Circuit Court for Baltimore City
Case No. 117004005-011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2576

September Term, 2017

DAMON ALEXANDER

v.

STATE OF MARYLAND

Berger,
Leahy,
Harrell, Glenn, T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: August 30, 2019

Damon Alexander, appellant, was charged by multiple indictments in the Circuit Court for Baltimore City with multiple counts of first and second-degree murder, attempted first and second-degree murder, and related handgun charges. After a jury trial, he was convicted of first-degree murder of Davon Dozier; first-degree murder of Troy Smothers; attempted first-degree murder of Tennod McGlotten; attempted first-degree murder of Antwan Nelson; attempted second-degree murder of Eric Russell; attempted second-degree murder of Bernadette Boyd; six counts of use of a handgun in the commission of a felony or crime of violence; wearing, carrying, and transporting a handgun; and, possession of a regulated firearm after having been convicted of a disqualifying crime. After he was sentenced, appellant noted this timely appeal.[1]

QUESTIONS PRESENTED

Appellant presents the following four questions for our consideration:

I. Did the trial court err in denying the motion to suppress the extrajudicial photo identification?

II. Did the trial court err in admitting the AT&T cell phone records and jail calls in the absence of the requisite proper certificate of authenticity or other foundational requirements?

[1] Appellant was sentenced to two consecutive terms of life imprisonment for the first-degree murder convictions; one consecutive and one concurrent term of ten years, five years' without the possibility of parole, for each handgun conviction related to the first-degree murder convictions; two consecutive terms of 30 years for the attempted first-degree murder convictions; a consecutive term of 30 years for attempted second-degree murder; a consecutive term of 10 years for one count of attempted second-degree murder; four concurrent terms of 10 years for four counts of use of a firearm in the commission of a felony or crime of violence; and, a concurrent term of 10 years for possession of a regulated firearm. The sentence for wearing, carrying and transporting a handgun was merged for sentencing purposes.

III. Did the trial court err in admitting inadmissible hearsay?

IV. Did the trial court err in admitting overly prejudicial crime scene photographs?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

This case arises out of a shooting that occurred on the evening of November 30, 2016, in front of the Stop 1 convenience store in the Liberty Heights area of Baltimore City. Prior to the shooting, Tennod McGlotten was standing outside the convenience store with his friends, Davon Dozier and Troy Smothers, and a man he knew only as "Sosa." He saw a man whom he did not know approach the store. Mr. McGlotten heard gunshots and turned toward the man for a matter of seconds. The man was wearing a hood that did not cover his face. Mr. McGlotten was shot five times in the stomach and sustained a graze wound to his wrist. He ran to a nearby grassy area and called his girlfriend and then 911. Eventually, he was taken to the University of Maryland's Shock Trauma Center ("Shock Trauma"), where he remained for a couple of weeks.

Davon Dozier died at the scene of the shooting. A medical examiner testified that he had sustained 11 gunshot wounds, all from the back to the front of his body, that the cause of his death was multiple gunshot wounds, and that the manner of death was homicide. Troy Smothers was taken to Shock Trauma, where he died. A medical examiner concluded that the cause of his death was a single gunshot wound to the back and that the manner of death was homicide. Three other individuals were injured as a result of the shooting. Eric Russell sustained graze wounds to his lower back, Antwan Nelson sustained

"multiple injuries to his back," and Bernadette Boyd sustained a graze wound to her shoulder.

After viewing surveillance video from the convenience store, police developed appellant as a suspect. During the course of their investigation, police learned that appellant's cousin had been killed on November 29, 2016 during a home invasion-type robbery on Duvall Street, not far from the Stop 1 convenience store. Baltimore City Police Detective Julian Min and Detective Sergeant Richard Purtell attempted to show a photo array to Antwan Nelson, but he was not cooperative.

On December 6, 2016, Detectives Min and Purtell visited Mr. McGlotten at Shock Trauma, but he had had surgery, was lethargic, and could not recognize the detectives. The detectives returned the following day and found Mr. McGlotten to be "a little bit more alert and talkative." The detectives spoke with him about what happened on the night of the shooting and found the information he provided to be coherent. Mr. McGlotten's uncle and step-father were with him in his hospital room. His uncle was on one side of the bed holding his hand and his step-father was standing by a window. Detective Min stood on the opposite side of the hospital bed from Mr. McGlotten's uncle. The detectives asked Mr. McGlotten to view a photo array and that process was audio recorded using one of the detectives' cell phones. Mr. McGlotten wavered between two photographs but eventually identified a photograph of appellant as the person who shot him.

On December 12, 2016, appellant was arrested at a home located at 2825 Westwood Avenue. Detective Min obtained a search warrant for that home. When he arrived to conduct the search, there were three people in the home: Carla Skinner, David Edwards,

and Ashley Sparrow. Detective Min obtained the cell phone number from Ms. Skinner, and then proceeded to call that number. He then heard a cell phone in the home ring and, subsequently, seized it. No data was recovered from that cell phone. Detective Purtell obtained the call records for the cell phone from AT&T.

Federal Bureau of Investigation Special Agent Matthew Wilde testified as an expert in historical call detail analysis. He examined cell phone records for a specific cell phone number, and concluded that the location of the phone tracked the time and general location of the shooting in front of the Stop 1 convenience store on November 30, 2016.

After appellant was arrested, detectives obtained recordings of jail phone calls made by appellant to family members and other individuals, some of which were played for the jury. Appellant's jail cell was also searched and various letters were seized. Redacted versions of those letters were admitted in evidence.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Prior to trial, appellant moved to suppress the extrajudicial photographic identification of him by Mr. McGlotten. The court denied that motion to suppress, and, over objection, evidence of the photo array and Mr. McGlotten's identification of appellant was admitted at trial. Appellant contends that the photo array procedure used by the detectives was inherently and impermissibly suggestive "given the fact that [Mr.] McGlotten was hospitalized" and because the detectives did not conform to the Baltimore

City Police Department's policy preference for the 'double-blind' method. Appellant maintains that the detectives used a disfavored method of photographic identification, the folder shuffle method, and failed to conform to the requirements for that method. We are not persuaded.

A. Standard of Review

In considering a trial court's denial of a motion to suppress evidence, we consider only the record developed at the suppression hearing. *Sinclair v. State*, 444 Md. 16, 27 (2015); *Raynor v. State*, 440 Md. 71, 81 (2014) (citing *Briscoe v. State*, 422 Md. 384, 396 (2011)). We view the evidence in the light most favorable to the prevailing party, and accept the circuit court's findings of fact unless they are clearly erroneous. *Sizer v. State*, 456 Md. 350, 362 (2017); *Sinclair*, 444 Md. at 27. We review the suppression court's legal conclusions without deference and make "our own independent constitutional evaluation as to whether the officer's encounter with the defendant was lawful." *Sizer*, 456 Md. at 362.

The right to due process of law is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 24 of the Maryland Declaration of Rights.[2] "[D]ue process protects the accused against the introduction of evidence of, or

[2] The due process clause of the Fifth Amendment provides, in part, that "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. V. It is applicable to the states through the Fourteenth Amendment. The due process clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV. Article 24 of the Maryland Declaration of Rights, a corollary to the Fourteenth Amendment's due process clause, similarly provides that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or,

tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Moore v. Illinois*, 434 U.S. 220, 227 (1977); *accord Neil v. Biggers*, 409 U.S. 188, 196-99 (1972); *Jones v. State*, 310 Md. 569, 577 (1987), *judgment vacated on other grounds*, 486 U.S. 1050 (1988). When an accused challenges the admissibility of an extrajudicial identification procedure on due process grounds, Maryland courts apply a two-step test that, in essence, seeks to determine whether the challenged identification was unreliable:

> The first [step] is whether the identification procedure was impermissibly suggestive. If the answer is "no," the inquiry ends and both the extra-judicial identification and the in-court identification are admissible at trial. If, on the other hand, the procedure was impermissibly suggestive, the second step is triggered, and the court must determine whether, under the totality of the circumstances, the identification was reliable.

