Circuit Court for Baltimore City
Case No.: 121068004

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1419

September Term, 2023

LENNY EPPS

v.

STATE OF MARYLAND

Arthur,
Reed,
Friedman,

JJ.

Opinion by Reed, J.

Filed: July 2, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Lenny Epps, was indicted in the Circuit Court for Baltimore City and charged with first-degree murder, two counts of attempted first-degree murder, assault, home invasion, and related firearms offenses. After his first trial ended in a mistrial, Appellant was tried by a jury and found guilty of first-degree murder, one count of attempted first degree murder, use of a firearm in connection with both of those offenses, one count of first-degree assault and use of a firearm in connection therewith and being a felon in possession of a firearm. Appellant was subsequently sentenced to two consecutive life sentences for murder and attempted murder, a consecutive twenty-five years for assault, three twenty-year concurrent sentences on the firearms convictions, the first five without parole on each, and fifteen years concurrent for being a felon in possession. On this timely appeal, Appellant asks us to address the following questions:

> 1. Did the lower court err in denying Appellant's motion to dismiss on Constitutional speedy trial grounds?
>
> 2. Did the lower court err in denying the impermissibly suggestive photographic identification?
>
> 3. Did the lower court abuse its discretion in refusing to allow Appellant to call one of the prosecutors as a witness?

For the following reasons, we shall affirm.

BACKGROUND

Our summary of the trial record is intended to provide context for the issues raised in this appeal, rather than a comprehensive review of the evidence presented. *See Thomas v. State*, 454 Md. 495, 498-99 (2017) ("Because the issue dispositive of this appeal does not require a detailed recitation of the facts, we include only a brief summary of the

underlying evidence that was established at trial."); *see also Parks v. State*, 259 Md. App. 109, 113 (2023) ("Because the issue in this appeal is purely a procedural one, we dispense with a detailed recitation of the underlying crime").

On January 23, 2021, a man entered the rented room occupied by Douglas Griffin, Davon Griffin, and Alissa Traylor and started firing a handgun. Traylor died in the shooting while Douglas and Davon Griffin survived and were treated for their injuries at Johns Hopkins Hospital. Pertinent to some of the issues raised on appeal, Douglas Griffin did not identify anyone when first responders arrived at the scene of the shooting, but he did identify Appellant in a photo array shown to him at the hospital. Both Douglas and Davon Griffin identified Appellant in court as the man who shot them and Traylor.

Appellant was arrested and gave a taped statement to police denying any involvement in the shooting. Appellant had been previously convicted of a crime that disqualified him from possessing a regulated firearm.

We shall include additional details in the discussion that follows.

DISCUSSION

I.

Appellant first contends the lower court erred in denying his motion to dismiss for violation of his right to a speedy trial. The State disagrees, as do we.

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees, among other things, a criminal defendant's right to a speedy trial. *Howard v. State*, 440 Md. 427, 447 & n.13 (2014). Article 21 of the Maryland Declaration of Rights contains a substantially similar guarantee. *Id*. at 447. Claims that the Sixth Amendment

guarantee has been violated are assessed under the balancing test announced by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

In reviewing a trial court's denial of a motion to dismiss for a claimed speedy trial violation, we accept the court's factual findings unless clearly erroneous, *Glover v. State*, 368 Md. 211, 221 (2002), but we review "without deference" its "conclusion as to whether a defendant's constitutional right to a speedy trial was violated." *Howard*, 440 Md. at 446-47 (citing *Glover*, 368 Md. at 220).

In performing that review, we must apply the four-factor balancing test outlined in *Barker*. *See, e.g., Howard*, 440 Md. at 447; *Glover*, 368 Md. at 221-22. Those factors are: the length of delay, the reason for the delay, the defendant's assertion of his or her right, and the prejudice to the defendant. *Barker*, 407 U.S. at 530. *Accord Phillips v. State*, 246 Md. App. 40, 56 (2020). "None of these factors is, in itself, either necessary or sufficient to find a violation of the speedy trial right; instead, 'they are related factors and must be considered together with such other circumstances as may be relevant.'" *Nottingham v. State*, 227 Md. App. 592, 613 (2016) (quoting *Barker*, 407 U.S. at 533).

Pertinent to our analysis, our review of the record and the findings by the circuit court, both before Appellant's first trial and the retrial following a hung jury, establishes the following chronology:

February 9, 2021: Appellant arrested on a District Court charging document and Initial Appearance. (*State of Maryland v. Epps*, District Court No. 6B02433850)

March 9, 2021: Appellant was indicted in the Circuit Court for Baltimore City. Trial set for September 9, 2021.

September 9, 2021: Appellant's initial trial date. Trial was postponed because, according to the record, Defense Counsel was unavailable and due to an Administrative Closure due to the COVID-19 pandemic. Good cause found for postponement.

February 14, 2022: Appellant's second trial date. Because the courts were still closed due to the pandemic, Appellant's trial was postponed until August 22, 2022.

August 22, 2022: Appellant's third trial date. Prosecutor out on medical leave. Trial postponed until August 26, 2022, and then to February 7, 2023.

February 7-8, 2023: Appellant's fourth trial date. Due to a courthouse fire, the trial was delayed one additional day to February 8, 2023.[1]

Length of delay

Applying the four *Barker* factors, we first consider the length of delay. "[T]he first factor, the length of the delay, is a 'double enquiry,' because a delay of sufficient length is first required to trigger a speedy trial analysis, and the length of the delay is then considered as one of the factors within that analysis." *State v. Kanneh*, 403 Md.. at 688 (citation omitted). "The length of delay for speedy trial analysis is measured from the earlier of the date of arrest, filing of indictment, or other formal charges, to the date of trial." *Greene v. State*, 237 Md. App. 502, 512-13 (2018) (citations omitted).

