Circuit Court for Baltimore City
Case No. 117248010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2414

September Term, 2019

RYAN KELLY HAZEL

v.

STATE OF MARYLAND

Friedman,
Wells,
Zic,

JJ.

Opinion by Zic, J.

Filed: July 23, 2021

We are called upon to determine whether the Circuit Court for Baltimore City improperly admitted an officer's body-worn camera footage and if there was any error, whether the error was harmless. For the following reasons, we reverse the trial court's conviction of appellant Ryan Kelly Hazel and remand the case to the Circuit Court for Baltimore City for a new trial.

BACKGROUND

On August 10, 2017, at approximately 11:15 p.m., Detectives Scott Armstrong and Daniel Waskiewicz initiated a traffic stop and stopped the driver, Mr. Hazel, in a Nissan Maxima after observing the vehicle travelling without its headlights turned on. As Detective Armstrong approached the stopped car, Mr. Hazel took off without warning. At the time of the stop, Mr. Hazel had a suspended driver's license. Detectives Armstrong and Waskiewicz pursued the Nissan Maxima but lost sight of the vehicle.

The vehicle traveled several blocks and, by happenstance, passed another group of officers[1]—Detectives Jeffrey Henry, Mark Tallmadge, and Richard Weese, and Officer Allyson Hobe—who were conducting an unrelated traffic stop. Within a few seconds of the vehicle passing at a high rate of speed, the four officers heard a loud crash. The officers immediately terminated the unrelated traffic stop and responded to the accident

[1] Throughout the briefs, record, and transcripts, the law enforcement officers involved in this case were referred to as "Detective" and "Officer" interchangeably. We will refer to each as they introduced themselves when they testified, or, if they did not testify, in the manner they were referenced in the record. Collectively, we will refer to all as officers. We mean no disrespect in doing so.

where they found the Nissan Maxima had collided with another vehicle. The other vehicle was occupied by Margaret Hall, who was pronounced dead on the scene.[2]

Detective Henry testified that when he arrived at the scene, he saw a man, whom he believed to be the driver lying between two cars. He sat the man up and placed him in handcuffs. When Detective Armstrong arrived, he confirmed that the man was Mr. Hazel, the driver of the Nissan Maxima. It was apparent that Mr. Hazel was injured and required medical attention—he had blood coming out of his mouth and suffered a broken leg. Detective Henry immediately called for a medic and accompanied Mr. Hazel to shock trauma. He further testified that he did not recover any drugs or guns on Mr. Hazel or in the surrounding area.

Meanwhile, Officer Hobe approached the Nissan Maxima and observed Iyen Palmer still in the passenger seat. Officer Hobe confirmed that Ms. Palmer was the only occupant of the car and that the driver's side door was closed but not latched. She described Ms. Palmer as very upset, appeared to be in pain, and looked like she was in shock. Officer Hobe testified that Ms. Palmer could not speak very well or move and that she stayed with Ms. Palmer until the medics arrived. Officer Hobe further testified that Ms. Palmer asked her to find her purse as well as her phone to call her mother. Detective Armstrong later determined that the Nissan Maxima was registered to Ms. Palmer.

After the medics arrived and Mr. Hazel and Ms. Palmer were taken to a hospital, Detective Tallmadge and Officer Hobe conducted an inventory search of the Nissan

[2] In a separate case, Mr. Hazel pleaded guilty to manslaughter by gross negligence.

Maxima. In the front passenger seat footwell where Ms. Palmer had been sitting, Detective Tallmadge located a "small [white] backpack or satchel that contained a handgun and a significant amount of CDS, or narcotics." Detective Tallmadge testified that the white bag[3] was closed and that there was significant property and debris in the area where it was found. The white bag contained a handgun with a magazine and ammunition, a scale, plastic bags of narcotics, and a Nordstrom gift card. The Nordstrom gift card did not have a name on it. The magazine was a 50-round drum, which contained 35 rounds. The parties stipulated that the gun was test-fired and determined to be operable. Detective Tallmadge testified that, in his expert opinion, the recovered CDS was of sufficient quantity to suggest that it was intended for street-level sales and not for personal use. A forensic scientist testified for the State that her analysis of the evidence revealed that the items in the plastic bags tested positive for heroin, cocaine, oxycodone, and alprazolam. Detective Tallmadge searched the entire vehicle and found no other contraband. He testified that he never saw Mr. Hazel in possession of the drugs, the gun, or the white bag and that narcotics bags were not dusted for fingerprints.

Mr. Hazel was ultimately charged with various drug and gun possession offenses: possession with the intent to distribute heroin; possession with the intent to distribute cocaine; possession of a firearm during the commission of a drug trafficking crime; possession of narcotics, specifically heroin, cocaine, oxycodone, and alprazolam;

[3] The parties disagree as how to describe the white bag. The State calls the bag a "satchel" while Mr. Hazel characterizes it as a "purse" or "handbag." The Evidence Control Unit entered the bag as a "handbag." We will simply refer to it as a "bag."

wearing, carrying, or transporting a handgun in a vehicle; unlawfully receiving a detachable magazine; fleeing and eluding a police officer; and unlawful possession with intent to use drug paraphernalia.

Before trial, Mr. Hazel moved to suppress Officer Hobe's body-worn camera footage, which recorded her conversation with Ms. Palmer. At a pretrial hearing, the court questioned the probative value of the video. The State argued that it was seeking to admit the video so the jury could observe Ms. Palmer's "demeanor" because her "demeanor" indicates that Mr. Hazel, rather than Ms. Palmer, owned the white bag:

> [THE COURT]: What's the State's argument on how that's probative?
>
> [THE STATE]: Your Honor, that are two people in the car that was in the accident. There was Mr. Hazel and Ms. Palmer. That Your Honor, is absolutely probative just like any other body-worn camera. This is not about there's no mention of someone in Ms. Hall's car that was dead. It doesn't show Ms. Hall's car at all. It has nothing to with the prejudice behind the, you know, manslaughter matter that I do agree is unfair and prejudicial.
>
> [THE COURT]: Yeah. But I'm asking what does this prove other than the fact that she was involved in the accident and suffered some injury?
>
> [THE STATE]: Your Honor, this is the only person they can pin to the gun and the drugs found. The gun and drugs later, I'll proffer --
>
> [THE COURT]: This is the only person --
>
> [THE STATE]: The only other person that they could try to raise reasonable doubt that had the drugs and gun upon them. The bag that the gun and drugs was found, where the gun and drug was found was in the satchel bag at that woman's feet.

That's what Officer Talma[d]ge will later testify to. There was a lot of junk all over that car. . . . It's not prejudicial because it doesn't say anything about the murder and at that woman's feet is where we find the gun and all the drugs in a satchel bag.

The State's going to argue that that drug and gun belonged to Mr. Hazel. That was the reason why he was in control of that vehicle and that's why he was found on the street. That's the State's case. So it's very probative just like any body-worn camera it's probative -- the officer is on the stand[] all the time. . . .

[THE COURT]: I don't think. But all evidence must be relevant because irrelevant evidence is inadmissible as a general rule. That's why I was asking you what relevance it played. The fact that it happened doesn't necessarily make it admissible. It has to be relevant.

[THE STATE]: The State's point, Your Honor, *given that woman's demeanor, given the way she is in that accident*, the State has to prove beyond a reasonable doubt that it is either constructive possession or that it is Mr. Hazel's and *seeing the demeanor of the other person beyond just the description or testimony from an officer is absolutely important that includes tell the fact finder that it is more likely or less likely that that woman did not own that satchel bag and Mr. Hazel did.*

[THE COURT]: All right. Defense?

[DEFENSE]: Your Honor, I would argue that's exactly why it's inadmissible. The State wants to dovetail in testimony of Ms. Palmer by using this video to say that she's not the one who owned this gun with the giant extended magazine, so that it must be Mr. Hazel. That's why Mr. Hazel's on trial. The State has made a determination that she seems weak or unable and they want to dovetail that in without giving us an opportunity to put her on the stand and cross examine her and to proffer. I think that's exactly the reason why the State says they want to use it is why it is inadmissible.

> [THE STATE]: Your Honor, now this is a hearsay argument as opposed to probative. Of course, all evidence that the State is going to present is prejudic[ial] and I know that this tough but if we're talking about the hearsay, I believe that all this presen[t] sense impression and excited utterance up until certainly five minutes, Your Honor, where she starts coming a little bit further and she holds that officer's hand.
>
> But all the statements that Ms. Palmer makes are not in for the truth of the matter asserted. They're excited utterances and beyond hearsay.

(emphasis added). After viewing the video, the court determined that it would permit the State to play the footage: "All right. I'm inclined to allow this video. I don't find anything unduly prejudicial. There's no blood. There's no gore, and it's indicative of who else is in the case [sic car?] at the time of the collision."

Following the trial court's ruling to admit the video, Mr. Hazel requested that the court admonish the State not to "make arguments that based on the video, she's sympathetic, based on her demeanor and try to dovetail this into some kind of eviden[ce] to use." The court responded, "[w]ell, we'll see how that goes" and that it would "not . . . pre-rule on that."

During the trial, before the video was played to the jury, Mr. Hazel again objected to the recording. Mr. Hazel renewed his objections and reminded the court that he objected "on multiple grounds: as to the hearsay, as to the purpose, as to relevance, [and] as to the prejudicial over the probative." The trial court ruled that the video was relevant to "the position of the items in the car" and "to whom the bag belonged":

> [THE COURT]: Well, I did review it yesterday and made a preliminary ruling, but the evidence, as it has come in today,

> has convinced me that it is relevant to some of the issues that have been raised: the position of the items in the car, to whom the article belonged and that sort, and to whom the bag belonged and that sort of thing.
>
> With respect to the allegations of hearsay, this is just a recitation of the transaction between Officer Hobe, where she's being heard at the scene. I do not believe that the probative value is outweighed by any unfair prejudice and, therefore, deny the request, again, to exclude it; and, therefore, I overrule your objection.

The video was subsequently played to the jury. In the video, the jury could see Officer Hobe witness the Nissan Maxima race by and hear the impact of the car crash. The video then shows Officer Hobe arriving at the scene of the accident and approaching the car. The driver side is empty, but Officer Hobe finds Ms. Palmer still in the passenger seat. Officer Hobe attempts to keep Ms. Palmer calm until the medics arrived. The interaction, which is transcribed in part below, lasts about five and one-half minutes[4]:

> [OFFICER HOBE]: Oh shit. Hon, are you okay?
>
> [MS. PALMER]: No.
>
> [OFFICER HOBE]: Can you move?
>
> [MS. PALMER]: No.
>
> [OFFICER HOBE]: Is there anybody else in your car?
>
> [MS. PALMER]: No. Can I please call my mom?
>
> [OFFICER HOBE]: All right.

[4] Officer Hobe's body-worn camera footage was transcribed slightly differently each time it was played at trial. We have reproduced each transcription as it appears in the transcript when played at each stage of the trial.

