Circuit Court for Montgomery County
Case No. 132262

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 398

September Term, 2018

MARCUS ANTOINE NICHOLSON

v.

STATE OF MARYLAND

Graeff,
Leahy,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 24, 2019

A jury in the Circuit Court for Montgomery County convicted Marcus Antoine Nicholson, the appellant, of one count of robbery and one count of second-degree assault. The appellant was sentenced to 15 years for robbery; the assault conviction merged for sentencing.

The appellant presents six questions for review, which we have condensed and rephrased as five:

> I. Did the trial court err by refusing to give a missing evidence instruction?
>
> II. Did the trial court err by declining to give a requested curative instruction?
>
> III. Did the trial court err by not restricting the prosecutor's characterization of the DNA evidence in closing argument?
>
> IV. Did the trial court err by permitting the prosecutor to exceed the scope of cross-examination on redirect examination of a police witness?
>
> V. Did the trial court err by admitting in evidence an e-mail clarifying a payroll record? [1]

For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On January 3, 2017, Parfait Maah was attacked and his wallet was stolen as he was walking home from a bus stop near Gateshead Manor Way, in Silver Spring. Eight

[1] The sixth question the appellant poses is: "Under the cumulative error doctrine, did the foregoing errors affect the jury's verdict?" Because we are holding that the trial court did not err, we need not address this contention.

months later, on August 17, 2017, the appellant was indicted on charges arising out of that attack. The charges were tried to a jury over three days in January 2018. The following pertinent facts were adduced at trial.

On the night of the robbery, Maah was walking through the grounds of an apartment complex in Silver Spring when he heard someone running behind him. He glanced back and saw a man approaching with one arm raised above his head. Maah tried to step out of the man's way, but the man pushed him. Maah and the man began to struggle, eventually ending up on the ground. The man was holding a "long knife" "in a brown case." He stole Maah's wallet, containing $65 in cash and credit cards, and an immigration document. As the man attempted to run away, Maah grabbed hold of his leg. The man wriggled out of Maah's grasp, but his shoe came off and Maah held onto it.

Maah walked the rest of the way home and called 911. Within a few minutes, Officer Michael Peitzmeier, with the Montgomery County Police Department ("MCPD"), responded to Maah's home. Maah gave Officer Peitzmeier the assailant's shoe and led him back to the scene of the robbery. Maah described his assailant as a "dark-complected Black male, approximately between 5 foot 9 and 5 foot 10, with an average build[and] . . . shoulder-length black dreadlocks" wearing a "black . . . trench coat, black pants, and black basketball shoes."

At the scene of the robbery, Officer Peitzmeier located some of Maah's belongings on the ground. He gave the assailant's shoe to MCPD Officer Thomas Kelly, with the K-9 division, and, using the scent from the shoe, Officer Kelly and his

bloodhound, Allie, attempted to track the assailant. Allie tracked the scent to a nearby apartment building, but she did not follow the scent to a particular apartment. Officer Kelly returned the shoe to Officer Peitzmeier, who bagged it for forensic analysis.

MCPD Detective Wayne Cummings was the lead investigator assigned to the case. He spoke to Maah by telephone on January 10, 2018, and asked him if he would be able to identify his assailant. Maah replied that he "wasn't sure" because it had been "dark" and he "didn't think he saw [his assailant's] face."

The next day, Detective Cummings met with Maah in person to obtain a buccal swab for DNA analysis. During that meeting, Maah gave a description of his assailant consistent with the one he had given to Officer Peitzmeier and added that the man appeared to be between the ages of 25 and 33. According to Detective Cummings, during this meeting, Maah said "he thought he could" identify his assailant. As we shall discuss in more detail below, that statement was not memorialized in Detective Cummings's investigative notes, as they were produced by the State.