[1] On February 13, 2023, the court declared a mistrial due to a hung jury. Retrial began on May 8, 2023. Neither party suggests we consider the length of delay, amounting to 84 days, between the mistrial to the start of Appellant's second trial. *See generally*, *Hallowell v. State*, 235 Md. App. 484, 513-14 (2018) (in considering a situation where there is a retrial following a mistrial, the relevant period runs from the mistrial to the retrial) (citing *Icgoren v. State*, 103 Md. App. 407, 420, *cert. denied*, 339 Md. 167 (1995)); *see also Greene v. State*, 237 Md. App. 502, 515 n.3 (2018) (distinguishing between periods in a "serial trial context").

Here, the length of delay from February 9, 2021, when Appellant was arrested, to February 8, 2023, the start of his trial, was approximately two years. This delay is presumptively prejudicial and of constitutional dimension. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year.").

Reasons for delay

Under the second *Barker* factor, we look to the reasons for the delay and which party bears responsibility for them. *Vermont v. Brillon*, 556 U.S. 81, 90-91 (2009). "'[D]ifferent weights should be assigned to different reasons,'" with things such as deliberate attempts by the prosecution "'to hamper the defense'" weighing heavily against the government and "'delay caused by the defense weigh[ing] against the defendant.'" *Brillon*, 556 U.S. at 90 (quoting *Barker*, 407 U.S. at 529, 531; *Doggett*, 505 U.S. at 657). "In considering this factor, we... address each postponement of the trial date in turn." *State v. Kanneh*, 403 Md. at 690.

February 9, 2021 (arrest) to September 9, 2021 (first trial date):

The first delay of approximately seven (7) months is arguably a long time for what is usually considered pretrial preparation. This period is ordinarily weighed neutrally and not chargeable to either party. *See White v. State*, 223 Md. App. 353, 384 (2015) ("The span of time from charging to the first scheduled trial date is necessary for the orderly administration of justice, and is accorded neutral status." (citation omitted). We also note

that the COVID-19 pandemic was still an issue in 2021.[2] Courts considering the impact of the coronavirus pandemic also recognized that the global emergency required a contextual balancing of the right to a speedy trial against matters of public health and safety. *See, e.g., United States v. Olsen*, 21 F.4th 1036, 1047 (9th Cir.) ("[S]urely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health") (footnote omitted). Notably, the federal Eastern District of Virginia found that the COVID-19 pandemic was a valid reason for delay, and rejected any suggestion that said delay should weigh heavily, or at all, against the government. *See United States v. Pair*, 522 F.Supp.3d 185, 194 (E.D. Va. 2021), *aff'd*, 84 F.4th 577 (4th Cir. 2023). We do not charge either party for this delay.

September 9, 2021 (first trial date) to February 14, 2022 (second trial date):

This delay of just over five months was also due to delays caused by the pandemic. As the court observed during the hearing before the first trial:

> I will say in September of 2021, we were trying cases but not many because everybody was having to be distance and so we only had a limited number of courtrooms where we could try, where we could try cases.
>
> We were having jurors convene at the War Memorial Building. It was – we were trying cases but it was on a much curtailed schedule. And then in February of 2022, we had by that time had stopped all jury trials because

[2] CDC Museum Timeline, https://www.cdc.gov/museum/timeline/covid19.html (last visited April 18, 2025); https://www.mdcourts.gov/coronavirusorders (last visited April 18, 2025); https://mdcourts.gov/sites/default/files/import/coronavirus/marylandjudiciarycovid19timeline.pdf (last visited April 18, 2025) (hereinafter "Maryland Judiciary COVID 19 Timeline").

> there had been a spike in COVID cases over the winter of 2021/2022 and so we stopped trying cases, doing jury trials at all for a little while.
>
> I was in Family at the beginning of 2022 and we were doing even like the divorce and custody hearings were over Zoom. We weren't doing them live.[3]

We conclude this delay was neutral and not chargeable to either party.

February 14, 2022 (second trial date) to August 22, 2022 (third trial date):

On March 7, 2022, the Maryland judiciary resumed normal operations. *See* the Maryland Judiciary COVID-19 Timeline. The delay from February 14, 2022, to August 22, 2022, was approximately six months and one week. The circuit court charged this delay, at least from March 7th on until August 22nd to the State, but only "lightly so," stating:

> February 14th to August 22 -- or February 14th at least to March the 7th, when they resumed to having trials that similarly is neutral. The period from March the 7th, to August 22nd, is attributed to the State but only lightly so. It's not as if they were engaging in deliberate foot dragging or attempting to sabotage the case. There were various administrative obstacles there.

We concur with the court that the delay from March 7th until August 22nd is chargeable to the State. Although, understandably, there would have been some delay in bringing cases postponed during the pandemic to trial, this case was pending for over a year by March 2022. That being said, there was no evidence that the State deliberately delayed Appellant's trial, and we will weigh this delay against the State, but only slightly. *See Barker*, 407 U.S. at 531 (stating that delay caused by overcrowded courts should be

[3] The circuit court's findings on Appellant's renewed motion to dismiss prior to the second trial were consistent with the court's findings before the first trial.

weighed less heavily than a deliberate attempt to delay trial); *Dalton v. State*, 87 Md. App. 673, 687-88 (1991) (good cause finding considered, and in the absence of prosecutorial neglect or indifference, any delay chargeable to the State will not weigh heavily in a constitutional analysis).

