Circuit Court for Baltimore County
Case No. 03-K-16-003419

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1303

September Term, 2017

MICHAEL KYRI ISAAC, JR.

v.

STATE OF MARYLAND

Meredith,
Graeff,
Beachley,

JJ.

Opinion by Graeff, J.

Filed: September 21, 2018

On April 19, 2017, Michael Kyri Isaac, Jr., appellant, was convicted by a jury, in the Circuit Court of Baltimore County, of attempted second degree murder, home invasion, robbery with a dangerous weapon, first degree assault, use of a firearm in the commission of a crime of violence, theft of a motor vehicle, theft of property having value between $1,000 and $10,000, wearing, carrying, or transporting a handgun on his person, and wearing, carrying, or transporting a handgun in a motor vehicle.[1] The court sentenced appellant to a total of 55 years' imprisonment, all but 30 years suspended.[2]

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in denying appellant's motion to sever?
2. Did the circuit court err in precluding relevant admissible evidence material to appellant's defense?
3. Did the circuit court err in permitting inadmissible lay opinion testimony?
4. Did the court err in precluding relevant and admissible testimony and restricting cross-examination related to latent prints of another individual?

[1] Appellant was tried jointly with Jacques Maurice Jones. This Court affirmed Jones' convictions in an unreported opinion, *Jones v. State*, 2018 WL 3414220 (Md. App. July 13, 2018).

[2] The circuit court sentenced appellant, as follows: attempted second degree murder, 25 years' imprisonment, all but 15 years suspended, with five years' probation; home invasion, 25 years, all but 15 years suspended, to be served consecutively; armed robbery, 15 years' concurrent; unlawful taking of a motor vehicle, five years consecutive, suspended; possession of a handgun, three years concurrent; wearing, carrying, or transporting a weapon in a vehicle, three years concurrent; use of a firearm in the commission of a crime of violence, five years, without the possibility of parole, concurrent.

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of May 29, 2016, Ryan Johns and two friends, Antwarn and Daron Jones, went to Baltimore City in Mr. Johns' 2003 black Mercedes Benz. After having drinks, they went to the Horseshoe Casino.

When Mr. Johns and Antwarn left the casino, the sun was rising. Mr. Johns drove Antwarn, who was seated in the rear passenger area, back to Mr. Johns' home in Woodlawn, where he lived with his mother and her friend. He parked the car in the driveway and proceeded into the house, while Antwarn remained asleep in the car. When Antwarn woke up at approximately eight or nine in the morning, he discovered that his shoes, watch, and cellphone were missing. Assuming he was the victim of a prank, Antwarn headed into Mr. Johns' house to collect those items.

Antwarn woke Mr. Johns and asked if he had seen his missing items, but Mr. Johns had not seen them. They then tried to "piece together the night." Antwarn remained at Mr. Johns' residence until approximately 2:00 p.m., when he left with his fiancé.

At approximately 5:00-5:30 p.m., while Mr. Johns was alone in the house on the second floor, he heard a "big boom." He saw an older gentleman, whom he later identified as Jacques Jones, entering the house. When Mr. Johns asked Jones "what's up," Jones retrieved a handgun, told Mr. Johns to "shut the fuck up," and walked up the steps toward him. Jones asked Mr. Johns "where the money at," stating that he "knew [Mr. Johns] had money" because he could smell it. A younger guy, who Mr. Johns identified as appellant,

also came up the stairs telling Mr. Johns to "stop fucking playing" and demanding to know "[w]here the money [was] at?" Neither man had a mask, but they both wore medical gloves.

The men went room to room, going through Mr. Johns' closets and drawers, and then going to Mr. Johns' mother's room. They were asking about money, and Mr. Johns advised that he did not have any money on him, but he had a bank card in his wallet, which was downstairs in his jeans. When Mr. Johns lifted his jeans to get his wallet, his car keys fell out, and appellant stated: "Oh, you got a Benz. Oh, we taking that," and he then took the keys.

Appellant and Jones then took televisions from the house out to the Mercedes. Appellant noticed that Mr. Johns' neighbors were outside taking pictures of him and Jones. He came upstairs, put a revolver to Mr. Johns' face, and told him that his "neighbors are about to get your head blown off."