By July 2017, the appellant had been identified as a suspect.[2] On August 3, 2018, Detective Cummings served a DNA search warrant on the appellant and obtained a buccal swab from him for DNA analysis. Detective Cummings noted that the appellant's race, height, age, build, and hairstyle were consistent with the description Maah had

[2] The prosecutor advised the court, outside the hearing of the jury, that the DNA information recovered from the assailant's shoe was entered into the FBI's Combined DNA Index Systems database and resulted in "a hit" for the appellant.

given of his assailant. Detective Cummings did not ask Maah to view a photographic array.

At trial, Maah testified that the appellant "look[ed] like" his assailant.

Mary Hardy, a forensic scientist in the forensic biology unit of the MCPD's crime laboratory, testified that she took two swabs from the inside of the assailant's shoe. From the swabs, she obtained a "mixed DNA profile of at least three contributors, indicative of a major male contributor." She explained that the "major contributor" is the person whose DNA is present in the highest quantity. DNA analysis revealed that the appellant's DNA was "included as the major contributor to the [mixed] DNA profile" obtained from the interior of the shoe. We shall discuss Ms. Hardy's testimony in greater detail below.

The appellant chose not to testify. He called his grandmother, Carolyn Nicholson, as his only witness. She testified that she and her husband (the appellant's grandfather) were living in a house in Lanham, in Prince George's County, and that the appellant had been living with them since 2008. She further testified that, in January 2017, the appellant started a job with Bates Trucking and Trash Removal ("Bates"). She could not recall the date in January 2017 he had started that job. On the days the appellant worked for Bates, he started very early in the morning and finished by the afternoon, and his grandfather gave him a ride to work.

After the defense rested, the State admitted into evidence, over objection, a copy of certified payroll records from Bates and an email clarifying those records. Together,

these documents showed that the appellant began working for Bates no earlier than January 6, 2017 - - three days after the robbery.

The jurors were instructed on four counts: armed robbery, robbery, first-degree assault, and second-degree assault, denoted on the verdict sheet as Counts 1, 1(a), 2, and 2(a), respectively. The jury acquitted the appellant of Counts 1 and 2 and convicted him of Counts 1(a) and 2(a), which were the lesser included offenses. After sentencing, a timely appeal was noted.

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

DISCUSSION

I.

Missing Evidence Jury Instruction

As explained, during his investigation, Detective Cummings spoke to Maah three times: by telephone on January 10, 2017; in person at Maah's home on January 11, 2017; and by telephone on July 6, 2017. Detective Cummings's investigative notes, which were admitted in evidence at trial, show that on January 10, 2017, Maah told Detective Cummings that "it was dark [and the] incident happen[ed] quick" and that Maah "did not see [the] suspect's face but knows his body build." The notes from January 11, 2017 reflect that Detective Cummings obtained a buccal swab from Maah. The notes from July 6, 2017 reflect that Maah told Detective Cummings that because "it was dark when [the] incident occurred[, h]e was not sure if he could ID [a] photograph [of his assailant]."

On direct examination, Detective Cummings testified that when he met with Maah on January 11, 2017, Maah told him that he thought he might be able to identify his assailant. On cross-examination, Detective Cummings acknowledged that there was nothing to that effect in the investigative notes he gave to the prosecutor. Detective Cummings testified he was certain that Maah had made that statement to him, however, and suggested that he might have made a notation of it:

> [DEFENSE COUNSEL]: . . . anywhere in your notes does it say Mr. Maah told you he believed he could identify the suspect?
>
> [DETECTIVE CUMMINGS]: That's correct.
>
> [DEFENSE COUNSEL]: It's not written down anywhere?
>
> [DETECTIVE CUMMINGS]: I'm not going to say anywhere, *but it's not in these notes.*
>
> [DEFENSE COUNSEL]: All right. Did you take other notes?
>
> [DETECTIVE CUMMINGS]: There are times where I write things down. I'm, I'm saying, *this is the majority of my notes*. He said it. It's not written down, though.
>
> [DEFENSE COUNSEL]: So your testimony is that you took other notes from your conversations with Mr. Maah?
>
> ***
>
> [DETECTIVE CUMMINGS]: *It's a possibility that there are other notes of things written down.*
>
> [DEFENSE COUNSEL]: And did you turn those notes over to the state's attorney?
>
> [DETECTIVE CUMMINGS]: No.
>
> [DEFENSE COUNSEL]: Did you destroy those notes?