Jones v. State, 395 Md. 97, 109 (2006) (internal citations and footnote omitted).

The defense bears the burden of showing unnecessary suggestiveness in procedures used by the police. *Smiley v. State*, 442 Md. 168, 180 (2015); *Bean v. State*, 240 Md. App. 342, 355 (2019). Suggestiveness exists, and a photo array is impermissibly suggestive, when the manner of presenting the array to the witness or the makeup of the array "indicates which photograph the witness should identify." *Smiley*, 442 Md. at 180. Stated otherwise,

in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Declaration of Rights, Art. 24. The Court of Appeals has explained that the phrase "law of the land" is synonymous with "due process of law" as that phrase is used in the Fifth and Fourteenth Amendments to the United States Constitution. *See Sapero v. Mayor of Baltimore*, 398 Md. 317, 344 (2007) (and cases cited therein).

"[s]uggestiveness exists where the police, in effect, say to the witness: 'This is the man.'" *Thomas v. State*, 213 Md. App. 388, 417 (2013) (citing *Jones*, 310 Md. at 577).

"[M]ere suggestiveness," however, "does not call for exclusion." *Turner v. State*, 184 Md. App. 175, 180 (2009). If the defense shows that the identification procedure was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, by clear and convincing evidence, that the identification was reliable. *Smiley*, 442 Md. at 180; *Jones*, 395 Md. at 111. The United States Supreme Court and the Court of Appeals have identified five factors that may be used to assess reliability. Those factors include the witness's opportunity to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's description of the criminal, the witness's level of certainty in his or her identification, and the length of time between the crime and the identification. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Jones*, 310 Md. at 577-78. Ultimately, the court must determine whether the identification is admissible by "weigh[ing] the reliability of the identification against the 'corrupting effect' of the suggestiveness." *Jones*, 310 Md. at 578.

B. Suppression Hearing

At the pre-trial suppression hearing, Detective Min testified that he prepared a photo array that included a photograph of appellant, who had been developed as a suspect in the shooting. Both Detective Min and Detective Purtell were aware of which photograph depicted the suspect. The array consisted of one photograph of appellant, five photographs of other individuals, and two "blank fillers," each of which was placed in a separate folder. The photographs were obtained from a police department data base and photographs

similar to appellant's were chosen. According to Detective Min, the two "blank fillers" were required by police procedure under General Orders governing the folder shuffle method and they were included to give the impression that there were "a lot more" photographs.

Detectives Min and Purtell went to Shock Trauma on December 6, 2017 for the purpose of showing the photo array to Mr. McGlotten. They did not do so, however, because "he was in too much pain." The detectives returned the following day. At the suppression hearing, Detective Min testified that two of Mr. McGlotten's uncles were in the hospital room at the time the photo array process was conducted. One was standing "around the bed" and the other was holding Mr. McGlotten's hand.

The process of showing the array to Mr. McGlotten was not video recorded, but Detective Purtell used his cell phone to audio-record the event and that recording was played for the jury. The process began when Detective Purtell gave Mr. McGlotten the following instructions:

> What we want to do is – so over the course of the investigation we develop people that we want to show you. And what Detective Min has there is what's called a photographic lineup. I'm going to read you something so you understand how this works, but it's very simple. It's like – it's probably like what you see on TV. Let me just read it. It says, this is – this is going as part of your ongoing investigation into the shooting of – well, when you got shot last Wednesday. You'll be shown some photographs.
>
> The person who committed the crime may or may not be in the set of photographs you're about to view. The individuals you view may not appear exactly as it did on the date of the incident. Features such as head, facial hair and – are subject to change. Photographs may not always depict the

> true complection [sic]. They could be lighter or darker than what you see. Please pay no attention to any markings under, colored effects that may appear on the photos or any other difference in the type of style of the photographs. You must look at all the photographs in the folders. After you have had an opportunity to view the photographs, I will ask the following question of; do you recognize anyone? If you do, what is the number of the person you recognize? What role, if any does that person play in this investigation? Do you understand these instructions?

Mr. McGlotten stated that he understood the directions. Detective Min then handed him the folders. At that point, an unidentified voice, believed to be one of Mr. McGlotten's uncles, said, "Take your time." Detective Min assisted Mr. McGlotten with the folders because he had "a little difficulty" with his hands. After Mr. McGlotten reviewed the photographs, the following exchange took place, with the unidentified voice attributed to one of the uncles that was in Mr. McGlotten's hospital room:

> DETECTIVE PURTELL: Repeat those three questions for you. Did you – do you recognize anyone in those photographs?
>
> MR. MCGLOTTEN: No.
>
> Q.: You didn't recognize anybody?
>
> A.: I recognize (inaudible). I think I've seen him (inaudible).
>
> Q.: Okay. That person here that you saw the person, what number was that? Why don't you – if you forgot the numbers you can take these back.
>
> [Unknown Voice]: They're upside down.
>
> * * *
>
> DETECTIVE MIN: Looking at all of the photos (inaudible two words).

DETECTIVE PURTELL: Yeah, they're cumbersome the size of (inaudible one word). When you look at them, which one do you think it was you said?

MR. MCGLOTTEN: One or two.

DETECTIVE PURTELL: Do you remember the facial hair might have changed from that date. All of those photographs (inaudible).

DETECTIVE MIN: Some of them are old.

DETECTIVE PURTELL: That's why I read those instructions.

[Unknown Voice]: Which ones seems to be similar?

* * *

[Unknown Voice]: So out of the two, the two you got right there, which one would you say is more of the one you think? Number four?

* * *

DETECTIVE MIN: (Inaudible). The SID number, can you read it a loud [sic] for me?

MR. MCGLOTTEN: 3133581.

DETECTIVE MIN: And –

DETECTIVE PURTELL: The last question I'm going to read again. What role, if any does this person play in the investigation, meaning –

MR. MCGLOTTEN: That guy.

DETECTIVE PURTELL: That was the guy that shot you?

DETECTIVE MIN: And there's a statement section under the pictures and can you write that (inaudible two words) very briefly, if you can.

* * *

DETECTIVE MIN: Can you read that for me?

MR. MCGLOTTEN: He hit me with a gun.

DETECTIVE MIN: He hit you with a gun. Did he hit you with a gun –

MR. MCGLOTTEN: No. He fired – he shot –

DETECTIVE MIN: Yeah. Because when you say somebody hit you with a gun means somebody –

[Unknown Voice]: (Inaudible one word) five times.

DETECTIVE PURTELL: Since this is – since it is recorded. So he's the one who shot you five times? That's what you're trying to say?

MR. MCGLOTTEN: Yeah.

DETECTIVE PURTELL: Okay. Let me have you sign your name right there.

DETECTIVE MIN: Today is the 7th. And time now is 7:30. And I just want you to clarify (inaudible) five times?

MR. MCGLOTTEN: He shot – he shot.

DETECTIVE MIN: He shot.

DETECTIVE PURTELL: Let him answer. So it's not – he shot you, this –

MR. MCGLOTTEN: (Inaudible).

After Mr. McGlotten identified photograph number 4, which depicted appellant, as the person who shot him, the following colloquy occurred:

DETECTIVE PURTELL: Okay. Tennod, did myself or Detective Min force you to pick out number four?