Appellant asked about Mr. Johns' cellphone, and Mr. Johns responded that it was in his bedroom. Appellant made Mr. Johns go into the upstairs bathroom while he looked for the phone, and Mr. Johns, noticing an opportunity to flee, ran down the steps. Mr. Johns tripped and fell, however, and appellant shot Mr. Johns in the arm. Mr. Johns ran outside to one of his neighbors' homes.

Another neighbor, Sabra Spears, called 911. She testified that, shortly before Mr. Johns ran out of the house, at approximately 5:45 p.m., she observed a blue Hyundai Sonata, with three men inside, parked outside of her house and another vehicle pull up

behind the Sonata. One of the men from the Sonata entered the passenger side of the second vehicle, and that vehicle proceeded to leave. The other two men, who were wearing blue medical gloves, exited the Sonata and walked into Mr. Johns' residence.

Concerned, Ms. Spears called another neighbor and told him what she observed. Both neighbors decided to go outside to assess the situation and determine if they should call the police. They observed the Sonata parked out front idling, and they saw one of the two men carrying items out of the house and placing them inside a parked Mercedes. Shortly thereafter, they heard a "pop, pop, pop" and observed someone running out of Mr. Johns' home toward them requesting help. Ms. Spears went into her house and locked the door, and Mr. Johns went into the house of their neighbor, who called Ms. Spears and asked her to call 911, which she did.

Detective Hartwig, a member of the Baltimore County Police Department, was the first officer to respond to the scene.[3] The detective observed a television in the driveway, and the front door to the residence was open.[4] Additional police officers arrived, and during a protective sweep of the residence, the officers observed a pair of gloves on the stairs and another pair in front of an upstairs bedroom door. The house appeared to be ransacked, and one of the televisions from the residence appeared to have been struck by a bullet.

[3] Detective Hartwig did not provide his or her first name.

[4] Unless designated otherwise, the law enforcement officials listed herein are members of the Baltimore County Police Department.

An officer with the forensic services unit photographed the Sonata, which was still parked and idling outside the house. In the backseat, a vehicle license plate was visible. After receiving consent to search the home, the police recovered two bullet projectiles, one from the home's entry doorway frame and the second from the dining room.

Emergency medical technicians treated Mr. Johns on the scene for a gunshot wound to his right arm. They then took him to the hospital for further treatment. At the hospital, Detective Ronald Long conducted a brief interview with Mr. Johns.

After appellant was released from the hospital, he was transported to police headquarters and shown a photo array.[5] Mr. Johns identified appellant as the person who shot him, stating: "He looks, this, this is who I believe shot me. . . . But I could be wrong."

On May 31, 2016, members of the forensic team executed a search and seizure warrant on the Sonata, which had been towed back to police headquarters. They recovered from the rear passenger area of the car a wallet with Jones' Maryland driver's license and social security card, as well as a cellphone and a license plate belonging to a vehicle owned

[5] Detective Ronald Long prepared a photographic array using the registration information from the license plate in the Sonata. He compiled pictures of five separate individuals from a computer database, each with similar characteristics and skin tone to that of appellant, the owner of the license plate. After obtaining the photographs, Detective Long utilized a "double blind" procedure to show the photographs to Mr. Johns. The double blind procedure involved stapling each of the photographs consisting of appellant and five other individuals to a file folder, identifying those file folders with numbers, shuffling the file folders, and then having a separate officer, who was not involved in compiling the photographs, present the numbered folders to Mr. Johns to identify the suspect. Detective Long observed from his desk in a separate room from where the identification took place.

by appellant and his grandmother, Consundra Bradford.[6] From the front passenger seat, the police observed folded papers containing an Enterprise Rent-A-Car rental agreement that identified Ms. Bradford as the renter and an earnings statement from appellant.

The police subsequently recovered Mr. Johns' Mercedes in Baltimore City and transported it to the headquarters of the Baltimore County Police to be searched and processed.[7] Fingerprints were recovered and tested, but they did not match those of either appellant or Jones.