> [DETECTIVE CUMMINGS]: Well, yeah. If they – *if she doesn't have them, they are destroyed*.

(Emphasis added.)

Defense counsel included in his requested jury instructions a modified version of Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:29.[3] He argued that the jurors should be instructed that if they believed that Detective Cummings had made notes that he did not turn over or that he destroyed, "then they can draw an inference that that might have been unfavorable to the State."

The prosecutor objected to the requested instruction. The court declined to give it, remarking that "cross-examination cover[ed] everything" and that, based upon Detective Cummings's testimony, any notes that may have been destroyed would have been "very favorable" to the State.

After the court instructed the jurors, it asked counsel whether they were "satisfied." Defense counsel asked to approach and requested an additional instruction concerning a stipulation. He did not object to the court's failure to give the requested missing evidence instruction.

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[3] MPJI-Cr 3:29 provides:

> You have heard testimony about (name), who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

On appeal, relying upon *Cost v. State*, 417 Md. 360 (2010), the appellant contends the trial court erred by not giving the requested instruction. He argues that because identity was a key issue at trial, Detective Cummings's testimony that he may have made and then destroyed investigative notes of Maah's saying that he thought he could identify his assailant took on significance and improperly bolstered Maah's in-court identification of the appellant.

The State counters that this issue is unpreserved because the appellant failed to make a timely objection, as required by Rule 4-325(e), and on the merits the requested instruction was not warranted and the court did not err by declining to give it.

We begin with the preservation question. Rule 4-325(e) states that a party may not "assign as error the giving or the failure to give an instruction unless the party objects on the record promptly *after* the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." (Emphasis added). Here, after the instructions were given, defense counsel requested an additional instruction on a topic unrelated to his requested missing witness instruction, but did not object to the court's failure to give a missing evidence instruction. Clearly, then, preservation was not actually accomplished under Rule 4-325(e). Nor was the rule substantially complied with. Substantial compliance will be recognized rarely, *Sims v. State*, 319 Md. 540, 549 (1990), and then only when the rule effectively, although not technically, was followed. That did not happen here. Accordingly, the missing evidence instruction issue is not properly before us for review.

Even if this issue were preserved, we would not find merit in it. Pursuant to Rule 4-325(c), the court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Whether to give an instruction concerning an inference that may be drawn from the evidence is subject to trial court discretion, and therefore is reviewed for abuse of discretion. *Harris v. State*, 458 Md. 370, 406 (2018).

In *Patterson v. State*, 356 Md. 677, 681 (1999), the Court held that "a party is generally not entitled to a missing evidence instruction." It reasoned that counsel may argue the adverse evidentiary inference to the jury in summation, but the court need not instruct on it. *Id*. at 685. A little over a decade later, in *Cost*, 417 Md. at 360, the Court revisited that issue and held that the "unusual facts" in that case amounted to an "exceptional circumstance" that required the trial court to give a missing evidence instruction. *Id*. at 378-80. In *Cost*, the defendant was charged with crimes arising from the stabbing of a fellow prison inmate inside a prison cell. The investigative officer failed to collect any evidence from inside the cell and the cell was cleaned before a detective from the Internal Investigative Unit arrived to examine it for physical evidence. At trial, the defense argued that the physical evidence could have been exculpatory and requested a missing evidence instruction, which was denied. After being convicted of reckless endangerment, the defendant appealed.