MR. MCGLOTTEN: No.

Q. Did we show you number four?

A. No.

Q. That's – that is the person that you remember as shooting; is that correct?

A. Yeah.

Q. In reference to this investigation what we've been talking about, is there anything that myself or Detective Min forgot to ask you?

A. Is this totally confidential?

Q. What do you mean? This – this information will go to the state's attorney's office. What happens from here, this – we're not running out to arrest this guy. We're not running to go to court. We're not getting ready to drag him into court. At this rate we're not putting it on the news. We're not putting your name anywhere. This is a stepping stone into us trying to get the person that did it. And obviously if this man appeared in this photographic lineup we showed you, you're not the only one that's telling us this. So there's other witnesses out there. There's other people that care about what's going on. So with that – you've got nothing to worry about. When you get better we're going to make sure you don't get hurt. You're very important to us. You're very important to the police department, so don't worry about –

[Unknown Voice]: Important to me too.

* * *

DETECTIVE PURTELL: Well, he looks – compared to yesterday he looks so much better. Let's conclude this. Mr. Tennod, we will still stay in touch and –

DETECTIVE MIN: I want to ask you one thing.

DETECTIVE PURTELL: Okay. Go ahead.

DETECTIVE MIN: I just want to – so when this guy shot you, where did he shot [sic] you, in the front or back?

MR. MCGLOTTEN: Front.

DETECTIVE MIN: In the front. So, you know, you – that's all I had.

At the suppression hearing, Detective Min was asked to review portions of the police department's General Orders regarding photo arrays. He acknowledged that the General Orders required the person administering a photo array using the folder shuffle method to place each folder in front of the witness one at a time, that the witness should indicate whether the person in the photograph was the person the victim saw, and that the witness should then return the photograph to the administrator. Detective Min explained that Mr. McGlotten was handed one large folder that contained eight manila folders, six of which contained photographs and two of which contained blank sheets of paper.

Detective Min testified that although the double-blind method is preferred, it is not required. He acknowledged that the preferred double-blind method of showing a photo array was not used, but explained that that was because the process was conducted in a hospital and because, at that time, there were no other members of the Baltimore City Police Department to conduct a photo array using the double-blind method. On cross-examination, he clarified that when the homicide unit goes "into a tactical mode in a high profile case" such as this one, all of the detectives working respond to the scene, so it would have been difficult to find someone independent to bring to the hospital to conduct the photo array with Mr. McGlotten. Detective Min acknowledged that the General Orders

provide that the independent administrator in a double-blind photo array need not be "part of the same command" as the primary investigator, but he testified that "[w]e usually work within the homicide. [sic] That's what we use."

At the conclusion of Detective Min's testimony, defense counsel asked the court to suppress Mr. McGlotten's identification of appellant on the ground that the photographic identification process was impermissibly suggestive. Defense counsel argued, among other things: that the police failed to use the preferred double-blind method; that the police failed to follow the proper procedure for the folder shuffle method, which required them to give Mr. McGlotten the folders one at a time and ask him after he viewed each photograph whether he saw the person who shot him; that the police allowed Mr. McGlotten's uncles to participate in the photo array process; and that the police improperly provided feedback after the identification procedure was completed, which bolstered Mr. McGlotten's confidence that he had picked the right person and tainted any in-court identification he might make.

The State conceded that "there was not a rote compliance with the step-by-step of the General Order with regard to" the folder shuffle method that was used, but argued that there was nothing in the way the photographic identification was conducted to "give rise to a substantial likelihood of irreparable misidentification."

The suppression court found that "the exigency with regard to this photo array was promulgated by Mr. McGlotten's medical condition," that, based on the audio recording of the identification procedure, Mr. McGlotten "appeared to be oriented . . . as to who he was, where he was and when he was there," and that his responses were alert and clear. The

court determined that, although Mr. McGlotten was not instructed that the investigation would continue regardless of whether he selected a photograph, he was "specifically, generally instructed." The court found that the photographs that Mr. McGlotten viewed were "remarkably similar looking individuals[.]" With respect to the presence of Mr. McGlotten's uncles in the hospital room, the court did not find that "unusual at all," in light of the victim's life-threatening injuries and the fact that he was in Shock Trauma. Moreover, there was no evidence that Mr. McGlotten's uncles knew that appellant or any of the other individuals depicted in the photographs were suspects. Nor was there any evidence that the uncles had any discussions with the detectives or that Mr. McGlotten "was in any way coached."

The court concluded:

> [T]he court finds unequivocally that the Defense has failed to meet the initial burden to produce sufficient evidence to demonstrate to this court that the procedure used by Baltimore City Police in obtaining the identification of Mr. Alexander was unnecessarily and impermissibly suggestive – and I noted that pursuant to Smiley versus State that there is simply insufficient evidence demonstrating to this court's satisfaction that the presentation of the array, the manner of the presentation, the makeup of the array in any way indicates that – indicated rather to Mr. McGlotten that he should identify the individual depicted in photograph number four, meaning Mr. Alexander through that process. And four, those – I should say, upon those findings respectfully, the Defense supplemental motion to suppress the pretrial identification of Mr. Alexander is denied.

Appellant argues, as he did below, that the photo array procedure was inherently suggestive because Mr. McGlotten was hospitalized, the police failed to use the double-blind method, and the police failed to conform to the proper procedures for the folder

shuffle method. He also asserts that the detectives converted an already inherently suggestive procedure into an impermissibly suggestive procedure by prompting and redirecting Mr. McGlotten, by condoning his uncles' interventions in the conduct of the procedure, and by "confirming" Mr. McGlotten's selection of appellant's photograph, thereby contaminating his later in-court identification of appellant.

There is nothing about the manner or place in which the photographic identification procedure was conducted, or the statement of any person present, to support the argument that someone suggested which photograph Mr. McGlotten should identify. Preliminarily, we note that there is no support to appellant's assertion that the identification process was inherently suggestive because it occurred in a hospital room. The suppression court recognized that Mr. McGlotten had suffered five gunshot wounds and was undergoing treatment at Shock Trauma, but also found that he was oriented to "time, person and space" and that, although medicated, was clear minded. The court further found that he answered questions "with clarity" and was "alert." We also note that the police department's General Orders governing the folder shuffle method specifically apply to situations where a victim or witness is "confined to a hospital." In addition, we have previously held that an identification by a hospitalized victim was not impermissibly suggestive. *See Hailes v. State*, 217 Md. App. 212, 230-34 (2014) (agreeing with trial court's finding that identification by hospitalized victim was not impermissibly suggestive), *aff'd*, 442 Md. 488 (2015).

We also find no merit in appellant's contention that the decision not to use the preferred "double blind" identification process was suggestive. According to the police

department's General Orders, the folder shuffle method was a permissible procedure in this case, where Mr. McGlotten was in the hospital and Detective Min testified that it would have been difficult to find an independent administrator in light of the high-profile nature of the case. *See generally* Md. Code (2018 Repl. Vol.), § 3-506.1(a)(7) of the Public Safety Article (requiring written policies regarding eyewitness identification and setting forth procedures).

With regard to the folder shuffle method, appellant contends that the detectives failed to conform to the proper procedure because Mr. McGlotten did not view each photograph separately and indicate whether he recognized the person depicted before viewing the next photograph. Even assuming the truth of that assertion, there was no evidence presented at the suppression hearing to show that such a failure rendered the process suggestive or that anyone suggested to Mr. McGlotten which photograph to select or did anything to make an identification of appellant more likely.

