UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1537

September Term, 2013

MICHAEL WALLER

v.

STATE OF MARYLAND

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*Zarnoch,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 21, 2016

*Zarnoch, Robert A., J., participated in the 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.

The appellant, Michael Waller, was tried twice in connection with the May 29, 2010, shooting death of Ronald Anderson, Jr. His first trial, held in March 2012, ended in a hung jury and was declared a mistrial. His second trial, which took place from August 27-30, 2013, concluded with a jury convicting the appellant of both first-degree murder and wearing and carrying openly a dangerous weapon. The appellant was sentenced to life in prison for first-degree murder and five years of concurrent imprisonment for openly carrying a dangerous weapon.

Having noted a timely appeal, the appellant presents four questions for our review, which, for clarity, we have rephrased as follows:[1]

1. Did the circuit court violate the appellant's constitutional right to a speedy trial?

[1] The appellant presents the questions exactly as follows:

1. Whether the court erred by denying Mr. Waller's motion to dismiss inasmuch as he was denied his Constitutional right to a speedy trial?

2. Whether the court abused its discretion in refusing to ask a *voir dire* question aimed at identifying prospective jurors who would draw an inference of guilt if Appellant did not testify?

3. Whether the court erred by refusing to allow the defense to enter into evidence the recorded statements of a deceased witness?

4. Whether the court erred by admitting improper hearsay evidence?

2. Did the circuit court abuse its discretion in denying the appellant's request to *voir dire* prospective jurors as to whether they would draw an inference of guilt if he did not testify?

3. Did the circuit court abuse its discretion in denying the appellant's request to introduce the recorded statements of a deceased witness?

4. Did the circuit court abuse its discretion by allowing inadmissible hearsay into evidence?

We answer each of these questions in the negative. Therefore, we affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On May 29, 2010, Ronald Anderson, Jr. (the "victim") was shot and killed on the 4100 block of Pennington Avenue in Baltimore City. Located near the body were a cell phone, foam cups, and suspected saliva and blood, as well as five 12-gauge Remington shotgun spent shells. The medical examiner confirmed that the victim's death was caused by multiple shotgun wounds. The appellant was subsequently indicted for first-degree murder in violation of Md. Code Ann., Crim. Law Art. ("C.L.") § 2-201, openly carrying a dangerous weapon in violation of C.L. § 4-101(c)(1), and carrying a dangerous weapon with intent or purpose of injuring another in violation of C.L. § 4-101(c)(2).

The appellant's first trial began on March 1, 2012, and ended in a hung jury on March 14, 2012. The appellant was then retried on August 27-30, 2013. As indicated above, it was this second trial, *i.e.*, the retrial, that resulted in the convictions from which the present appeal stems.

Shaun Schroeder testified at both trials as a fact witness for the State. Prior to the trial that began on August 27, 2013, the appellant made a motion *in limine* to exclude any evidence relating to Ms. Schroeder's pre-trial statement to the police that a third person named Sierra told her that the shooter's name was "Mike." The appellant's counsel specifically requested that the State "redact any such references to th[e] third-party hearsay statement in a written copy and/or a taped statement." Ms. Schroeder had made the statement at issue—*i.e.*, identified the appellant as "Mike"—in an interview on June 2, 2010, in which she picked the appellant out of a photo array and identified him as the shooter. The circuit court granted the appellant's motion. In doing so, the court instructed the State to redact all references to the contested hearsay from any written or tape-recorded evidence. However, during the trial, the State played an un-redacted tape recording of Ms. Schroeder's pre-trial interview with the police. The appellant's counsel renewed the objection from the motion *in limine*, stating specifically that any reference to the name "Mike" should be redacted because it was hearsay. The circuit court overruled the objection on the grounds that Ms. Schroeder had picked the appellant out of a photo array not because she learned from a third party that his name was Mike, but because she was an eye-witness to the crime.

The State played the tape of Ms. Schroeder's pre-trial interview only after she took the stand and testified that she did not recall speaking with the police or, for that matter, anything that occurred on May 29, 2010. She testified that her lack of memory was the result of the alcoholism she previously suffered from. Immediately after listening to her former statements, she continued to deny remembering the events of the murder.

However, upon further direct-examination, she testified that while her original plan was to insist that she could not recall the murder, she now felt like she had to "do what's right." Therefore, she confirmed that she had seen the murder and identified appellant as the person who shot the victim.