Detective Long testified that, during the course of the investigation, officers investigated the whereabouts of the Sonata utilizing tag readers positioned around the area. It was determined that, on May 30, 2016, at the time the car was being rented by Ms. Bradford and appellant, the car was located at the Horseshoe Casino in Baltimore City. Pursuant to a subpoena request, and utilizing the names of the suspects and victim, and each vehicle's license plate numbers, Charles McCreedy, the Director of Surveillance and Risk for the Horseshoe Casino, searched the casino's surveillance system. The evidence showed that the Mercedes and the Sonata were in the casino's parking lot during the early hours of May 30, 2016. The surveillance cameras showed that Mr. Johns' Mercedes exited the casino at the intersection of Russell and Bayard Street at approximately 4:49:14 a.m., and the Sonata exited the parking garage of the casino at 4:49:45 a.m.

[6] After obtaining Jones' information from the search of the Sonata, Detective Long showed Mr. Johns a photographic array, where Mr. Johns identified Jones as the other suspect.

[7] After the shooting, appellant and Jones fled the scene in the Mercedes.

Ms. Bradford testified that she had rented the Sonata from Enterprise Rent-A-Car after appellant's vehicle was totaled on May 25, 2016, and the parties needed another vehicle. Although Ms. Bradford and appellant were authorized to operate the Sonata, she was aware that appellant allowed someone else to drive the vehicle. Ms. Bradford stated that she had given the car to the appellant on May 29, 2016.

On May 30, 2016, Ms. Bradford received a call in the "early part of the day" from appellant. At approximately 4:00 p.m., Ms. Bradford received another call from the appellant, and she subsequently met him at Walbrook Junction, where they rode around for approximately 45 minutes looking for the Sonata. Because the time was "getting later and later," and "it was getting dark," Ms. Bradford called 911 to report the car stolen. Two Baltimore City officers responded to her house, but they told her that, because the car was in Baltimore County, she would have to go to the Woodlawn precinct. The officers left at approximately 9:30 p.m. Ms. Bradford testified that, due to the time, she decided to follow up the next day. The next morning, May 31, 2016, Ms. Bradford went to Enterprise to report the vehicle stolen, and that afternoon, she went to the Woodlawn precinct to file a stolen vehicle report.

Valerie Rencher, a Risk Management Coordinator with Enterprise Rent-A-Car, testified that, on May 31, 2016, she learned that the Sonata was stolen when Shamira Williams, the assistant manager of the Enterprise branch Ms. Bradford had visited, contacted her. After reviewing a June 1, 2016, report from the National Insurance Crime Bureau, Ms. Rencher called the Baltimore County Police Department and was told that the

car had been found in Baltimore City and taken to a tow yard. She was not aware that the car had been reported stolen or any 911 call had been made on May 30, 2016.

Officer Keith Matthews, who was on desk duty at the Woodlawn precinct, testified that Ms. Bradford came into the precinct on May 31, 2016, at approximately 1:00 p.m., to file a report that the Sonata was stolen. Pursuant to the incident report, Ms. Bradford said that her grandson had the vehicle on May 30, 2016, and the vehicle was stolen sometime between May 30 at 9:11 p.m. and May 31 at 1:30 a.m.

Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Appellant's first contention is that the circuit court erred in denying his motion to sever his case from that of his co-defendant, Jones. The State disagrees, arguing that the court acted within its discretion in denying the motion.

A.

Procedural Background

On April 3, 2017, the circuit court held a pre-trial hearing to address appellant's motion for severance.[8] Appellant's counsel argued that prejudice would result from a joint

[8] On July 18, 2016, the circuit court initially ordered that appellant be tried jointly with Jones. The April 3, 2017, motions hearing transcript indicates that the issue of joint versus separate trials had been raised several times. In September 2016, appellant's counsel filed a motion to sever, which "the State did not object" to at the time. The State then scheduled separate trial dates, with Jones' trial scheduled for March 21, 2017, and appellant's trial scheduled for April 10, 2017. Following a delay with Jones' trial, the State

trial based on the potential use of Jones' statement implicating appellant and the admission of evidence "that would not be admissible against [appellant], but would be admissible against [] Jones."

The State argued that the cases should be joined because the claims arose from a single series of events and all evidence would be "mutually admissible." Although the State acknowledged that it possessed evidence of a statement made by Jones implicating appellant, it advised the court that it did not intend to use that statement during trial. When the court specifically asked whether every item of evidence would be mutually admissible against each defendant, the prosecutor responded: "Yes. That's exactly what I'm telling you."

