Circuit Court for Baltimore City
Case No. 114049029

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 788

September Term, 2015

DARIUS BROWN

v.

STATE

Meredith,
Leahy,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 5, 2017

A jury in the Circuit Court for Baltimore City found Appellant guilty of first-degree murder and other related offenses. He raises five questions for our consideration, which we have reordered slightly:

1. "Did the trial court err in admitting the prior statements of Jamal Kingsborough and Shatira Rich?"

2. "Did the trial court err in admitting inadmissible hearsay?"

3. "Did the trial court err in restricting Appellant's Sixth Amendment right to confront and cross-examine two witnesses?"

4. "Did the trial court err in admitting Appellant's medical records?"

5. "Did the trial court err in admitting prejudicial crime scene photographs?"

Discerning neither error nor abuse of discretion, we affirm the judgments of the circuit court.

BACKGROUND

A grand jury indicted Appellant on January 16, 2014, on charges of first- and second-degree murder, use of a handgun in the commission of a crime of violence; and wear, carry, transport a handgun. The following facts were presented at Appellant's subsequent jury trial conducted over three days from February 25-27, 2015.

On the night of May 22, 2013, Xavier "Ziggy" Lewis was shot multiple times outside a house in the 2800 block of Ashland Avenue in Baltimore City. He died as a result of his injuries.

Jamal Kingsborough was interviewed by police on September 26, 2013, after he was arrested on an outstanding warrant in another case. Mr. Kingsborough provided a

recorded statement for police indicating that he saw Appellant shoot the victim on the night of May 22, 2013. At trial, Mr. Kingsborough testified that he did not know Appellant and recanted the statement he gave to the police in multiple ways. Thereafter, portions of Mr. Kingsborough's recorded interview from September 26th were played before the jury, including the following:

> DETECTIVE DELGADO: As so that night, where were you at?
>
> MR. KINGSBOROUGH: On monument and Madison, no Madison and Kenwood.
>
> DETECTIVE DELGADO: Were you with [Appellant] or with Siggy or- -
>
> MR. KINGSBOROUGH: I was by myself. But I saw it.
>
> DETECTIVE DELGADO: When you say you saw it, where were you at?
>
> MR. KINGSBOROUGH: Madison.
>
> DETECTIVE DELGADO: You saw it (inaudible). And what, can you tell me again what you saw" I mean did you see (inaudible) was he standing on the porch?
>
> MR. KINGSBOROUGH: He was standing right there on, on the corner. And [Appellant] saw him, he came out of the alley and he crossed the street, went through the alley and came up the alley (inaudible) on Kenwood where the bridge at.
>
> DETECTIVE DELGADO: Yeah.
>
> MR. KINGSBOROUGH: Ziggy was on the right hand side, across the street (inaudible). Right there and he shot him.
>
> DETECTIVE DELGADO: All right, once he shot him what happened then?
>
> MR. KINGSBOROUGH: [Appellant] ran.

Mr. Kingsborough also told investigators in his recorded interview that Appellant shot the victim with "a revolver, a .38. . . . It was silver, it was silver and gold. Had gold trim around it. And he just started shooting." He also explained that he had witnessed the victim shoot Appellant two weeks earlier. Kingsborough identified Appellant by name as the shooter in a photo array.

Shatira Rich also provided a recorded statement to police on June 26, 2013. At trial, Ms. Rich testified that she "didn't hear [Appellant] say anything. He didn't, I just told you the statement I gave the police was false. So there's no, no even need for you to be asking no more questions because I plead the Fifth." Following a bench conference between counsel and the court, the audio-taped statement of Ms. Rich's interview with police was then played for the jury.

In her recorded statement, Ms. Rich explained that she was not present during the shooting, but that the next day she was standing next to her cousin while Appellant told her cousin that

> when he pulled the gun out to shoot the boy the boy's eyes, the boy put his hands up and his eyes got big and he shot him. . . . And he told people, he was talking about it and bragging about it. He was telling people that he basically got away it, he's slick (inaudible).
>
> * * *
>
> And he made the comment to her that when he . . . pulled the gun out on Ziggy, Ziggy turned around, he seen him so he said that his eyes got big because he seen the gun and [Appellant] started [] shooting him.