August 22, 2022 (third trial date) to February 7-8, 2023 (fourth trial date) :

This delay of five months and two and a half weeks began because the prosecutor was on medical leave. The prosecutor explained that he was hospitalized and had surgery, which required some time to recuperate. The court acknowledged that, in a complicated murder case involving three victims, the prosecutor's absence was a valid reason for a postponement, explaining:

> Okay. August of 2022 when a couple weeks before or a few weeks before the prosecutor [ ] had gone out, I got the impression unexpectedly for medical treatment in July of 2022. He was out for a time.
>
> This is a murder case, not a drunk driving case. You can[not] just plug in another prosecutor on short notice and proceed. …

The court continued that the February 2023 dates were selected by "agreement, sort of mutual availability of everybody[.]"

This delay is also chargeable to the State, but does not weigh heavily in our analysis. *See Marks v. State*, 84 Md. App. 269, 283 (1990) ((request for joint continuance is neutral and not chargeable to either party), *cert. denied*, 321 Md. 502 (1991); *Ferrell v. State*, 67 Md. App. 459, 464 (1986) (concluding that, although chargeable to the State, the State is less culpable when the delay is due to the illness of the prosecutor). *Cf. Barker v. Wingo*,

407 U.S. at 534 (seven-month delay due to illness of ex-sheriff provides "strong excuse" for delay).

Assertion of right

The third *Barker* factor examines the "defendant's responsibility to assert his right." *Barker*, 407 U.S. at 531. This factor is "closely related" to the other three, and "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id*. at 532. Here, Appellant requested a speedy trial in an omnibus pre-trial motion, filed on September 23, 2022. He again requested a speedy trial in a pro se motion filed on January 9, 2023. Although he asserted his right to a speedy trial, Maryland courts have not attached significant weight to a general omnibus filing. See *State v. Ruben*, 127 Md. App. 430, 443 (1999) ("[C]ourts could 'weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection'") (emphasis in original, quoting *Barker*, 407 U.S. at 529), *cert. denied*, 356 Md. 496 (1999). We further observe that the Appellant's handwritten and more detailed assertion was made just one month before the first scheduled trial. Although Appellant did assert his right to a speedy trial twice, the assertions neither "strongly support or refute his argument that he was deprived of the right." *State v. Ruben*, 127 Md. App.. at 443. *See also Jules v. State*, 171 Md. App. 458, 488 (2006) ("Although appellant made known his desire for a speedy trial shortly after he was indicted and again months later after a substantial period of the delay, it is fair to say that his demands to be tried were not constant and strident for long periods of time in between"), *cert. denied*, 396 Md. 525 (2007); *Ratchford v. State*, 141 Md. App. 354, 360 (2001) (determining that this factor was a non-factor where appellant, who never

waived his speedy trial right, asserted the right only once in the form of a pro forma objection to a postponement and otherwise failed to "consistently and vigorously cry out for the speedy disposition of the charges against him").

Prejudice

The fourth, final, and "most important factor in the *Barker* analysis is whether the defendant has suffered actual prejudice." *Henry v. State*, 204 Md. App. 509, 554 (2012). The prejudice factor is "weighed with respect to the three interests that the right to a speedy trial was designed to preserve": (1) avoiding "oppressive pretrial incarceration"; (2) minimizing "anxiety and concern of the accused"; and (3) limiting potential impairment of the defense. *State v. Kanneh*, 403 Md. at 693 (quoting *Barker*, 407 U.S. at 532). "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*.

Appellant argues that he was prejudiced because his defense was impaired by the absence of Detective Powden, the officer who administered the photo array to Douglas Griffin, one of the surviving victims. At the hearing before the first trial, the State acknowledged that Powden left the Baltimore City Police Department and transferred to New Hampshire. The State continued:

> And so he was unavailable when I contacted him to come in and testify. If there were parts – the only thing that Detective Powden did was to show the photographic array to Douglas Griffin. That was captured on his body worn camera.
>
> If there were parts of Detective Powden's body worn camera or the whole thing that the Defendant wanted to admit into evidence I would stipulate to that, stipulate to its admissibility and that, it would be admitted. And so Defendant hasn't lost Detective Powden's body worn camera.

If the Defense wanted to have Detective Powden personally appear then the Defense could have subpoenaed him to appear. He's still in the United States. He's still subject to a subpoena just with the proper, just with the proper procedures followed.

And so I haven't heard of any information that would have come from Detective Powden that would have affected the defense in any way, would have assisted the Defense in any way. And so I don't believe that Detective Powden's testimony would have been helpful to the Defense. It would have been hurtful.

Appellant's counsel responded:

[DEFENSE COUNSEL Your Honor, as far as Powden, I did not even know that he was not going to be here, that he wasn't at the State and that he wasn't going to be called because he did the photo array, as soon as he did he would be called.

But, you know, I think the motion to suppress the ID, the photo array ID, he's the one that presented it, supposedly in a double blind way. So, I would want the ability to talk to him about the detective being in the hallway, what conversations took place in the hallway and whether or not any information was given in the hallway from the homicide detectives to him and relayed somehow even if unconsciously to the Mr. Douglas Griffin.

So, you know, if I'm challenging and I show that it's infamously suggested certainly the person who did the array would be an important part of the puzzle. And as far as subpoenaing him, I didn't know he wasn't going to answer, but second of all it's really hard to get an out of state subpoena –

THE COURT: Oh it's a tremendous pain in the butt but you can do it but it's a pain.

[DEFENSE COUNSEL]: Right. But then I have to like make sure he replies and I'm not sure that would be – I'm not sure he's there and working and he choose to ignore it having received a summons that he would even appear.

So, in light of that, Your Honor, I think that's, you know, that impacts him because we are making this motion and he's not here, the very person who did the photo array.