On April 4, 2017, the circuit court denied appellant's motion to sever. It explained, in its written order, that its decision was based on the "representation of the Assistant State's Attorneys that the statements made by both Co-Defendants . . . will not be introduced," and "that all evidence the State intends to introduce is mutually-admissible" against both co-defendants. On April 10, 2017, prior to trial, the court denied appellant's motion to reconsider the issue.

informed counsel on March 22, 2017, of its intent to consolidate Jones' trial with appellant's. Appellant moved again to sever his trial. The State advised the court at the April 3 hearing that it previously had set different trial dates because it intended to use the defendant's statements, but it no longer was planning to do so.

B.

The Parties' Contentions

Appellant contends that the court erred in denying his motion for severance. In support, he argues that the court erred in ruling that the following evidence was mutually admissible: (1) the stipulation between Jones and the State that Jones had a prior conviction that prohibited him from possessing a regulated weapon; (2) Jones' prison medical examination record indicating that he had two missing teeth; and (3) that the police investigated whether the Sonata was being used as a "hack," i.e., an illegal taxi.[9]

The State contends that the court acted within its discretion in denying appellant's motion to sever. Although the State agrees that some non-mutually admissible evidence ultimately was admitted, it argues that none of it was unfairly prejudicial. It asserts that "[n]one of the evidence identified by [appellant] caused him any unfair prejudice" because the evidence "had nothing to do with [appellant] at all."

[9] Appellant also argues that the circuit court abused its discretion in failing to "acknowledge that the hostile defenses were likely to create undue prejudice," despite his counsel's notice of potential hostile defenses concerning co-defendant Jones. Appellant did not, however, make this argument below, and therefore, it is not preserved for this Court's review. *See* Md. Rule 8-131; *Robinson v. State*, 404 Md. 208, 216 (2008) ("[A]n appellate court ordinarily will not consider any point or question 'unless it plainly appears by the record to have been raised in or decided by the trial court.'") (quoting Md. Rule 8-131(a)).

C.

Law of Severance

The issue of joinder or severance is governed by Md. Rule 4-253, which provides that a trial court may order a joint trial for two or more defendants "if they are alleged to have participated in the same act or transaction." Md. Rule 4-253(a). The Rule promotes judicial economy by saving the time and expense of separate trials if the court, in its discretion, deems a joint trial proper. *State v. Hines*, 450 Md. 352, 368 (2016). If it appears, however, "that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative, or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires." Md. Rule 4-253(c).

"In its consideration of joinder (and thus severance), a trial court weighs the conflicting considerations of the public's interest in preserving judicial economy and efficiency against unduly prejudicing the defendant." *Galloway v. State*, 371 Md. 379, 395 (2002). The term "'"[p]rejudice" within the meaning of Rule 4-253 is a "term of art," and refers only to prejudice *resulting* to the defendant *from* evidence that would have been inadmissible against that defendant had there been no joinder.'" *Id* at 394 n.11 (quoting *Ogonowski v. State*, 87 Md. App. 173, 186-87 (1991)).

When determining whether to grant a motion to sever trials against more than one defendant, the court must consider the following:

> First, the judge must determine whether evidence that is non-mutually admissible as to multiple offenses or defendants will be introduced. Second,

> the trial judge must determine whether the admission of such evidence will cause unfair prejudice to the defendant who is requesting a severance. Finally, the judge must use his or her discretion to determine how to respond to any unfair prejudice caused by the admission of non-mutually admissible evidence. The Rule permits the judge to do so by severing the offenses or the co-defendants, or by granting other relief, such as, for example, giving a limiting instruction or redacting evidence to remove any reference to the defendant against whom it is inadmissible. The judge must exercise his or her discretion to avoid unfair prejudice.

Hines, 450 Md. at 369-70.

In cases involving a joint trial of more than one defendant, a judge is not required to order a severance. *Id.* at 374. Accordingly, the admission of the non-mutually admissible evidence would not, alone, entitle a defendant to a separate trial from his codefendant. *Id.* The determination whether to grant severance of defendants or other relief to safeguard against prejudice from a joint trial is a matter within the discretion of the trial court. *Id.* at 370. The court's decision is reviewed on appeal only for abuse of discretion. *Id.*

Here, at the time appellant made his motion to sever his trial from the trial of Jones, the State advised the court that all of the evidence would be mutually admissible against each defendant. Given this representation, which was not contradicted by either defendant, the court did not abuse its discretion by denying the motion to sever.