Ms. Rich also stated that Appellant shot the victim because previously, the two men had been in a car together "and Ziggy was playing with the gun on his lap" and shot

Appellant in the shoulder. "And then after that happened [Appellant] came from the hospital, everything was cool, him and Ziggy was still cool. And a couple of days later [Appellant] killed him." She also told investigators that she knew Appellant for seven years, since she was ten years old, because: "his mother and my grandmother used to live (inaudible) we all lived on the same block. That's how I know him and I ever since then we grew up . . . we basically been around each other."

The jury convicted Appellant for first-degree murder; use of a handgun in the commission of a crime; and wearing, carrying, or transporting a handgun. On May 6, 2016, the court sentenced Appellant to life imprisonment on the first degree murder conviction and a concurrent twenty years' imprisonment for use of a handgun.[1] This timely appeal followed. We provide additional facts as necessary throughout our examination of each issue on appeal.

DISCUSSION

I.

Prior Inconsistent Statements

Prior to Appellant's trial, the State's attorney indicated to the court that she was concerned that both Mr. Kingsborough and Ms. Rich would recant their identifications of Appellant when they were called to testify. Ms. Rich, for instance, informed the State that she was "being threatened and harassed by people who she believe[d] [we]re related to the

[1] For sentencing purposes, the court merged Brown's conviction for wearing, carrying, or transporting a handgun.

defendant." Because of this, the State brought Ms. Rich to a safe house after her pretrial testimony. While she was staying with Victim's Services, Ms. Rich received text messages "advising her that she should testify that she didn't know anything[,]" and then she failed to check in to her safe house or to respond to phone calls from detectives or Victims Services. As expected, at trial, both Ms. Rich and Mr. Kingsborough did not testify consistent with their recorded oral statements. Over Appellant's general objection, the State introduced as substantive evidence their prior recorded statements and their pretrial photo array identifications of Appellant.

On appeal, Appellant contends the circuit court erred by admitting Ms. Rich's and Mr. Kingsborough's prior inconsistent statements because, he argues, the State may not call a witness, the testimony of whom it knows will not aid its case, for the sole purpose of opening the door to admit that witness's prior inconsistent statements. He argues that the State knew full well that its witnesses would "balk" at testifying but called them for the sole purpose of impeachment. It is of no matter, Appellant insists, whether the State sought to admit those prior statements as impeachment evidence or substantive evidence, it was error to permit the State to call a witness for the soul purpose of impeachment. Finally, Appellant contends that the circuit court erred by admitting inconsistent statements under the hearsay exception without making a finding on the record that either witness feigned their inability to remember.

The State responds that the prior statements that Appellant challenges met the requirements of Maryland Rule 5-802.1(a) because the witnesses' prior statements were

inconsistent and recorded contemporaneously by electronic means. Under Rule 5-802.1, the State contends, it is irrelevant whether the State knew that its witness would recant at trial. Further, the State argues, Rule 5-802.1 does not require the trial court to make an explicit finding that the "lack of memory was feigned," and that we must resolve in favor of the non-moving party—the State—whether there was sufficient evidence to support the trial court's evidentiary ruling.

Alternatively, the State suggests that the prior inconsistent statements were admitted properly under Rule 5-613. To support this position, the State argues that the "subterfuge rule" applies only if the State has "full knowledge" that the witness will recant—a requirement that was not met here, according to the State. At the motion's hearing, the State contends, Appellant did not allege the State had full knowledge, but instead relied on the prosecutor's statement that it was "probably" a "concern" that the witnesses would "most likely" recant. Further, the State maintains that even if the prosecutor had full knowledge at the motions hearing, eight days before trial, a lot could have happened in the meantime—particularly when considering Mr. Kingsborough was awaiting sentencing.

Maryland Rule 5-802.1 provides, in relevant part, that the hearsay rule does not exclude "statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement" if that statement "is inconsistent with the declarant's testimony" and was "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." Md. Rule 5-802.1(a)(3).

