified in Maryland law as "[a]statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Md. Rule 5-803 (b)(1).

that the shooting victim, Pierce, was still under the stress of the startling event when he made the statements to Detective Wormouth. As we will explain, we conclude that the statements, even if improperly admitted, were harmless.

Under the Maryland Rules, hearsay is defined as "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(c). Further, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. Our standard of review of hearsay is as follows:

> Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.' Md. Rule 5-802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.

Bernadyn v. State, 390 Md. 1, 8 (2005); *accord Thomas v. State*, 429 Md. 85, 98 (2012); *see also Gordon v. State*, 431 Md. 527, 538 (2013) ("[T]he trial court's legal conclusions are reviewed *de novo*, but the trial court's factual findings will not be disturbed absent clear error.").

Prior to hearing testimony in this case, the State moved to admit evidence that Wilson was a gang member in the Bloods, as well as evidence relating to the February 2013 fight between Wilson and Pierce. The court heard testimony from Pierce and Branch regarding this prior incident, outside the presence of the jury, and that testimony was substantially similar to that set forth above. After hearing argument, the court ruled that Pierce and Branch could testify that Wilson held himself out as a Blood gang member, and

that the evidence concerning the prior incident was admissible to show motive and intent for the shooting. Immediately thereafter, and in front of the jury, Pierce testified about the prior incident from February 2013 when he fought with Wilson and took his bandana.[5]

When the State initially asked Detective Wormouth about his conversation with the victim at the scene, Wilson objected on the grounds of hearsay. The court initially sustained the objection. The State then argued that the victim's statements were admissible as statements of identification. Further, the State asserted "[i]t is not hearsay made right afterwards, I'll get into more about his demeanor, excited utterance." The court changed

[5] At no time during that examination did Wilson's trial counsel object or ask for a continuing objection. It was only later, when the other witness, Branch, began testifying about Wilson's gang affiliation, that counsel asked for, and received, a continuing objection to this line of inquiry.

Ordinarily, that an objection was raised during a motion *in limine* does not obviate the need for a contemporaneous, and timely, objection when the evidence is elicited at trial. *See Reed v. State*, 353 Md. 628, 643 (1999) (when evidence that has been contested in a motion *in limine* is admitted at trial, a contemporaneous objection must be made pursuant to Md. Rule 4-323 (a) in order for that question of admissibility to be preserved for appellate review). There are exceptions to the rule, such as when a trial court has denied a motion *in limine* to exclude evidence, a contemporaneous objection need not be made when "requiring [the defendant] to make 'yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance.'" *Clemons v. State*, 392 Md. 339, 362 (2006) (quoting *Watson v. State*, 311 Md. 370, 372 n.1 (1988)).

Although there was no objection when Pierce testified to the prior altercation he had with Wilson, Pierce's testimony came right on the heels of the court's ruling on the motion *in limine*, which appears to fit the exception to the contemporaneous objection rule. Although the preservation issue is close, given that the State does not contend that this issue is unpreserved, we will address the issue on the merits. *See Whittington v. State*, 147 Md. App. 496, 513 n. 3 (2002) (assuming that the issue on appeal was properly presented given the State's failure to argue non-preservation)*, cert. denied*, 373 Md. 408, *cert. denied*, 540 U.S. 851 (2003).

its ruling, allowing Wormouth, over objection, to testify that the victim told him that "Flame" shot him. That specific identification evidence is not being challenged on appeal.

What is challenged is Detective Wormouth's testimony concerning what Pierce told him about why Wilson shot him. Pertinent to this issue is the following:

> Q. What, if anything, did he tell you about why Flame shot him?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: What's the objection?
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> [DEFENSE COUNSEL]: Hearsay.
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> [PROSECUTOR]: Your Honor, may we approach?
>
> THE COURT: Sure.
>
> (Counsel approach the bench and the following ensued.)
>
> [PROSECUTOR]: **State would argue this is present impression, victim has just been shot dripping blood, being worked on. Everything he is saying just happened. There was prior testimony about how the officers came in five minutes of this incident, so he's dripping blood, he's excited. He's agitated. Everything –**
>
> [DEFENSE COUNSEL]: I don't think that's accurate. I believe it's been five to 10 minutes and it's certainly not a present impression. He's not preceding [sic] the event, as it's happened they –
>
> THE COURT: I'll overrule the objection. He's explaining the event.