Appellant asserts that the detectives contaminated the identification process by telling Mr. McGlotten that "over the course of the investigation, we develop people that we want to show you." That assertion does not find support in the record. Almost immediately after that statement, Detective Purtell instructed Mr. McGlotten that "[t]he person who committed the crime may or may not be in the set of photographs you're about to view." Thus, Mr. McGlotten was explicitly told that the shooter might not be in the photo array. There is nothing in the detective's statements to suggest that he guided or advised Mr. McGlotten to select appellant's photograph, that he indicated in any way that

appellant was the suspect, or that he provided information as to why any of the photographs were selected as part of the array.

Appellant also claims that the identification process was impermissibly suggestive because the detectives redirected Mr. McGlotten after he failed to identify anyone in the photographs and by allowing him to view the array a second time. As we have discussed, after Mr. McGlotten viewed the photo array once, he was asked if he recognized anyone in the photographs. His response, "Huh-uh," was ambiguous. Detective Purtell attempted to clarify the response by asking, "You didn't recognize anybody?" Mr. McGlotten responded that he had not "recognized" anyone, but thought he had "seen" someone in the array. Because Mr. McGlotten could not recall the number of the photograph, Detective Purtell permitted him to look at the photographs a second time. Appellant does not provide any authority for the proposition that the detectives were not permitted to ask clarifying questions or that Mr. McGlotten was prohibited from viewing the photo array a second time. Moreover, neither the detective's clarification nor Mr. McGlotten's second review of the photo array rendered the identification process impermissibly suggestive.

The same is true with respect to appellant's contention that the detectives redirected Mr. McGlotten by reminding him that features such as facial hair are subject to change and that the photographs in the array might be old. The statement that the facial hair might have changed was nothing more than a reminder of the pre-identification instructions that Detective Purtell read before Mr. McGlotten viewed the photo array. Moreover, the photographs all depicted individuals with neatly trimmed hair that the court characterized as "short trimmed beard with similar beard cutting styles." As a result, the reminder that

features such as facial hair are subject to change applied equally to all of the photographs and, therefore, could not be considered impermissibly suggestive. There was no evidence to suggest that statements about facial hair or the fact that the photographs might be old constituted coaching or in anyway suggested to Mr. McGlotten that he should select appellant's photograph.

Similarly, there is no evidence that any of the statements made by the unknown individuals identified as Mr. McGlotten's uncles constituted coaching or redirection. There is no evidence that the uncles knew the identity of the shooter or the suspect in the photo array. Detective Min specifically testified that he did not give the uncles the name or the identity of the suspect and the trial judge found, as a fact, that there was no evidence the uncles knew the identity of the suspect or his location in the photo array.

Appellant directs our attention to the following statements made by Detective Purtell after the identification process was completed and in response to Mr. McGlotten's question, "Is this totally confidential?":

> [DETECTIVE PURTELL]: What do you mean? This – this information will go to the state's attorney's office. What happens from here, this – we're not running out to arrest this guy. We're not running to go to court. We're not getting ready to drag him into court. At this rate we're not putting it on the news. We're not putting your name anywhere. This is a stepping stone into us trying to get the person that did it. And obviously if this man appeared in this photographic lineup we showed you, you're not the only one that's telling us this. So there's other witnesses out there. There's other people that care about what's going on. So with that – you've got nothing to worry about. When you get better we're going to make sure you don't get hurt. You're very important to us. You're very important to the police department, so don't worry about –

These statements were made after Mr. McGlotten had identified appellant, so they had no bearing on whether his identification was suggestive. *See Aiken v. State*, 101 Md. App. 557, 572-73 (1994) (officer telling victim she had "selected the right person" after the identification "had absolutely no effect" on the identification). Although an impermissibly suggestive out-of-court identification may taint a subsequent in-court identification, *Coleman v. State*, 8 Md. App. 65, 75-78 (1969), there is simply nothing in the record of the suppression hearing to suggest that the makeup of the array, or the circumstances surrounding its presentation, suggested to Mr. McGlotten that he should select appellant's photograph. As appellant failed to meet his burden of showing that the identification process was impermissibly suggestive, the suppression court did not err in denying the motion to suppress without addressing the issue of reliability.

II.

Appellant next argues that the trial court erred in admitting in evidence certain cell phone records and recorded jail phone calls because the State did not properly authenticate those exhibits as business records. Prior to trial, the State filed a notice of intent to introduce at trial business records of AT&T cell phone calls and recorded jail phone calls without the testimony of the custodians of those records. Appellant filed pretrial motions in limine to preclude the admission of both sets of records. After a hearing on September 20, 2017, the court denied the motions in limine finding that the State had substantially complied with the requirements of the Maryland Rules.

A. Authenticity

Maryland Rule 5-803 provides certain exceptions to the rule prohibiting the admission of hearsay. With respect to records kept in the course of regularly conducted business activities, the Rule provides, in relevant part, as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (b) Other exceptions.
>
> * * *
>
> (6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Md. Rule 5-803(b)(6).

In addition to the exception for records of regularly conducted business activity, the Maryland Rules also provide for self-authentication under certain circumstances. Maryland Rule 5-902(b)(1) provides:

> (1) Procedure. Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

Of importance to the instant case is Rule 5-902(b)(2), which sets forth the form of the certificate to be used when a party wishes to proceed using self-authentication:

> (2) Form of certificate. For purposes of subsection (b)(1) of this Rule, the original or duplicate of the business record shall be certified in substantially the following form:
>
> Certification of Custodian of Records
> or Other Qualified Individual
>
> I, _____, do hereby certify that:
> (1) I am the Custodian of Records of or am otherwise qualified to administer the records for:
> _____ (identify the organization that maintains the records), and
> (2) The attached records
> (a) are true and correct copies of records that were made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of these matters; and
> (b) were kept in the course of regularly conducted activity; and
> (c) were made and kept by the regularly conducted business activity as a regular practice.
> I declare under penalty of perjury that the foregoing is true and correct.
> Signature and title: _____

Date: _____

With these rules in mind, we shall address each of appellant's contentions separately.

B. AT&T Cell Phone Records

The defense moved to preclude the State from admitting AT&T cell phone records for the specific cell phone number, which was associated with the cell phone seized by police during a search of appellant's home at 2825 Westwood Avenue. The defense argued that the declaration of authenticity provided by the State was missing certain information required by Maryland Rules 5-803(b)(6) and 5-902(b), specifically, that it failed to state that the records were made at or near the time of the occurrence of the matter set forth, that the information was transmitted by a person with knowledge of the matters, and that they were made and kept by the regularly conducted business activity as a regular practice.

Defense counsel explained:

> Well without laying that foundation, there's no way to tell whether the records were kept in the ordinary course of business, were made or transmitted by [sic] person with knowledge. There's a reason why that language is in the statute it's because we can rely on that to say the records are reliable or trustworthy. Without that there's no way to tell how these records were generated, who generated them, when they were generated. There's just no way to tell from the certificate, a custodian or somebody from the company would have to come and the State would have to lay the foundation through that person.

The State acknowledged that the declaration of authenticity did not comply "verbatim" with Maryland Rule 5-902(b), but argued that it contained "substantially the same information" and complied with "the spirit of the statute." After a discussion about

how the State would proceed if the court determined that the declaration of authenticity did not comply with the Rules, the State explained that it did not intend to introduce the cell phone records to prove the truth of the matters asserted in them, but as a foundation for the testimony of FBI Special Agent Wilde, the State's expert in historical call detail analysis. The prosecutor stated that the "call details themselves are inconsequential to the State" because it was not seeking to introduce the records to show that this particular phone number was used to call another number. At the conclusion of the hearing on the motion in limine, the court found that the State "substantially complied with the spirit and the letter of Maryland Rule 5-902, read in conjunction with Maryland Rule 5-803[.]"