At trial, however, non-mutually admissible evidence was admitted. Nevertheless, appellant did not object or move for a mistrial. *Cf. Butler v. State*, 231 Md. App. 533, 547-49 (2017) (court denied motion for severance based on State's assurance that problematic evidence would not be admitted; when inadmissible evidence was admitted at trial,

appellant made a motion for mistrial). Accordingly, there is no basis for a finding that the court abused its discretion in proceeding with the joint trial. *See Ball v. State*, 57 Md. App. 338, 360, *cert. denied*, 300 Md. 88 (1984) (a judge cannot abuse discretion when he or she is not called upon to exercise discretion). Appellant's contention in this regard is without merit.

II.

Evidentiary Challenges

Appellant next contends that his defense was that he did not participate in the home invasion, and critical to this defense was evidence showing that the Sonata was stolen on May 29, 2016. He asserts that the court erred in precluding relevant evidence and argument in this regard, including: (1) an audio cd of a 911 call from Ms. Bradford reporting the car stolen; (2) testimony by Ms. Bradford regarding when appellant last had the car; and (3) closing argument regarding the theft of the Sonata. We will address each contention, in turn.

A.

911 Call

Appellant contends that the circuit court erred in excluding from evidence a recording of Ms. Bradford's 911 call reporting the Sonata stolen.[10] The State contends that

[10] At the time defense counsel sought to admit the recording, he did not proffer any details of the call, such as the time or date in which it occurred. Ms. Bradford, however, testified that she called the police late in the evening, when it was getting dark, on May 30, 2016.

the court acted within its discretion in excluding this evidence because it "was hearsay not subject to an exception."

Hearsay "is a statement, other than the 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). Hearsay generally is not admissible as evidence unless an exception applies. Md Rule 5-802.

Ordinarily, a trial court's decision concerning the admissibility of evidence is viewed under an abuse of discretion standard. *Bernadyn v. State*, 390 Md. 1, 7 (2005). The admission of hearsay evidence, however, requires a different standard of review "[b]ecause a circuit court has no discretion to admit hearsay in the absence of an exception to Rule 5-802." *Hallowell v. State*, 235 Md. App. 484, 522 (2018). "[A]ppellate review of whether evidence is hearsay and, if so, whether it falls within an exception and is . . . admissible, is *de novo*." *Id*. *Accord Dulyx v. State*, 425 Md. 273, 285 (2012).

Appellant asserts that the recording was admissible on either of two grounds. First, he argues, as he did below, that the evidence was not hearsay because it was offered, not for the truth of the matter asserted, but to impeach the testimony of Ms. Rencher and Detective Long. The trial court found that the recording was not proper impeachment evidence. As explained below, we agree.

Maryland Rule 5-616 permits the impeachment of a witness through the use of extrinsic evidence. In particular, it provides that "extrinsic evidence contradicting a witness's testimony" may be admissible for non-collateral matters. Md. Rule 5-616(b)(2).

Ms. Rencher testified that, on May 31, 2016, Ms. Bradford informed Enterprise that the Sonata had been stolen. On cross-examination, the following occurred:

> [APPELLANT'S COUNSEL]: From your vantage point you don't believe there was ever a call to 911 on theft of this vehicle on May 30th, 2016, is that accurate?
>
> [PROSECUTOR]: Objection.
>
> [THE COURT]: She doesn't believe. Sustained.
>
> [COUNSEL]: What is your understanding of any call to 911 on May 30, 2016?
>
> MS. RENCHER: I don't know of any call May 30th. I just have what the rental notes say, from [what] the customer told [Atalia].[11]
>
> ***
>
> [COUNSEL]: . . . If I were to advise you that a call was made to 911 on May 30th, 2016 regarding the theft of this vehicle would that surprise you?
>
> MS. RENCHER: Honestly I, I don't want to say it surprised me. It doesn't surprise me. I just wasn't aware of anything because we never got a police report number.
>
> [COUNSEL]: To your knowledge did [the Enterprise Branch Manager] take any written notes with regard to his interaction from Ms. Bradford?
>
> MS. RENCHER: Not that I know of.