The court then made the following findings with respect to prejudice:

> Then I'd look at prejudice and it is true certainly that this long of pretrial incarceration is in itself prejudicial in its [ef]fect. There are studies that show that people who are released have a greater likelihood of success at trial than people who stay in jail during that longer of period of time.
>
> And of course, there is just a problem of being in jail. You're not working. You're not supporting your family. You're not able to help your attorney contact witnesses and things like that.
>
> And there is a specific assertion of prejudice in this case which is that one of the detectives who administered the photo arrays to one of the witnesses has gone to New Hampshire. I don't know when he went to New Hampshire, so I don't know – I mean, you know, if he went to New Hampshire, you know, in June of 2021, then it really wasn't because of the delay that he's not available.
>
> But certainly his absence has been prejudicial to the Defense but he – there is video of the presentation of the array and he's in New Hampshire. It's not like he fell off the face of the earth. And is – could have been contacted and even if necessary subpoenaed by the Defense in this case.
>
> So, while there is some prejudice however I will acknowledge that much. But weighing all of these factors together the largely neutral basis and sort plague-driven basis for the delays and the, and the circumstances of the prejudice and the fact that not only is there video of the presentation of the array but the detective was at least contactable by phone as well as subject to a U.S. subpoena. I find that Mr. Epps's speedy – constitutional speedy trial rights were not violated and a motion to dismiss is denied.

Appellant renewed the motion before the second trial and the circuit court's findings remained consistent:

> [THE COURT]: So, I heard that the hardship was – I heard there was a hardship. It was hard to work with having someone who is incarcerated for almost a two years period of time, really a two year period of time, that an officer moved to New Hampshire, and so therefore was making it more difficulty [sic] – it could make it more difficult to get witnesses. And, so, if I heard you all correctly, there's now two officers that are no longer with the Baltimore City Police Department?

[PROSECUTOR]: Yes, Your Honor.

THE COURT: So, now that there are two officers who are no longer with the Police Department, but the Court also heard that everything that was done with those police officers or the police officers had, or the detectives had in this case, were also on body worn camera. And I understand that there was a prior trial, but we're here retrying this case again, but all of that – all of that information on the body worn camera from the officers or detectives who are no longer with the police department were, in fact, used in the first trial. While I have heard that it makes things harder, and I agree that there shouldn't be anything that makes something harder, this Court does not find that has been – that the fourth factor, the degree of prejudice to the Defendant has been met. Has it made things difficult[], yes, but I have not heard that the Defendant has in fact been prejudice[d] because these two officers, police officers are no long with the Baltimore City Police Department, so prejudice in the fact that we – that it took this long to finally go to trial. So, based on the Barker Wingo factors, the Court will deny the Motion to Dismiss.

We are not persuaded that Detective Powden's absence amounted to actual prejudice given these circumstances, including because Appellant could have subpoenaed him to appear at trial. Certainly, the line of questioning as to what Detective Powden heard and said before the photo array no doubt was "grist for the jury mill" of competing interests of cross-examination and went to the weight of the evidence. *See generally, Cerrato-Molina v. State*, 223 Md. App. 329, 337 (2015) ("Choosing between competing inferences is classic grist for the jury mill"). However, we are unable to conclude this potential prejudice meant the deprivation of his right to a speedy trial. As our Supreme Court has explained:

> Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. But *this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context*. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case.

Glover, 368 Md. at 231 (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971) (emphasis in *Glover*).

Balancing

Finally, we balance these factors to determine whether Appellant was denied his constitutional right to a speedy trial. In doing so, we recognize that "[n]o single *Barker* factor, considered in isolation, is 'either necessary or sufficient to find a violation of the speedy trial right; instead, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Hallowell*, 235 Md. App. at 513 (quotations and citations omitted).

Here, the length of delay was two years. While this is a significant delay, this was a case involving a homicide and two attempted murders and is not entirely unexpected in such a case. *See State v. Kanneh*, 403 Md. at 689 ("[T]he delay that can be tolerated is dependent, at least to some degree, on the crime for which the defendant has been indicted") (citation omitted). Of the reasons for the delay, we conclude the delay from March 7, 2022, to February 8, 2023, a delay of approximately 11 months, is chargeable to the State but does not weigh heavily against the State for the reasons previously stated. Appellant asserted his right to a speedy trial, but in a *pro forma* fashion, and again one month before trial, not weighing heavily in our analysis. And, as for prejudice, we conclude that, although, despite Appellant's lack of securing the witness's appearance at trial, there was but a possibility of prejudice, ultimately to the weight of the evidence and competing inferences, and that possibility did not amount to actual prejudice such as to deprive him of his right to a speedy trial.

II.

Appellant next argues that the court erred in denying his motion to suppress an out-of-court identification made by victim Douglas Griffin. He claims the identification was impermissibly suggestive because Griffin may have been influenced by information from a search of a neighbor's house, where police found Appellant's ID and ammunition, before selecting his photo in a double-blind photo array. The State responds that Appellant has no "factual support" for this argument, and the court correctly found that the police did not impermissibly suggest to Griffin whom to select from the photo array. We agree.

In reviewing a court's ruling on a motion to suppress an extra-judicial identification procedure, we consider the record in the light most favorable to the prevailing party, in this case, the State. *Greene v. State*, 469 Md. 156, 165 (2020) (citing *Small v. State*, 464 Md. 68, 88 (2019). In addition, we accept the court's factual findings unless they are clearly erroneous, but we review its legal conclusions *de novo*. *Id*. (citing *Norman v. State*, 452 Md. 373, 386 (2017).

The pertinent law stems from the right of due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article 24 of the Maryland Declaration of Rights. These protect "the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *Small v. State*, 464 Md. 68, 82-83 (2019) (citations and quotations omitted). "When an accused challenges the admissibility of an extrajudicial identification procedure on due process grounds, Maryland courts assess its admissibility using a two-

step inquiry." *Id*. at 83 (internal footnote omitted). Maryland continues to follow this test. *Small*, 464 Md. at 103 (Barbera, C.J., concurring).