At trial, defense counsel objected to the admission of the AT&T call records on the ground that the declaration of authenticity did not comply with the Maryland Rules. Defense counsel reminded the court that the State had advised that it was not going to introduce the call records to show the truth of the matter asserted. The State then requested that only the first page of the call records be admitted in evidence "so that the jury may have some context as to what information was utilized by Detective Wilde as far as the columns themselves." The following exchange occurred:

> [PROSECUTOR]: The call logs themselves are inconsequential, but they are the basis of [Agent Wilde's] evaluation. And so I just need the jury to have some sort of context as to what the document he was looking at looked like. So I could simply just publish one page of the document for the ladies and gentlemen of the jury to show how Agent Wilde utilized that information.
>
> THE COURT: The State is not alleging that this gentleman, Mr. Alexander made certain calls at certain times from certain locations as if he had been in theory working with any co-

conspirator or anybody else to arrange a setup of the intended or even unintended victims of this case, right?

[PROSECUTOR]: No, Your Honor. It's simply that the phone was utilized at particular times and when it was utilized at those times, it was utilizing certain cell phone towers. The call – the number dialed, the number receiving the call, the text number texted to or received is inconsequential to the investigation.

THE COURT: If I can fast-forward to the end of that run.

[PROSECUTOR]: Yes.

THE COURT: Is it the State's theory that calls on that particular phone were made or received and texts were sent or received up to a point in time and then there was a gap where there was nothing that coincides with the time of this event?

[PROSECUTOR]: Yes, Your Honor.

THE COURT: And then the calls and/or texts resumed?

[PROSECUTOR]: Yes, Your Honor. And that's how Agent Wilde's report lists. It lists the calls and which towers they utilized and the times of those calls, not the numbers dialed, the message sent, nothing about the content of the calls.

* * *

THE COURT: Well, for – look, with regard to what's been marked for identification as State's Exhibit 82, the exhibit in its entirety is not being admitted. The State – and that objection for the reasons placed upon the record by the Defense is sustained. The court will permit the top sheet, the first page to be admitted for the purpose explained by the State which is to essentially give a baseline of various items of data. And I mean headers, not detail within the headers –

[DEFENSE COUNSEL]: Right, right.

THE COURT: -- as to how it assists, if at all, this agent in this process.

Thereafter, only the first page of the AT&T call detail records was admitted in evidence during the testimony of FBI Special Agent Wilde, who was qualified and accepted, without objection, as an expert in historical cell detail analysis. Agent Wilde used the AT&T call detail records to create a report depicting the cell tower use for the phone number supplied by Ms. Skinner during certain times on the date of the shooting. The first page of the AT&T call records, which was admitted in evidence as State's Exhibit 82, included only data relating to calls made on November 29, 2016, the day prior to the shooting, and did not include any data from the day of the shooting.

As the State notes, demonstrative evidence is "physical evidence that 'helps the jurors understand the testimony, but is otherwise unrelated to the case.'" *Ware v. State*, 348 Md. 19, 65 (1997) (quoting Joseph F. Murphy, Jr., *Maryland Evidence Handbook*, § 1101, at 576 (2d ed. 1993)). It is "generally offered for clarification or illustration of the witness's testimony and it need not be original or authentic." *Id.* The record makes clear that none of the information on the one page of the AT&T call records that was admitted as State's Exhibit 82 was offered for the truth of its contents. It was merely offered for the limited purpose of illustrating the type of information Agent Wilde considered when creating his expert report. Thus, the trial court did not err or abuse its discretion in admitting State's Exhibit 82 for the purpose of clarifying or illustrating Agent Wilde's testimony.

C. Recorded Jail Phone Calls

In support of its request to admit recordings of certain phone calls made by appellant while in jail, the State provided a "Certification of Records" signed by an employee of the

Maryland Department of Public Safety and Correctional Services Intelligence Division ("DPSCS"), who was an authorized custodian of the records maintained by that Division. The certification provided that the employee had reviewed all of the requested records, namely all calls made by appellant from December 31, 2016 to March 30, 2017, and that the records were "true and correct certified copies maintained in the normal course of agency business." The employee declared "under penalty of perjury that the foregoing is true and correct[,]" and signed and dated the certificate. Appellant objected to the Certification of Records on the ground that it failed to state that the records "were made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of these matter" and that they "were made and kept by the regularly conducted business activity as a regular practice," as required by Rule 5-902(b)(2).

The court determined that the Certification of Records "substantially complied with not only the spirit, but the requirements of Maryland Rule 5-902." Subsequently, the State identified additional recorded jail phone calls and provided certifications for them that were substantially the same as the prior Certification of Records. At a hearing on November 7, 2017, defense counsel objected to the Certification of Records used for recordings of jail phone calls from December 13, 2016 and January 10, 2017, citing the same failures to comply with the requirements of Rule 5-902(b)(2). The court declined to modify its prior ruling that the Certification of Records substantially complied with Rule 5-902. Again, during the course of trial on November 13, 2017, the State advised defense counsel of its intent to play a portion of an additional recorded jail phone call that was made on

November 9, 2017. The prosecutor advised the trial court that it had provided defense counsel with a copy of the November 9, 2017 call in its entirety, as well as a Certification of Records that had "the same slightly . . . incorrect certification" as those previously accepted by the court. Defense counsel noted that she had the "same issue" with the third certification. The call was played for the jury over defense counsel's objection.

Appellant argues here, as he did below, that the three certifications failed to indicate that they were "made at or near the time of the occurrence," "by a person with knowledge," and that it was the "regular practice" to make and keep such records. We need not determine whether the certifications were sufficient to establish authenticity under Maryland Rule 5-902(b) because, even assuming, *arguendo*, that they were not, the record makes clear that the recorded jail phone calls were authenticated by circumstantial evidence of the manner of creation and the nature of the recordings themselves.[3]

A document is authenticated when there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a); *Walls v. State*, 228 Md. App. 646, 688 (2016) (requirement of authentication or identification as condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims). Rule 5-901(b) provides a non-exhaustive list of ways in which evidence may be authenticated, including "testimony of a witness

[3] Although the trial court found that the certifications were sufficient to authenticate the recorded jail phone calls under Maryland Rule 5-902(b), the Court of Appeals has long held that a trial court's decision may be affirmed for a different reason. *See, e.g, Robeson v. State*, 285 Md. 498, 502 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm.").

with knowledge that the evidence is what it is claimed to be" and circumstantial evidence, "such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics." Md. Rule 5-901(b)(1) and (4); *see also State v. Bryant*, 361 Md. 420, 429 n.4 (2000) ("business records can also sometimes be authenticated by circumstantial evidence of the manner of creation and nature of the document involved"); *Davis v. Goodman*, 117 Md. App. 378, 417 (1997) ("In some cases the court may properly conclude from the circumstances and the nature of the document involved that it was made in the regular course of business.") (quoting 6 McLain, *Maryland Evidence*, § 803(b).1, at 379 (1987)).

This requires "proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Jackson v. State*, 460 Md. 107, 122 (2018) (citing *Sublet v. State*, 442 Md. 632, 678 (2015)). "'[T]he burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.'" *Darling v. State*, 232 Md. App. 430, 455 (2017), *cert. denied*, 454 Md. 655 (quoting *Johnson v. State*, 228 Md. App. 27, 59 (2016), *cert. denied*, 450 Md. 120); *see also Jackson*, 460 Md. at 116 (holding same).