Detective Wormouth's testimony then continued:

> Q. Detective, you can answer that question. What did the victim tell you about why Flame shot him?
>
> A. He advised that several months prior to this shooting incident that he, him and the suspect that shot him, had a confrontation, basically described – the way he explained it was he had checked him, he checked him as in the way that you would approach a fellow gang member or another gang

member and either some words or, you know, basically through some words he didn't respond in a proper manner, which led him to believe that he was not a true gang member.

Q. Which led –

A. Which led the victim to believe that this gentleman was not a true gang member. At that point, the proper procedure would be to strip them of their colors. He advised that he stripped him –

[DEFENSE COUNSEL]: Objection.

THE COURT: I'll sustain that objection.

BY [PROSECUTOR]:

Q. And so the victim said he stripped the defendant of his colors?

A. That's correct.

Q. And what occurred after – what did the victim advise happened after he took the defendant's colors?

A. It was a fight.

[DEFENSE COUNSEL]: Objection.

THE COURT: What's the objection?

[DEFENSE COUNSEL]: Hearsay.

[PROSECUTOR]: State would cite the same rule.

THE COURT: It's still part of the same explanation, so you may answer.

(Emphasis Added).

Wilson contends that reflected in the testimony above, the State argued that the statements about the prior incident between Wilson and Pierce were admissible under the present sense impression exception to the rule against hearsay. On appeal, the State has

abandoned that argument, and we need not consider that exception.[6] *See McCracken v. State*, 429 Md. 507, 516 n. 6 (2012) (declining to address a separate argument that evidence was properly seized under the Fourth Amendment where that argument was abandoned by the State at oral argument). The State contends instead, that even though the prosecutor identified her argument to admit the hearsay as an exception under the present sense impression exception, the argument actually presented described the excited utterance exception to the hearsay rule. And, the State continues, although the court applied "what appear[ed] to be a present sense impression analysis, [] it is axiomatic that trial courts can be right for the wrong reason."

The Court of Appeals has stated:

[6] We observe, without deciding, that it appears the exception is inapplicable under these facts. Maryland Rule 5-803 (b) (1) provides an exception to the rule against hearsay for: "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Pursuant to this exception, the statement must be made contemporaneously with the event. *Booth v. State*, 306 Md. 313, 319-20 (1986). The rationale of the exception is that it preserves "the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate." *Id.* at 324; *accord Washington v. State*, 191 Md. App. 48, 92, *cert. denied*, 415 Md. 43 (2010). Although precise contemporaneity is not required by the Rule, "the time interval between observation and utterance must be very short." *Booth*, 306 Md. at 324. Thus, "[t]he appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought." *Id.* "If the declarant is speaking in past tense, he is unlikely to be stating a present sense impression." Murphy, *Maryland Evidence Handbook* § 803[B], p. 363 (4th ed. 2010).

In this case, the prior fight between Wilson and Pierce occurred on or around February 17, 2013. Pierce was shot approximately four months later, on July 23, 2013. The time interval was not short between these events. Moreover, Pierce's statements to Detective Wormouth about the prior event were primarily in the past tense. Accordingly, the statements were not admissible under the present sense impression.

> Apart from the exceptions previously noted, this Court has consistently taken the position that an appellee is entitled to assert any ground adequately shown by the record for upholding the trial court's decision, even if the ground was not raised in the trial court, and that, if legally correct, the trial court's decision will be affirmed on such alternative ground.

Unger v. State, 427 Md. 383, 406 (2012).

Maryland Rule 5-803 provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (b) Other Exceptions. . . . (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

As a threshold matter, it appears at least that the exception was before the trial court because, although the State argued that the evidence was admissible under the present sense exception, the State specifically mentioned the excited utterance exception, at least once, stating "[i]t is not hearsay made right afterwards, I'll get into more about his demeanor, excited utterance." The State also argued for admission because Pierce was "excited" and "agitated."

However, in his reply brief, Wilson cites *Cassidy v. State*, 74 Md. App. 1, *cert. denied*, 312 Md. 602 (1988), *superseded on other grounds by Walker v. State*, 107 Md. App. 502 (1995), to suggest that we should not consider the excited utterance exception. In *Cassidy*, this Court stated:

> It would be quite possible, of course, for a ruling on admissibility to be sustained on one ground even if the trial court had rested its decision on a very different ground. A ruling may be right for the wrong reason. When the alternative ground offered is that of the Excited Utterance Exception to

> the Hearsay Rule, however, it is required that there be findings of predicate fact. ***Unless the evidence is so clear and decisive as to compel such findings as a matter of law, an actual finding of fact would be required*** that there had been a dramatic incident sufficient to generate the requisite excitement. Additionally, an actual finding of fact would be required that the declarant at the time of the utterance was still in the throes of the exciting event and was not capable of reflective narration.