William Grimes also testified for the State as a fact witness; however, he died before the second trial was presented and, thus, was only able to testify in person at the first trial. Nevertheless, a recording of his original testimony was played for the jury at the trial that began in August 2013. Mr. Grimes was a retired policeman who lived nearby the location of the crime. He testified that on the night of the shooting, he called 911 and explained to the dispatcher that he heard four or five gunshots and saw two men, who looked like black males, running down the street. One of the men he saw was wearing a green hoodie and jeans. During this testimony, he stated that both men had guns and that another individual asked the appellant "did you get the guy?", to which the appellant answered in the affirmative. It is disputed whether Mr. Grimes was sitting on his steps when the shooting occurred or if he was inside of the house opening his door. Prior to his testimony, Mr. Grimes identified the appellant in a photo array.

Prior to the start of the second trial, the appellant requested that Mr. Grimes' statements made during a police interview be admitted on the grounds that the interview was similar to a deposition pursuant to Rule 5-804(b)(1)[2] and 5-803(b)(24).[3] Counsel for the appellant planned to use this evidence for impeachment purposes. The trial court denied this request on the basis that a pre-trial interview with the police is not equivalent

[2] Md. Rule 5-804(b)(1) provides:

> **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Former Testimony. Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[3] Md. Rule 5-803(b)(24), the so-called "catchall" hearsay exception, provides:

> *Other Exceptions*. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

to a deposition, which is given under oath while the parties are present and able to conduct cross-examination. In addition, it held that the statement did not fall under any of the other hearsay exceptions. During trial, the appellant again asked the court to admit Mr. Grimes' statements as extrinsic evidence of a prior inconsistent statement under Md. Rule 5-613.[4] The circuit court denied the request because Mr. Grimes never denied making the statement and explained them during the first trial.

The appellant's version of the events of May 29, 2010, differed from the versions told by Ms. Schroeder and Mr. Grimes. Following his June 7, 2010, arrest, the appellant was interrogated by Detective Yost, the primary detective investigating the case. During the interrogation, the appellant told Detective Yost that on the night of the shooting, he had gone to the home of Audrey Gary, the mother of his then-girlfriend, which is where

[4] Md. Rule 5-613 provides:

> **(a) Examining Witness Concerning Prior Statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> **(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

he found out about the shooting. The appellant claimed that while at Ms. Gary's home, he watched wrestling with a child whom Ms. Gary was babysitting.

Ms. Younger, the appellant's girlfriend in May 2010, testified that she picked the appellant up from Ms. Gary's home after the shooting. She testified that she had gone to a party with the appellant earlier that evening. The victim was also at the party, but Ms. Younger testified that he and the appellant greeted each other warmly. Ms. Gary testified that she saw the appellant a few hours before the shooting wearing a blue pullover hoodie, but that she did not see him again after the shooting.

On September 20, 2013, after his second trial resulted in convictions of first-degree murder and openly carrying a dangerous weapon, the appellant noted a timely appeal.

DISCUSSION

I. SPEEDY TRIAL

A. Parties' Contentions

The appellant argues that the circuit court erred in denying his motion to dismiss for violation of his Sixth Amendment right to a speedy trial. The appellant asserts that the delay of three years and two months between the time of his arrest and the time of his second trial was a violation of his constitutional right to a speedy trial. We disagree. The appellant also contends that even if this Court only considers the delay from the date the mistrial was declared until the date the second trial began (a period of one year, five months, and twenty six days), then that amount of time, in and of itself, is "substantial enough to trigger an analysis of the . . . factors" from *Barker v. Wingo*, 407 U.S. 514,

530-32 (1972), which are: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his right; and (4) whether the defendant suffered prejudice. The appellant argues that he at no point waived or gave up his right to a speedy trial, that the reasons for delay were not "wholly neutral," and that he was prejudiced by the delay. We disagree.

The State responds that the circuit court properly denied the appellant's motion to dismiss. The State argues that the length of delay is measured from the date of declaration of a mistrial to the date of the second trial. The State argues that the eighteen-month delay is not sufficient to compel dismissal because similar periods of time have been found to be constitutionally permissible. The State also asserts that all the delays between the mistrial and the retrial were approved by the administrative judge for good cause shown, and that the appellant was not prejudiced from the delay. *See, e.g., Howell v. State*, 87 Md. App. 57, 82, *cert. denied*, 342 Md. 324 (1991) ("the span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status"); *Epps v. State*, 276 Md. 96, 111 (1975) (recognizing that illness or medical condition of prosecution witness is a justifiable delay and not attributed to either the prosecution, the defendant or the court).

Furthermore, regarding the third *Barker* factor, the "defendant's responsibility to assert his right [to a speedy trial]," the State contends that the appellant presented no evidence of his assertion of his right. *Barker*, 407 U.S. at 532. The State points out that this factor is "closely related" to the other three, and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id*.