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: Okay.

[MS. PALMER]: I can't move my leg.

* * *

[OFFICER HOBE]: I know. I've got somebody right here.

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: All right, hon. Just stay with me. Stay with me.

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: Yeah. Talk to me. Okay? Just talk to me. Okay?

[MS. PALMER]: (Indiscernible.) I need to hear my little boy.

[OFFICER HOBE]: Where is your phone at, hon?

[MS. PALMER]: In the -- in the (indiscernible).

[OFFICER HOBE]: Okay. Okay. Where is your phone at, hon?

[MS. PALMER]: I can't find it.

[OFFICER HOBE]: You can't find it?

[MS. PALMER]: No.

[OFFICER HOBE]: Oh.

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: What hurts, hon?

[MS. PALMER]: Everything.

[OFFICER HOBE]: Everything? Okay.

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: Calm down. Calm down.

[MS. PALMER]: I hurt.

[OFFICER HOBE]: Calm down. I know you're hurt. It's okay. Just --

[MS. PALMER]: Is that my phone?

[OFFICER HOBE]: No. It's not your phone.

[MS. PALMER]: (Indiscernible.) It was plugged in.

[OFFICER HOBE]: Keep talking to me. It was plugged up?

[MS. PALMER]: I was trying to bring up FaceTime, and that's when -- I'm in a lot of pain.

[OFFICER HOBE]: Okay. Just keep talking to me. Okay?

[MS. PALMER]: It should be on the floor.

[OFFICER HOBE]: On the floor?

[MS. PALMER]: It should be on the floor.

[OFFICER HOBE]: All right.

[MS. PALMER]: Right here. Attached to that pink cord.

[OFFICER HOBE]: Attached to the pink cord?

[MS. PALMER]: Yes. Right down -- you'll see it. I need to call my mother.

[OFFICER HOBE]: Okay. Oh, here you go. Here you go. Here you go. Oh, jeez.

[MS. PALMER]: Wait. Somebody call my mom.

[OFFICER HOBE]: Yeah. Absolutely, honey. We got a medic coming for you. All right?

[MS. PALMER]: Wait. I've got to FaceTime her.

[Officer Hobe talks with other officer for a moment.]

[MS. PALMER]: Can you -- can you tell my mom where I am, please?

[OFFICER HOBE]: Huh?

[MS. PALMER]: Can you tell my mom where I am, ma'am?

[OFFICER HOBE]: We're at Mount and Pratt.

* * *

[OFFICER HOBE]: Medics are coming. So as soon as they get here, we'll let you know. All right?

* * *

[OFFICER HOBE]: I'm right here. I'm not going anywhere.

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: Is this your car?

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: Okay.

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: Do you want me to hold your hand?

[MS. PALMER]: (Indiscernible.)

[OFFICER HOBE]: Squeeze my hand. Okay? Squeeze my hand. All right? Here. Here. Squeeze my hand. Okay? You're going to be okay.

* * *

[OFFICER HOBE]: You'll be all right. You'll be all right.

* * *

[OFFICER HOBE]: What's your name?

[MS. PALMER]: -- (indiscernible). Iyen.

[OFFICER HOBE]: What is it?

[MS. PALMER]: Iyen.

[OFFICER HOBE]: Iyen?

[MS. PALMER]: Yes.

[OFFICER HOBE]: All right. Well my name's Allyson. Okay? I'm going to -- I'm just going to keep holding your hand. All right? You're going to be all right. Medics are on their way.

* * *

[OFFICER HOBE]: Is your purse in the car?

* * *

[MS. PALMER]: *It's an all-black (indiscernible) purse that has my ID and my registration.*

[OFFICER HOBE]: Okay. Is that in the backseat?

* * *

> [OFFICER HOBE]: Okay. It's fine. You don't have to worry about it. I can look for it. All right?
>
> [MS. PALMER]: (Indiscernible). My car keys (indiscernible).
>
> [OFFICER HOBE]: Your car keys?
>
> [MS. PALMER]: House keys.
>
> [OFFICER HOBE]: House keys? Okay.
>
> [MS. PALMER]: (Indiscernible.)
>
> [OFFICER HOBE]: We'll make sure to get that out of here. All right?

(emphasis added). Despite Ms. Palmer's description of her purse as an "all-black purse," Officer Hobe testified that no black purse was recovered from the vehicle. Ms. Palmer was not called as a witness.

At the end of the State's case-in-chief, Mr. Hazel moved for judgment of acquittal. The court denied the motion, ruling that "given the fact that possession can be actual or constructive," Mr. Hazel was "sufficiently close to the bag for the jury to consider that it may have belonged to him." The court also noted that "[w]hether or not it belonged to [Mr. Hazel] or Ms. Palmer is a question for the jury." The defense declined to present any evidence during its case-in-chief.

During closing arguments, the State argued that Mr. Hazel had possession of the bag because he fled after the initial stop and had control of the car as the driver. The State mentioned neither Officer Hobe's testimony nor Ms. Palmer's statement about an "all-black purse." Mr. Hazel then argued:

> [We] told you in the opening that there's a purse, there's a Nordstrom's gift card, sounds like it's a woman's bag, it's at a woman's foot, and a woman was asking for her purse. . . .
>
> * * *
>
> . . . Reasonable doubt, [we] explained . . . to you, Ms. Iyen Palmer was the registered owner of the car.
>
> That's what the Judge and the State was just kind of intimating about. [The court] read the instruction which includes "whether the Defendant had ownership or possessory interest in the vehicle."
>
> Who owned the vehicle? Because he was driving it so the State's theory is because he took the wheel he knows everything in the car, inside a woman's purse? Ms. Palmer is sitting in the passenger seat, the purse is on the passenger seat floorboard area where the phone was also located at Ms. Palmer's feet.
>
> Ms. Palmer had her phone there, it's a purse, it had a Nordstrom's gift card in it. *Ms. Palmer, actually because Detective Hobe said this, asked for her black purse. Could you (inaudible . . .) this as her black purse?* Because Detective Hobe says they didn't find a black purse.
>
> Everything in these facts is Ms. Palmer had possession and she should be the person sitting right there.

(emphasis added).[5]

In response, during its rebuttal argument, the State directed the jury to Officer Hobe's body-camera video: "And what that video shows is what that car looked like before the satchel was recovered. There is debris all over her area of the car here,

[5] The State objected to the last statement—"Everything in these facts is Ms. Palmer had possession and she should be the person sitting right there"—and the trial court sustained the objection.

including that satchel bag." The State then played the entire video for the jury again, pausing it at various times to add commentary. The following transpired:

> [MS. PALMER]: (Inaudible) my purse and my (inaudible).
>
> [OFFICER HOBE]: Is your purse in the car?
>
> [MS. PALMER]: (Inaudible).
>
> [OFFICER HOBE]: Okay.
>
> [MS. PALMER]: It's an all black purse (inaudible) with my ID and my registration.
>
> [OFFICER HOBE]: Okay. Is that in the back?
>
> (Video of Officer Hobe's camera footage is paused at 11:31 a.m.)
>
> [THE STATE]: *With my ID and registration, all black purse. That was the description. That is -- The satchel is not that.*
>
> (Video of Officer Hobe's camera footage resumes play at 11:31 a.m.)
>
> [MS. PALMER]: (Inaudible).
>
> [OFFICER HOBE]: Okay, it's fine. You don't have to worry about it, I can look for it, all right.
>
> [MS. PALMER]: My car keys and my house keys (inaudible).
>
> [OFFICER HOBE]: Your car keys, your house keys, okay.
>
> [MS. PALMER]: (Inaudible).
>
> [OFFICER HOBE]: We'll make sure they get that out of here, all right.

> (Video of Officer Hobe's camera footage is stopped at 11:32 a.m.)

(emphasis added). A little later in its rebuttal argument, the State remarked:

> Why would she direct Detective Hobe to anything in that car if she knows she's got all this contraband? *She described something completely different than this, black purse, keys, wallet, all those things, that anyone else I argue would probably be concerned about in an accident.*
>
> Now that satchel is a guest bag and the only guest in that car by stipulation was [Mr. Hazel]. Do these belong to that woman? I argue no. I argue no. I argue it belongs to the person who has dominion and control for that vehicle, who is driving that vehicle, who is fleeing and eluding in that vehicle who has the bad luck of seeing another stop on South Mount Street that I argue freaked him out more and he got in an accident and it's tragic for everyone, including [Mr. Hazel], and I'm sorry people got hurt.
>
> Consciousness of guilt, [Mr. Hazel]. He got out of that car, yes, maybe for other reasons, but he wanted to get that satchel away from him. That is a guest bag, ladies and gentlemen.

(emphasis added).

Following deliberations after a three-day trial, on November 7, 2019, the jury convicted Mr. Hazel of all counts. The court imposed a 22-year prison term. Mr. Hazel then noted this appeal on January 30, 2020.

QUESTIONS PRESENTED

Mr. Hazel presents several questions for our review, which we have slightly rephrased as follows:

1. Did the trial court err by admitting Ms. Palmer's statement because it constituted hearsay and did not qualify as either an excited utterance or a present sense impression, and if so, was such error harmless?

2. Did the trial court err by admitting Officer Hobe's body-worn video footage, which was irrelevant, unfairly prejudicial, and contained bad acts evidence, and if so, was such error harmless?

3. Did the State fail to present sufficient evidence to support Mr. Hazel's convictions?

We hold that the circuit court erred by admitting portions of Officer Hobe's body-worn video footage and by admitting Ms. Palmer's statement. We also hold that the error of admitting Ms. Palmer's statement contained in the video was not harmless. Therefore, we reverse the judgment of the circuit court and remand the case for new trial. For the third question, we conclude that the State presented sufficient evidence to support Mr. Hazel's convictions to permit a retrial.

DISCUSSION

I. THE TRIAL COURT ERRED BY ADMITTING A PORTION OF THE BODY-WORN VIDEO FOOTAGE.

Mr. Hazel contends that the trial court erred by admitting Officer Hobe's body-worn camera footage. He offers several evidentiary grounds for the video's inadmissibility: relevance, unfair prejudice, hearsay, and character evidence. We start our analysis with the last evidentiary challenge.

A. Mr. Hazel's Bad Acts Argument Was Not Preserved.

Mr. Hazel contends that Officer Hobe's body-worn video footage should have been excluded because it contained bad acts evidence. *See* Md. Rule 5-404(b)

("Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person to show action in the conformity therewith."). Mr. Hazel asserts that he sought to exclude anything related to the car accident as bad acts evidence. Specifically, Mr. Hazel claims the video portrayed Mr. Hazel as a "bad person" because he caused a car accident, which injured Ms. Palmer, and then he "abandoned" her. The State argues that Mr. Hazel's claim was not preserved because "he did not raise a 'bad acts' objection at trial to . . . [Officer] Hobe['s] video."