The rule on which Appellant relies, which the Court of Appeals addressed in *Spence v. State*, 321 Md. 526 (1991), forbids the State from calling a witness, over objection, who would add nothing to the State's case, "for the sole purpose of 'impeaching' the witness with *otherwise inadmissible* hearsay." *Id.* at 530 (emphasis added). Although Appellant insists that this rule also applies when the State calls a recanting witness to introduce prior inconsistent statements as substantive evidence, Court of Appeals precedent belies this point. In *Bradley v. State*, the Court noted in *dicta* that a prior inconsistent statement would have been admissible had it "been reduced to writing and signed, thus making it admissible as substantive evidence rather than solely impeachment evidence." 333 Md. 593, 607 (1994). Then, in *Stewart v. State*, the Court ruled explicitly that "*Spence*'s prerequisite that the State be surprised by a recanting witness's testimony before inconsistent out-of-court statements can be admitted to impeach the witness" "has no applicability where . . . a witness's prior inconsistent statements are offered as *substantive evidence*[.]" 342 Md. 230, 243 (1996) (emphasis in original). Accordingly, the holding in *Spence* is inapplicable when the impeachment evidence that the State offers is admissible as substantive evidence pursuant to an exception to the hearsay rule.

Appellant concedes in his brief that the trial court admitted these inconsistent statements under the hearsay exception in Maryland Rule 5-802.1(a). He argues, however, that this was error because the court made no findings on the record as to whether the witnesses feigned their memory loss. Similar to the petitioner in *McClain v. State*, 425 Md. 238 (2012), Appellant cites *Corbett v. State*, 130 Md. App. 408, 425-26 (2000), for

the proposition that the trial court is required to make an explicit finding. But as the Court in *McClain* noted, "[n]owhere . . . does the *Corbett* Court require that such a finding be made on the record." 425 Md. at 252. The *McClain* Court explained that the facts in *Corbett* demonstrated that the trial court made an *implicit* finding that the testimony was inconsistent based on the judge's inquiry into the inconsistency, the State's proffer that the statements were inconsistent, and the judge's subsequent admittance of the prior inconsistent statement under Rule 5-802.1. *Id.*

Returning to the case at bar, after Mr. Kingsborough's repeated denials in response to the State's questioning, the State moved to admit Mr. Kingsborough's prior recorded statement, arguing: Mr. Kingsborough "recanted in multiple ways. He's denied knowing [Appellant], he's denied knowing the victim, . . . he's also said he was intoxicated. . . . He's indicated he's had no conversations with [Appellant] about the time that [Appellant] was shot and that he knows nothing." Appellant objected but offered no argument in support of his objection when the circuit court asked. The court overruled the objection, reasoning that it thought the State "laid the foundation for his statement to come in and I think you [defense counsel] know that too."

We are satisfied, as the Court of Appeals was in *McClain*, that the "cold record" in this case demonstrates that Mr. Kingsborough was not being truthful in his denials at trial. The State began laying the foundation for this prior to trial when it voiced its concern to the court that its witness would recant. Then, at the motion's hearing, when asked if he told the detectives a story, Mr. Kingsborough responded: "Yeah. It was a lie. It was just

a random story that you read out of a book." Similarly, at trial, Mr. Kingsborough began his testimony by suggesting that he lied when he spoke to the detectives about this case: "But let me say this right now, it was a lie . . . I actually said a lie just to get out [of an unrelated robbery charge]." Additionally, when the State pressed Mr. Kingsborough on his denial of part of his conversation with the detectives, he responded, "I guess it's on the tape right there. Play it." Throughout Mr. Kingsborough's testimony, he denied knowing both Appellant and the victim. He blamed his lack of memory on being intoxicated while he was at the police station, despite claiming the night of his statement that he was sober, and seeming to remember well the other details from his time at the police station (that he wasn't read his *Miranda* rights, that he was in a small room with three chairs and a table, what Detective Delgado's face looked like, that the detective let him wear his coat, that he successfully identified Appellant in a photo array, and that detectives did not talk to him about his robbery charge until after asking him about this case). Considering all of this, together with the court's explanation that the State "laid the foundation," we conclude that the court made an implicit finding that Mr. Kingsborough was not being truthful about his inability to remember the conversations he had with detectives about this case, and that the record on appeal supports this finding.