Finally, regarding the fourth factor in *Barker*, the State argues that the appellant did not suffer any prejudice from the delays that occurred.

B. Standard of Review

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration for Rights guarantee a criminal defendant the right to a speedy trial. When reviewing a trial court's denial of a motion to dismiss on speedy trial grounds, the appellate court must accept the trial court's findings of fact, unless those findings are clearly erroneous. *Glover v. State*, 368 Md. 211, 221 (2002); *See also State v. Ruben*, 127 Md. App. 430, 438 (1999), and *Doggett v. United States*, 505 US 647, 652 (1992). In addition, the appellate court does a *de novo* review of a constitutional claim. *Id*.

In *Barker,* the Supreme Court established the test used to determine whether a person's right to a speedy trial has been violated. 407 U.S. at 530-32. As indicated *supra*, the four factors identified in *Barker* are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. "The determination must be made upon an overall view of the circumstances peculiar to each particular case, keeping in mind not only the rights of the defendant but also the interests of society." *State v. Bailey*, 319 Md. 392, 414-14 (1990).

C. Analysis

The Supreme Court in *Barker* stated that the four factors it created to assist courts in determining whether a person's right to a speedy trial has been violated "have no

talismanic qualities; courts must still engage in a difficult and sensitive balancing process." 407 U.C. at 533. It is this very balancing process upon which we now embark.

The Court of Appeals has adopted and applied *Barker* in analyzing speedy trial violations under both the Sixth Amendment and Article 21. *See, e.g., Glover v. State*, 368 Md. 211, 221 (2002). The length of delay is the triggering factor for the *Barker* analysis. If the delay is not presumptively prejudicial, there is no need to analyze the other factors. *Barker*, 407 US at 530.

i. Length of Delay and Reason for Delay

The appellant's contention that the delay pertaining to his constitutional right to a speedy trial is calculated from the date of his arrest until the date of his retrial is misguided. Although the length of delay is generally "measured from the date of arrest or filing of indictment, information, or other formal charges to the date of trial," *In re Thomas J.*, 372 Md. 50, 73 (2002) (quoting *Divver v. State*, 356 Md. 379, 388-89 (1999)), where there is a mistrial, this Court will only consider the period from the date of the mistrial and the commencement of the appellant's second trial. *See Icgoren v. State*, 103 Md. App. 407, 420 (1995) (holding that the length of delay is measured from "the date of the declaration of a mistrial and the commencement of the retrial" absent extraordinary circumstances). Here, the appellant's mistrial occurred on March 14, 2012. After numerous postponements, the appellant's second trial commenced on August 27, 2013, which amounts to a delay of seventeen months and 13 days (one year, 5 months, and 13 days). Thus, this is the appropriate period of delay to be used in our analysis of the first *Barker* factor.

The length of the delay involves a "'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *State v. Kanneh*, 403 Md. 678, 688 (2008) (citing *Glover*, 368 Md. at 222-23). There is "no specific duration of delay [which] constitutes a *per se* delay of constitutional dimension[.] *Glover*, 368 Md. at 223 (citing *Barker*, 407 U.S. at 523).

In the case *sub judice*, the delay of seventeen months is "presumptively prejudicial" and, therefore, requires balancing of the remaining factors. *Id.* (holding that a delay greater than one year and fourteen days is "presumptively prejudicial" and requires analysis of the remaining factors); *see Divver v. State*, 356 Md. at 389-90 (one year and sixteen days "raises a presumption of prejudice and triggers the balancing test"); *Brady v. State*, 291 Md. 261, 265 (1985) (fourteen-month delay gives rise to a *prima facie* speedy trial claim).

The length of the delay, however, "is the least determinative of the four factors that [a court] consider[s.]" *Howard v. State*, 440 Md. 427, 447-48 (2014) (quoting *Kanneh*, 403 Md. at 690) (alterations in original). Furthermore, "the duration of the delay is closely correlated to the other factors, such as the reasonableness of the State's explanation for the delay, the likelihood that the delay may cause the defendant to more pronouncedly assert his speedy trial right, and the presumption that a longer delay may cause the defendant greater harm." *Glover*, 368 Md. at 225.