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Pursuant to Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise the objection is waived." A general objection preserves all grounds against admissibility of the evidence on appeal. *DeLeon v. State*, 407 Md. 16, 24-25 (2008). Conversely, a specific objection limits appellate review to only the specified ground for the objection raised. *Gutierrez v. State*, 423 Md. 476, 488 (2011). For instance, the Court of Appeals has held that when a defendant objects on relevance grounds at trial, the defendant fails to preserve an argument that the evidence was unduly prejudicial or constituted other crimes evidence. *See Klauenberg v. State*, 355 Md. 528, 541-42 (1999); *Jeffries v. State*, 113 Md. App. 322, 340-42 (1997).

During the pretrial motions hearing, Mr. Hazel sought to exclude several pieces of evidence, such as photographs, CCTV recordings, and Officer Hobe's body-worn camera

footage. Mr. Hazel claimed he objected to all bad acts evidence related to the car accident when he argued the following:

> But at this point I see the auto accident which he's now charged within this case, anything related to the manslaughter which is not charge[d] in this case, as another bad act and I would object to anything related to another bad act on the other case being used in trial, first of all, because it's highly prejudicial which is why it wasn't used in the last trial and [the State], I believe, agrees with me, but I want to go a step forward and say the State has not provided any notice under 404(b) that they wish to use any other bad act in[] this trial, so I would object as to a notice form that they cannot use any prior -- or other bad act. I know that we cannot erase the fact which it's on a video, it's the reason they get in the car, that there was a car accident.

It is unclear, however, whether this argument was in relation to the photographs, CCTV recordings, or any evidence depicting the manslaughter. Officer Hobe's body-worn video footage, however, was not specifically mentioned in relation to this argument.

Mr. Hazel did not raise a bad acts objection regarding Officer Hobe's video at either the pretrial motions hearing or trial. At the pretrial motions hearing, the State argued that the video was relevant, probative, and not unfairly prejudicial. In response to the State's argument, Mr. Hazel made the following objection regarding the video's admissibility:

> Your Honor, *I would argue that's exactly why it's inadmissible*. The State wants to dovetail in testimony of Ms. Palmer by using this video to say that she's not the one who owned this gun with the giant extended magazine, so that it must be Mr. Hazel. That's why Mr. Hazel's on trial. The State has made a determination that she seems weak or unable and they want to dovetail that in without giving us an opportunity to put her on the stand and cross examine her and

> to proffer. *I think that's exactly the reason why the State says they want to use it is why it is inadmissible.*

(emphasis added). At trial, Mr. Hazel, specified the following grounds for objection:

> Your Honor, this is the video we watched twice yesterday [at the pretrial motions hearing] and I objected strenuously to on multiple grounds: as to the *hearsay*, as to the *purpose*, as to *relevancy*, as to the *prejudicial over the probative*. *All the arguments that were made yesterday regarding this video I continue*.

(emphasis added).

Mr. Hazel did not raise a bad acts objection regarding Officer Hobe's body-worn video footage; instead, his objections were specifically for hearsay, purpose, relevancy, and unfair prejudice. Thus, on appeal, Mr. Hazel is limited to the specific grounds that he raised below. *See Gutierrez*, 423 Md. at 488 ("[W]hen an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified." (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004))); *DeLeon*, 407 Md. at 25 ("An objection loses its status as a 'general' one . . . 'where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence.'" (quoting *Boyd v. State*, 399 Md. 457, 476 (2007))); *Klauenberg*, 355 Md. at 541 ("[W]hen the objecting party states his or her grounds for objection at trial he or she normally is limited to those grounds on appeal . . . .").

Mr. Hazel cites to *Jeffries v. State*, 113 Md. App. 322 (1997) and a Washington state case to support the proposition that his objection on the grounds of unfair prejudice

preserved a Rule 5-404(b) bad acts objection. In *Jeffries*, the appellant objected to evidence on grounds of relevancy at trial and raised a bad acts or other crimes claim for the first time on appeal. 113 Md. App. at 341. This Court determined that the bad acts or other crimes claim was not preserved for appellate review because an objection based on relevance is not "the same thing" as an objection based on unfair prejudice. *Id.* at 341-42. In *Jeffries*, we also noted that "the appellant's argument [on appeal] is exclusively one of prejudice of the 'other crimes' evidence variety." *Id.* at 342.

In the instant case, we do not find *Jeffries* to support Mr. Hazel's contention that "an objection challenging bad acts evidence is an objection based on an unfair prejudice claim" because the Court of Appeals addressed this specific situation in *Ware v. State*, 360 Md. 650 (2000). In *Ware*, the appellant objected at trial "on the grounds that the evidence was irrelevant and that its prejudicial effect outweighed its probative value." 360 Md. at 675. On appeal, the appellant contended that the evidence was irrelevant and, for the first time, argued that the evidence violated Rule 5-404(b). *Id.* The Court of Appeals held that the appellant's Rule 5-404(b) claim was not preserved for appellate review because the bad acts argument was never made before the trial court. *Id.* at 675-76 (citing, in support of its conclusion, *Klauenberg v. State*, 355 Md. 528, 541-42 (1999), which held that a defendant waived his right to argue a bad acts claim on appeal when the only objection at trial was based on relevancy). An objection based on unfair prejudice does not preserve a bad acts claim for appellate review. *See* 360 Md. at 675-76. Similarly, in the instant case, Mr. Hazel raised an unfair prejudice objection but did not

raise a bad acts objection. His Rule 5-404(b) claim was not preserved by virtue of his unfair prejudice objection.

Thus, Mr. Hazel has not preserved his bad acts evidence argument for appellate review and we decline to review the merits. We will next review his objections concerning relevance, prejudice, and hearsay.

B. Only a Portion of the Body-Worn Video Footage Is Relevant.

The starting point for determining the admissibility of the body-worn video footage is analyzing its relevance. Our review of the trial court's decision to admit the video involves a two-step process. First, the court's determination as to whether evidence is legally relevant is reviewed de novo. *Funes v. State*, 469 Md. 438, 478 (2020) (citing *Ford v. State*, 462 Md. 3, 46 (2018)). If the evidence in question is relevant, we next consider whether the trial court abused its discretion by admitting relevant evidence that should have been excluded under Rule 5-403. *Funes*, 469 Md. at 478. There is an abuse of discretion when "no reasonable person would take the view adopted by the circuit court." *Williams v. State*, 457 Md. 551, 563 (2018) (first citing *Fuentes v. State*, 454 Md. 296, 325 (2017); and then citing *Alexis v. State*, 437 Md. 457, 477-78 (2014)).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. The test for relevance is a "low bar to meet." *Williams*, 457 Md. at 564 (citing *State v. Simms*, 420 Md. 705, 727 (2011)). To

be admissible, evidence "must be relevant to the issues and must tend either to establish or disprove them." *Dorsey v. State*, 276 Md. 638, 643 (1976) (quoting *Kennedy v. Crouch*, 191 Md. 580, 585 (1948)). Relevant evidence generally is admissible while irrelevant is never admissible. *See* Md. Rule 5-402. Relevant evidence, however, may be excluded under Rule 5-403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Mr. Hazel contends that the body-worn video footage is inadmissible under Rules 5-401, 5-402, and 5-403 because it is irrelevant but, if relevant, its scant probative value is substantially outweighed by its risk of unfair prejudice. Mr. Hazel maintains that the video of Ms. Palmer "suffering from her injuries, calling for her mother, and receiving comfort and sympathy from the police" was unrelated to any of the drug- or handgun-related offenses at issue and should have been excluded. He further argues that because Ms. Palmer does not mention the drugs or firearm and does not state that the white bag belongs to her or Mr. Hazel, the video has no tendency to prove who possessed the white bag. Even if the video is relevant, Mr. Hazel asks this Court to find that the trial court abused its discretion by admitting the video because its probative value is substantially outweighed by the danger of unfair prejudice.

The State responds that the video is admissible under Rule 5-402 because it meets Rule 5-401's low relevance threshold and that the trial court did not abuse its discretion

in admitting the video under Rule 5-403. The State contends that the video was relevant to the question of who had control and possession of the bag and its contents and that Ms. Palmer's "appearance, demeanor, and behavior" in the wrecked car was relevant to the drug and firearm offenses for which Mr. Hazel was charged. The State further asserts that the probative value of the video was not outweighed by the danger of unfair prejudice.

The trial court admitted Officer Hobe's body-worn camera footage in its entirety. We, however, hold that only portions of the video are relevant and analyze the video in three segments. First, the video footage depicting the speeding car and Officer Hobe arriving on the scene is relevant. This part of the video portrays the unrelated traffic stop when another car speeds by. Officer Hobe and her fellow officers immediately end the unrelated stop and pursue the speeding car. Upon arriving at the scene of the car crash, Officer Hobe approaches the Nissan Maxima and finds the driver side is empty, though the door is ajar. When Officer Hobe moves to the passenger side, she finds Ms. Palmer. This portion of the video is relevant because it makes it more probable that the speeding car was the Nissan Maxima driven by Mr. Hazel that fled Detectives Armstrong and Waskiewicz. It also tends to establish that Mr. Hazel left the vehicle after the crash while Ms. Palmer remained in the passenger seat, which is relevant to whether Mr. Hazel possessed the white bag containing the contraband. Additionally, this portion of the video is not unfairly prejudicial under Rule 5-403. While the car crash is horrific, there is no observable blood or gore and there is no sight of Ms. Hall, the victim of the crash.

The probative value of watching Officer Hobe arrive at the incident and her view of the car crash outweighs any danger of unfair prejudice. The trial court did not abuse its discretion in admitting this portion of the video.

Second, the portion of the video showing Ms. Palmer's demeanor and behavior during her conversation with Officer Hobe is not relevant. At the pretrial motions hearing, the State argued that Ms. Palmer's demeanor made it "more likely that . . . [Ms. Palmer] did not own that satchel bag and Mr. Hazel did." In its brief, the State contends that her "demeanor and emotional state" were relevant to whether Ms. Palmer or Mr. Hazel—exclusively or jointly—possessed the contraband, explaining that Mr. Hazel was more likely to have possessed the bag because Ms. Palmer "seemed completely unaware of what was at her feet." This line of reasoning implies that someone who is in shock or upset after a car accident is incapable of possessing contraband or, put differently, implies that another person must possess the contraband. We do not find this argument persuasive.

Ms. Palmer's behavior and demeanor as depicted in the footage do not have "any tendency to make [it] . . . more or less probable" that Mr. Hazel owned the white bag containing the gun, ammunition, and drugs. Md. Rule 5-401. Ms. Palmer was in a state of shock, and, not surprisingly, focused on her own injuries and contacting her mother and "little boy." Her natural reaction to the accident does not have any tendency to establish that Mr. Hazel possessed the white bag. The depictions of Ms. Palmer as an injured passenger in a car accident and receiving comfort from the police have no bearing

on who possessed the gun and drugs in the white bag located at Ms. Palmer's feet, either jointly or exclusively. Furthermore, the video does not show Mr. Hazel. It does not even show the white bag at Ms. Palmer's feet. Because we conclude that Ms. Palmer's appearance, behavior, and demeanor are not relevant to the issue of who had control and possession of the white bag and its contents, we do not need to address whether this segment of the footage was unfairly prejudicial under Rule 5-403.