The Court of Appeals reversed. It noted that physical evidence from the crime scene was "highly relevant," was the type of evidence that ordinarily would be collected

and analyzed, and was "completely within State custody." *Id*. at 380. Under those circumstances, the defendant was entitled to a jury instruction advising the jurors that they were permitted, but not required, to draw an inference that, had the missing evidence been presented, it would have been unfavorable to the State's case. *Id*. at 381. The Court emphasized that its holding did not require trial courts to give missing evidence instructions "as a matter of course, whenever the defendant alleges the non-production of evidence that the State might have introduced." *Id*. at 382.

The logic that produced the holding in *Cost* does not apply to the facts in the case at bar. In *Cost*, the State failed to preserve from a crime scene crucial physical evidence that the defendant maintained could have exculpated him. Here, Detective Cummings testified that he might have made a contemporaneous written notation of Maah's January 11, 2017 statement that he thought he could identify his assailant, but if he did make such a notation and it was not in the notes he provided to the prosecutor, then he must have destroyed the notes. Unlike the physical crime scene evidence in *Cost*, which clearly had existed, and could have been exculpatory, here, the "missing" notes may never have existed at all and, if they had existed and had been produced, they would not have exculpated the appellant, but would have been helpful to the State. Defense counsel, recognizing this, argued in closing that Detective Cummings's investigative notes were the definitive record of Maah's statements; he did not suggest that any notes were missing. This plainly was not a case warranting a missing evidence instruction and the trial court did not abuse its discretion by declining to give one.

II.

Request for Curative Instruction

In her supplemental "Forensic Biology Report" ("DNA Report"), which was admitted in evidence, Ms. Hardy wrote that analysis of the sample obtained from the "interior of [the assailant's] shoe" produced a "[m]ixed DNA profile of at least 3 contributors; indicative of a major male contributor[.]"[4] She concluded in her report that the appellant was "included as the major contributor" of the DNA and that the "[m]inor DNA profile" was not "suitable for comparisons[.]"

At trial, Ms. Hardy was called as an expert witness for the State. On direct, she defined "touch DNA" as DNA collected from skin cells or sweat shed by a person who came into contact with an object. She explained that when "people have consistent, constant, repetitive contact with a particular item," the probability of collecting useable touch DNA increases. She further explained a related "practice" known as "wear DNA":

> So when I speak of wear DNA, my goal here is to try to identify a particular person that – or the primary person that was wearing an item. So similar to touch DNA, it's just another form of touch DNA. Essentially, the theory is if you wear an item repeatedly, then over time your skin cells, your sweat – sweat is a bodily fluid – are going to build up over time, and we're going to have accumulation of your DNA, even if you wash it. You know, generally we still have an accumulation of your DNA, and so we're able to identify someone who is the primary wearer of a particular item. So that's another type of sampling technique that we utilize.

[4]Ms. Hardy's initial DNA Report was completed before the appellant was identified as a suspect. That report analyzed the sample from the shoe and compared it to the known sample for Maah.

At that point, defense counsel asked to approach. At the bench, he complained that this was the "first time [he'd] heard about a primary wearer analysis" and that it was a "little bit of a surprise" to him because it wasn't in Ms. Hardy's DNA Report. The prosecutor responded that Ms. Hardy would be testifying about "what her expectations would be in terms of if there's a primary wearer" and that the DNA Report adequately disclosed that opinion, given that it discussed the presence of a major contributor and minor contributors to the DNA sample. Defense counsel replied that he did not take issue with testimony about the "quantity of DNA" but he did take issue with Ms. Hardy's offering an opinion as to who was "the primary wearer of the shoe[.]" The prosecutor answered, "I don't think she's going to render that opinion[,]" but elaborated that Ms. Hardy might testify that she would expect a "primary wearer" to be the major contributor. Defense counsel objected to Ms. Hardy's offering that opinion, arguing that it had not been disclosed in her report. The court reserved ruling, reasoning that it needed more testimony to elucidate Ms. Hardy's opinions before doing so.