In the first step of the inquiry, the court must determine whether the identification procedure was "impermissibly suggestive." *Montague v. State*, 244 Md. App. 24, 53 (2019). "Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify." *Smiley v. State*, 442 Md. 168, 180 (2015). "The impropriety of suggestive police misconduct is in giving the witness a clue about which photograph the police believe the witness should identify as the perpetrator during the procedure." *Small*, 464 Md. at 88-89. "The sin is to contaminate the test by slipping the answer to the testee." *Morales v. State*, 219 Md. App. 1, 14 (2014) (citations and quotations omitted).

That said, "it is not a Due Process violation per se that an identification procedure is suggestive." *Morales*, 219 Md. App. at 14. Rather, "[t]he procedure must be *impermissibly* suggestive, and it is the impermissibility of the police procedure that warrants exclusion." *Id*. (emphasis in original). "*The defendant bears the burden of making a prima facie showing of suggestiveness*." *Small*, 464 Md. at 83 (emphasis added). "If the court determines that the extrajudicial identification procedure was not suggestive, then the inquiry ends and evidence of the procedure is admissible at trial." *Id*.

If, however, the suppression court determines that the identification procedure was suggestive, the court moves to step two of the due process inquiry, in which the court "must weigh whether, under the totality of the circumstances, the identification was reliable."

Small, 464 Md. at 83-84. Here, the burden is on the State to show by clear and convincing evidence that "the independent reliability in the identification outweighs the corrupting effect of the suggestive procedure." *Montague*, 244 Md. App. at 54. In assessing that evidence, the court should focus on five factors: "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." *Small*, 464 Md. at 84.

Here, at the pre-trial hearing before the first trial, Douglas Griffin testified that he saw the person who shot him on January 23, 2021. He agreed that, when he was being treated for his injuries at the hospital afterwards, he did not name the person or give a description, but the person sometimes stayed overnight at the residence and was "Kameeka's boyfriend."

Douglas Griffin was then asked several questions about the extra-judicial photo identification. The detective who interviewed him did not stay in his hospital room very long and showed him a series of pictures. Pertinent to Appellant's claim that the extra-judicial identification was impermissibly suggestive, Douglas Griffin testified that he was never shown a single picture of Appellant or Appellant's identification or given Appellant's name. Instead, Appellant's photo was included in an array of "multiple pictures with different people in it." Griffin maintained that the police never mentioned Appellant's name before showing him the array.

Griffin also testified he did not know that a search warrant had been executed prior to his identification. No one told him what was found as a result of the search warrant and he did not hear anyone discussing the case before he was shown the array. Douglas Griffin concluded his direct examination by agreeing that he identified someone and that he signed his name on the array.[4]

On cross-examination by the State, Douglas Griffin testified that Appellant was the person he identified. Appellant came to his house earlier the day of the shooting, "screaming" that the Griffins should not "come around his girl." Appellant lived with a woman named "Kameeka" who lived nearby.

The parties then stipulated to the admission of the body camera footage of Detective Powden, the officer who showed Douglas Griffin the array in question, and that video is transcribed. Pertinent to the issue raised, as part of the preliminary instructions to Griffin, Detective Powden told him that "I'm not involved in this investigation other than showing you these photographs and I do not know the identify of the suspect." Griffin understood the instructions and had no questions.

Griffin then looked at the photographs, one by one, and stopped at Photo #3, stating, "that's the one." After looking at the remaining photographs, Griffin confirmed that he picked Photo #3 and stated that he was "[t]he shooter." Detective Powden then asked Griffin if he would write a statement on the Photo #3 and Griffin shook his head negative and gave no verbal response. However, Griffin did agree to sign his name to the

[4] A copy of the array that was introduced at the motions hearing is included in the record.

photograph. On redirect, Douglas Griffin maintained that he did not give the police a name at the scene of the shooting, but maintained he told them the shooter was "Meeka's boyfriend."

After the evidence was received, the court heard the following argument:

> [DEFENSE COUNSEL]: Right. Because the gist of it is if he was discussing matters with – if this – the video showed that it was at 8:00 and that's going to be – well, if there was evidence seized and there were detectives there that are part of the investigation, and you clearly see the detective open the curtain to let the other officer in.
>
> And then come back out and like stop like he's talking to that person then there's an idea that they showed him – that he didn't know the person before but then they showed him an ID and he's like, oh yeah, that's the guy.
>
> THE COURT: But he said they didn't do that.
>
> [DEFENSE COUNSEL]: True.
>
> THE COURT: And it's certainly not on the video. The video looks like they're standard issue, double blind, sequential photo array.
>
> [DEFENSE COUNSEL]: But is it double blind if there's an officer in the corridor that possibly could have spoken to him about it.
>
> THE COURT: What evidence do I have of that?
>
> [DEFENSE COUNSEL]: You don't. And I don't, I don't think it was Detective Jordan. I think it was Detective Gibbs (phonetic) that was in the hallway. But that's the hard - -that's the reason why we warranted [sic] it.
>
> THE COURT: Okay. All right. [Prosecutor], anything?
>
> [PROSECUTOR]: Your Honor, the video seemed very clear to me that was as is usual double blind, sequential photo array conducted and the witness looked through, you know, all of the photographs.
>
> When he got to number 3 he actually identified Mr. Epps but he did look through all of the photographs. I think they followed the procedures

> that they're supposed to. And so I would ask that you deny the motion to suppress.
>
> The court then denied the motion:
>
> > THE COURT: All right. Again at the end of the day it's up for the jury to decide how [much] weight to give to the, to the identification of the photo array. My job is to decide if it is constitutionally impermissible that other had so suggested that it can't be relied on.
> >
> > I have absolutely no evidence that this was a constitutionally impermissible or unduly suggestive photo array. This was a – sort from the video that I have and from the testimony of the witness a sort of textbook, double blind, sequential photo array. And so the motion to suppress the photo array is denied.