Third, Ms. Palmer's statement that she has "an all black purse . . . with [her] ID and [her] registration" is relevant because it goes to the issue of who controlled or possessed the white bag containing the contraband. It tends to prove that Ms. Palmer did not own the white bag because she specifically stated that she owned "an all-black purse," thereby suggesting that the bag belongs to Mr. Hazel. The probative value of the statement is not outweighed by the danger of unfair prejudice because the remark does not evoke an emotional response or influence the jury to disregard evidence or the lack thereof. *See* Md. Rule 5-403; *Odum v. State*, 412 Md. 593, 615 (2010) (noting that the probative value of evidence is outweighed by the danger of unfair prejudice "when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case"). Because we determine that Ms. Palmer's statement is relevant and not unfairly prejudicial, we next consider whether that statement is inadmissible hearsay.

C. Ms. Palmer's Statement Is Inadmissible Hearsay.

Whether evidence is hearsay is an issue of law reviewed de novo, without deference to the trial court. *Morales v. State*, 219 Md. App. 1, 11 (2014). 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). Put another way, an out-of-court statement is hearsay when "offered in evidence to prove today the same truth of the matter that was asserted by the declarant at the time he or she made the out-of-court statement." 6A Lynn McLain, *Maryland Evidence State and Federal* § 801:1(b), at 171 (3d ed. 2013); *see also Handy v. State*, 201 Md. App. 521, 539-40 (2011) (reciting the same statement). Even if a party initially offers an out-of-court statement for a non-hearsay purpose, the statement may still constitute hearsay if later used for its truth. *See Parker v. State*, 408 Md. 428, 443-46 (2009) (holding an informant's statement inadmissible because, despite the State's proffer for a non-hearsay purpose, the statement was introduced during the State's case-in-chief and then used for the truth of the matter asserted during closing argument (citing *Conley v. Florida*, 620 So. 2d 180, 183 (Fla. 1993) ("[R]egardless of the purpose for which the State claims it offered the evidence, the State *used* the evidence to prove the truth of the matter asserted. In so doing, the statement constituted hearsay."))). Unless an exception to this rule applies, hearsay is inadmissible at trial. Md. Rule 5-802.

Mr. Hazel asserts that Ms. Palmer's statement was hearsay because it was offered for the truth of the matter asserted when, during closing argument, the State replayed the

video and used the statement to prove that the bag at Ms. Palmer's feet was not hers. Conversely, the State maintains that the statement was not offered for the truth of the matter asserted. We agree with Mr. Hazel.

The State did not offer Ms. Palmer's statement into evidence for the truth of the matter asserted. The trial court, upon admitting the video at trial over Mr. Hazel's hearsay objection, reasoned: "[w]ith respect to the allegations of hearsay, this is just a recitation of the transaction between Officer Hobe, where she's being heard at the scene." The State, however, then used the statement for its truth during closing argument. *See Parker*, 408 Md. at 443-46. After replaying Officer Hobe's body-worn camera footage during its rebuttal argument, the State argued:

> With my ID and registration, all black purse. *That was the description. That is -- The satchel is not that*.
>
> * * *
>
> Why would [Ms. Palmer] direct Detective Hobe to anything in that car if she knows she's got all this contraband? *She described something completely different than this, black purse, keys, wallet, all those things, that anyone else I argue would probably be concerned about in an accident*.
>
> Now that satchel is a guest bag and the only guest in that car by stipulation was [Mr. Hazel]. Do these belong to [Ms. Palmer]? I argue no. I argue no.

(emphasis added). The State asked the jury to infer that Ms. Palmer believed that she owned a black purse and that her belief was accurate. *See* McLain, *supra*, § 801:1(b), at 171-72 (explaining that an out-of-court statement is offered for its truth if the proponent

of the statement is "implicitly asking the fact-finder . . . to necessarily infer" that the declarant is both sincere and accurate). Thus, the State used the statement to establish the truth of the matter asserted—that Ms. Palmer owned a black purse. We determine that Ms. Palmer's statement—"[i]t's an all-black . . . purse that has my ID and my registration"—is hearsay.

We next turn to whether any exceptions to the hearsay rule apply. Mr. Hazel claims that the statement does not meet any exceptions to the hearsay rule. The State argues that even if the statement was offered for its truth, it qualifies as a present sense impression or excited utterance. We discuss each exception in turn.

1. *The Statement Is Not a Present Sense Impression.*

A present sense impression is 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). The declarant must speak from firsthand knowledge but need not have been startled, excited, or upset about the perceived event. *See Morten v. State*, 242 Md. App. 537, 556 (2019). The statement must be made contemporaneously or immediately after the event so the "declarant has [no] opportunity to reflect and fabricate." *Booth v. State*, 306 Md. 313, 324 (1986) ("[B]ecause the presumed reliability of a statement of present sense impression flows from the fact of spontaneity, the time interval between observation and utterance must be very short.").

Although a short period of time elapsed between the accident and Ms. Palmer's conversation with Officer Hobe, Ms. Palmer's statement concerning her black purse does

not describe or explain the perceived event or condition, namely the car accident. The State argues that Ms. Palmer's description of the purse was a statement "as to external events then and there being perceived by [her] senses," *Booth*, 306 Md. at 319, because Ms. Palmer "was injured and trapped in the car and . . . described her purse [so Officer] Hobe . . . could help her find it." We disagree. To be admissible as a present sense impression, Ms. Palmer had to describe the car crash while it was occurring or immediately after. Ms. Palmer's description of the color and contents of her purse does not describe the car accident. *Cf. Washington v. State*, 191 Md. App. 48, 90-95 (2010) (holding that the victim's statement that "[t]he [defendant]'s looking for a fight" was admissible as a present sense impression because the victim described the defendant's demeanor moments after conversing with the defendant). Ms. Palmer's statement does not qualify as a present sense impression.

2. *The Statement Is Not an Excited Utterance.*

The second hearsay exception at issue is an excited utterance, which is 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." Md. Rule 5-803(b)(2). "[T]he declarant's statement must pertain to, be associated with, or concern the startling event which prompted the statement. That is, the declarant's statement must be more than just the result of, or caused by, the startling event." *State v. Harrell*, 348 Md. 69, 82 (1997). "The essence of [this] exception is the inability of the declarant to have reflected on the events about which the statement is concerned." *Marquardt v. State*, 164 Md. App. 95,

123 (2005) (quoting *Parker v. State*, 365 Md. 299, 313 (2001)), *overruled in part on other grounds by Kazadi v. State*, 467 Md. 1 (2020). We examine the totality of the circumstances to determine whether a statement is an excited utterance. *Harrell*, 348 Md. at 77. We consider the following factors, though none are dispositive: (1) the lapse in time between the startling event or condition and the statement; (2) the spontaneity of the statement; and (3) the emotional state of the declarant at the time of the statement. *See Parker*, 365 Md. at 316-17; *Marquardt*, 164 Md. App. at 124; *Davis v. State*, 125 Md. App. 713, 716 (1999).

Ms. Palmer was undoubtedly under stress caused by the car crash as she was injured and unable to move. Officer Hobe testified that Ms. Palmer was very upset and that she tried to keep her calm until the medics arrived. Ms. Palmer's statement, however, was not spontaneous—it was in response to specific inquiries from Officer Hobe. Officer Hobe and Ms. Palmer's conversation lasted just under six minutes, during which Officer Hobe helped find Ms. Palmer's phone and call her mother. *See Marquardt*, 164 Md. App. at 129 (noting that "[t]he detailed nature and amount of information given to [the officer] . . . indicates that the statement did not constitute an excited utterance"). Towards the end of the conversation, Officer Hobe asked Ms. Palmer, "[i]s your purse in the car?" And in response, Ms. Palmer said, "[i]t's an all-black . . . purse that has my ID and my registration." Ms. Palmer did not spontaneously blurt out the color and contents of her purse, and while not dispositive, the lack of spontaneity may indicate that this statement was the product of reflexive thought. *See*

Parker, 365 Md. at 316 ("[W]hether the declarant's statement is exclaimed impulsively or is the result of the inquiry of another party is not dispositive but, instead, is only one factor to be considered in the admissibility of an excited utterance."). Even the State recognized Ms. Palmer's calm demeanor during arguments on pretrial motions: "I believe that all this was presen[t] sense impression and excited utterance up until certainly five minutes, Your Honor, where she starts coming a little bit further and holds that officer's hand." More importantly, Ms. Palmer's statement about the color and contents of her purse did not relate to the startling event of the car crash. Instead, her statement is merely a result of the car accident. *See Harrell*, 348 Md. at 82. An exciting or startling event creates the possibility of an excited utterance, but not every statement following a startling event qualifies; there must be a sufficient connection to the startling event. *See id.* at 81-82. Ms. Palmer's statement does not qualify as an excited utterance because it lacks such a connection to the car accident.

In sum, Ms. Palmer's statement that she has "an all-black . . . purse that has [her] ID and [her] registration" is hearsay offered for its truth and is not admissible under any exception to the hearsay rule. Thus, the trial court erred in admitting the portion of the video containing the statement.

3. *The State's Claim that Mr. Hazel "Opened the Door"*

The State also argues that the its reference to the "all-black purse" during closing rebuttal argument was a fair response to defense counsel's closing remarks about the purse. Essentially, the State asserts that defense counsel "opened the door" during

closing argument, thereby permitting the State to draw attention to the video and reference the particular statement made by Ms. Palmer. We disagree.

Briefly, the "opening the door" doctrine is "a rule of expanded relevancy" that applies to both opening and closing arguments. *Sivells v. State*, 196 Md. App. 254, 282 (2010) (quoting *Conyers v. State*, 345 Md. 525, 545 (1997)). The doctrine permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel. *See State v. Heath*, 464 Md. 445, 459 (2019). In other words, "'opening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" *Id.* at 459 (quoting *Clark v. State*, 332 Md. 77, 85 (1993)). The doctrine, however, "does not permit the admission of evidence that is incompetent, i.e., evidence that is 'inadmissible for reasons other than relevancy.'" *Sivells*, 196 Md. App. at 282-83 (quoting *Grier v. State*, 351 Md. 241, 261 (1998)); *accord Grier*, 351 Md. at 261 (incompetent evidence of post-arrest silence inadmissible); *Clark*, 332 Md. at 87-88, 87 n.2 (incompetent hearsay evidence inadmissible); *Sivells*, 196 Md. App. at 283 (incompetent vouching comments inadmissible). "Whether an opening the door doctrine analysis has been triggered" is reviewed de novo. *Heath*, 464 Md. at 457. "Whether responsive evidence was properly admitted into evidence is reviewed for an abuse of discretion." *Id.* at 458.