On resumed direct examination, the prosecutor asked Ms. Hardy to describe her analysis of the shoe. She replied that she had "collected a sample of DNA for supposed wearer DNA" with the "objective" of "identify[ing] who could have been the primary wearer of this particular shoe." Defense counsel asked to approach again, but the court declined that request and directed the prosecutor to "lay a foundation[.]" The prosecutor asked Ms. Hardy why she had sampled the inside of the shoe and she replied: "I was

interested in trying to obtain DNA from the primary wearer." Defense counsel objected, and the court took a recess to hear additional argument.

The court questioned Ms. Hardy about the basis for her opinions, asking if she was "equating a primary wearer with who's got the most DNA that you found on the shoe?" She replied, "Yes." The court asked why she referred to such a person as the "primary wearer" and proposed some hypotheticals to assess whether a person who had worn a shoe one time, but under extreme conditions, might leave behind more DNA than the "primary wearer." Ms. Hardy acknowledged that this was possible, but opined that, ordinarily, she would expect that the person who wore the shoe most often would be the major contributor to any DNA sample collected from the interior of the shoe. The court noted that Ms. Hardy had not used the term "primary wearer" or even "wearer" in her report. Ultimately, the court ruled that Ms. Hardy could not testify about the "primary user, primary wearer" of the shoe, but she could testify, based upon her expertise, "where she would expect to find a wearer of the shoe to leave DNA[.]"

At the conclusion of the bench conference, defense counsel requested a "curative instruction as to the primary wearer comments that were made earlier." The court denied the request, noting that it did not "want to bring any more attention to it," that mentioning it again would be "undue reference to it," that it did not want to "tell the jury that whoever the major contributor [was] wasn't the primary wearer," and that, in the court's view, such an instruction was not needed at that time. The court offered to revisit the issue at the end of cross-examination, as necessary.

On resumed direct examination, Ms. Hardy testified that although she would "expect a majority of DNA on the interior of a shoe to originate from a person or persons that have worn . . . a particular item," there were "other ways DNA can be transferred" to an item of clothing or footwear. She explained that, in this case, she had found a "mixture [of DNA from] at least three individuals" and the major contributor's DNA accounted for an average of nine times the amount of DNA as the minor contributors.

The appellant contends the trial court erred by denying his request for the curative instruction because Ms. Hardy gave "opinions that were not included in her report and were never disclosed to the defense." The State responds that we should decline to address this issue because the testimony the appellate argues necessitated a curative instruction was cumulative of other testimony that was received in evidence without objection. On the merits, the State asserts that the trial court's ruling was not an abuse of discretion.

On preservation, we conclude that this issue is properly before us. Defense counsel objected as soon as it became apparent that Ms. Hardy intended to offer an opinion about who the "primary wearer" of the shoe was and objected to each subsequent use of that term, until the court ruled that Ms. Hardy could not use that term during her continued testimony. This was sufficient to preserve this issue for appellate review.

We turn to the merits. When a trial court finds that inappropriate material has come before the jury, its decision whether to grant a curative instruction is a matter of discretion, which we review for abuse. *Carter v. State*, 366 Md. 574, 587-88 (2001).

Here, before the request for a curative instruction was made, Ms. Hardy had testified three times that her objective in swabbing the inside of the assailant's shoe was to identify the "primary wearer[.]" She had not opined that the appellant was the "primary wearer" of the shoe, however, and the defense objection and the court's favorable ruling effectively precluded her from doing so. Under the circumstances, the court decided that a curative instruction was not necessary at the time it was requested because Ms. Hardy had only begun to explain her methodology and an instruction repeating the "primary wearer" nomenclature would probably cause more harm than good. The court also recognized that it would not be proper to give a curative instruction that would imply to the jurors that, when time came for them to deliberate, they could not consider whether the "major contributor" to the DNA was the person who primarily wore the shoe. The court agreed to revisit the issue at the end of cross-examination, if that were necessary.