Prior to the retrial, Appellant renewed this motion, proffering that the photo array was prepared and then shown to Douglas Griffin after the police found Appellant's identification in the home of "Kemika Lewis" along with some ammunition. Defense counsel argued that this was impermissibly suggestive. Defense counsel conceded that Douglas Griffin denied this occurred but continued to argue that the "timing and the of [sic] the events" suggested that "something had to have been done" before Griffin identified Appellant. The court ruled that this argument was preserved, and appellate counsel submits that the court erred in not denying the motion.

We are not persuaded Appellant met his burden of establishing the procedures used to present the photo array to Douglas Griffin were impermissibly suggestive. There was no evidence that Detective Powden or anyone else told Griffin who to select. There was no evidence that Detective Powden or anyone else told Griffin about the results of the search warrant, as Appellant speculates. And there was no evidence that the police found the shooter. *Cf. Wallace v. State*, 219 Md. App. 234, 245 (2014) (although police told the

witness "they had the person" there was no evidence that they told witness who to select); *Gatewood v. State*, 158 Md. App. 458, 477 (2004) (holding extrajudicial photographic identification of defendant was not impermissibly suggestive, even though police detective told the witness that he knew who the suspect was).

Further, the court was not clearly erroneous in finding that this was a "standard issue, double blind, sequential photo array." Double-blind photo arrays are used to prevent the administering officer from suggesting inadvertently or making any other insinuations regarding the identity of the suspect. To accomplish this, the administering officer is not involved in the investigation, making him or her "blind" to which photograph, if any, depicts the suspect. *See generally, Smiley v. State,* 216 Md. App. 1, 38 (2014) (explaining a double-blind photo array occurs when "the officer administering the identification procedure does not know which photograph is that of the suspect"), *aff'd,* 442 Md. 168 (2015). This finding was supported by the record.

Ultimately, Appellant's complaint appears to focus on how his photograph came to be included in the photo array, arguing that it was only included after his identification was found in the neighbor's residence. And yet, it would be reasonable to assume that in nearly all police investigations, witnesses are not asked to identify photos unless the police have identified a suspect. It is also reasonable to assume that most witnesses are aware that the police have identified a possible suspect at the time they are shown a photo array. That

mere awareness does not suggest whom the witness should identify. In short, the procedure here was not impermissibly suggestive.[5]

III.

Finally, Appellant contends the court abused its discretion in not permitting him to call one of the prosecutors as a witness. This concerns victim Douglas Griffin's revelation on direct examination during the second trial that he told a prosecutor a few days earlier that the reason he did not identify Appellant at the scene of the shooting was because he was "afraid." Appellant concedes that Detective Jordan confirmed that Griffin did not identify Appellant at the scene and never told police that the reason was because he was afraid. And Appellant acknowledges that, ordinarily, resolution of any discrepancies between Griffin and Detective Jordan was a matter for the jury. Nevertheless, Appellant concludes "he was placed in the unfair position of attacking Griffin's credibility with Jordan, a witness he was 'already trying to impeach.'"

The State responds that the jury heard from both Griffin and Detective Jordan on this issue and Appellant "had more than enough leverage to impeach Griffin's statement that he did not identify the shooter by name initially because he was afraid." The State notes that, at the second trial, Griffin confirmed that he did not testify at the first trial that he was afraid to identify Appellant at the scene. The State further notes that Detective

[5] Moreover, although our analysis ends because the array was not impermissibly suggestive, even if we were to address reliability, Griffin knew that Appellant was the boyfriend of a neighbor, and, based on the transcript and the video of the identification, which we have reviewed on appeal, Griffin's identification was unequivocal. Griffin stopped when he came to Photo #3 and said, "that's the one."

Jordan testified six times that Griffin never said he was afraid. The State concludes that the court properly exercised its discretion under these circumstances in not permitting Appellant to call one of the prosecutors to "present additional cumulative testimony on an issue he thoroughly explored during both Griffin's and Detective Jordan's testimony."

Before we address the background and pertinent law on this issue, it is important to clarify the question presented. There is no dispute that Griffin did not identify Appellant at the scene and first identified him when he was shown the photo array at the hospital. To be clear, the issue *is not* whether Griffin told police at the scene that he was afraid to identify the appellant. Rather, the specific issue before the trial court and on appeal *is* whether Griffin told a prosecutor, two days before the second trial, that fear prevented him from identifying the appellant at the scene.

To recap the evidence presented, Douglas Griffin testified and identified Appellant as the person who shot him, his brother, and Alissa Traylor. During the shooting, and after he was shot, Griffin jumped out a window and went to his aunt's house located nearby. His aunt called the police and Griffin returned to the scene.

Griffin testified that he told the police he was shot but he did not identify the shooter at that time. Asked whether an officer asked him if he knew who shot him, Griffin testified, without objection, "I told him no, because I didn't really want to say at the time. I was scared." Griffin further testified that he was "[s]ad, scared, shock. I was in shock." He confirmed, again without objection, that he did not want to identify the shooter because he was scared. Griffin continued that he identified Appellant as the shooter when he was shown a photo array while being treated for his injuries at the hospital.

On cross-examination, Griffin confirmed that this was the first time he had ever testified that fear prevented him from identifying the shooter to police at the scene of the incident. The following exchange is pertinent:

> Q: So at no time did you tell Detective Jordan "Hey, I didn't mention anyone because I was afraid."
>
> A: No.
>
> Q: And since February, you've spoken to [the Prosecutor], the State's Attorney in this matter?
>
> A: Only when it's close to court.
>
> Q: Okay. And did you discuss the case when you talked to him on the phone?
>
> A: Yes. Not on the phone.
>
> Q: I'm sorry?
>
> A: Not on the phone.
>
> Q: It was in person?
>
> A: Yes.
>
> Q: At any time, did you say to [the Prosecutor] "Oh, I didn't say anything because I was afraid."
>
> A: Yes.
>
> Q: You did. When was that?
>
> A: Like two days ago.
>
> Q: Two days ago.
>
> A: Three.