Regarding the second *Barker* factor, the reason for the delay, the Supreme Court indicated that "different weights should be assigned to different reasons." 407 U.S. at

531. In the present case, the reasons for the delays are evidence in the following timeline, which begins on the date a mistrial was declared and ends on the date the retrial began:

> March 14, 2012 Appellant's trial ended in a mistrial due to a hung jury; transcripts were not ready; administrative court found good cause to postpone.
>
> May 17, 2012 Postponement charged to both; appellant's counsel was unavailable and transcripts from first trial were still unavailable; postponement by the State because of unavailable transcripts; administrative court found good cause.
>
> July 11, 2012 Postponement charged to both; State's witness failed to appear; appellant's attorney needed time to review transcripts; administrative court found good cause.
>
> September 6, 2012 Postponement charged to appellant. Parties indicated they were ready for trial, but appellant needed appropriate clothes for court appearance and needed additional time for further investigation; administrative court found good cause.
>
> October 15, 2012 Postponement charged to defense; appellant's counsel was sick; good cause found.
>
> December 3, 2012 Both parties ready for trial, but no court available; good cause found.
>
> February 4, 2013 Postponement charged to State; State's witness, Detective, was unavailable due to wife's surgery; good cause found.
>
> April 16, 2013 Postponement charged to State; Assistant State's Attorney unavailable due to appearance in another trial; good cause found.
>
> June 14, 2013 Both parties ready for trial, but no court available; good cause found.
>
> August 27, 2013 Second trial commenced.

In the aggregate, the reasons for delay stem largely from neutral reasons. Out of the nine postponements, only four were charged solely to the State. Two of these postponements were a result of the unavailability of a court, which are general administrative delays, and therefore weigh only slightly against the State. *See Butler v. State*, 214 Md. App. 635, 659-61 (holding that unintentional generalized administrative delays caused by overbooked courts and unavailable State witnesses "weigh only slightly against the State"). Another of the postponements by the State was due to the unavailability of a State's witness. "[H]owever, [such] a valid reason . . . as a missing witness[] should serve to justify appropriate delay." *Howard*, 440 Md. at 448 (quoting *Barker*, 407 U.S. at 531). Finally, the delay caused by the unavailability of the prosecutor is also accorded little weight against the State. *See Butler*, 214 Md. App. at 659-60 ("Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated[.] . . . [N]evertheless, . . . [they must] be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." (internal quotations and citations omitted)).

None of the delays caused by the State demonstrates any intentional or bad faith efforts to hamper the defense. Moreover, the delays caused by the defendant cannot form the basis for a claim of deprivation. *Id.* at 660. This factor, therefore, weighs only slightly in the appellant's favor.

ii. Assertion of Right

When analyzing the assertion of right factor, the trial court found that there was no evidence of assertion of right by the appellant. The appellant argues that he at no point waived or gave up his right to a speedy trial, but admits to the trial court's finding that there is no evidence that he asserted his right *between the mistrial and the retrial*. *See* Appellant's Br. at 10. Because we are only considering the time between the mistrial and the retrial, *see Icgoren*, 103 Md. App. at 423 (holding that the constitutional speedy trial analysis following a mistrial concerns only the delay from the date of the mistrial until the start of the retrial), any assertion of right before the mistrial was declared is immaterial. Therefore, this Court finds that the appellant did not assert his right for a speedy trial.

iii. Prejudice to the Defendant

When analyzing prejudice, there are several interests to consider. Those interests include the prevention of an oppressive pretrial incarceration, minimizing the anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. *See Barker*, 407 US at 532. Prevention of an oppressive pretrial incarceration, as well as minimizing the anxiety and concern of the accused, are interests that can be credited to the appellant because of his incarceration pending trial. However, there is nothing indicating that his defense was impaired by the delay and, and we explained *supra*, this is the most important interest protected by the fourth *Barker* factor, *i.e.*, the prejudice factor. Tellingly, the appellant does not even allege that the delay caused important evidence to go missing, caused any witnesses to become unavailable, or otherwise impaired his

ability to present his defense. "[U]nder Supreme Court guidelines, an affirmative demonstration of prejudice is not necessary to prove that a defendant was denied his constitutional right to a speedy trial." *Jones*, 279 Md. 1, 16-17 (1976) (citing *Moore v. Arizona*, 414 U.S. 25, 26 (1973)). Nonetheless, "if a defendant can show prejudice, of course, he has a stronger case for dismissal." *Jones*, 279 Md. at 16-17. Accordingly, we hold that the prejudice factor, like the assertion of right factor, weighs against the appellant.

After conducting the balancing test on the four factors from *Barker*, and taking into consideration the precedent cited by both parties, we determine that the delay was not unconstitutional.