On resumed direct examination, Ms. Hardy explained that she chose to swab the inside of the assailant's shoe because, as common sense would dictate, that is where she would expect a wearer of the shoe to shed DNA. She elaborated, however, that a non-wearer of an item, such as the shoe in this case, also can transfer DNA to the item in various ways. This testimony clarified that the major contributor of the DNA found in the shoe would not necessarily be the primary wearer of the shoe, thus ameliorating any potential prejudice caused by Ms. Hardy's initial references to the "primary wearer" analysis. (It appears that defense counsel agreed, as he did not renew his request for a curative instruction at the close of cross-examination.)

It was reasonable for the court to want to avoid repeating the "primary wearer" phrase at the point in Ms. Hardy's testimony when the objection was made and granted; and we cannot say that there was prejudice to the defense, especially given the curative effect of Ms. Hardy's later testimony and the fact that the evidence established that the shoe in this case actually had been worn by the assailant during the attack, and was not merely found elsewhere. The court did not abuse its discretion in denying the request for a curative instruction.

III.

Closing Argument

In her closing argument, the prosecutor said:

> Mr. Maah, when this robbery occurred had no idea what the DNA would show. He told you when. We know whether the robbery was. And he told you the description [of the robber] not knowing whose DNA was in that shoe.
>
> But the description, the race, the complexion, the hair, the age, the build, the clothing. And low and behold *the science, which doesn't lie,* months later shows us that the, this DNA profile in the shoe, there was only one DNA profile in this shoe that rose to the threshold level for comparison and it was the defendant[']s.

(Emphasis added). Defense counsel objected without referencing what part of the prosecutor's argument he was complaining about. The court overruled the objection.

Then, two other times in her closing argument, the prosecutor used the phrase "[t]he science does not lie." Defense counsel did not object either time. He did object to a further reference by the prosecutor to the fact that there was only one major contributor to the DNA in the shoe, that being the appellant. (That objection was overruled as well).

Now, on appeal, the appellant contends his initial objection was to the prosecutor's use of the phrase "the science, which does not lie," and that the trial court erred by overruling the objection, because the phrase was an "improper characterization of the DNA evidence." The State responds that this issue is waived, as the defense failed to object when the phrase was repeated, twice, in closing, and that it lacks merit in any event.

We agree that the appellant failed to preserve this issue for review. To preserve a challenge to closing arguments, counsel must object "either when the argument was made or immediately after the prosecutor's initial closing argument was completed." *Jones-Harris v. State*, 179 Md. App. 72, 101-02 (2008). In the case at bar, defense counsel objected after the prosecutor pointed out that the DNA evidence for the shoe showed that the appellant was the only major contributor. In the sentence in which she made that assertion, she remarked that science "doesn't lie." There was nothing in the objection that would have informed the court that that characterization - - as opposed to the substantive point the prosecutor was making - - was what was being objected to. And when the prosecutor twice later made the same "science doesn't lie" remark, defense counsel did not object. Nor did he raise the issue at the end of the prosecutor's initial closing argument. Without any clear objection to the "science doesn't lie" remarks, the defense did not adequately inform the court of his objection so that the court could have taken specific action. Rather, it appears that no objection was made and this contention merely is an appellate afterthought.

Even if this issue were properly before us, we would not find any merit in it. Counsel is afforded wide latitude during closing arguments. *Degren v. State*, 352 Md. 400, 429-30 (1999). The prosecutor's challenged comments fell within the realm of permissible argument and the trial court did not abuse its discretion by declining to restrict it.

IV.

Scope of Redirect Examination

On direct examination of Detective Cummings, the prosecutor asked why he had not executed a search warrant at the appellant's home to search for evidence, such as the other shoe or Maah's wallet. Detective Cummings replied that there were "several reasons[,]" including that he did not know the appellant's address.