In *Bryant*, the Court of Appeals addressed the issue of admissibility of hospital records, specifically a toxicology report, when the custodian's certification was insufficient for self-authentication. In that case, Bryant was convicted of homicide by motor vehicle while under the influence of alcohol and other related charges. *Bryant*, 361 Md. at 422. At trial, the State introduced a toxicology report from a hospital that had Bryant's name on

it, indicated that a blood specimen had been received and tested, and listed the result of the blood alcohol concentration test. *Id.* at 424. A cover letter attached to the toxicology report was signed by the director of the hospital's medical records service and custodian of records and provided, in part, that the "enclosed medical records" were "an accurate reproduction of" Bryant's medical records which were "kept during the normal course of business" and housed in the hospital's medical record services department. *Id.* at 424-25. The letter also provided, "[t]o the best of my knowledge, these are the complete medical records of this patient." *Id.* at 425.

Bryant argued that the custodian's statement was insufficient to form a proper foundation for authentication as a business record and did not contain sufficient identifying information to establish him as the patient to whom the toxicology report referred. *Id.* The trial court determined that the cover letter was sufficient authentication of the toxicology report and that testimony from the hospital's chief toxicologist was sufficient to establish that the report was kept in the regular course of business and that the toxicology screen of Bryant's blood was "pathologically germane" to his treatment. *Id.* Over defense counsel's objection, the trial court admitted the toxicology report as a business record. *Id.*

The Court of Appeals held that the trial court erred in admitting the toxicology report because the "certification" attached to it did not, on its face, meet the requirements of the Maryland Rule pertaining to the self-authentication of business records.[4] *Id.* at 428. The Court noted that the "certification" was not made under oath subject to the penalty of

[4] At the time that *Bryant* was decided, the Rule pertaining to the self-authentication of business records was codified in Rule 5-902(a)(11).

perjury, the custodian did not certify "that the report was made at or near the time of the occurrence of the matters that it sets forth by a person with knowledge of those matters or that it was made and kept by the regularly conducted business activity as a regular practice." *Id.* In addition, the Court concluded that the toxicology report failed to indicate when it was actually made or that it was made by a person with knowledge of the matters that it contained. *Id.* at 429.

Notwithstanding those observations, the Court recognized that the failure to establish a sufficient foundation for self-authentication of the toxicology report did not exclude authentication by extrinsic evidence. Nevertheless, after reviewing the evidence presented at trial, the Court concluded that the toxicologist who testified at trial "*never* testified that the report was made at or near the time of the tests or that it was made by a person with knowledge, as Rule 5-803(b)(6) requires. Therefore his testimony also was inadequate to establish the necessary evidentiary foundation to admit the toxicology report." *Id.* at 430 (emphasis in original).

Unlike *Bryant*, in the case before us, the information contained in the certifications combined with the nature of the recordings and other extrinsic evidence was sufficient to establish that the recordings were what its proponent claimed. The three certifications in the instant case were signed by a custodian of records for DPSCS "under penalties of perjury." The certifications also provided that the jail phone call recordings were "true and correct certified copies" of records "maintained in the normal course of agency business."

Detective Purtell testified that "all calls that are made in and out of the Central Booking and the jails are recorded through a company" and that the police "have a system"

by which they are able to listen to the jail calls and "search different parameters in order to find out who's making a call to whom, when they make it, where they make it from." Because appellant did not have a state identification number when he was initially arrested, Detective Purtell searched for his calls using the phone numbers of appellant's mother and girlfriend. The recorded calls played at trial were calls that Detective Purtell searched for and determined were relevant to his investigation. Collectively, this evidence was sufficient to meet the State's slight burden of proving that the recordings were made and kept in the course of the regular business activity of the DPSCS which, as a regular practice, made and kept those records. In light of the nature of the records – recordings of telephone conversations – it is obvious that they were made at the time of each telephone call and clearly, the callers themselves had knowledge of the contents of their own conversations. Unlike the toxicology report in *Bryant*, the authenticity of the recordings did not depend on whether a DPSCS employee had knowledge of the contents of the calls. Thus, in light of the certifications, the nature of the recordings, and the testimony of Detective Purtell, the jail calls were properly authenticated as business records and the trial court did not err or abuse its discretion in admitting them in evidence.

III.

Appellant contends that the trial court erred in admitting hearsay evidence regarding appellant's phone number and the phone number of his mother, Carla Skinner. Specifically, he challenges the admission of testimony by Detective Min that the phone number of a cell phone seized from appellant's home was the number supplied by Ms. Skinner; testimony by Detective Purtell that he obtained information in reference to a cell

phone number that was "attributed" to appellant; and, testimony by Detective Purtell that after speaking with appellant's mother he had her phone number. For the reasons set forth below, we disagree.

A. Standard of Review

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Generally, hearsay evidence is not admissible. Md. Rule 5-802. "[H]earsay rulings are evidentiary rulings, which are typically subject to review for abuse of discretion." *Gordon v. State*, 431 Md. 527, 534 (2013). A trial court, however, has no discretion to admit hearsay evidence unless it falls within an exception to the Rule. *Id.* at 536 (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). To the contrary, "[h]earsay under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule . . . or is permitted by applicable constitutional provisions or statutes.'" *Bernadyn*, 390 Md. at 8 (quoting Md. Rule 5-802) (emphasis in original). Thus, we conduct a review without deference of whether the evidence at issue was hearsay. *Parker v. State*, 408 Md. 428, 437 (2009); *Bernadyn*, 390 Md. at 8.

A statement that "is not offered for the truth of the matter asserted . . . is not hearsay and it will not be excluded[.]" *Parker*, 408 Md. at 436 (internal quotation marks and citation omitted). An out-of-court statement is admissible as non-hearsay "if it is offered for the purpose of showing that a person relied and acted upon the statement, rather than for the purpose of showing that the facts elicited in the statement are true." *Morales v. State*, 219 Md. App. 1, 11 (2014) (citing *Purvis v. State*, 27 Md. App. 713, 716 (1975)).

Further, the admission of hearsay is not reversible error "when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the testimony of other witnesses." *Grandison v. State*, 341 Md. 175, 218-19 (1995), *cert. denied*, 519 U.S. 1027 (1996); *see also Yates v. State*, 429 Md. 112, 124 (2012) ("[T]he admission of the hearsay evidence did not ultimately affect the jury's verdict given the cumulative nature of the similar statements offered at trial.").

B. Testimony of Detective Min

At trial, Detective Min testified that on December 13, 2016, he went to the house where appellant had been arrested to execute a search warrant, and he found Carla Skinner, David Edwards, and Ashley Sparrow in the home. During the course of the search, Detective Min recovered some cell phones. According to Detective Min, he received the cell phone number from Ms. Skinner. He then dialed that number, heard the phone ring, and seized the phone. The phone was submitted to the evidence control unit and was eventually given to FBI Special Agent Matthew Wilde, who was unable to recover any useful data from it.

Detective Min's testimony about Ms. Skinner's out-of-court statement, in which she gave him the subject phone number, was not hearsay because it was offered only for the purpose of showing that Detective Min relied upon the statement and acted upon it by dialing that number. *Morales*, 219 Md. App. at 11. Detective Min's testimony was not offered for the purpose of showing that the phone number belonged to appellant. We, therefore, hold that the trial court did not err in admitting Detective Min's testimony.