The court's admission of Ms. Rich's prior inconsistent statement is more straightforward. After Ms. Rich denied knowing the victim at trial, Ms. Rich testified that she "didn't hear [Appellant] say anything. He didn't, I just told you the statement I gave the police was false. So there's no, no even need for you to be asking no more questions

because I plead the Fifth." When asked why she called the police, Ms. Rich responded "[b]ecause I was minding somebody else's business and I called the police, being no[sey]. And I'm not sure if that man killed that man so I'm not ready to send him to jail for something I didn't even see." After then testifying that she was never around Appellant, the State asked for a bench conference, at which point it sought to admit into evidence her prior statement as inconsistent with her testimony. The following colloquy then occurred:

> [DEFENSE COUNSEL]: I object, Your Honor.
>
> THE COURT: For the record.
>
> * * *
>
> [DEFENSE COUNSEL]: Yes, Your Honor. I wish I could say more to the Court of Special Appeals, if necessary.
>
> THE COURT: Right, but there's not much else to say. Again, from a legal standpoint, you acknowledge that we had a motion to suppress the photo array where the statement was play. You do acknowledge, again, as an officer of the Court, you acknowledge that **her answers are exactly different** from basically what she said in the statement, is that correct?
>
> [DEFENSE COUNSEL]: **I would admit that.** What she's saying today is–
>
> THE COURT: Yeah, that's, right.
>
> [DEFENSE COUNSEL]: -- much different.
>
> THE COURT: Thank you, sir. All right, over the defense objection I will allow the statement in. . . .

(Emphasis added). Based on this record, we hold that the circuit court found that Ms. Rich's statements were inconsistent with her prior recorded statement and, therefore, were admitted properly under Rule 5-802.1. We also hold that both Mr. Kingsborough's and

Ms. Rich's statements were introduced as substantive evidence, and, therefore, *Spence*'s prerequisite that the State be surprised by a recanting witness's testimony before an inconsistent out-of-court statement can be admitted does not apply to bar the admission of the statements. *Stewart*, 342 at 243.

II.

Hearsay Evidence

During the State's examination of the lead detective, the following exchange occurred:

> [STATE'S ATTORNEY]: What if anything did Ms. Shatira Rich tell you regarding the investigation that you were undertaking?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DET. DELGADO]: That she didn't witness the incident but [] while she was walking with her cousin and the Defendant, she heard the Defendant tell her cousin that he shot the victim.

Appellant contends that the trial court erred by allowing Detective Delgado to testify regarding Ms. Rich's out-of-court statements, which, he asserts, constitute inadmissible hearsay evidence. The State responds that Detective Delgado's testimony was offered for "the non-hearsay purpose of describing the homicide investigation." Even if this statement were hearsay, the State continues, its admission was not reversible error because the statement was cumulative—the jury heard a recording of Ms. Rich say that Appellant told her cousin that he shot the victim.

"'Hearsay' is a statement, other than one made by the declarant while testifying at

the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Generally, hearsay evidence is not admissible. Md. Rule 5-802. A court has no discretion to admit hearsay evidence unless it falls within an exception to the Rule. *Stoddard v. State*, 389 Md. 681, 688 (2005). But not all out-of-court statements are hearsay. "Generally, an out-of-court statement is admissible as non-hearsay if it is offered for the purpose of showing that a person relied and acted upon the statement, rather than for the purpose of showing that the facts elicited in the statement are true." *Morales v. State*, 219 Md. App. 1, 11 (2014) (citing *Purvis v. State*, 27 Md. App. 713, 716 (1975)). This Court reviews *de novo* the issue of whether or not evidence is hearsay. *Bernadyn v. State*, 390 Md. 1, 7-8 (2005).

In this case, we need not determine whether Detective Delgado's testimony was offered for the truth of the matter asserted. Even if the testimony at issue was hearsay, the State is correct that it was cumulative and its admission does not warrant reversal. The Court of Appeals has instructed that the admission of hearsay is not "reversible error when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the testimony of other witnesses." *Grandison v. State*, 341 Md. 175, 218-19 (1995); *see also Yates v. State*, 429 Md. 112, 124 (2012) ("[T]he admission of the hearsay evidence did not ultimately affect the jury's verdict given the cumulative nature of the similar statements offered at trial.").