On cross-examination, defense counsel asked Detective Cummings whether he had asked the appellant for his address when he served him with the DNA search warrant. Detective Cummings replied that he was not sure, but he did not think he had asked.

On redirect examination, the prosecutor returned to the issue of the appellant's address:

> [PROSECUTOR]: Now, [on] . . . July 6th, 2017, when you had applied for the statement of charges . . ., what information, if any, did you put in your application regarding the defendant's address?
>
> [DETECTIVE CUMMINGS]: Unknown.
>
> [PROSECUTOR]: Unknown. Now, [defense counsel] questioned you about, when you met with the defendant on August 3rd and obtained his buccal swab, whether you had asked him what his address was on that date, right?

[DETECTIVE CUMMINGS]: Yes.

[PROSECUTOR]: Now, in fact, when you met with the defendant, did you observe any tattoos on his person?

[DETECTIVE CUMMINGS]: Yes.

[PROSECTOR]: What tattoos did you observe?

[DETECTIVE CUMMINGS]: Well, I know one tattoo that caught my eye was 38.

Defense counsel objected and asked to approach. At the bench, defense counsel anticipated that the prosecutor was going to attempt to establish that the appellant used to "live[] at 3800 Castle Boulevard," an apartment complex near the location of the robbery. He argued that that was beyond the scope of his cross-examination. The court disagreed, remarking that it was "proper redirect" given that defense counsel "brought up the issue of [the appellant's address.]"

On resumed redirect examination, Detective Cummings testified that he had asked the appellant if he "rep[resented] 38[,]" adding that he knew "38 to be a street gang[.]" The latter comment was met with an objection, which was sustained, and the court granted defense counsel's motion to strike that statement. The prosecutor then asked Detective Cummings whether, in his experience, he "c[a]me to know the number 38 to represent the area of 3800 Castle Boulevard in Silver Spring?" Detective Cummings answered, over objection, "That area and the surrounding neighborhood." He further testified, without objection, that the appellant had told him that he had grown up in that area and was "never going to forget where . . . [he came] from."

The appellant contends the trial court committed a "clear abuse of discretion" by permitting the prosecutor to elicit testimony about the 38 tattoo and its meaning on redirect examination of Detective Cummings because that evidence "far exceeded the scope of defense counsel's question regarding whether the detective had asked [the appellant] for his current address." (Footnote omitted.) In the appellant's view, that error was compounded because it led Detective Cummings to make the highly prejudicial comment that he knew 38 to be a "street gang."

The State responds that the breadth of the trial court's discretion to control the scope of redirect examination is wide and that it was not exceeded in this case. We agree.

During redirect examination of a witness, the trial court has discretion to permit "inquiry into new matters not within the scope of cross-examination" to "'develop[] facts made relevant during cross-examination[.]'" *Daniel v. State*, 132 Md. App. 576, 583 (2000) (quoting *Bailey v. State*, 16 Md. App. 83, 110-11 (1972)). In the instant case, on cross-examination of Detective Cummings, defense counsel elicited testimony that Detective Cummings had not asked the appellant for his address, or at least could not recall having asked him. The trial court did not abuse its discretion by permitting the prosecutor to explore, on redirect, whether Detective Cummings had asked the appellant questions concerning his past addresses and his connection to the area where the robbery occurred. Further, the trial court did not commit any error with respect to Detective Cummings's blurted reference to "38" being a "street gang," given that it took immediate

action to strike that remark from the record at defense counsel's request and defense counsel did not seek any additional relief. *See, e.g., Morales v. State*, 219 Md. App. 1, 12-13 (2014) (when a defendant receives "all the relief that he sought with respect to . . . inadmissible testimony" there can be no error).

V.