II. VOIR DIRE

A. Parties' Contentions

The appellant argues that the trial court's refusal to allow the question to be posed to potential jurors of whether they would draw an inference from the appellant not testifying constituted reversible error. The appellant cites *Washington v. State*, 425 Md. 306 (2012), where the Court of Appeals outlined two categories of cause for disqualification of a juror: (1) a statute disqualifies a prospective juror; or (2) a "collateral matter is reasonably liable to have undue influence over" a prospective juror. *Id*. at 313. The second category is comprised of "biases directly related to the crime, the witness, or the defendant." *Id.* (internal quotation and citation omitted). Therefore, because the requested question would have revealed any "biases directly related to the . . . defendant," *id.*, the appellant asserts the trial court committed an abuse of discretion. We disagree.

In response, the State cites *Twining v. State*, 234 Md. 97 (1964). In that case, the Court of Appeals held that the trial court did not abuse its discretion where it refused to ask prospective jurors whether they would afford the defendant a presumption of innocence. *Id.* at 100. Specifically, the Court of Appeals stated that it is generally "inappropriate to instruct on the law at the [*voir dire*] stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." *Id*. The Court went on to say that this rule is particularly true in Maryland, "where the court's instructions are only advisory." *Id*. Therefore, the State asserts that instructions on the law at the *voir dire* stage are not appropriate because *Twining* is still good law.

The State also contends that the appellant's argument that the question would have aided his intelligent use of his peremptory strikes is misguided because Maryland adheres to limited *voir dire*. *See Washington*, 425 Md. at 313.

Finally, the State argues that "questions not directed to a specific ground for disqualification[,] but which are speculative, inquisitorial, catechizing or 'fishing,' or those asked in the aid of exercising peremptory challenges, may be refused in the discretion of the court, even though it would not be error to ask them." *Stewart v. State*, 399 Md. 146, 162 (2007). Thus, it is the position of the State that the trial court did not abuse its discretion in declining to ask the jury if they would draw an inference of guilt if the appellant did not testify.

B. Standard of Review

"The scope of *voir dire* and the form of the questions propounded rest firmly within the discretion of the trial judge." *Baker*, 157 Md. App. 600, 610-11 (2004)

(citation omitted). On review, an appellate court looks at the record as a whole when determining "whether the questions posed and the procedures employed . . . created a reasonable assurance that prejudice would be discovered if present." *Washington v. State*, 425 Md. 306, 313 (2012). Accordingly, we review that decision for an abuse of discretion. *See Carter v. State*, 374 Md. 693, 705 (2003). We will only find an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court . . . or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court." *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005) (citations and internal quotation marks omitted).

C. Analysis

"The overriding principle or purpose of *voir dire* is to ascertain the existence of cause for disqualification." *Baker*, 157 Md. App. at 611 (citation and internal quotation marks omitted). As we indicated *supra*, the Court of Appeals has outlined two areas of inquiries that may uncover cause for disqualification of a juror: "(1) an examination to determine whether prospective jurors meet the minimum statutory qualifications for jury service, and (2) an examination of a juror . . . conducted strictly within the right to discover the state of mind of the juror in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him." *Baker*, 157 Md. App. at 611 (citation and internal quotation marks omitted). "[I]f a prospective juror is 'unable to apply the law' or 'holds a particular belief . . . that would affect his ability or disposition to consider the evidence fairly and impartially,' he 'should be excused for cause.'" *Id.*

(quoting *Foster v. State*, 304 Md. 439, 454 (1985) (citation omitted), *cert. denied*, 478 U.S. 1010 (1986). "In determining what questions are likely to uncover a cause for disqualification, 'the questions should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered.'" *Id.* (quoting *State v. Thomas*, 369 Md. 202, 207 (2002)).

Furthermore, we have explained that

> [t]he purpose of the voir dire process is to determine the prospective jurors' state of mind, and further, to ascertain whether the venire harbors any bias, prejudice, or any relevant collateral matter. In so doing, the judicial process is protected by ensuring that the accused is tried by a fair and impartial jury.

Wilson v. State, 148 Md. App. 601, 658 (2002), *cert. denied*, 374 Md. 84 (2003).

In *Baker*, this Court held that "the trial court was not required to ask jurors whether they would draw an inference from the defendant's election not to testify." 157 Md. App. at 616. In reaching that conclusion, we relied on the Court of Appeals' rationale in *Twining* that

> [t]he rule[] of law stated in the proposed question[] w[as] fully and fairly covered in subsequent instructions to the jury. It is generally recognized that it is inappropriate to instruct on the law at this stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law.