C. Testimony that the Phone Number was Attributed to Appellant

Appellant also challenges the testimony of Detective Purtell that he had obtained information in reference to the subject cell phone number and that the number had been "attributed" to appellant. Detective Purtell testified as follows about the phone number of the cell phone seized from appellant's home:

> [PROSECUTOR]: So what investigative techniques did you utilize to continue your investigation after Mr. Alexander was charged and apprehended in this case?
>
> [DETECTIVE PURTELL]: Well, I – when we went to his house and when he was arrested I was able to obtain some information in reference to a cell phone number.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Do you know what the cell phone number was that was attributed to Mr. Alexander?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DETECTIVE PURTELL]: Not off the top of my head I don't.
>
> [PROSECUTOR]: Do you have it anywhere in your notes that would refresh your recollection?
>
> [DETECTIVE PURTELL]: [The phone number supplied by Ms. Skinner.]
>
> [PROSECUTOR]: And what, if anything did you do with the phone itself?
>
> [DETECTIVE PURTELL]: We seized the phone.

There is nothing in Detective Purtell's testimony to indicate that he obtained the phone number from an out-of-court declarant as opposed to his observation of the seized cell phone. Thus, the statement complained of does not constitute hearsay, much less inadmissible hearsay.

Appellant also challenges the prosecutor's suggestion that the cell phone number had been "attributed" to him. As the State acknowledges, the prosecutor's question was improper because it assumed facts that were not in evidence, not because it elicited hearsay evidence. In any event, the fact that police seized a cell phone from appellant's house, and that the cell phone rang when the subject phone number was dialed, did not prove that the cell phone belonged to, or was "attributed to" appellant. Other, non-hearsay evidence did that.

Detective Purtell testified that during a recorded jail phone call, appellant referenced the phone that detectives seized from his house and, by his statements, made clear that the phone belonged to him and that he did not want the police to have it:

> [APPELLANT]: Hey, yo, this ain't my number, right, so I could say something, I can talk, but I can't talk. I ain't really saying too much on these phones. This ain't my number. Yo, why my mother, I asked my mother a dozen times to get anything out the fucking house, yo. This bitch going to tell me they got nothing at all out this mother fucking house. Now this bitch, the PD bitch saying my mother said something about they took Dasia's phone and they took a phone from you. Like, what –
>
> [UNKNOWN]: Man, they took the phones. They took the phones.
>
> [APPELLANT]: Kiara. Then my aunt say when she tried to track me down (inaudible) you said it was secured. (Inaudible).

[UNKNOWN]: No, I did not. They was talking about the little, black phone. Listen to me Dae. No, they took your phone. They called your phone when I was sitting in the living room couch. They was talking to your mother in the kitchen. I guess they asked her what's your number or something. They called the phone. The detective straight took the phone out my hand like excuse me, I need that. I'm like, what you need my phone for? They didn't take the black one. They took the touch tone and they too (inaudible) out his room.

[APPELLANT]: No, yo.

[UNKNOWN]: I deleted everything though.

[APPELLANT]: Kia, it don't matter. They can still get those (inaudible).

[UNKNOWN]: Da, I know, but look, I didn't – I didn't know they was talking to her in the kitchen and then they called the phone and then they called the phone.

[APPELLANT]: (Inaudible). I don't know.

[UNKNOWN]: (Inaudible).

[APPELLANT]: Yo, the phone not in my name, yo, anyway. But still, like come on, yo. Yo.

[UNKNOWN]: (Inaudible). They took the phone from out the house.

* * *

[APPELLANT]: I know what's up with that fucking phone, man. Yo. Oh, my god, you.

[UNKNOWN]: Calm down.

[APPELLANT]: Yo, you – yo.

[UNKNOWN]: (Inaudible) me for. Your mother gave them the number.

> [APPELLANT]: Yo, that stupid bitch. Yo, I don't give a fuck. Both of you all are dumb mother fuckers. You know I was trying to keep that phone away from (inaudible). Yo, yo, call my mother's fucking phone, yo.
>
> * * *
>
> [APPELLANT]: Yo, bitch, you not listening. I'm – I'm the fucking one in this position, yo. Bitch, don't tell me talk to nobody about nothing. The only thing that mother fucking phone is not in my name, but still, and they ain't get it from me.

These statements by appellant make clear that the phone belonged to him and he did not want the police to have it. As a result, although the prosecutor's suggestion that the phone number had been "attributed" to appellant was premature because there was no evidence of that fact, it was harmless because there was ample evidence from appellant's own statements that did attribute the phone number to him. *Dorsey v. State*, 276 Md. 638, 659 (1976).

D. Detective Purtell's Testimony About Ms. Skinner's Phone Number

At trial, defense counsel objected to Detective Purtell testifying about anything said to him by appellant's mother, Ms. Skinner. The trial judge stated that such testimony "is not going to be permitted . . . [u]nless there's some exception to that[.]" When the court asked the prosecutor if the detective was going to testify about anything said by appellant's mother, she replied, "[y]eah, I believe the only thing he would say was she told me her phone number." The trial judge then cautioned counsel to "phrase their questions very carefully and very directly so as to not elicit inadmissible evidence."

Subsequently, the prosecutor returned to the topic of a phone number associated with appellant's mother, and she questioned Detective Purtell about whether he had used her phone number to search for recorded jail phone calls that were made by appellant:

> [PROSECUTOR]: Detective, earlier you testified that you had the opportunity to – as part of your investigation you listened to some phone calls that were recorded by the internal jail system that you believed belonged to Mr. Alexander; is that correct?
>
> [DETECTIVE PURTELL]: Yes.
>
> Q. Do you recall the date Mr. Alexander was arrested?
>
> A. I believe it was the 12th of December.
>
> Q. And what – strike that. Did you have as part of your investigation did you learn phone numbers that you believe belonged to Mr. Alexander's motion?
>
> A. Correct.
>
> [DEFENSE COUNSEL]: Objection.
>
> [DETECTIVE PURTELL]: I'm sorry.
>
> THE COURT: I apologize. Please repeat that question.
>
> Q. During the course of your investigation did you obtain a phone number that you believed belonged to Mr. Alexander's motion?
>
> THE COURT: And there's an objection to that?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: As it's posed, sustained.
>
> [PROSECUTOR]: Before Mr. Alexander was using his own identification number to make phone calls, how did you search for calls that you believed were being made by Mr. Alexander?

THE COURT: You can answer that.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DETECTIVE PURTELL]: We were – after talking to his mother I had his mother's phone number.

[DEFENSE COUNSEL]: Objection.

THE COURT: I'm sorry. Repeat your answer after –

[DETECTIVE PURTELL]: After talking to his mother I had her number.

THE COURT: Overruled.

Detective Purtell's testimony, that after talking to appellant's mother he had her phone number, was not hearsay. As discussed, an out-of-court statement is admissible as non-hearsay if it is offered to show that a person relied and acted upon the statement, rather than for the purpose of showing that the facts elicited in the statement are true. *Morales*, 219 Md. App. at 11 (citing *Purvis*, 27 Md. App. at 716). Detective Purtell did not testify as to Ms. Skinner's actual phone number, and the State did not offer her phone number, to establish that the number obtained actually belonged to her. Rather, the detective explained that he used known phone numbers, gathered from appellant's mother and girlfriend, to search for appellant's recorded jail phone calls. Thus, the challenged testimony was offered for the purpose of explaining the investigative steps taken by the detective to locate appellant's recorded jail phone calls. Accordingly, the trial court did not err in allowing Detective Purtell's testimony about Ms. Skinner's phone number.

IV.

Appellant contends that the trial court erred in admitting, over his objection, eleven crime scene photographs depicting the injuries of Davon Dozier, one of the victims, that were gruesome and overly-prejudicial.