Cassidy, 74 Md. App. at 19 (emphasis added); *see also Williams v. State*, 99 Md. App. 711, 724-25 (1994) (citing *Cassidy* for the proposition that where the trial court never had the opportunity to find facts to support that an utterance was excited, the appellate court cannot consider the excited utterance exception to the rule against hearsay).[7] *Cassidy* makes clear that where the court below has not actually considered the excited utterance exception, "[u]nless the evidence is so clear and decisive as to compel such findings as a matter of law, an actual finding of fact would be required" as to both of these factors. *Id.*

In *Cassidy*, the Court of Special Appeals concluded that it could not consider the excited utterance exception where, at trial, the out-of-court statements were offered as admissible only under the *res gestae* exception to the hearsay rule. 74 Md. App. at 9. Because the excited utterance exception was not asserted until the case was on appeal, this Court determined that it could not decide whether the out-of-court statement was an excited

[7] Deciding whether a declaration is an "excited utterance" requires a two-step inquiry by the circuit court as to whether (1) a startling event has occurred, and (2) whether the declarant was "was under the stress or excitement caused by the event" and "not capable of reflective narration" when he made the statement relating to the event. *Billups v. State*, 135 Md. App. 345,359 (2000) (internal citations omitted); *Cassidy*, 74 Md. App. at 19. Factual determinations underlying hearsay exceptions require deference by appellate courts. *See Gordon v. State*, 431 Md. 527, 536-37 (2013).

utterance because "[t]he State offered no evidence to show that the two-year-old declarant was in an excited condition at the time of the out-of-court assertion in issue." *Id.* at 16-20.

Similarly, in *Williams v. State*, this Court rejected the appellant's "alternative theory" of excited utterance where, at trial, the evidence was only offered as non-hearsay impeachment evidence. 99 Md. App. at 724. This Court stated:

> [The circuit court] was never called upon even to consider the question of whether the utterance was excited or otherwise trustworthy. There was no testimony bearing on the declarant's apparent state of mind or emotional demeanor. Absent extreme circumstances, an appellate court would never be in a position to make a determination in this regard in the first instance. It is a theory of admissibility that would have to be advanced by the proponent and would call for both some ancillary fact finding and some ruling by the trial judge.
>
> * * *
>
> We fully agree with the appellant that the circumstances were such that they *might* have given rise to an excited utterance. The admissibility of hearsay, however, turns not on whether an utterance *might have been* excited but on whether the utterance *was* excited. That can, generally speaking, only be determined by the trial judge after hearing the pertinent evidence on the subject of excitement. In this case, no such factual determination was ever made for the obvious reason that the trial judge was never called upon to make such a determination. Might-have-beens don't count.

Id. at 724-25.

Both *Cassidy* and *Williams* are instructive but clearly distinguishable from the case *sub judice*. In *Cassidy* and *Williams*, the appellants had not even alluded to the exited utterance exception at trial, and instead relied on completely different theories of admissibility. Here, the State specifically mentioned the excited utterance exception after a prior objection to testimony of the victim's out-of-court statements, stating "[i]t is not hearsay made right afterwards, I'll get into more about his demeanor, excited utterance." Additionally, the prosecutor argued as follows:

> [PROSECUTOR]: State would argue this is present impression, victim **has just been shot dripping blood, being worked on**. Everything he is saying just happened. There was prior testimony about how the officers came in five minutes of this incident, so he's dripping blood, **he's excited. He's agitated.** Everything –
>
> [DEFENSE]: I don't think that's accurate. I believe it's been five to 10 minutes and it's certainly not a present impression. He's not preceding [sic] the event, as it's happened they --
>
> [THE COURT]: I'll overrule the objection. He's explaining the event.

(Emphasis added).

We conclude that sufficient facts were presented to the court to support the *res gestae* exception to the hearsay rule, and that even if the trial court erred in failing to specify that the statements would be admitted under Rule 5-803(b)(2), any such error was harmless beyond a reasonable doubt. In criminal cases, "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." *State v. Blackwell*, 408 Md. 677, 698 (2009) (internal citations omitted). When making this assessment, we also consider whether cumulative evidence has been admitted:

> Evidence is cumulative when, beyond a reasonable doubt, we are convinced that "there was sufficient evidence, independent of the [evidence] complained of, to support the Appellant['s] conviction[]." *Richardson v. State*, 7 Md. App. 334, 343, 255 A.2d 463, 468 (1969). In other words, cumulative evidence tends to prove the same point as other evidence presented during the trial or sentencing hearing. For example, witness testimony is cumulative when it repeats the testimony of other witnesses introduced during the State's case-in-chief.