Detective Long testified that he was aware that a police report had been filed regarding the Sonata on May 31, 2016, at 1:00 p.m. He stated that the report indicated that the vehicle had been stolen between May 30, 2016, at 9:11 p.m. and May 31, 2016, at 1:30

[11] The transcript originally indicated that the name of the employee as Natalia, but Ms. Rencher subsequently corrected that the name was Atalia.

a.m. He did not make any comment regarding the existence of a 911 call regarding the Sonata.

The State contends that the circuit court properly exercised its discretion to exclude the audio recording as extrinsic impeachment evidence. It argues that "the 911 audio did not contradict the testimony of either the Enterprise representative or Detective Long" because "[n]either witness denied the existence of a May 30th 911 call reporting the Sonata stolen."

We agree with the State that the circuit court did not abuse its discretion in finding that the 911 call was not admissible as impeachment evidence. The call did not contradict the testimony of the detective or Ms. Rencher because neither witness denied the existence of a 911 call on May 30.

Appellant next contends that the court erred in determining that the audio recording was not admissible under the excited utterance exception to the hearsay rule.[12] The State disagrees, asserting that appellant "proffered no facts that could conceivably fit the definition of an excited utterance."

One of the exceptions to the hearsay rule is an excited utterance, i.e. "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Md. Rule 5-803(b)(2). A hearsay statement

[12] Appellant also argues on appeal that the 911 call was admissible as a business record and under the present sense impression exception. Appellant did not make those arguments below, and therefore, they are not preserved for this Court's review. *See* Md. Rule 8-131(c).

may be admitted under the excited utterance exception "'if "the declaration was made at such time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant . . . [who is] still emotionally engulfed by the situation."'" *Cooper v. State*, 163 Md. App. 70, 97 (2005) (quoting *West v. State*, 124 Md. App. 147, 162-63 (1998)). There must be "'a startling event and a spontaneous statement which is the result of the declarant's reaction to the occurrence.'" *Id*. (quoting *Parker v. State*, 365 Md. 299, 313 (2001)). To properly determine if a statement qualifies as an excited utterance,

> we look at the totality of the circumstances to determine whether the foundation for its admissibility has been established. The adequacy of the foundation is judged "by the spontaneity of the declarant's statement and an analysis of whether it was the result of thoughtful consideration [or] . . . the product of the exciting event."

Id. (quoting *Parker*, 365 Md. at 313).

Here, the circuit court stated that the 911 call "can't possibly be [an] excited utterance. It happened to somebody else hours earlier, right?" We agree with the circuit court that, under the circumstances here, where the phone call to 911 occurred hours after appellant initially called Ms. Bradford, and after they had exhausted their efforts to locate the vehicle, Ms. Bradford's call was not a "spontaneous and instinctive reaction" to the news that the car was stolen. *Cooper*, 163 Md. App. at 97. The court did not abuse its discretion in excluding this evidence.

B.

Ms. Bradford's Testimony Regarding When Appellant Last Saw the Sonata

Appellant's next contention is that the court erred in sustaining the State's objection to, and striking, Ms. Bradford's testimony that, to the best of her knowledge, the last time appellant had the Sonata was May 29, 2016. Appellant stated in his opening brief, with no citation to any authority, that the testimony was admissible hearsay because it involved a statement he made to Ms. Bradford. In his reply brief, he changed course, arguing that the testimony was not hearsay because Ms. Bradford could have answered based on her own knowledge. Additionally, he asserted that the statement was not offered for the truth of the matter asserted, but instead, to show that Ms. Bradford relied on appellant's statement to look for the missing car.

The State contends that the trial court properly excluded this evidence because it was "hearsay not subject to an exception." It asserts that "[i]t was clear from [Ms.] Bradford's testimony that she had no personal knowledge about when [appellant] last had possession of the Sonata," and any knowledge she had in this regard "necessarily came from out-of-court assertions made by" appellant.