Baker, 157 Md. App. at 616 (quoting *Twining*, 234 Md. at 100). Here, the circuit court instructed the jury that the appellant was presumed to be innocent, that the state had the burden of proving the appellant's guilt beyond a reasonable doubt, and that appellant was not required to prove his innocence. Thus, "[t]he rule[] of law stated in the proposed

question[] w[as] fully and fairly covered in subsequent instructions to the jury." *Twining*, 234 Md. at 100. We, therefore, apply the same principle here as we applied in *Baker* and hold that the circuit court did not abuse its discretion in declining to ask the jury the *voir dire* question.

III. RECORDED STATEMENT FROM DECEASED WITNESS

A. Parties' Contentions

The appellant argues that the circuit court committed reversible error where it denied his request to introduce the recorded statements made by Mr. Grimes during his interview with police. The appellant asserts that the trial court abused its discretion in failing to admit Mr. Grimes' statement under both Md. Rule 5-802.1, which provides that recordings by electronic means are exceptions to the hearsay rule, and Md. Rule 5-616(b), which provides that extrinsic evidence contradicting the witness' testimony may be admitted in non-collateral matters.

The State counters that the appellant failed to argue at trial that the statement was admissible under either of the two aforementioned Rules. The State points out that when the circuit court denied the appellant's request under Md. Rule 5-613, the appellant's counsel did not correct the court, but instead agreed that Rule 5-613 was the correct rule to consider. The State also argues that Mr. Grimes' statements constitute extrinsic evidence and were properly excluded because Mr. Grimes never recanted his prior statement to the police. Furthermore, at the first trial, the appellant's counsel cross-examined Mr. Grimes using the prior statement, which the jury at the second trial heard when the full recording of Mr. Grime's prior testimony was played.

B. Standard of Review

We have reiterated that the following standard of review applies to hearsay evidentiary issues:

> Generally, the standard of review with respect to a trial court's ruling on the admissibility of evidence is that such matters are left to the sound discretion of the trial court and unless there is a showing that the trial court abused its discretion, "its ruling [ ] will not be disturbed on appeal." The application of that standard, however, "depends on whether the trial judge's ruling under review was based on a discretionary weighing of relevance in relation to other factors or *on a pure conclusion of law*." If "the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling *de novo*." Under the Maryland Rules, hearsay must be excluded as evidence at trial unless it falls within an exception to the hearsay rule. Thus, a trial court's decision to admit or exclude hearsay ordinarily is an issue of law and, as discussed above, we review decisions of law *de novo*.

Conrad v. Gamble, 183 Md. App. 539, 565 (2008) (quoting *Figgins v. Cochrane*, 403 Md. 392, 419-20 (2008) (quoting *Hall v. University of Maryland Medical System Corp.*, 398 Md. 67, 82-83 (2007))).

C. Analysis

We shall hold that the circuit court did not err in denying the appellant's motion to play for the jury a recorded interview of Mr. Grimes by the police detective. We explain.

The court based its decision to deny the appellant's motion on Md. Rule 5-613. However, the appellant argues that the court should have considered Rules 5-802.1 and 5-616 instead. While the appellant is correct in that the tape of Mr. Grimes' interview could have been admissible under Md. Rule 5-802.1, the court was also correct in using Rule 5-613 to determine admissibility. Even though the recording could have been

entered under the hearsay exception of Rule 5-802.1(a)(3), it was taken out of the exception because the appellant's counsel planned to use it for impeachment purposes. *See Pinkney v. State*, 151 Md. App. 311, 322-23 (2003) (explaining that Rule 5-802.1 only allows extrinsic evidence to be admitted for substantive purposes).

Likewise, the recording of Mr. Grimes' interview with the police was inadmissible under Md. Rule 5-616 because the witness was not present to explain or deny his prior statements. Rule 5-616(b)(1) provides that "[e]xtrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 5-613(b)." would also not apply because it requires that extrinsic statements meet the requirements of Rule 5-613(b)." Rule 5-613(b) states that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule . . . until the requirements of section (a) have been met," which in turn provides:

> **(a) Examining Witness Concerning Prior Statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

Md. Rule 5-613(a). Therefore, because Mr. Grimes could not be afforded an opportunity to explain or deny his prior statement, the recording would be inadmissible under Rule 5-616(b).

For the aforementioned reasons, we affirm the circuit court's decision to deny admittance of Mr. Grimes' recorded interview.

IV. HEARSAY

A. Parties' Contentions

The appellant contends that the circuit court erred by admitting improper hearsay. He argues that the trial court should not have admitted Ms. Schroeder's statement regarding how she learned the appellant's name from a third party. The appellant argues that Ms. Schroeder's statement constituted inadmissible hearsay because she learned that the appellant went by "Mike" from a third party and the statement was offered for its truth. The appellant further argues that the error was not harmless because Ms. Schroeder was the sole eye-witness to the murder. The appellant asserts that Ms. Schroeder's reference to a third party implied to the jury that there was another witness who could identify the appellant as the shooter. Therefore, the appellant argues that the admission of this evidence constitutes reversible error.