Business Records Exception

On the first day of trial, Monday, January 22, 2018, the prosecutor advised the court that she had received an email from defense counsel at 4:33 p.m. on Friday, January 19, 2018, revealing that he would be calling the appellant's grandparents and they were expected to testify that, in January 2017, the appellant was living with them in Prince George's County and was working at a trash company, and that they had transported him to work. According to defense counsel, the grandparents had no specific recollection of January 3, 2017, however, and could not recall where the appellant was that day.

The prosecutor moved to exclude the grandparents' testimony because defense counsel had not timely disclosed them as witnesses and because, if they could not state with any specificity whether they had transported the appellant to work on January 3, 2017, their testimony would not be relevant. Defense counsel responded that he had spoken to the grandparents for the first time on January 19, 2017, and had immediately disclosed their anticipated testimony to the prosecutor. He asserted that the grandparents were not alibi witnesses, because even if they had driven the appellant to work on January 3, 2017, that would not provide an alibi for the night of January 3, as his work

hours were from approximately 5 a.m. to mid-afternoon. Defense counsel argued that their testimony nevertheless was relevant because it tended to show that the appellant was gainfully employed and living in another county, making it less likely that he would travel to Silver Spring to commit a robbery.

The court ruled that the appellant's grandparents could testify. The prosecutor inquired about the name of the trash company for which the appellant had worked, and defense counsel agreed to provide her with that information.

Later during the trial, the defense called Ms. Nicholson, the appellant's grandmother, who testified that the appellant began working for Bates "sometime in January [2017]," but that she could not recall the precise date. On cross-examination, the prosecutor clarified that the appellant was a "day laborer" for Bates, meaning that he only worked on days that Bates needed him. Ms. Nicholson testified that she had not contacted Bates to determine whether the company had any employment records for the appellant. After Ms. Nicholson's testimony concluded, the defense rested.

The following day, the prosecutor moved to admit into evidence a "Vendor QuickReport" from Bates that showed that the appellant had received his first paycheck, for $240, on Friday, January 13, 2017, and an email from Latoya Cloud, a Bates employee in the accounts payable department, explaining that each paycheck covers a period from Friday through Thursday at a rate of $80 per day, and that checks are distributed each Friday for the prior pay period. Thus, the paycheck the appellant received on January 13, 2017 covered the pay period from Friday, January 6, 2017

through Thursday, January 12, 2017, and paid the appellant for three days work. Ms. McCloud had signed a business records certification for the payroll records.

Defense counsel objected on the basis of relevancy. He argued that the payroll records were not probative because the appellant's employment with Bates was not an alibi, and that the records could mislead the jury and were "fairly collateral." The court overruled the objection and admitted the records, explaining that, given its prior ruling permitting the defense to call Ms. Nicholson as a late-disclosed witness, it was "only fair" to permit the State to show that the appellant's employment with Bates post-dated the robbery.

The appellant contends on appeal that the court erred by admitting the e-mail from Ms. McCloud under the business records exception to the hearsay rule.[5] He asserts that the e-mail was not a business record and was "highly prejudicial" to the appellant because by admitting it, the court left the jurors with the impression that the appellant had presented a false alibi defense.

[5] As pertinent, Rule 5-803(b)(6) permits the introduction of

> [a] . . report, record, or data compilation of acts[or] events . . . if (A) it was made at or near the time of the act[or] event . . ., (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the . . . report, record, or data compilation.

We agree with the State that this issue was waived when the appellant objected to the introduction of the employment records and the e-mail only on the grounds that they were irrelevant and potentially misleading. *See Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal."). Even if this issue were not waived, we would hold that any error in admitting the e-mail clarifying the certified business record was harmless beyond a reasonable doubt. The crucial evidence tying the appellant to the robbery was his DNA on the shoe that Maah pulled from his assailant's foot. That evidence was not rebutted by evidence that the appellant worked as a day laborer in January 2017 because, as the appellant points out, even if he had been employed on January 3, 2017, he still could have committed the robbery. The appellant was not prejudiced by any error in the admission of evidence on the issue of his employment with Bates.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.