Here, Detective Delgado testified to Ms. Rich's account of a conversation she had

with her cousin. This testimony was cumulative because the State had already admitted into evidence and played for the jury a recording of the *very* conversation in which Ms. Rich recounted to Detective Delgado that Appellant told her cousin that he shot the victim. Not only did the recording include Ms. Rich telling Detective Delgado that Appellant told her cousin about the shooting, but it included a vivid account of Appellant's conversation. In the recording, Ms. Rich tells Detective Delgado that she heard Appellant tell her cousin that "when he pulled out the gun to shoot the boy . . . the boy put his hands up and his eyes got big and he shot him. . . . And he told people, he was talking about it and bragging about it. He was telling people that he basically got away with it, he's slick (inaudible)." We conclude that, given the admission into evidence of Ms. Rich's own description of the conversation she overhead, Detective Delgado's single sentence describing that same conversation was cumulative and its admission does not warrant reversal. *See Yates*, 429 Md. at 124; *Grandison*, 341 Md. at 218-19.

III.

Limited Examination of Witnesses

At Appellant's trial, defense counsel sought to elicit testimony from a police officer about a conversation he had in the course of the investigation in which a confidential informant, who did not witness the shooting, told him that the "word on the street" was that someone nicknamed "Can't Get Right" shot the victim. At the pretrial hearing, the officer had testified that "Can't Get Right" was a "possible" nickname for a person by the name of Termaine Brown. At trial, the court addressed the issue and disallowed the testimony,

concluding it was secondary or tertiary hearsay. The court explained,

> Because you've acknowledged that this officer has no first-hand information, that the information he received is from a, an individual who was not there. It's what he heard on the street, so we're talking at a minimum, double hearsay. And if I thought about it, it could even be triple hearsay because it's not this officer. He didn't hear or see anything.

The court later sustained the prosecutor's objections when defense counsel sought to question the lead detective regarding information he had received about other potential suspects and when defense counsel pursued the same line of questioning with a detective called as a defense witness.

Appellant contends that the trial court unduly restricted his examination of the detective witnesses regarding their investigation and the possibility that there was another suspect in the shooting. Appellant suggests that it is "axiomatic that mechanistic application of a rule of evidence (*e.g.*, the hearsay rule) cannot operate to trump the fundamental constitutional right to present a defense." The State argues that the trial court properly excluded the hearsay testimony because it was, at least double hearsay, and there was no reason to believe that the evidence that Appellant sought to elicit from the detectives was reliable.

While the right to present a defense is fundamental, it is not absolute. *Kelly v. State*, 392 Md. 511, 537 (2006). An individual's right to present a defense is subject to the limitations of "procedural and evidentiary boundaries"—it does not, for example, entitle the defendant to present inadmissible evidence. *Id*. at 533, 537. Defendants are required to follow the rules of procedure and evidence, even where these limitations arguably

constrain their ability to present a defense. *Id*. at 543. In all cases, "[t]he scope of cross-examination lies within the sound discretion of the trial court." *Pantazes v. State*, 376 Md. 661, 681 (2003) (citations omitted).

In this case, the trial court properly determined that the evidence defense counsel sought to elicit was secondary or tertiary hearsay, *see Ashford v. State*, 147 Md. App. 1, 73 (2002) (depicting a chart to explain that secondary hearsay or "hearsay within hearsay" is a statement made by one speaker to a second speaker who then tells the witness), that did not fall within one of the exceptions to the hearsay rule. The statement at issue involved at least two levels of hearsay: a witness-detective heard from a confidential informant, who, in turn, heard it from "the street." Given the inadmissibility of this statement, we conclude that the trial court did not abuse its discretion in restricting the defense examination of the detectives.

IV.