At trial, the prosecutor argued that "out of the 100 and something photos taken," she chose only a limited number that showed specific pieces of evidence that she anticipated would be discussed at trial. The prosecutor averred:

> [PROSECUTOR]: The first picture, 56 shows the turned out left pocket of Mr. Dozier to show the items that were recovered from the left pocket. The next photo shows both pockets turned out to show that the items were recovered from within his personal property.
>
> The photographs of the injuries just depict where he was shot and what was documented. The closeups of the head photos show projectile evidence that's not depicted in the crime scene photos that was recovered. It was submitted under a different property number because it wasn't discovered until they started moving Mr. Dozier's body to recover each of those pieces of firearms evidence.
>
> THE COURT: And the fragments were located within his clothing as he was moved?
>
> [PROSECUTOR]: Correct. So they weren't depicted in the crime scene photos or with evidence markers, but they were submitted for evidence. I think it's important for the jury to understand where each piece of firearms evidence was recovered because it helps to tell the story of how he was shot, where he was laying when he was shot. I think it's important for the jury to see that some of those shots were fired when he was already laying on the ground, which would have caused the projectile to get stuck in the hood or to hit the concrete and flatten. So I think it's important to show the pieces of firearms evidence as they were discovered within Mr. Dozier's body to demonstrate where he was laying when he was shot and those

> items were not depicted in the crime scene photos so that they could be sterilized.

Defense counsel countered that the evidence was cumulative and that everything mentioned by the prosecutor could be explained and shown in the surveillance video that captured the shooting. The trial judge disagreed and balanced the probative value of the photographs with the potential for undue prejudice to appellant as follows:

> It's axiomatic that the picture tells a thousand words. The State's theory, as near as the court can tell at this phase of the proceedings is that Mr. Dozier was the victim of a homicide to the end that he was executed by having been shot 11 times. With no particular order known of course as to when certain shots were fired, which entered his body prior or after others.
>
> The court notes that any evidence which is, you know, admitted against any defendant by nature is prejudicial. The issue is whether the jury will be assisted in its fact finding function to determine as to certain evidence that was located, when it was located and how it was located, particularly evidence of shell casings, flattened bullet fragments, the position of the victim or at least where the victim was when he was shot. All of those items – I should say, all of those things are an issue. What's not an issue is that he was shot. And – but what is an issue is by whom he was shot.
>
> In addition, the court finds probative value with regard to these exhibits. Notwithstanding that they are graphic in nature and of course they're graphic in nature. They show a person who was the victim of a multiple gunshot wound caused death. The value of these photos in the view of the court because of other, if you will, pieces that the State is attempting to show through these photos to corroborate its case against this defendant is of a great probative nature and it does outweigh the undue prejudice. The court does not find undue prejudice will be visited upon the defendant by the admission of these ten [sic] and only ten [sic] photos. So respectfully, the objection is overruled and the exhibits shall be admitted. State's Exhibits, for the record, 39 through 74 are admitted. I'll explain that to the jury and I'm certainly going to note the

> Defense objection with regard to the items which were numbered 56 through 66.

Appellant argues, as he did below, that the subject photographs were cumulative to other evidence, that none of the photographs were relevant "to the only real contested issue in this case – the identity of the shooter," and that they "served no purpose other than to inflame the passions of the jury to the unfair prejudice" of appellant.

When considering the admission of photographic evidence, trial courts utilize a two-part test. "[F]irst, the judge must decide whether the photograph is relevant[.]" *State v. Broberg*, 342 Md. 544, 555 (1996). Maryland Rule 5-401 defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Court of Appeals has held that a photograph is relevant if it "'assist[s] the jury in understanding the case or aid[s] a witness in explaining his testimony[.]'" *Mason v. Lynch*, 388 Md. 37, 49 (2005) (quoting *Hance v. State Roads Comm'n*, 221 Md. 164, 172 (1959)). A determination whether evidence is relevant is a legal conclusion which we review without deference. *Smith v. State*, 218 Md. App. 689, 704 (2014).

If the trial court determines that a photograph is relevant, the judge must then balance its probative value against its prejudicial effect. *Broberg*, 342 Md. at 55. The admissibility of photographs under Maryland law "is determined by a balancing of the probative value against the potential for improper prejudice to the defendant[.]" *Bedford v. State*, 317 Md. 659, 676 (1989) (internal citations omitted). This balancing test is entrusted to the wide discretion of the trial court and we will not reverse its determination

unless there has been an abuse of discretion. *Broberg*, 342 Md. at 552. *See also Lovelace v. State*, 214 Md. App. 512, 548 (2013) ("'The trial court's decision will not be disturbed unless plainly arbitrary, …because the trial judge is in the best position to make this assessment.'") (quoting *Ayala v. State*, 174 Md. App. 647, 679 (2007)). In *Oesby v. State*, we discussed this highly deferential standard of review, stating:

> This final balancing between probative value and unfair prejudice is something that is entrusted to the wide discretion of the trial judge. The appellate standard of review, therefore, is the highly deferential abuse-of-discretion standard. The fact that we might have struck the balance otherwise is beside the point . . . . Reversal should be reserved for those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so.

Oesby, 142 Md. App. 144, 167-68 (2002).

The Court of Appeals has recognized that "all photographic evidence is in some sense cumulative. The very purpose of photographic evidence is to clarify and communicate facts to the tribunal more accurately than by mere words." *Johnson v. State*, 303 Md. 487, 503-04 (1985). Moreover, appellate courts have recognized that photographic evidence of crime scenes and autopsies of homicide victims are often relevant to a broad range of issues, including "'the type of wounds, the attacker's intent, and the modus operandi.'" *Roebuck v. State*, 148 Md. App. 563, 597 (2001) (quoting *Broberg*, 342 Md. at 553), *cert. denied*, 374 Md. 84 (2003). Here, the photographs were relevant and not impermissibly cumulative because, as the trial judge noted, each of them would assist the jury in its fact-finding function to determine where certain evidence, particularly shell casings and flattened bullet fragments, were located at the crime scene, when and how

that evidence was located, and the position of the victim, Mr. Dozier, when he was shot. The trial court did not err in making that determination.

With regard to the balancing of the probative value of the photographs and the potential for unfair prejudice, in *Bedford v. State*, 317 Md. 659 (1989), the Court of Appeals considered similar arguments to those raised by appellant in the instant case. In rejecting Bedford's arguments, the Court wrote:

> Bedford argues that the admitted photographs were irrelevant to the only issue contested, that of criminal agency. He points out that the pictures did not corroborate or discredit any element of the defendant's or the State's case, and merely established *what* happened, not *who* committed the crime. Citing several Pennsylvania and Maine opinions, Bedford alleges that where a photograph has only minimal significance, and no essential evidentiary value, the trial judge should be more inclined to exclude it if it is inflammatory. Nevertheless, we have not adopted such a test and require only that the trial judge not abuse his discretion.

Bedford, 317 Md. at 677.

Similarly, in *Broberg*, the Court of Appeals stated that "photographs do not lack probative value merely because they illustrate a point that is uncontested." *Broberg*, 342 Md. at 554 (citing *Grandison v. State*, 305 Md. 685, 730 (1986)).

The record before us clearly shows that the trial court considered and evaluated the arguments of the parties and the merits of the subject photographs. The trial court conducted the required balancing test and concluded that the probative value of the photographs was not outweighed by the potential for undue prejudice. The Court of Appeals has recognized that even though photographs "may be more graphic than other available evidence . . . we have seldom found an abuse of a trial judge's discretion in

admitting them in evidence." *Hunt v. State*, 312 Md. 494, 505 (1988). That is the case here. We find no abuse of the trial court's discretion in admitting the photographs in this case.

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