As discussed above, the State's use of the "all black purse" statement, though relevant, constituted inadmissible hearsay. As such, the statement was incompetent

hearsay evidence and the opening the door doctrine does not apply. The State could not rely on the statement for the truth of the matter asserted when it previously proffered the statement as not hearsay. Indeed, the opening the door doctrine does not permit an already-admitted statement proffered as not hearsay to be later used for its truth as incompetent hearsay evidence. *See Sivells*, 196 Md. App. at 282-83.

II. THE ADMISSION OF THE BODY-WORN VIDEO FOOTAGE WAS NOT HARMLESS ERROR.

We next decide whether the trial court's error in admitting Ms. Palmer's statement and the portion of the video depicting her demeanor was harmless. The standard for evaluating harmless error was set forth by the Court of Appeals in *Dorsey v. State*, 276 Md. 638 (1976):

> [W]hen an appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Id. at 659. The harmless error standard "is the standard that is most favorable to the defendant short of an automatic reversal." *Walter v. State*, 239 Md. App. 168, 191 (2018) (quoting *Dionas v. State*, 436 Md. 97, 109 (2013)). Once error is established, the burden is on the State to show that the error was not prejudicial. *See Dionas*, 436 Md. at 108. The harmless error "standard must be applied 'in a manner that does not encroach upon the jury's judgment.'" *Rainey v. State*, 246 Md. App. 160, 185 (2020) (quoting *Dionas*,

436 Md. at 109), *cert. denied*, 468 Md. 556 (2020). In conducting a harmless error analysis, "the issue is not what evidence was available to the jury, but rather what evidence the jury, in fact, used to reach its verdict." *Dionas*, 436 Md. at 109.

Several non-dispositive factors guide this analysis: the nature and effect of the error upon the jury; the jury's behavior during deliberations and the length of jury deliberations; the strength of the State's case from the jury's perspective; the State's use of the error; and whether the evidence was central to the case or merely cumulative. *See id.* at 110-12, 116; *Dove v. State*, 415 Md. 727, 743-44 (2010). Additionally, "where credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness's credibility is not harmless error." *Walter*, 239 Md. App. at 192 (quoting *Dionas*, 436 Md. at 110).

Briefly, "[e]vidence 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.'" *Dove*, 415 Md. at 743-44 (second and third alteration in original) (quoting *Richardson v. State*, 7 Md. App. 334, 343 (1969)). Cumulative evidence, in other words, "tends to prove the same point as other evidence presented during the trial or sentencing hearing." *Dove*, 415 Md. at 744 (explaining, for example, that "witness testimony is cumulative when it repeats the testimony of other witnesses introduced during the State's case-in-chief").

An "otherwise sufficient" test—whether the jury could have convicted without the improper evidence—is a misapplication of the harmless error test. *Dionas*, 436 Md. at

117. "Simply stating that the court failed to see how the outcome would be different is not the same as the court determining that the error did not influence the verdict." *Id.* (quoting *Perez v. State*, 420 Md. 57, 75 (2011)). For the State to prove that the error was harmless, the State must establish that the error did not contribute to the verdict, meaning that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Dionas*, 436 Md. at 117 (quoting *Taylor v. State*, 407 Md. 137, 165 (2009)).

A. Relevant Case Law

Before turning to the instant case, we examine relevant precedent to differentiate instances of harmless and not harmless error to guide our analysis.

1. *Soares v. State*

In *Soares v. State*, 248 Md. App. 395 (2020), Judge Moylan recently had the opportunity to provide clarity on the harmless error standard in Maryland. *See id.* at 418. In *Soares*, this Court held that Mr. Soares's right to silence under *Miranda v. Arizona*, 384 U.S. 436 (1966), was violated. *Id.* The State then asked this Court to consider whether the confession, even if erroneously admitted by the trial court, was harmless error. *Id.* The State argued that the confession "was cumulative to other evidence[,] such as the substantial contraband recovered from [Mr.] Soares'[s] home and a text message appearing to show [Mr.] Soares confirming that he sold crack cocaine." *Id.* at 419.

Judge Moylan explained that when addressing harmless error, "an appellate court engages in the unusual task of attempting to measure insignificance." *Id.* The flaw in the

State's argument was to conflate "the continuum of production, as a matter of law, [with] the continuum of persuasion, as a matter of fact." *Id.* Cumulative evidence may be an effective means of persuading the jury; the State, however, set the bar too low by "seek[ing] to assess harmless error by treating its remaining case, after subtracting the error, as a production issue rather than as a persuasion issue." *Id.* Judge Moylan further explained that while cumulative evidence may be of "no value for the minimal task of proving a prima facie case and avoiding an adverse judgment of acquittal[,]" that same evidence may be of "indispensable[] value in persuading twelve timorous and cautious 'doubting Thomases' to assert a definite conclusion unanimously and beyond a reasonable doubt." *Id.* at 419-20.

Judge Moylan emphasized that the assessment of harmless error is "a multi-factored exercise." *Id.* at 420. One indispensable factor is "whether the jury paid any attention to the evidence" and the State's use of the evidence. *Id.* More specifically, an appellate court should consider the following:

> Did the evidence in question make a grand entrance on center stage, perhaps with the fanfare of a ruling on contested admissibility, or did it slip in inadvertently, albeit erroneously, from the wings? Was the admission of the evidence the culmination of a fierce legal struggle over admissibility or, as happens not infrequently, did it end up in the case almost by accident or inadvertently? In essence, to what extent were jurors paying close attention? Once on stage, was it then used and exploited by the State or did it sit, neglected, in a quiet corner? *If the State, in jury argument, uses the tainted evidence in its effort to influence the jury, it is hard for the State later to claim that the evidence was incapable of influencing the jury.*

Id. (emphasis added). Essentially, "[d]oes the additional evidence produce in the theretofore undecided factfinder a discernible sigh of relief or does it produce simply a yawn?" *Id.* at 421.

Some evidence is capable of speaking for itself but is rarely the "smoking gun." *Id.* Often, "erroneously admitted evidence being subjected to harmless error review . . . tends to be of a peripheral or tangential nature." *Id.* Judge Moylan asked, "[w]hen history writes up its story of the case, what will be the artistic highlights? An artistic highlight could hardly be dismissed as having been harmless." *Id.* He further explained:

> When measuring not the weight of the evidence in a vacuum chamber but the impact of the error on a lay jury, one may not blithely discount the sex appeal of the tainted evidence. We measure not what **SHOULD** influence or have an impact on a jury but what **MAY** influence or have an impact on a jury. Our focus is not simply on the evidence *per se* but on the jurors *per se*. The focus may, indeed, be on the meekest and least resolute of them. In their infinite variety, jurors are less predictably persuadable than are accountants.

Id.

This Court determined that the error of admitting Mr. Soares's confession in violation of his *Miranda* rights was not harmless. *Id.* at 421-22. Judge Moylan noted that the case against Mr. Soares was mostly circumstantial: "[c]ontraband drugs were found in the appellant's house. [Mr. Soares] was one of the two owners and residents of that house. **ERGO. . . ?**" *Id.* at 421. Even though a likely "inference from the circumstantial [evidence] . . . may have saved the case from a directed verdict of acquittal," Mr. Soares's confession was the "smoking gun." *Id.* at 421-22. We held that

the spontaneous confession "was not peripheral surplusage"—"[i]t was a persuasive bombshell" that influenced the final verdict. *Id.* at 422.

2. *Mack v. State*

Judge Moylan also addressed harmless error, purely arguendo, in *Mack v. State*, 244 Md. App. 549 (2020). *Id.* at 575. The two appellants, Mr. Mack and Mr. Cheeks, were jointly tried and convicted by a jury of possession of a handgun, among other counts. *Id.* at 555. Both appealed to this Court, with Mr. Cheeks contending that it was error for an officer to provide an expert opinion without being qualified. *Id.* at 555, 557. Specifically, Mr. Cheeks claimed it was error for the officer to testify that certain surfaces do not yield fingerprints in explaining why fingerprinting was not conducted on the handgun recovered from the alley. *Id.* at 575. This Court determined that even assuming the trial court erred by permitting the officer to testify, any error would be harmless. *Id.*

The case turned on neither the "existence or non-existence of a fingerprint" nor the thoroughness of the police investigation. *Id.* at 575. The officer's opinion about certain surfaces not yielding fingerprints did not go to an element of the crime. *Id.* at 575; *cf. id.* at 575-76 (citing *Ragland v. State*, 385 Md. 706, 725-27 (2005) (holding that error was not harmless because two officers' opinions—that the appellant's ambiguous behavior constituted the drug transaction—went to the core of the criminal charge at issue and did not merely influence the verdict but made the verdict possible)). Judge Moylan explained that the officer's opinion was "nothing more than a fringe issue on the peripheral rim of the trial." 244 Md. App. at 575. While no fingerprints on the handgun were collected,

direct eyewitness testimony proved that the gun was in Mr. Cheeks's hands as he fled out a window before dropping the gun in the alley. *Id.* It was never a matter of controversy whether Mr. Cheeks possessed the gun. *Id.*

Judge Moylan noted that a major factor in the harmless error analysis is the "purpose for which the . . . evidence was offered and . . . the likely impact the evidence may have had" on the jury. *Id.* Whether the police conducted a thorough investigation was a tangential issue that did not go to the core issue of whether Mr. Cheeks possessed the handgun recovered from the alley. *Id.* at 576. As Judge Moylan stated, "[t]he hypothetical error . . . . did not even go to a major tangent. Its impact, at most, would have been a tangent of a tangent." *Id.* Judge Moylan explained that there was significant attenuation and that "[t]he more the attenuation, of course, the greater the likelihood that the hypothetical error would have been harmless." *Id.* at 576-77. The officer's reason for not having the handgun fingerprinted was of no consequence to the jury's decision to convict. *Id.* at 577. Consequently, the error, assuming any, was harmless. *Id.*

3. *Paydar v. State*

In *Paydar v. State*, 243 Md. App. 441 (2019), Mr. Paydar appealed his jury convictions for first-degree assault and false imprisonment of his wife, Ms. Ariani, contending that the trial court erred in admitting hearsay statements contained within an officer's body-worn camera footage. *Id.* at 443. This case arose when, after an argument, Mr. Paydar locked Ms. Ariani in the trunk of his car in their garage and threatened to kill her. *Id.* at 444-45. Ms. Ariani escaped and ran to a neighbor's house

for help where an officer later arrived. *Id.* at 445. The officer's body-worn camera footage contained several statements by Ms. Ariani explaining the incident. *Id.* at 446-51. This Court held that the trial court erred in admitting the hearsay statements and such error was not harmless. *Id.* at 456, 463-64.