The evidence here clearly was offered for the truth of the matter asserted. Indeed, appellant states in his opening brief that the purpose of Ms. Bradford's testimony and the alleged phone call was to "prove that the car was stolen on May 29th and that [appellant] was not driving the car on May 30th at the time of the home invasion."

Moreover, contrary to appellant's claim, there was no testimony that Ms. Bradford had personal knowledge regarding when appellant had the vehicle last. Rather, any knowledge Ms. Bradford had regarding when appellant last possessed the vehicle necessarily came from appellant's out-of-court assertion when he called her on May 30, 2018. The evidence was hearsay, not subject to admission under any exception. *See Conyers v. State*, 345 Md. 525, 544 (1997) (self-serving hearsay statement made by a defendant is not admissible on the defendant's behalf). The circuit court properly excluded this evidence.

C.

Closing Argument

Appellant's next contention is that the "court erred when it restricted [his counsel's] closing argument related to the theft of the Sonata." He asserts that the court "shut down" counsel when she tried to present the defense that the car was reported stolen on May 29, and that appellant and his grandmother were looking for the car at the time of the robbery.

The pertinent part of closing argument was as follows:

> [APPELLANT'S COUNSEL]: Her grandson [appellant] found out the vehicle was stolen on the 30th.
>
> [STATE'S COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> [STATE'S COUNSEL]: Move to strike.
>
> THE COURT: Yes, sir.

[APPELLANT'S COUNSEL]: . . . I put to you that no matter how the State tried to trick Ms. Bradford, she was very clear. That prior to this home invasion, you heard the State, first call at 9-1-1 occurred at 5:45 p.m. on the 30th. She and her grandson had been looking for the vehicle. That prior to the first 9-1-1, she and her grandson had resolved that this vehicle really is stolen.

[STATE'S COUNSEL]: Objection.

THE COURT: Sustained.

[STATE'S COUNSEL]: Move to strike.

THE COURT: Yes, sir.

***

[APPELLANT'S COUNSEL]: [Appellant] was nowhere near the rental car on the 30th, the 31st. The last time he saw this was the 29th.

[STATE'S COUNSEL]: Objection.

THE COURT: Sustained.

[STATE'S COUNSEL]: Move to strike.

THE COURT: Yes.

The State contends that the trial court properly exercised its discretion in sustaining the State's objections and striking the statements of appellant's trial counsel. It argues that defense counsel's statements regarding Ms. Bradford's testimony were not "based on facts in evidence."

Generally, "attorneys are afforded great leeway in presenting closing arguments to the jury." *Degren v. State*, 352 Md. 400, 429 (1999). Arguments of counsel, however, "are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom." *Wilhelm v. State*, 272 Md. 404, 413 (1974). Counsel

may not "state and comment upon facts not in evidence." *Id.* *Accord Lee v. State*, 405 Md. 148, 166 (2008).

"[T]he trial judge is in the best position to gauge the propriety of argument." *Mitchell v. State*, 408 Md. 368, 380 (2009). An appellate court, therefore, will not disturb the trial court's decision "'absent a clear abuse of discretion by the trial court of a character likely to have injured the complaining party.'" *Id.* at 381 (quoting *Grandison v. State*, 341 Md. 175, 225 (1995)).

Here, we agree with the State that the circuit court did not abuse its discretion in controlling the scope of closing argument. With respect to the first statement, that appellant found out that the vehicle was stolen on May 30, there was no evidence presented to support this statement. Similarly, there was no evidence to support the other two statements, i.e. that Ms. Bradford determined that the vehicle was stolen when she called 911 at 5:45 p.m. on May 30 or that appellant last saw the vehicle on May 29. Ms. Bradford merely testified that appellant called her on May 30, 2016, that she and appellant looked for the car that day, and she reported the car stolen later that day and on May 31. Counsel's statements in closing argument went beyond that evidence, and the court did not abuse its discretion in sustaining the objections and striking the statements.

III.

INADMISSIBLE LAY TESTIMONY

Appellant contends that the court erred by permitting Detective Long to offer inadmissible lay opinion testimony. He asserts that the court improperly allowed Detective Long to give an opinion about Mr. Johns' identification of him.

Counsel for appellant, on cross-examination of Detective Long, extensively questioned the detective about the victim's description of his assailants' complexion, and the detective's understanding of various skin tones. Counsel suggested that the photos did not match the description of the suspects described by Mr. Johns.