Dove v. State, 415 Md. 727, 743-44 (2010) (citations omitted).

We note in this case that, on appeal, Wilson does not challenge the court's ruling on the motion *in limine* admitting evidence of the February fight through the trial testimony of Pierce and Branch. Because this evidence was nearly identical to Pierce's statements offered through Detective Wormouth, we are unable to conclude that Wilson was prejudiced by the court overruling Wilson's objection to Wormouth's testimony. As the Court of Appeals has noted, "the most fundamental principle of appellate review [] is that the action of a trial court is presumed to have been correct and the burden of rebutting that presumption is on the party claiming error first to allege some error and then to persuade us that that error occurred." *State v. Chaney*, 375 Md. 168, 183-84 (2003) (citation omitted). Given that there has been no challenge on appeal to the trial court's decision to admit evidence of this prior altercation through the testimony of Pierce and Branch, we presume that the court's ruling was correct. *See State v. Chaney*, 375 Md. at 184 ("Though prejudice occasionally may be presumed, error is never presumed by a reviewing court.").

Furthermore, the evidence tending to establish that Wilson was the shooter was strong in this case. The victim survived to identify Wilson as his assailant. This was directly corroborated by Branch's testimony. And, it was, at minimum, circumstantially confirmed by the surveillance videos and photographs admitted for the jury's consideration. Finally, the cell phone evidence placed Wilson's cell phone in a two-mile radius from the shooting shortly beforehand, and within five miles a short time later. Under these circumstances, we conclude that any error in admitting Pierce's statements to the detective was harmless beyond a reasonable doubt.

II.

Wilson next asserts that the trial court abused its discretion in allowing Detective Swonger to testify as an expert. During trial, Detective Swonger explained how he was able to review records obtained from Mr. Wilson's cell phone carrier, including call detail and cell tower data, to plot and map-out a historical record of calls from Wilson's cell phone and thereby determine his approximate location on July 23, 2013 from 10:35 a.m. through 12:53 p.m. Wilson contends that Detective Swonger did not possess sufficient training and experience to be qualified as an expert in the area of cell phone technology and mapping.

Detective Swonger testified to his extensive qualifications in cell phone technology and experience in mapping cell phone communications during a pre-trial hearing on the defendant's motion to exclude him as an expert. He received his undergraduate degree from the University of Maryland, and had a Master's of Science from Johns Hopkins University. He first began learning about cell phones from practical experience as a robbery detective with the Prince George's County Police. At around that time, cell phones were being stolen quite often. He learned on the job that he "could call the phone companies and receive accurate, timely information on where the stolen phones were. We were catching people." Swonger testified that he communicated with the phone carriers on a daily basis in order to obtain actionable intelligence. Swonger also learned from network engineers in the field.

Detective Swonger had met with company representatives from Verizon and AT&T. He learned "basic subscriber level" information as well as infrastructure and government

applications from Verizon. He also spent a day following an engineer who was working for AT&T setting up cell phone towers near FedEx Field.

Detective Swonger trained with the Federal Bureau of Investigation ("FBI"). That training included practical exercises on using cell phone towers and learning to calculate "azimuths," from the towers. He explained that "azimuth" was a way to determine the coverage area from a particular side of a cell phone tower. Swonger also testified that he maintained correspondence with an FBI agent who worked for the Cellular Analysis Survey Team. They provided the "basic know how" in cell phone technology.

Swonger also took two classes at the White Collar Crime Center, including one on basic evidence handling for cell phones and another two day course "more geared towards apprehending fugitives based off cell phone records," including the likely location of a cell phone.

Detective Swonger received a total of 35 hours of training from the Public Agency Training Council ("PATC"). PATC is a training group that trains specialists in a variety of fields, including hostage negotiators and death investigators. Swonger received training at PATC from Glen Bard, who had been recognized as a cell phone expert in 22 different states. Detective Swonger testified that he also was familiar with mapping software, PerpHound and MapPoint, which can "graphically depict areas where the phone is" and is used to locate criminal suspects.

Detective Swonger's experience and training led him to become a trainer himself for other police officers and certified correctional officers through the Maryland Police Corrections and Training Center. He and a partner also trained the Homicide Section of

the Prince George's County Police Department. Swonger also trained members of the Charles County Police Department, some agencies in North Carolina, and the Maryland State's Attorney's Association.