After Griffin again confirmed that he told the prosecutor a few days before this retrial that he did not identify Appellant when police first responded, because he was scared, Defense Counsel moved for a mistrial. The following ensued:

> [DEFENSE COUNSEL]: This is the first time --the first time he has ever said anything about being afraid. He never said anything at the scene (unintelligible) this day, and now he's telling us that he spoke to the State's Attorneys about it and said to the State's Attorneys that the reason why he doesn't say he was at the scene was because he was afraid.
>
> If so, that's a statement by a witness, especially when it's changed, the Defense is entitled to any oral substance of the witness's statement, and what he would have said to prevent this very thing, surprise. I could have, you know, obviously planned differently. It's one thing if he said it on the stand and it was a total surprise to everybody here. But if he's telling me that he talked to the State's Attorney and I was not given that information, how is that fair to Mr. Epps?

The prosecutor conferred with co-counsel and then proffered, "I don't recall, and she doesn't recall, Mr. Griffin saying that during our meeting, and so that's the reason the State never turned it over is that I don't recall him saying that, so. So I don't know that it's a – there's no reason for a mistrial to be granted." The State continued that it did not know that Griffin would testify in this manner and that this belated disclosure on the witness stand was not a discovery violation.

Defense Counsel then responded:

> [T]he problem now, then, becomes they are now witnesses. He's either telling the truth or he's not telling the truth, and now they admit (unintelligible) to be both present at the meeting, along with Detective – Jordan -- with the witness. So, I want to call them to say whether it happened or not, and his credibility is at stake. Where is this coming from, is this the first time it's coming up or not.

(cleaned up).

The court suggested that Defense Counsel could call Detective Jordan, who was also present during this meeting referred to by Griffin. Defense Counsel replied that there were credibility issues with Detective Jordan. Defense Counsel then conceded, "I would take the State's Attorney's word for, but I need to show to the jury to say he's lying, he's making this up out of whole cloth."

The court confirmed that Appellant's motion was for the discovery violation, excused the jury for the day, and then Defense Counsel called Detective Jordan to the stand. Detective Jordan agreed that he was present for a pretrial meeting with Griffin and one of the State's Attorneys a few days earlier. Pertinent to the issue raised, and with respect to this particular meeting, Defense Counsel inquired of Detective Jordan as follows:

> Q. Did he provide any other explanation for why he didn't say anything at the scene of the shooting that night?
>
> A. I can't remember, no.
>
> Q. Right. Do you recall him ever bringing up being afraid of Mr. Epps?
>
> A. I can't remember that, no.
>
> Q. Okay. Do you recall him ever discussing not naming Mr. Epps because he was afraid of him?
>
> A. He didn't say that – he discussed about Mr. Epps because the fact that he threatened him and his brother prior to the shooting. He came to him and made a threat against him.

And:

> Q. Right. Got that. At the meeting on Friday, did he ever say anything about being afraid to identity anyone, Mr. Epps, at the scene at the house that night.

A. He didn't say anything about afraid, no.

The parties then addressed the court and Defense Counsel agreed this was a "credibility issue for Mr. Douglas Griffin[.]" Defense Counsel then argued that she wanted to call one of the prosecutors to confirm that the information, that Griffin told them a few days prior to this retrial that he was afraid, because there were credibility issues with Detective Jordan as well. After hearing from the Prosecutor, Defense Counsel maintained that she wanted a mistrial because Griffin's testimony was a surprise and that she wanted more time to prepare.

The court then ruled on the mistrial motion, finding in pertinent part as follows:

> [THE COURT]: I will say that at the bench Defense indicated that they, you know, believed what the Prosecutor, over the Detective, based on the prior arguments made at a motion, without going into detail about that. This Court finds the statement made by the Prosecutor credible, that at that meeting that the statement that Mr. Griffin said on the stand today was not said at that meeting. Detective Jordan just said he doesn't recall him, saying – recall Mr. Griffin saying that at all.
>
> I think that what the Defense even stated is that in your argument for the mistrial is that Mr. Douglas Griffin is changing his story, it's something out of the blue, it's surprise. That happens not only to Defense sometimes, it happens to the State as well, where a witness will take the stand and say something completely out of the ordinary and not what you thought that that person was going to say.
>
> I – from this Court's perspective, it is a credibility issue. I don't believe that based on the three factors in order to determine, to decide on a mistrial, that that has been met. It requires a high degree of necessity for a mistrial.
>
> We have a credibility issue. That is not a high degree of necessity for a mistrial. And, so, it's not a discovery violation. It would be something different if Detective Jordan had said, "Yes, indeed, he did say this," and so that statement was made in front of the Prosecutors and it wasn't something that was turned over. That's – that's not what we have here.

> Yeah. I'm just going to leave it there. I think it's a credibility issue. I don't think that even you get past it, you get to any of the other requirements in order for me to find manifest necessity. I mean, if I engage in the process of exploring reasonable alternatives, I can grant a continuance so that you can prepare further if need be for the purposes of cross examining Mr. Douglas Griffin.
>
> I mean, we've excused the jury, obviously, so there wouldn't be any additional cross examination of him today. And, hopefully, that you being able to prepare – I mean, it's 3:30 now, between now and tomorrow morning, and I can give you the time that you need. If you say "Your Honor, I need to start at 10:00 or 11:00 instead of 9:30," I'll give you the time that's needed in order for you to prepare for cross examination.
>
> But I would say that that is the reasonable alternative to dealing with this credibility issue. It's not a mistrial, so I'm going to deny your request for a mistrial. Okay. Go ahead.
>
> [DEFENSE COUNSEL]: No. I just was saying I think that having overnight will allow me to adjust accordingly to the issue of credibility and then, obviously, cross examining Detective Jordan, who is testifying tomorrow.