We noted that the case against Mr. Paydar rested on Ms. Ariani's credibility because she was the only witness who could provide direct evidence of Mr. Paydar's actions on the night of the incident. *Id.* at 459. The State used the footage to bolster Ms. Ariani's in-court testimony and her overall credibility during its closing rebuttal argument, emphasizing the consistency between her testimony and statements in the footage:

> [W]hen we watched the . . . body cams . . . , her demeanor is very evident, and you'll get a chance to review them, review them again. You don't have to take her word for it on the witness stand that she was scared for her life . . . . There's no doubt, not just reasonable doubt, any possible doubt when you watch those body cameras . . . . You know exactly how she was feeling right after the event, and she's highly credible because of that.
>
> * * *
>
> Okay, let's talk about her prior, her consistent prior statements, all the things she says that are the same when she testifies . . . . Every statement she . . . gave, whether it was sworn testimony here or prior statements, she's duct-taped, she was zip-tied, thrown into the trunk, and the defendant went to get his gun—these are all prior consistent statements.

Id. at 459-60 (alteration in original). We noted that while prior consistent statements may be cumulative, that does not make them harmless because "it is the[] consistency [of the

statements] that is the very nature of the harm." *Id.* at 461 (alterations in original) (quoting *McCray v. State*, 122 Md. App. 598, 610-11 (1998) (holding that "when the State's case depends virtually exclusively on the credibility of a witness, . . . the bolstering of the witness's credibility by prior consistent statements cannot be harmless error")).

We also considered the "jury's actions during deliberations." *Paydar*, 243 Md. App. at 462. Jury notes and the length of deliberations often "provide context, albeit not necessarily conclusive, for the evaluation and understanding of the jury's findings, and thus, perspective." *Id.* (quoting *Dionas*, 436 Md. at 112). After a three-day trial, the jury deliberated over the course of two days. *Id.* On the second day of deliberations, the jury submitted two notes, asking how to proceed if they could not come to a unanimous decision on one of the charges. *Id.* at 463. Fifteen minutes after being instructed by the court that a partial verdict may be entered, the jury reached a partial verdict. *Id.* We noted that these facts suggested that "the jury struggled with Ms. Ariani's credibility." *Id.*

We held that the error was not harmless because the State used the body camera footage to bolster Ms. Ariani's credibility. *Id.* at 463-64. Accordingly, we were unable to "declare a belief, beyond a reasonable doubt" that admission of the footage "in no way influenced th[e] verdict." *Id.* (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

4. *Potts v. State*

In *Potts v. State*, 231 Md. App. 398 (2016), Mr. Potts appealed his convictions for various handgun possessory charges. *Id.* at 404-05. He argued that the trial court erred in admitting a hearsay statement during an officer's testimony. *Id.* at 407. While this Court agreed with Mr. Potts that the statement was inadmissible hearsay, it held that any error was harmless. *Id.* at 408.

The officer testified that he heard a fellow officer say that Mr. Pott's right hand was "cupped to his body," indicating that Mr. Potts had a weapon on him. *Id.* at 407. The statement, however, was cumulative because it reiterated the testimony of two other officers that they saw Mr. Potts with his right hand holding his dip area (indicating a person is armed) and saw him pull a gun from his waistband. *Id.* at 409. We further noted that the officer's statement was not critical to the case because it merely explained why the officer pursued Mr. Potts. *Id.* at 410. Mr. Potts argued that the officer's testimony was so prejudicial that the factfinder's decision would have been different had the statement been excluded. *Id.* at 409. We explained that any error was harmless because the officer's statement did not bridge a critical gap. *Id.* at 410; *cf. id.* at 409-10 (citing *Graves v. State*, 334 Md. 30, 43 (1994) (holding that a hearsay statement identifying appellant as the gunman and accomplice "added substantial, perhaps even critical, weight to the State's case against [the appellant]" because it "provided a bridge that synthesized and buttressed the identification[] of [the appellant]" by two other witnesses)).

5. *McClurkin v. State*

In *McClurkin v. State*, 222 Md. App. 461 (2015), Mr. Jackson and Mr. McClurkin were jointly tried and convicted by a jury for attempted first-degree murder and several related crimes. *Id.* at 466. Both appealed to this Court, with Mr. McClurkin separately raising the issue of whether the circuit court erred in admitting a telephone recording made by Mr. Jackson. *Id.* In the jail call recording, Mr. Jackson told a woman "that he needed someone to pressure the victim . . . to stop him from telling people that he and [Mr.] McClurkin were involved in the shooting." *Id.* at 470. We agreed with Mr. McClurkin that the circuit court erred in admitting the telephone recording because it was inadmissible hearsay against Mr. McClurkin, but held that error was harmless beyond a reasonable doubt. *Id.* at 484.

We first considered the "overall strength" of the State's case. *Id.* We noted that the victim knew Mr. McClurkin before the shooting and there was at least one prior incident where Mr. McClurkin and Mr. Jackson tried to fight the victim. *Id.* at 485. The victim had no trouble identifying Mr. McClurkin as the shooter. *Id.* Additionally, the police arrested Mr. McClurkin and his co-conspirators as they attempted to flee the shooting. *Id.* The strength of the State's case against Mr. McClurkin "weigh[ed] heavily in favor of a finding of harmless error." *Id.* at 484.

We next explained that the evidence was cumulative because three calls made by Mr. McClurkin from jail were admitted into evidence. *Id.* at 485. In each of the three calls, Mr. McClurkin requested that someone pressure the victim to change his story. *Id.*

This evidence was more incriminating than Mr. Jackson's call because Mr. McClurkin named his co-conspirators, "thereby implying he was one of the three men who conspired to shoot the victim." *Id.*

Even though the jury requested to re-listen to the audio recordings of the jailhouse calls, which the court granted, it was clear that Mr. Jackson's call was "unimportant in relation to everything else the jury considered in reaching its verdict." *Id.* (quoting *Dionas*, 436 Md. at 118). We held that any error was harmless beyond a reasonable doubt because the victim identified Mr. McClurkin as the shooter, Mr. McClurkin was apprehended with his co-conspirators almost immediately after the shooting while fleeing the scene, and Mr. Jackson's recording was cumulative to Mr. McClurkin's properly admitted and more incriminating hearsay statements. 222 Md. App. at 485.

6. *Webster v. State*

In *Webster v. State*, 221 Md. App. 100 (2015), Mr. Webster appealed his jury convictions for several possessory drug and firearm charges. *Id.* at 105. After failing to appear in court, police responded to an apartment and discovered Mr. Webster in the rear bedroom. *Id.* at 106. The apartment was owned by Ms. Bedel, the mother of Mr. Webster's child. *Id.* at 107. The police recovered a loaded rifle, ammunition, drugs, and drug paraphernalia from the apartment. *Id.* at 106. Two notebooks and a Frederick County Detention Center identification card with Mr. Webster's picture were also found in the bedroom. *Id.* at 107. At trial, Trooper Stevens testified as to the contents of one of the notebooks and explained that the name "Yeah-O," which appeared in the notebooks,

was Mr. Webster's nickname and a slang term for cocaine in Spanish. *Id.* at 115-16. On appeal, Mr. Webster argued that the trial court erred in admitting Trooper Stevens's testimony about the alleged nickname in the notebook because it was inadmissible hearsay. *Id.* at 115. We disagreed and held that there was no error when the trial court admitted the evidence. *Id.* at 119. We also determined that, assuming the admission was erroneous, any error was harmless beyond a reasonable doubt. *Id.*

The State offered Mr. Webster's nickname and alleged meaning as circumstantial evidence to connect Mr. Webster to the drugs and guns recovered from the apartment. *Id.* Mr. Webster's alleged nickname and meaning, however, "w[ere] cumulative to other evidence establishing [Mr. Webster]'s relationship to the apartment and its contents." *Id.* Particularly, Trooper Stevens testified that he was familiar with Mr. Webster as they spoke on prior occasions and that he knew Mr. Webster lived at the apartment with his child and Ms. Bedel. *Id.* at 119-20. Ms. Bedel also testified that Mr. Webster stayed in her apartment, slept in the master bedroom, and kept clothes there. *Id.* at 120. Police found Mr. Webster present in the apartment and found a Frederick County Detention Center identification card with his picture on the nightstand. *Id.* Additionally, Mr. Webster admitted that he stayed in the apartment on occasion and stored clothes there. *Id.* We determined that this other evidence, besides the notebook, "demonstrated a strong connection between [Mr. Webster] and the apartment." *Id.* In response to Mr. Webster's defense that he just happened to be present in the apartment when the police arrived and that the contraband belonged to someone else, we explained that a rational factfinder

could conclude that Mr. Webster jointly and constructively possessed the contraband. *Id.* ("The State did not need to show that [the appellant] exercised sole possession of the drugs and paraphernalia. Rather, a person may have actual or constructive possession of the CDS, and the possession may be either exclusive or joint in nature." (quoting *Moye v. State*, 369 Md. 2, 14 (2002))). If there was any error, it was harmless. 221 Md. App. at 119.

7. *Yates v. State*

In *Yates v. State*, 202 Md. App. 700 (2011), *aff'd*, 429 Md. 112 (2012), the jury convicted Mr. Yates and his co-defendant, Mr. Kohler, of second-degree felony murder and several related drug and handgun offenses. 202 Md. App. at 706. On the night of the incident, Mr. Yates gave Mr. Kohler drugs in exchange for money. *Id.* at 705. After Mr. Kohler left, Mr. Yates discovered the money was fake. *Id.* Mr. Yates ran after Mr. Kohler and gunshots were fired, resulting in the death of an innocent bystander. *Id.* A detective testified that a witness told him that as Mr. Yates was leaving the scene of the murder, the witness heard Mr. Yates state: "I popped that [N…]." *Id.* at 706 (alteration in original). Mr. Yates appealed, contending that the detective's testimony contained inadmissible hearsay and was unduly prejudicial. *Id.* We held that the statement was not admissible as substantive evidence and was improperly admitted as a prior inconsistent statement. *Id.* at 707-08.

We next turned to whether the erroneous admission of the statement was harmless, noting that "[t]his Court and the Court of Appeals have found the erroneous admission of

evidence to be harmless if evidence to the same effect was introduced, without objection, at another time during the trial." *Id.* at 708-09 (listing examples). In this case, the "critical content" of the inadmissible statement was that Mr. Yates fired the gun that killed the victim. *Id.* at 709. This content was admitted without objection on three other occasions by different witnesses who testified that Mr. Yates fired the gun. *Id.* at 709-10. We determined that the detective's testimony, which contained an admission that Mr. Yates believed he shot Mr. Kohler, was cumulative to other evidence establishing that Mr. Yates was the shooter. *Id.* at 710. Mr. Yates further argued that the error was not harmless because the statement was "inflammatory" and "provocative" and the detective's testimony was "far more compelling than the halfhearted accounts" by the other witnesses. *Id.* We disagreed and explained that the central issue was whether Mr. Yates shot the victim. *Id.* The detective's testimony, while characterizing the shooting in a more provocative manner, was cumulative to prior testimony and merely relayed what another witness said. *Id.* at 710-11.