Detective Swonger worked on approximately 500 cases involving plotting, or mapping, cell phone locations, including roughly 250 cases for the State's Attorney's Office. Swonger also worked on live tracking, or attempting to locate a cell phone in real time, in excess of 700 times. He qualified as an expert in six cases, in one of which Detective Swonger's credentials were specifically challenged by an experienced defense attorney. Swonger was nevertheless accepted as an expert in that case.

On examination by defense counsel, Detective Swonger agreed that he had never worked for a cell phone company and had never maintained a cell phone tower. He had also had not taken any courses in radio frequency or electrical engineering.

After hearing argument, the motions court denied the motion *in limine* and found that Detective Swonger was qualified to offer expert opinion testimony. At trial, Wilson received a continuing objection to Detective Swonger's testimony. The jury and the trial court then heard about the detective's qualifications, and that evidence was substantially similar to that heard by the motions court. Over objection, Detective Swonger was accepted as an expert in cell phone technology.

Maryland Rule 5-702 provides:

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

(2) the appropriateness of the expert testimony on the particular subject, and
(3) whether a sufficient factual basis exists to support the expert testimony.

The "'admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *Bomas v. State*, 412 Md. 392, 406 (2010) (citations omitted). "We review the trial court's decision to admit or reject expert testimony for an abuse of discretion only." *Cantine v. State*, 160 Md. App. 391, 405 (2004), *cert. denied*, 386 Md. 181 (2005). "Generally, a trial court has 'wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony.'" *Donati v. State*, 215 Md. App. 686, 742 (quoting *Massie v. State*, 349 Md. 834, 850-51 (1998)), *cert. denied*, 438 Md. 143 (2014). Reversal of a trial court's ruling on the admissibility, vel non, of expert testimony "is warranted only if founded on an error of law or some serious mistake, or if the trial court has seriously abused its discretion." *Hartless v. State*, 327 Md. 558, 576 (1992).

Pertinent to the specific question presented, it is well settled that "the determination by the trial court of the experiential qualifications of a witness will only be disturbed on appeal if there has been a clear showing of abuse of the trial court's decision." *Rollins v. State*, 392 Md. 455, 500 (2006) (internal quotations and citations omitted). "To qualify as an expert, one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will probably aid the trier [of fact] in his search for truth." *Perez v. State*, 193 Md. App. 259, 313 (2010) (citations and internal quotation marks omitted), *rev'd on other grounds*, 420 Md. 57 (2011).

In considering whether a witness is qualified to offer expert testimony, a trial court should consider whether the expert has "special knowledge of the subject on which he is to testify that he can give the jury assistance in solving a problem for which their equipment of average knowledge is inadequate." *Radman v. Harold*, 279 Md. 167, 169 (1977) (citation omitted). This knowledge may be derived from "observation or experience, standard books, maps of recognized authority, or any other reliable sources," including "the experiments and reasoning of others, communicated by personal association or through books or other sources." *Id.* at 170. "[T]he mere fact that a person offered as a witness has not been personally involved in the activity about which he is to testify does not, as such, destroy his competency as an expert." *Id.* at 170 (allowing an internist to offer an opinion regarding the performance of a hysterectomy even though he had never personally performed such a procedure).

This Court recently addressed the exact issue presented *sub judice* in *Hall v. State*, 225 Md. App. 72 (2015). In *Hall*, this Court upheld the circuit court's determination that a state trooper was qualified as an expert witness in "cell phone and cell tower data reading, and utilizing the information to plot on a map to create a historical record of a cell phone's location at the time of communications." *Hall*, 225 Md. App. at 83, 95. The State called State Trooper Dave Dwyer of the Technical Surveillance Unit of the Maryland State Police as an expert witness at trial to testify as to cellphone record mapping. *Id.* at 83. On appeal, the appellant argued that Trooper Dwyer was not an expert because his "qualifications. . . fall short of what [the Court of Special Appeals] have required in *Coleman-Fuller v. State*, 192 Md. App. 577 (2010), and *Wilder v. State*, 191 Md. App. 319, *cert. denied*, 415 Md.