The State counters with the argument that this issue is unpreserved because the appellant did not object at the point during Ms. Schroeder's testimony where she identified the appellant as "Mike Mike," *i.e.*, the point at which the prosecutor presented the photo array to Ms. Schroeder and asked her to identify what she had written. The State also argues that in the statement played to the jury, Ms. Schroeder did not state or suggest that the out-of-court declarant identified the shooter as "Mike." In addition, the State asserts that Ms. Schroeder's statement does not suggest that her identification of the shooter was based on someone telling her that the shooter's name was Mike. The State

contends that the fact that Ms. Schroeder learned the appellant's name from a third party is not hearsay because the "use of such a name does not rise to the level of an assertion." *State v. Johnson*, 13 A.3d 1064, 1066 (R.I. 2011) (citations omitted). Finally, the State argues that even if Ms. Schroeder's statements were inadmissible hearsay, their admission would constitute harmless error based on Ms. Schroeder's eye-witness account of the murder and Mr. Grimes' identification of appellant as the shooter.

B. Standard of Review

We have reiterated the following standard of review that applies to hearsay evidentiary issues:

> Generally, the standard of review with respect to a trial court's ruling on the admissibility of evidence is that such matters are left to the sound discretion of the trial court and unless there is a showing that the trial court abused its discretion, "its ruling [ ] will not be disturbed on appeal." The application of that standard, however, "depends on whether the trial judge's ruling under review was based on a discretionary weighing of relevance in relation to other factors or *on a pure conclusion of law*." If "the trial judge's ruling involves a pure legal question, we generally review the trial court's ruling *de novo*." Under the Maryland Rules, hearsay must be excluded as evidence at trial unless it falls within an exception to the hearsay rule. Thus, a trial court's decision to admit or exclude hearsay ordinarily is an issue of law and, as discussed above, we review decisions of law *de novo*.

Conrad v. Gamble, 183 Md. App. 539, 565 (2008) (quoting *Figgins v. Cochrane*, 403 Md. 392, 419-20 (2008) (quoting *Hall v. University of Maryland Medical System Corp.*, 398 Md. 67, 82-83 (2007))).

C. Analysis

Ms. Schroeder's statement to Detective Yost regarding her account of the murder was played to the jury. In that statement, Ms. Schroeder indicated that she was walking "northbound" when she saw "a gentleman with a turquoise hoodie r[unning]" with a "glove on." She told Detective Yost that she watched as the man "ran through the round of the alley." The recording continued to be played for the jury as the following colloquy occurred:

> DETECTIVE YOST: Okay. Now -- and you, you had seen [the appellant] before. Is that correct?
>
> SCHROEDER: I seen him a couple of hours prior to this in a house.
>
> DETECTIVE YOST: A house on what street?
>
> SCHROEDER: On Locust.
>
> DETECTIVE YOST: On Locust. *What did -- did anybody call him? Did you know what his name was?*
>
> SCHROEDER: *No one said his name (inaudible) until after everything was done and over with.*
>
> DETECTIVE YOST: Okay. All right. So you saw him. You're walking on Pennington, and you see him roll a glove on his hand up towards the house where you saw him earlier?
>
> SCHROEDER: Right.
>
> DETECTIVE YOST: Okay. And then what happened? You guys just kept walking?
>
> SCHROEDER: I kept walking, and I noticed that Sierra was walking, but he was behind me. And I was already feeling threatened, so I let them get in front of me. And as they was coming up beside of me, the one dude (inaudible) and I seen a

gun in his pocket. So I crossed the street. So there's an old man and a prostitute like, and I tried to get the old man to give me a ride. And I was trying to get the prostitute in the car because the old man was (inaudible).

So in the midst of all of that, I heard a gunshot. When I looked up, it was Mike shooting at people, shooting the guy. He had a hoodie on but it wasn't --

DETECTIVE YOST: Okay.

SCHROEDER: -- pulled tight --

DETECTIVE YOST: What kind of hoodie was it?

SCHROEDER: It was a turquoise hoodie.

DETECTIVE YOST: Turquoise hoodie. So -- and where did he come from?

SCHROEDER: Came from Locust.

DETECTIVE YOST: Locust. And you say he was just shooting?

SCHROEDER: He was shooting (inaudible).

YOST: And you knew him as what? What did you know his name was?

SCHROEDER: I heard his name was Will.