Medical Records

The State's theory at trial was that Appellant shot the victim in retaliation because the victim shot Appellant the month prior. To support its theory, the State called as a witness Officer Vlard, the police officer who responded to the hospital where Appellant was treated after he was shot on April 28, 2013. Following the officer's testimony, the court permitted the State, over Appellant's general objection, to introduce Appellant's medical records into evidence.

Appellant asserts on appeal that the trial court erred by admitting his medical records

without proper authentication. Appellant complains that the State failed to provide a proper custodian for the records or proper notice to Appellant that it planned to present self-authenticating documents without a custodian.

The State responds that Appellant fails to allege that he was prejudiced by the court's admission of his medical records. Any error was harmless beyond a reasonable doubt, according to the State, because Officer Vlard's testimony already established that Appellant received treatment for a gunshot wound on the same date documented in Appellant's medical records. Further, the State suggests that our standard of review is deferential on questions of authentication and that Officer Vlard's testimony, considered in context, provided sufficient authentication of the content in Appellant's medical records. Finally, the State argues that Officer Vlard's testimony coupled with Ms. Rich's prior testimony that the victim shot Appellant made cumulative any information contained within Appellant's medical records.

Medical records are routinely admitted at criminal trials as business records pursuant to Md. Rule 5-803(b)(6).[2] Maryland Rule 5-902(b) allows such records to be self-

[2] Md. Rule 5-803(b)(6) provides that certain documents are not excluded by the hearsay rule, including:

> (6) Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if

authenticating

> provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) *notifies the adverse party* of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

The State's argument concedes—implicitly, at least—that it did not properly authenticate Appellant's medical records or, alternatively, comply with the notice requirement in Rule 5-902(b). Despite this, however, we agree with the State that any error in admitting the evidence at issue does not warrant reversal.

Prior to the admission of the medical records, Officer Vlard's testified that on April 28—the same date listed on Appellant's medical record—she responded to a call concerning call that a male walked into Bayview hospital with a gunshot wound. Officer Vlard also testified, refreshing her recollection with the police report that she had prepared regarding the incident, that the name of the person who was the victim of the gunshot to the abdomen was Appellant, Darius Brown. Finally, she testified that she interviewed Appellant at the hospital and that he gave his date of birth as April 5, 1989—the same date listed on the medical record admitted at trial. In addition to Officer Vlard's testimony, Mr.

> the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Kingsborough told investigators, in his recorded statement that was played for the jury, that the victim shot Appellant "in the side," and Ms. Rich's recorded statement also indicated that Appellant was in hospitalized when the victim had shot him two weeks before the murder. *See supra Yates*, 429 Md. at 124 (holding that improperly admitted evidence was harmless because it "did not ultimately affect the jury's verdict given the cumulative nature of similar statements offered at trial"); *see also Robeson v. State*, 285 Md. 498, 507 (1979) ("[W]here a witness later gives testimony, [w]ithout objection, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless." (citations omitted)).

Appellant makes no attempt on appeal to claim that the admission of the medical records was prejudicial. Considered in the context of officer's Vlard's testimony, which was consistent with the content of the medical records, we cannot agree that the circuit court's admission into evidence of a cumulative, self-authenticating medical record warrants reversal because the State failed to comply with Rule 6-502(b)'s notice requirement. *See Yates*, 429 Md. at 124; *Robeson*, 285 Md. at 507.

V. Crime Scene Photographs

During Brown's trial, the State offered into evidence a series of photographs taken of the victim and the crime scene. Defense counsel objected, arguing that the crime scene photos were unnecessarily inflammatory and had little probative value given that photographs taken during the autopsy had already been admitted. The State's attorney proceeded to argue the probative value of each of the crime-scene photos it selected, noting

that she made an effort to limit which photos she chose to send to the jury. The State contended that its first photo showed the victim's injuries and how he was found at the scene, which tended to support Ms. Rich's testimony that Appellant claimed to have shot the victim in the face. This was relevant, the State averred, because the defense opened the door by adducing testimony from the medical examiner on cross-examination that the victim was not actually shot in the face or head. The court agreed that the defense opened the door, but cautioned: "You don't get to take six or seven shots and show it six or seven different ways. . . . But I'm certainly allowing you to show exactly what you said, . . . how he existed at the scene." The court then went through each photo:

> Okay, so [Exhibit] 11I does show the victim with his face up, with blood coming out of his mouth and blood behind his head. One could argue that looks like he had been shot in the face. Exhibit 11K is the back of his head. Again, one could argue that it looks like he was shot. Exhibit 11B is a picture of [] the victim laying down on the ground, as is 11C from a slightly different angle. Exhibit 11D is just a floss pick.
>
> I'm allowing 11M because it shows a wound on the victim, 11N [because] it shows a wound pattern through his pants. Exhibit 11O because it shows items that were recovered. . . . The Court will not allow in 11E as duplicitous, it shows the victim at a different, not relevant angle.

The court also determined that it would allow the photo marked State's Exhibit 11F in addition to those just discussed, but would not allow 11A, 11B, 11G, 11H, 11J, or 11L, reasoning that the State had "sufficient pictures and . . . those others are duplicitous and are more prejudicial than probative." In so ruling, the court clarified that it would admit the photos whether or not Ms. Rich eventually testified at trial, reasoning:

> [T]hey're pictures of the crime scene. They [] give the trier of fact a full view of what happened on the date, which the State has every right to do. The State doesn't have a right to just, you know, throw picture after picture

> after picture, but they do have a right to show what it looked like at the scene because the trier of fact needs to see what it looked like[.] I do agree with the State, a sterile view of everything isn't particularly the be all and end all but certainly a lot of extra blood isn't necessary. The man was shot [] a number of times. There are pictures of that and that's satisfactory.

Ultimately, the trial court admitted ten of the crime scene photographs, and excluded four.

Appellant now contends, in his fifth and final contention on appeal, that the trial court abused its discretion by allowing the admission of the crime scene photographs. Though he concedes that they were "arguably relevant," he claims that they were "overly-prejudicial" and "served no other purpose than to inflame the passions of the jury."

The State responds that the admissibility of photographic evidence is best left to the trial judge's sound discretion. The State argues that the trial court here exercised its discretion properly because it excluded some photos and admitted others after it "considered this issue at length, and the prosecutor gave detailed reasons as to why the photographs should be admitted."

When considering the admission of photographic evidence, trial courts utilize a two-part test. "[F]irst, the judge must decide whether the photograph is relevant[.]" *State v. Broberg*, 342 Md. 544, 555 (1996). A photograph is relevant if it "'assist[s] the jury in understanding the case or aid[s] a witness in explaining his testimony[.]'" *Mason v. Lynch*, 388 Md. 37, 49 (2005) (quoting *Hance v. State Roads Comm'n*, 221 Md. 164, 172 (1959)). "[S]econd, the judge must balance its probative value against its prejudicial effect." *Broberg*, 342 Md. at 555. "The admissibility of photographs under this state's law is determined by a balancing of the probative value against the potential for improper

prejudice to the defendant. . . . This balancing is committed to the trial judge's sound discretion." *Bedford v. State*, 317 Md. 659, 676 (1989) (internal citations omitted). "'The trial court's decision will not be disturbed unless plainly arbitrary, ... because the trial judge is in the best position to make this assessment.'" *Lovelace v. State*, 214 Md. App. 512, 548 (2013) (quoting *Ayala v. State*, 174 Md. App. 647, 679 (2007)).

In this case, Appellant concedes the relevance of the photographs, so we focus on the second prong of the two-part test. It is clear from the record that the trial court considered and evaluated the arguments of the parties and the individual merits of each photo, weighing the probative value of each photo against its potential prejudicial effect. The court cautioned the State that it would not get multiple pictures showing the same gratuitous scene, and then the court excluded several photos that it determined to be cumulative or gratuitously bloody. As the Court of Appeals has recognized, even though photographs "may be more graphic than other available evidence . . . we have seldom found an abuse of a trial judge's discretion in admitting them in evidence." *Hunt v. State*, 312 Md. 494, 505 (1988). Given the consideration and discretion the trial court employed in admitting only those photographs that it determined were not cumulative or unfairly inflammatory—as well as its explanation, on the record, for doing so—we do not that the trial court abused its discretion. Accordingly, we affirm its decision to admit the photographs at issue.

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