43 (2010),” and that, instead, “a cell tower engineer or an employee of [appellant’s] cell phone company” would have been an appropriate expert. *Id.*

Wilson relies on the same arguments in his appeal. We conclude that Wilson’s reliance on *Coleman-Fuller v. State*, 192 Md. App. 577 (2010), and *Wilder v. State*, 191 Md. App. 319, *cert. denied*, 415 Md. 43 (2010), in support of his argument that Detective Swonger was unqualified to be an expert is misplaced. The issues presented in those cases clearly concerned whether expert opinion testimony was required in the first instance, or whether a lay witness could offer testimony about cell phone records and cell phone technology. *See Coleman-Fuller*, 192 Md. at 612; *Wilder*, 191 Md. App. at 347. In contrast to the issue presented here, what was at stake in those cases was the threshold question when the State attempts to use “lay opinion” testimony to prove a point in issue when the better approach, under *Ragland v. State*, 385 Md. 706 (2005) and its progeny, is to require that qualified experts offer such testimony, especially when it is based upon specialized knowledge, skill, experience, training or education. Moreover, in contrast to the issue of whether a designated expert is qualified under Md. Rule 5-702, *Ragland*, *Coleman-Fuller* and *Wilder* are as much concerned with the State’s notice and discovery obligations when it comes to distinguishing between the ordinary testimony of a lay witness and the more specialized testimony and reports of an expert. *See Ragland*, 385 Md. at 725; *Coleman-Fuller*, 192 Md. App. at 619; *Wilder*, 191 Md. App. at 368.

In *Hall*, this Court addressed arguments similar to Mr. Wilson’s by clarifying that *Coleman-Fuller* and *Wilder* only established that cell phone record mapping or data plotting “may only be admitted through expert testimony.” *Id.* at 90-91. Here, as in *Hall*,

the State has satisfied that requirement by offering its witness, Detective Wormouth, as an expert in cell phone record mapping.

In *Hall*, we next considered "whether the trial court abused its discretion when it certified Trooper Dwyer as an expert." *Id.* at 91. We explained in *Hall* that this Court did not determine in *Wilder* nor *Coleman-Fuller* whether the law enforcement officers who offered lay testimony "possessed the 'knowledge, skill, experience, training, or education' necessary to be qualified as an expert." *Id.* at 92-93. We further clarified, "nothing in those opinions suggests that we intended to enumerate specific qualifications that a witness must at a minimum possess before being qualified as an expert on cell tower data plotting." *Id.* at 92.

We concluded in *Hall* that the circuit court did not abuse its discretion in certifying Trooper Dwyer as an expert witness, where his training and experience included:

> . . .having been assigned to the Maryland State Police Technical Surveillance Unit since 2003, a 24–hour training program with the FBI Cellular Analysis Survey Team (CAST), two cellular tracking courses with Harris Corporation totaling 56 hours, and a 40–hour course with Digital Receiver Technology, Inc. Furthermore, Trooper Dwyer testified on direct examination that he had been plotting and mapping cell phone tower data as a part of his regular duties with the technical surveillance unit for the past ten years and that he had experience plotting the records of appellant's cellular carrier, T–Mobile.

Id. at 94. We determined that "Trooper Dwyer's training and experience was more than sufficient to qualify him as an expert." *Id.*

Here, we are similarly persuaded that the trial court properly exercised its discretion. Detective Swonger's background, training and experience—which is strikingly similar to

that of Trooper Dwyer—clearly supported the court's determination that he was more than qualified to offer expert opinion evidence about cell phone tracking in this case.

III.

Wilson's final contention is that the court erred in admitting Detective Swonger's report and accompanying maps that contained statements that they were peer-reviewed and in permitting him to testify that his work was peer-reviewed. Wilson argues that these statements amounted to inadmissible hearsay. As to Swonger's testimony, Wilson maintains that the "only reasonable inference that the jury could have drawn" from this evidence is that the peer reviewer had come to the same conclusion as Detective Swonger, otherwise the State would not have called him as a witness. Wilson further asserts that the evidence that the report was peer reviewed "was obviously offered to prove the truth of the matter asserted, *i.e.*, that the peer reviewer agreed with [Detective] Swonger's determination" that Wilson's cell phone was in the vicinity of the scene of the shooting.

The State responds that the evidence was not offered for the truth of the matter asserted. The State argues that Detective Swonger's statement during his testimony was only "about the process involved in preparing the cell phone report and maps for trial," and that is not hearsay. Furthermore, the State disagrees that there is any implicit assertion that the reviewer agreed with Detective Swonger's conclusions, but rather "it is more likely that the reviewer ensures only that the author adhered to the appropriate standards in reaching his or her conclusion, without forming an opinion about the validity of that conclusion."

We conclude that although the court erred in admitting the evidence, any error was harmless beyond a reasonable doubt.[8]

The present question concerns a statement on State's Exhibits 34, 35, and 36, that says "REPORT/RECORDS PEER REVIEWED BY: Detective J. Seger #2668," and the following testimony from Detective Swonger:

> Q. Was your case peer reviewed?
>
> A. Yes.