DETECTIVE YOST: Will. Okay. You had talked with him earlier that night?

SCHROEDER: Right (inaudible).

DETECTIVE YOST: Okay. Now he -- now so you're saying the guy Mike was shooting Will at that time?

SCHROEDER: Um-hum.

DETECTIVE YOST: Okay. And did Will fall on the ground?

SCHROEDER: Yes.

DETECTIVE YOST: Okay. And then what happened?

SCHROEDER: Immediately.

DETECTIVE YOST: Immediately?

SCHROEDER: (Inaudible) Mike stood over top of him (inaudible) excuse me, four, like three or four.

(Emphasis added). After the tape was played, the appellant's counsel objected on the same grounds that she raised in her motion *in limine*. She also clarified that her request was for any reference to the name "Mike" to be redacted because it was hearsay.

Under the Maryland Rule 5-801(c), 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). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). A "declarant" is "a person who makes a statement." Md. Rule 5-801(b). 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. "Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility.

In the case *sub judice*, we agree with the State that Ms. Schroeder's statement regarding how she later learned of the appellant's name from a third party does not amount to inadmissible hearsay. *Webster v. State*, 221 Md. App. 100 (2015), we explained that

> A person's name is the title by which he himself and others habitually call him. To know a person's name, therefore, is to have heard him so called by himself and by others. In strictness, such an utterance is not hearsay, except where it is made as an assertion of fact. But, though it may be hearsay, as a source of information, yet is universally relied upon as a source of knowledge. Courts have commonly accepted the testimony founded upon it.

Id. at 117 (quoting 2 Wigmore, Evidence § 667a, at 928 (Chadbourne rev.1979)) (emphasis omitted). We went on to note that

> [o]ne virtually always learns a name—even one's own—by being told what it is. Nevertheless, evidence as to names is commonly regarded as either not hearsay because it is not introduced to prove the truth of the matter asserted, . . . or so imbued with reliability because of the name's common usage as to make any objection frivolous.

Webster, 221 Md. App. at 117 (quoting *U.S. v. Allen*, 960 F.2d 1055, 1059 (D.C.Cir.1992), and citing *State v. Shields*, 619 S.W.2d 937, 940 (Mo. Ct. App.1981) ("Evidence of the name by which a person is known is not within the rule excluding hearsay evidence.")).[5]

Ms. Schroeder's identification of appellant on the photo array was not based on her having heard that the shooter's name was Mike. Rather, her identification came directly from her witnessing the appellant commit the murder. Thus, contrary to the appellant's contention, Ms. Schroeder's statement that she later learned of the appellant's

[5] *See also State v. Barnett*, 41 N.C. App. 171, 174 (1979) ("The name a person is called is a fact, and in this case the witness was testifying to such a fact within his own knowledge"); *Johnson*, 13 A.3d at 1066 ("[A] multitude of courts have held that evidence about a person's nickname, in this context, does not constitute hearsay because the use of such a name does not rise to the level of an assertion"); *State v. Feyereisen*, 345 N.W.2d 58, 60 (S.D. 1984) ("[T]here is substantial authority that evidence of a name by which a person is known is not within the rule excluding hearsay evidence.").

name was not hearsay because it was not offered to prove that appellant was the shooter. *See Webster*, 221 Md. App. 100, 118 (2015) (holding nickname tied to defendant found on a notebook in the apartment "was not offered as circumstantial evidence of [defendant]'s involvement in the drug trade, and thus was not hearsay"). Ms. Schroeder's statement to the police provided that she had seen the appellant shoot the victim on the evening of May 29, 2010. She was able to identify appellant as the shooter because she witnessed the murder, and not because she later learned his name.

Furthermore, we are also persuaded that if there was any error, it was harmless beyond a reasonable doubt. *See Bellamy v. State*, 403 Md. 308, 332 (2008) ("Once it has been determined that error was committed, reversal is required unless the error did not influence the verdict; the error is harmless only if it did not play any role in the jury's verdict.") (citation and internal quotation marks omitted). Again, Ms. Schroeder's initial statement to the police provided that she saw the appellant commit the murder and identified the appellant's photo in a photo array as the shooter. In addition, she also identified the appellant as the shooter during her trial testimony. Mr. Grimes also testified that immediately after the shooting he saw the appellant holding a sawed off shotgun and running with another man, who was also carrying a gun. Mr. Grimes stated that he saw the appellant's face because the appellant turned and looked at him when he yelled "police." Therefore, given the plethora of other evidence against the appellant, we hold

that if there was any error regarding the admission of inadmissible hearsay, any such error was harmless.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.