In response, the State asked Detective Long about a supplement he wrote in reference to his interview with Mr. Johns, in which Mr. Johns described the assailants, as follows: "[A] male approximately six feet tall, 215 to 220 pounds, in his thirties, dark skin with hair on his face" and "a black male, approximately five-eight to five-nine 150 to…160 pounds, 20 to 25 years and medium to dark skin." When Detective Long testified that he remembered Mr. Johns giving him that description, the prosecutor asked who he "attributed those descriptions to," and Detective Long testified that he attributed the first description to Mr. Jones and the second one to appellant. He then explained that he got the photographs of these individuals and tried to obtain similar photographs, including skin complexion, in the photo array.

Appellant's contention that this testimony constituted impermissible lay opinion was raised, and rejected, in codefendant Jones' appeal. In that case, the Court stated, in an unreported opinion, as follows:

> Jones contends that the detective's responses to the State's questions involve impermissible lay opinion testimony. We disagree. When the testimony is viewed in the context of Isaac's examination, it is apparent that the detective was simply explaining why he selected the photographs of Jones and Isaac and how he had selected the photographs of the other persons in the array. In particular, he explained that he had selected the other persons because he thought that they resembled Jones and Isaac (and not, as Isaac's counsel implied, because he was relying on an imperfect understanding of what Johns meant when he described an assailant "brown skinned"). It was appropriate for the State to elicit this testimony in light of the apparent insinuation that the detective had been insensitive or inept in preparing the photo array.

Jones v. State, 2018 WL 3414220, at *6 (Md. App. July 13, 2018).

The State contends that this Court is bound by this prior opinion under law of the case doctrine, and we cannot independently consider it. In any event, it asserts that, if we do "reconsider the issue anew," we should reach the same result and find no error.

We need not consider whether the law of the case doctrine would preclude us from reaching a result different from that reached in Jones' appeal because we agree that there was no error. In the context in which the testimony occurred, it did not constitute Detective Long's opinion regarding who was responsible for the home invasion. Rather, it was offered to: (1) explain that appellant's photo was included in the photographic array because it matched the description given by the victim; and (2) rebut the suggestion, made

during cross-examination, that appellant and Jones did not match Mr. Johns' description of the assailants. The circuit court did not abuse its discretion in admitting this evidence.

IV.

Exclusion of Latent Print Evidence

Appellant's final contention is that the court erred "when it precluded relevant and admissible testimony and restricted the cross examination concerning the latent prints of another person." Specifically, he argues that the court erred in not allowing defense counsel to ask about the criminal background of Terry Griffen, the person whose fingerprint was found on the outside of Mr. Johns' vehicle. He asserts that "[w]hether or not Mr. Griffen had a criminal background was relevant to the question of whether he was the one that committed the crimes against Mr. Johns."

The State disagrees. Noting that this Court rejected the same contention in codefendant Jones' case, the State again contends that the claim is precluded by the law of the case. In any event, it argues that, because "there was no way to determine when Griffen's latent prints were left on the outside of the Mercedes and there was no other evidence to suggest that Griffen was present at the scene when the home invasion and shooting occurred, this evidence was not relevant and was properly excluded."

In addressing its analysis in codefendant Jones' case, Judge Arthur concluded as follows:

> [T]he question of whether Griffen had a criminal record had little, if any, probative value, because it would require several long leaps of inference to conclude that Griffen had any responsibility for the home invasion. There was no way to determine when or how Griffen left his fingerprints on the

> exterior of the Mercedes, nor any other evidence indicating that Griffen was present during the crime. For all anyone knows, Griffen may not have touched the Mercedes until after the home invasion, when it was parked around the corner from Jones'[] in East Baltimore. In short, Griffen's criminal record alone would do almost nothing to implicate him as the perpetrator of this particular crime. In these circumstances, the evidence of Griffen's criminal background had no bearing on Jones'[] guilt or innocence; and even if it were arguably relevant in some highly tenuous way, it might well mislead or confuse the jury.

Jones, 2018 WL 3414220, at *4.

That same analysis applies here. The circuit court did not abuse its discretion in precluding evidence regarding Mr. Griffen's criminal background.

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