Wilson made timely objections to both admissions in court. The testimony that the report was peer reviewed came after Detective Swonger's testimony about the findings contained in his report, including that two calls were made from Wilson's cell-phone within the vicinity of the crime scene around the time of the crime. We note that Detective Swonger stated earlier in his testimony that his reports and findings were peer reviewed, and Wilson did not object to that statement.

Under the Maryland Rules, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. The Committee Note to Rule 5-801 provides:

> This Rule does not attempt to define "assertion," a concept best left to development in the case law. The fact that proffered evidence is in the form of a question or something other than a narrative statement, however, does not necessarily preclude its being an assertion. The Rule also does not

[8] When the State offered to admit portions of Detective Swonger's report about the location of the cell phone, appellant objected on the grounds that testimony that the report was "peer reviewed" was hearsay and amounted to a confrontation clause issue. The court overruled the objection, but granted counsel a continuing objection. On appeal, appellant only contends that the evidence violated the rule against hearsay, and does not maintain his confrontation clause argument.

> attempt to define when an assertion, such as a verbal act, is offered for something other than its truth.
>
> This Court has stated that:
>
> > At common law, "the hearsay rule applie[d] when the probative value of the declarant's statement rests on the out-of-court declarant's sincerity and accuracy." McLain, *Maryland Evidence*, § 801:1(b)(I). At common law, a statement could be deemed a hearsay statement if it was being offered to prove its literal contents or to prove an assertion which the utterance implied. *See* McLain at § 801:4(a).

Fair v. State, 198 Md. App. 1, 13 (2011).

Courts generally begin by identifying the proposition that the evidence was offered to prove. *See Bernadyn v. State*, 390 Md. 1, 10 (2005) ("We therefore begin our inquiry by identifying the proposition that the medical bill was offered to prove.") (citing *United States v. Hathaway*, 798 F.2d 902, 907 (6th Cir. 1986) (stating that "in addressing the question of whether the documents at issue were hearsay, we begin by determining what the evidence offered to prove."); Murphy, *Maryland Evidence Handbook* § 702, at 305 (4th ed. 2010) ("When an out-of-court statement is offered in evidence, the trial judge must first determine why it is being offered.")).

Wilson's contention is that evidence that Swonger's work was peer reviewed was meant to convey that the out-of-court declarant, *i.e.*, the reviewer, had reached the same result as Swonger. Therefore, this was an implied assertion offered to prove the truth of Swonger's cell phone tracking report. Appellee rebuts this contention and asserts that Detective Swonger's testimony was only about the process involved in preparing his report and maps for trial and, therefore, is not hearsay.

In *Stoddard v. State*, 389 Md. 681 (2005), the Court of Appeals considered whether an out-of-court declaration made by an 18 month old child to her mother asking "is [the defendant] going to get me?" constituted hearsay. *Id.* at 683. The State offered this evidence to prove that the child had witnessed the murder of her three-year-old cousin. *Id.* at 683, 689. The Court held that the statement was hearsay, stating:

> [W]here the probative value of words, as offered, depends on the declarant having communicated a factual proposition, the words constitute an 'assertion' of that proposition. The declarant's intent *vel non* to communicate the proposition is irrelevant. If the words are uttered out of court, then offered in court to prove the truth of the proposition--i.e. of the 'matter asserted'--they are hearsay under our rules."

Id. at 703-704.

Thereafter, in *Bernadyn v. State*, 390 Md. 1 (2005), the Court of Appeals considered "whether a medical bill seized by police at 2024 Morgan Street in Edgewood, Maryland, and addressed to 'Michael Bernadyn, 2024 Morgan Street, Edgewood, Maryland 21040,' when used by the State to establish that Bernadyn lived at that address, constitutes inadmissible hearsay." *Id.* at 3. Police executed a search warrant at this location and recovered a quantity of marijuana. *Id.* When the State sought to admit the medical bill, Bernadyn objected, contending that he did not live at this address and that admission of the bill was prejudicial. *Id.* at 4. The court overruled the objection and the State, during closing, *specifically* relied on the medical bill to prove that Bernadyn lived at the location where the drugs were found. *Id.* at 4-8. Relying on *Stoddard, supra*, the Court of Appeals held that, under these circumstances, the medical bill constituted a "written assertion" and that, "[w]hen used to prove the truth of that assertion, the bill was hearsay under Md. Rule

5-801(c), because it contained 'a statement . . . offered in evidence to prove the truth of the matter asserted.'" *Id.* at 11.[9]

In contrast to these cases—where the assertion was offered as direct evidence to prove the matter asserted—a number of subsequent opinions recognize that assertions may be non-hearsay when they are, instead, nonassertive, circumstantial evidence relevant to proving some fact in issue. In *Fields v. State*, 168 Md. App. 22, 37, *aff'd*, 395 Md. 758 (2006), Saturio Grogrieo Fields, also known as "Sat Dogg," was convicted of first-degree murder and two counts of first-degree assault stemming from the shooting of three young men at a bowling alley. *Id.* at 27. Fields moved to preclude the State from eliciting testimony from Detective Canales that the name "Sat Dogg" appeared on a television screen in the bowling alley. *Id.* at 29-30.