We also considered the State's use of the inadmissible evidence. *Id.* at 711. We explained that in both *Harrod v. State*, 423 Md. 24 (2011), and *Anderson v. State*, 420 Md. 554 (2011), the State discussed the inadmissible evidence during closing argument, "which illustrated the importance of the evidence and precluded a finding of harmless error." *Id.* (first citing *Harrod*, 423 Md. at 41-42; and then citing *Anderson*, 420 Md. at 569). Conversely in *Yates*, the State did not mention the detective's testimony in its closing argument. 202 Md. App. at 711. The only reference to the statement was by Mr.

Kohler's counsel who relied on the statement to suggest that Mr. Kohler did not participate in the drug transaction because he was white. *Id.* We held that any error in admitting the detective's testimony was harmless because the State did not rely on the evidence during closing argument and the inadmissible evidence was cumulative to other evidence indicating that Mr. Yates fired the gun after chasing Mr. Kohler. *Id.*

8. *Dulyx v. State*

In *Dulyx v. State*, 425 Md. 273 (2012), a jury convicted Mr. Dulyx of aiding and abetting a robbery. *Id.* at 283. Two armed men robbed a store and abducted a customer before fleeing with a third man who was the getaway driver. *Id.* at 275-76. At issue was whether Mr. Dulyx was the driver. *See id.* at 291. The Court of Appeals determined that the trial court erred by admitting the abducted customer's suppression hearing testimony because it was inadmissible hearsay evidence. *Id.* at 291.

The Court further held that the error was not harmless. *Id.* at 291-92. No physical evidence identified Mr. Dulyx as the getaway driver and no eyewitnesses at trial were able to identify him as the driver. *Id.* at 291. The abducted customer was the only person to observe the getaway driver, so his testimony "provided the jury with a direct link between [Mr. Dulyx] and the robbery and abduction." *Id.* at 291-92. The Court could not "declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Id.* at 292 (quoting *Dorsey*, 276 Md. at 659).

9. *Gutierrez v. State*

In *Gutierrez v. State*, 423 Md. 476 (2011), a jury convicted Mr. Gutierrez of murder, in an incident linked to gang violence. *Id.* at 482. A gang expert testified as to the violent practices of MS-13, stating that MS-13 is "the gang that we had seen the most violence with recently for the past four, four and a half years in this region." *Id.* at 486. The Court of Appeals held that the trial court erred in allowing this comment because it was inadmissible, prior bad acts evidence. *Id.* at 499.

The Court further determined that this error was harmless because, based on other properly admissible evidence in the record, it was "confident that the statement would not have persuaded the jury to render a guilty verdict when it would not have otherwise done so." *Id.* at 500. Such other evidence established that Mr. Gutierrez was affiliated with MS-13 and traveled into rival gang territory to kill someone as part of his initiation. *Id.* Specifically, Mr. Gutierrez shouted "Mara Salvatrucha" at a crowd and opened fire on the group after being insulted. *Id.* Three different witnesses named him as the shooter. *Id.* Additionally, there was a "mountain of other testimony detailing the violent practices of the gang," making the expert's statement that MS-13 was one of the most violent gangs in recent years not so shocking or prejudicial. *Id.* The Court noted, however, that "[h]ad this been the only comment regarding violence, it could not so easily 'blend in,' and we might reach a different result." *Id.*

B. The Trial Court's Error Was Not Harmless.

At oral argument, we requested supplemental briefings on, assuming the trial court committed error by admitting the video, whether the error was harmless. Mr. Hazel argues that the video and Ms. Palmer's statement were critical to the State's case and cannot qualify as harmless error. The State contends that, assuming the trial court erred, any error was harmless because the jury was not influenced, in any way, by the video or Ms. Palmer's statement. Because we determine that the erroneous admission of Ms. Palmer's statement was not harmless, we need not address whether the erroneous admission of the portion of the video showing Ms. Palmer's demeanor was harmless.

1. *The Erroneous Admission of Ms. Palmer's Statement Was Not Harmless Error.*

We first look to the overall strength of the State's case. Our task is not to determine whether the evidence is sufficient on its own; instead, we must consider "whether the trial court's error was unimportant in relation to everything else the jury considered in reaching its verdict." *Paydar v. State*, 243 Md. App. 441, 458 (2019) (quoting *Dionas*, 436 Md. at 118) (articulating that the harmless error analysis is not an "otherwise sufficient" test). Here, the State's case against Mr. Hazel for possession—either exclusive, constructive, or joint—of the handgun and contraband found in the white bag was largely circumstantial. The State's case was devoid of any direct evidence linking Mr. Hazel to the white bag containing the contraband: no contraband was recovered from Mr. Hazel, no fingerprints or DNA evidence were submitted tying Mr. Hazel to the white bag, and no witness testimony directly linked Mr. Hazel to the white

bag. Instead, the State's case relied on the jury making an inference that Mr. Hazel was guilty of constructively possessing the contraband based on: (1) his status as the driver of the car; (2) his proximity to the white bag located at Ms. Palmer's feet in the passenger footwell; and (3) his attempt to flee the initial traffic stop and his immediate exiting of the car when it crashed. The State also relied on Ms. Palmer's statement as further circumstantial evidence connecting Mr. Hazel to the white bag.

Even though the jury likely could have found Mr. Hazel in constructive possession of the contraband based on this circumstantial evidence,[6] our task is to determine whether Ms. Palmer's statement "**MAY**" have influenced or impacted the jury. *Soares v. State*, 248 Md. App. 395, 421 (2020). We do not measure the weight of the evidence but rather the impact of the error on the jury. *Id.* The likely effect of Ms. Palmer's statement on the jury cannot be discounted. The central issue was whether Mr. Hazel possessed the white bag containing the contraband, and Ms. Palmer's statement that she owns an all-black purse likely impacted the jury's determination. Indeed, if Ms. Palmer owned an all-black purse (and not a white bag), then the jury could infer that Mr. Hazel therefore must have possessed the white bag. It is unlikely that Ms. Palmer's statement did not influence the jury's verdict. Unlike *Webster*, where other cumulative evidence established the appellant's connection to the apartment and permitted a rational factfinder to conclude the appellant jointly and constructively possessed the contraband found within the

[6] The elements of constructive possession will be discussed in greater detail in the next section.

apartment, there was no other cumulative evidence in the instant case. *See* 221 Md. App. at 119-20.

Moreover, Ms. Palmer's statement was not cumulative to other properly admitted evidence. The State did not present any other evidence or testimony presenting the same information that Ms. Palmer owned an all-black purse. *Cf. Potts v. State*, 231 Md. App. 398, 408-10 (2016) (inadmissible hearsay statement was cumulative to two officers' testimony that appellant possessed a handgun); *McClurkin v. State*, 222 Md. App. 461, 484-85 (2015) (inadmissible hearsay statement was cumulative to three other jail calls incriminating the appellant); *Webster*, 221 Md. App. at 119-20 (inadmissible hearsay statement was cumulative to other evidence connecting appellant to the apartment containing contraband); *Yates*, 202 Md. App. at 710-11 (inadmissible hearsay statement was cumulative to other witness testimony that appellant was the shooter).

Instead, the video was the only piece of evidence containing Ms. Palmer's statement describing the color and contents of her purse. *See Dulyx*, 425 Md. at 291-92 (determining that the inadmissible evidence provided the only direct link and therefore was not cumulative); *Gutierrez*, 423 Md. at 500 (noting that if the inadmissible statement was "the only comment [on the issue], it could not so easily 'blend in,' and [the Court] might reach a different result,"—i.e., that the statement could be not cumulative). Officer Hobe testified that an all-black purse was not found in the vehicle and no other witness testified about an all-black purse. Ms. Palmer's statement was the only piece of evidence establishing that she owned an all-black purse.

We also consider the purpose for which the inadmissible evidence was offered and the impact of such evidence. *See Mack v. State*, 244 Md. App. 549, 575 (2020). The greater attenuation between the error and the core issue of the case, the more likely that said error is harmless. *See id.* at 576-77. Importantly, Ms. Palmer's statement was not a peripheral piece of evidence. Instead, her statement went to the central issue in the case: whether Mr. Hazel possessed the white bag containing the contraband—either exclusively, jointly, constructively, or not at all. Ms. Palmer's statement that she owned an all-black purse was not cumulative to any other evidence and implicitly linked Mr. Hazel to the white bag. *See Dulyx*, 425 Md. at 291-92 (determining error to not be harmless when the inadmissible evidence was the only evidence that directly linked the appellant to the crime); *cf. Potts*, 231 Md. App. at 409-10 (finding harmless error when the inadmissible statement did not bridge a critical gap or add substantial weight to the State's case).

We next consider whether the jury paid close attention to the evidence. To determine this, we look to the process by which the Stated introduced the video and how it was ultimately used. *See Soares*, 248 Md. App. at 420. More specifically, we inquire whether the evidence made a "grand entrance on center stage . . . or . . . slip[ped] in inadvertently" and whether it was "then used and exploited by the State or . . . s[a]t, neglected, in a quiet corner." *Id.* In the instant case, Ms. Palmer's statement was admitted after the "culmination of a fierce legal struggle over [its] admissibility"—the court admitted the video over pretrial motions to exclude the evidence and objections

regarding its admissibility during trial. *Id.* The State also emphasized Ms. Palmer's statement during its closing rebuttal argument when it replayed the entirety of the body-worn camera video. The State paused the video immediately after Ms. Palmer describes her all-black purse to further stress the importance of her statement:

> [OFFICER HOBE]: Is your purse in the car?
>
> [MS. PALMER]: (Inaudible).
>
> [OFFICER HOBE]: Okay.
>
> [MS. PALMER]: It's an all black purse (inaudible) with my ID and my registration.
>
> [OFFICER HOBE]: Okay. Is that in the back?
>
> (Video of Officer Hobe's camera footage is paused at 11:31 a.m.)
>
> [THE STATE]: *With my ID and registration, all black purse. That was the description. That is -- The satchel is not that.*

(emphasis added). The State finished replaying the video and dedicated the final moments of its rebuttal to argue that the white bag belonged to Mr. Hazel because Ms. Palmer "described something completely different than [the white bag], [a] black purse, keys, wallet." Discussing the inadmissible evidence during closing argument highlights the importance of the evidence and likely precludes a finding of harmless error. *See Harrod v. State*, 423 Md. 24, 41-42 (2011); *Anderson v. State*, 420 Md. 554, 569 (2011); *Yates*, 202 Md. App. at 711 (reasoning that the State's lack of reference to the inadmissible evidence in closing argument supported the conclusion that the error was harmless). The State's discussion of Ms. Palmer's statement was the last argument the

jury heard before deliberations. "If the State, in jury argument, uses the tainted evidence in its effort to influence the jury, it is hard for the State later to claim that the evidence was incapable of influencing the jury." *Soares*, 248 Md. App. at 420; *see also Washington v. State*, 406 Md. 642, 656-58 (2008) (concluding that the trial court's erroneous admission of surveillance videotapes was not harmless when the State heavily relied upon the videotapes during opening and closing arguments to prove its case).