A majority of this Court held that the content of the television monitor constituted "an item of circumstantial evidence" of a material proposition—specifically, that Fields was present at the bowling alley—and not a direct or implied assertion of that proposition by an out-of-court declarant. We noted that the prosecutor did not attempt to use this evidence to show that a known declarant believed Fields was present in the bowling alley.

[9] One commentator has explained *Bernadyn* as follows:

> Offering a life-line for future prosecutions, however, the [*Bernadyn* [*v. State*, 390 Md. 1 (2005)] majority's opinion suggests that it would have found differently, had the State offered the bill for the limited purpose of showing that something bearing the name of the defendant was found in the house . . . . This is the procedure that the majority was advising the State to follow in the future.

6A McLain, *Maryland Evidence* § 801:6 at 219-220 (3d ed. 2013

The prosecutor only argued that the crime scene included a bowling alley with the name "Sat Dogg," written above it. *Fields*, 168 Md. App. at 37.

Although this Court recognized that there was some probative value to the evidence at issue, we concluded that "[t]he Appellant's name on the television screen in the bowling alley was not an implied assertion of the factual proposition that the Appellant was present at the bowling alley, although it was circumstantial evidence that could be probative of that fact." *Id.* at 38. [10] "Because the evidence was not an 'assertion,' under Rule 5-801(a), it was not a 'statement' under that subsection and hence was not hearsay under Rule 5-801(c). It was admissible non-hearsay evidence." *Fields*, 168 Md. App. at 38.

In this case, Wilson contends that the fact that Swonger's report was peer reviewed implicitly asserted that the out-of-court declarant, *i.e.*, the reviewer, had reached the same result as Swonger. According to the current case law in Maryland, "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." *Stoddard*, 389 Md. at 692 (emphasis added). Here, we agree that the out-of-court statement that the report and map were peer reviewed implies that the report and map are correct based on the data provided to Detective Swonger. The prosecutor elicited testimony that the report was peer reviewed and both the report and the map contained the words "peer reviewed." The only purpose for the State to offer evidence of

[10] The Court of Appeals affirmed this decision on harmlessness grounds, expressly declining to consider the merits of this Court's hearsay analysis. *Fields, supra*, 395 Md. 758 (2006).

the peer review that can be understood from the transcript is to bolster the opinion and report of their expert witness, Detective Swonger. Furthermore, unlike in *Fields*, the probative value of the evidence that the report and map were peer reviewed depended upon the belief of the peer reviewer, or upon the accuracy of that reviewer's belief. *Fields*, 168 Md. App. at 37-38. Therefore, because the out-of-court statement of peer review impliedly asserted that the report and map were correct and the out-of-court statement was offered to prove the validity of the report and map, the evidence of peer review is hearsay under our rules.

However, we conclude that any error in this case was harmless beyond a reasonable doubt. *See Fields*, 395 Md. at 759 ("even if the court erred with respect to the evidentiary issue, the error was harmless beyond a reasonable doubt. . ."). During closing argument, defense counsel's entire challenge to the cell phone tower data was as follows:

> The State made some deal about the cell tower, but the phone calls were an hour apart. I think they tell you nothing. What would have been useful information is if they had done a cell tower dump, which the detective said he didn't do, which tells you all the phone calls off specific towers that were made that you can bet made at a specific time. In fact, as he told you, there are actually towers much closer to the crime scene than the towers that were off Mr. Wilson's phone was used – that Mr. Wilson's phone used.

Thus, Wilson's counsel was able to argue effectively to challenge the report—arguing essentially that the true complaint was that the police did not do enough of an investigation. Additionally, Wilson could have offered an expert to contradict Detective Swonger testimony.

The evidence against Wilson was strong. Not only was evidence of motive and intent presented, his primary victim survived to identify him at trial. The other eyewitness also knew him and the shooting was captured on surveillance video. Thus, the jury could evaluate that evidence, and give it what weight they thought it deserved, as the ultimate fact-finders in this case. Accordingly, any error was harmless beyond a reasonable doubt.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.