Additionally, we evaluate whether the error affected the jury's assessment of witness credibility. *See Walter v. State*, 239 Md. App. 168, 192 (2018) ("[W]here credibility is an issue and, thus, the jury's assessment of who is telling the truth is critical, an error affecting the jury's ability to assess a witness's credibility is not harmless error." (alteration in original) (quoting *Dionas v. State*, 436 Md. 97, 110 (2013))). Even though Ms. Palmer did not testify at trial, the State argued in rebuttal, after replaying the video, that Ms. Palmer's statement should be believed:

> She was obviously in shock. . . . She was obviously hurt. She was obviously in pain. But she was answering, she was talking. If you had . . . a gun, in a bag and you're driving around with it [are] you[] going to direct [Officer] Hobe to it, any bag?
>
> . . . This is a guest bag just like if you invited somebody over to your house to stay for the weekend and they come in with all their bags. This is just a guest bag.
>
> [Mr. Hazel] was the driver. . . . He was her guest. I argue to you he brought this right in there all packed up, put it in wherever it was in the car, we all know where it ended up.
>
> She wants to call her mother. She is frightened. She has been -- She is the only [person] left in that car that's

> smoking. This is a guest bag. She has no idea what's in this bag.
>
> * * *
>
> Why would she direct [Officer] Hobe to anything in that car if she knows she's got all this contraband?

Given that the jury's assessment of whether Ms. Palmer was telling the truth was limited only to the body-worn camera footage, the jury's assessment of Ms. Palmer was likely affected because the jury could not assess her credibility. *See, e.g.*, *Paydar*, 243 Md. App. at 463-64 (determining that the victim's inadmissible hearsay statements contained in body-camera footage, which improperly bolstered the victim's in-court testimony, was not harmless error because it affected the jury's assessment of the victim's credibility). Whether Ms. Palmer was credible in asserting that she owned an all-black purse likely influenced the jury's assessment of whether the white bag belonged to Mr. Hazel.

While not conclusive evidence, we also consider the jury's actions during its deliberations for insight into its perspective. After a three-day trial, the jury deliberated for approximately three hours,[7] during which it did not ask the court a single substantive question during its deliberations. The case was decided quickly, indicating that the jurors did not believe the case was close, thus weighing in favor of finding harmless error. *See Rainey v. State*, 246 Md. App. 160, 187 (2020) (explaining that the jury's short

[7] The jury was sent to deliberate at approximately 11:30 a.m. and broke for lunch around 12:30 p.m. After taking an approximately one-hour lunch break, the jury returned with a verdict around 3:30 p.m.

deliberation suggested that it did not think it was a close case); *cf. Paydar*, 243 Md. App. at 462-63 (determining that the jury struggled with the witness's credibility based on its two days of deliberations and two notes).

While jury deliberations were short, we are convinced by the other factors that the error of admitting Ms. Palmer's statement was not harmless. The State's case was largely circumstantial, Ms. Palmer's statement went to a central issue in the case and was not cumulative to any other evidence, the jury's assessment of Ms. Palmer's credibility was likely affected, and the State heavily relied on the statement during closing argument. We cannot "declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976).

III. THERE WAS SUFFICIENT EVIDENCE TO CONVICT MR. HAZEL.

Mr. Hazel argues that there was insufficient evidence to sustain his convictions for possessing the drugs and handgun because the State failed to prove that he had any knowledge of or dominion or control over the white bag.[8] The State disagrees and

[8] In his brief, Mr. Hazel claims that the State failed to present sufficient evidence "to sustain his convictions for possession with intent to distribute cocaine and possession of cocaine and marijuana." The State correctly notes that Mr. Hazel was not convicted of possession of marijuana. The State also argues that Mr. Hazel conceded his sufficiency of the evidence claim by failing to challenge his convictions for possession of heroin, oxycodone, alprazolam, a magazine, and a scale. Mr. Hazel stated in his reply brief, however, that "it is clear throughout [his] brief that [he] is challenging his conviction with respect to all of 'the drugs' and 'contraband' for which he was charged." We believe it is clear that Mr. Hazel is challenging his convictions for all charges pertaining to the possession of any object found within the white bag. We shall consider the sufficiency of the evidence for those possessory charges in this appeal.

Nevertheless, Mr. Hazel does not argue that there was insufficient evidence to support his convictions for: transporting a handgun in a vehicle in violation of Criminal

contends it presented sufficient evidence to support a finding of constructive possession. Even though we reverse Mr. Hazel's convictions on other grounds, we address his sufficiency of the evidence claim for double jeopardy purposes. *Breeden v. State*, 95 Md. App. 481, 511 (1993) (In criminal appeals, this Court "is required to address sufficiency of the evidence issues even if [we have] already decided to reverse the defendant's conviction on other grounds."); *see also Samba v. State*, 206 Md. App. 508, 535 (2012). If "the evidence was insufficient to sustain a conviction, then double jeopardy prohibits the retrial of the defendant for the crime at issue." *Breeden*, 95 Md. App. at 511.

When reviewing the sufficiency of the evidence, we determine "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). "In determining whether evidence was sufficient to support a conviction, an appellate court 'defer[s] to any possible reasonable inferences [that] the trier of fact could have drawn from the . . . evidence.'" *Grimm*, 447 Md. at 495 (alterations in original) (quoting *Jones v. State*, 440 Md. 450, 455 (2014)). Accordingly, "the limited question . . . is not whether the evidence *should have or probably would have* persuaded the majority

Law § 4-203; unlawfully receiving a detachable magazine in violation of Criminal Law § 4-305; and fleeing and eluding a police officer in violation of Transportation § 21-904(b)(1). For these three charges, we do not address whether the evidence was sufficient because "[a]rguments not presented in a brief or not presented with particularity will not be considered on appeal." *Diallo v. State*, 413 Md. 678, 692 (2010) (quoting *Klauenberg v. State*, 355 Md. 528, 552 (1999)).

of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Darling v. State*, 232 Md. App. 430, 465 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004)). Further, while "circumstantial evidence alone is sufficient to support a conviction, 'the inferences . . . must rest on more than mere speculation or conjecture'" and "must 'afford the basis for an inference of guilt beyond a reasonable doubt.'" *State v. Morrison*, 470 Md. 86, 106 (2020) (quoting *Smith v. State*, 415 Md. 174, 185 (2010)).

Mr. Hazel was convicted of possession of narcotics, specifically heroin, cocaine, oxycodone, and alprazolam; possession with the intent to distribute heroin and cocaine; unlawful possession with the intent to use drug paraphernalia; and possession of a firearm during the commission of a drug trafficking crime. Md. Code Ann., Crim. Law §§ 5-601, 5-602, 5-619(c), 5-621. All of these crimes require proof of possession. §§ 5-601, 5-602, 5-619(c), 5-621.

Section 5-101(v) of the Criminal Law Article defines "possess" as "exercis[ing] actual or constructive dominion or control over a thing by one or more persons." Possession of contraband may be actual or constructive, joint or individual. *White v. State*, ___ Md. App. ___, No. 1232, Sept. Term 2019, 2021 WL 2132247, *19 (filed May 26, 2021). Inherent in exercising dominion or control is knowledge of the contraband because "an individual ordinarily would not be deemed to exercise 'dominion or control' over an object about which he is unaware." *Bordley v. State*, 205 Md. App. 692, 717-18 (2012) (quoting *Smith*, 415 Md. at 187).

Specifically, constructive possession over contraband exists when an individual "has dominion or control over the contraband itself or over the premises or vehicle in which it was concealed." *Neal v. State*, 191 Md. App. 297, 316 (2010). The "controlled set of guidelines" for finding constructive possession of contraband are the following:

> 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

White, 2021 WL 2132247, at *19-20 (quoting *Moseley v. State*, 245 Md. App. 491, 505 (2020)). These factors constitute a non-exhaustive list and no single factor is conclusive. *Spell v. State*, 239 Md. App. 495, 512 (2018).

Here, Mr. Hazel, as the driver of the Nissan Maxima, was in close proximity to the contraband in the white bag, which was found in the passenger footwell. There was evidence to support an inference that Mr. Hazel exercised knowledge, dominion, and control over the gun and contraband found in the white bag. Based on the fact that Mr. Hazel was the driver of the Nissan Maxima, a factfinder may infer that he had knowledge of the contraband contained within the vehicle given that "[d]rivers generally have dominion and control over the vehicles they drive." *Neal*, 191 Md. App. at 316 (alteration in original) (quoting *State v. Smith*, 374 Md. 527, 553 (2003)). Knowledge of contraband may be imputed to the driver of a vehicle—regardless of whether that person owns or is merely driving the vehicle. *Samba*, 206 Md. App. at 537 (explaining that

"[s]uch an inference of knowledge may be drawn even though there was a passenger in the vehicle who arguably had equal access and a greater evidentiary nexus to the weapon"). There was no evidence that Mr. Hazel participated in the use and enjoyment of the contraband.

The evidence that Mr. Hazel fled the initial traffic stop and exited the car after the vehicle crashed also supports a reasonable inference that he knew the gun and contraband were in the vehicle. *See Gimble v. State*, 198 Md. App. 610, 626 (2011); *Stuckey v. State*, 141 Md. App. 143, 174 (2001) (noting that evidence of flight "can constitute relevant evidence on the issue of consciousness of guilt"). Mr. Hazel contends that his initial flight from the traffic stop was due to fear of being treated unfairly by police. He further contends that there was no evidence that his exiting of the car after the accident was another attempt to flee, but rather he was seeking a safer location to wait for medical assistance. Mr. Hazel's contentions, however, "merely go[] to the weight, not the sufficiency, of the evidence, because the jury was free to infer that [his] flight was motivated, instead, by his consciousness of guilt." *Mills v. State*, 239 Md. App. 258, 277 (2018) (determining that the appellant's assertion that he fled out of fear of being accosted by an intoxicated bystander when he heard police shout "gun" went to the weight, not sufficiency, of the evidence).

Viewing this evidence in the light most favorable to the State, the jury could have found that Mr. Hazel constructively possessed the white bag containing the handgun and

contraband. Because the State presented sufficient evidence to convict Mr. Hazel of these possessory charges, Mr. Hazel may be retried on those charges.

CONCLUSION

In summary, we conclude that (1) the portion of the video depicting the speeding car and Officer Hobe arriving on the scene was relevant and not unfairly prejudicial; (2) the portion of the video showing Ms. Palmer's demeanor and behavior while interacting with Officer Hobe was not relevant; (3) Ms. Palmer's statement concerning her black bag was relevant and not unfairly prejudicial; (4) Ms. Palmer's statement was hearsay and does not qualify as either a present sense impression or excited utterance; and (5) the admission of the portion of the video containing Ms. Palmer's statement was not harmless error. Therefore, we reverse the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.