The next trial day began with Douglas Griffin's continued cross-examination. Griffin agreed that he never told the police who responded to the scene of the shooting that he could identify the shooter. He agreed that he just said that "somebody" was the shooter. Further, Griffin testified as follows:

> Q. Okay. Now, yesterday you said that "Oh, I didn't say anything because I was afraid," is that what you said yesterday?
>
> A. Right.
>
> Q. And for two years while this case has been going on, you never said that, have you?
>
> A. Said what?
>
> Q. You've never said "I said I don't know because I was afraid."

A. Not sure.

Q. Well, in February, when you testified, you said "I don't know" because you were in shock, is that what you said then?

A. Yeah.

Q. And you have never testified other than that about why you said "I don't know," correct?

A. Not sure.

Q. Did you ever say anything to [the Prosecutors] about "I said I don't know because I was afraid."

A. Not sure.

Q. Didn't you testify yesterday that you were at a meeting with them and you said you told them that?

A. Yes.

Q. Is that still your story today, that you told them on Friday, at a meeting prior to trial?

A. Yes.

Q. And Detective Jordan was there as well?

A. At the meeting, yes.

Q. Yes. And you were all talking about the case, right?

A. Yes.

Q. But you never testified about that before, right?

A. Not sure.

Later that same day at trial, the State called Detective Robert Jordan. Detective Jordan testified on direct examination that the first time he spoke to Douglas Griffin was

in the emergency room at the hospital. On cross-examination, Detective Jordan testified that he was not present at the scene of the shooting when Griffin spoke to the police, and that he first spoke to him at the hospital.

As for the issue raised, Defense Counsel asked Detective Jordan about this meeting a few days prior to trial with Griffin and the prosecutors. Detective Jordan confirmed that they spoke at that meeting about why Griffin did not identify anyone at the scene but that he did not remember what Griffin said. The detective further testified he did not know why Griffin told the first responders he did not know who the shooter was. Asked whether Griffin said "anything about being afraid," the detective testified "I can't remember." Detective Jordan further testified that he did not ask Griffin why he did not identify anyone at the scene.

Detective Jordan repeatedly testified that Griffin never told him that he was afraid. Cross-examination concluded as follows:

> Q. …I'm asking you specifically, the meeting on Friday, did he ever say "Hey, I didn't say anything about it being Lenny Epps when I was at the scene because I was afraid." Did he ever say that at the meeting on Friday?
>
> A. *No, he didn't say about being afraid*.

(emphasis added).

After this final exchange, the defense counsel approached the bench and stated that Detective Jordan did not testify that Griffin had never said he was afraid. Despite the apparent conflict between counsel's argument and the immediately preceding testimony set forth above, Defense Counsel continued that, at most, Detective Jordan testified "I don't recall" and "I don't recollect" several times. For that reason, Defense Counsel insisted that

"the best person" to counter Griffin's testimony about being afraid "would be one of the State's Attorneys." Defense Counsel argued:

> Maybe I'm not saying it articulately, but what I'm saying is he, you know, Detective Jordan was not the one doing the questioning. He ostensibly was listening. He doesn't recollect, and I have people who can affirmatively recollect that he didn't say that, that he's bringing it up for the first time on the stand, and I think that's hampering Mr. Epps if I can't bring that to the jury.

The State responded that Detective Jordan did, in fact, testify that Griffin did not say he was afraid at the meeting with prosecutors. Therefore, there was no reason to call one of the prosecutors to the witness stand. The court agreed:

> THE COURT: When they met with him, did he say this, and my understanding of his last answer was "No." So, I don't think that gets you to making either of these State's Attorneys, ASAs here, a witness in this case to -- for that. I think it's still where we were before, where it's up to the jury to decide credibility, but I'm not going to say that you can put either of them on the stand. I think he answered the question.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: I mean, obviously, you're free to argue in closing how you need to argue, but –
>
> [DEFENSE COUNSEL]: All right. Thank you.[6]

[6] Throughout closing, Defense Counsel argued that Griffin was not credible because he lied about not identifying the shooter to first responders at the scene because he was afraid. Defense Counsel added that Griffin also lied to the jury about informing the prosecutors and Detective Jordan a few days before trial that he was scared, and counsel conceded that Detective Jordan contradicted that testimony during cross-examination. Specifically, with respect to this pretrial meeting, Defense Counsel argued "we know that's a lie because Jordan gets on the stand, and he didn't want to say it, we were going round and round, but finally at the end he said no, he didn't say that, because he knows it's important. Douglas Griffin lied to you about that." Defense Counsel maintained this theme throughout closing argument, at least with respect to Douglas Griffin, including "[a]s far as being a scared person, he certainly never, ever mentioned that before. He doesn't know, and he should, and he doesn't say anything because he doesn't know."

The general rule of admissible evidence is that "all relevant evidence is admissible" and "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. Relevant evidence is defined 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." Md. Rule 5-401; *Merzbacher v. State*, 346 Md. 391, 404 (1997) ("To be relevant, evidence must tend to establish or refute a fact at issue in the case."). Whether evidence is relevant depends on "the considerable and sound discretion of the trial court." *Merzbacher*, 346 Md. at 404. However, a court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. The determination of whether evidence is relevant under Rule 5-401 and therefore admissible under Rule 5-402 is reviewed under an abuse of discretion standard. *Brooks v. State*, 439 Md. 698, 708 (2014). This includes decisions to curtail cross-examination. *Simmons v. State*, 392 Md. 279, 296 (2006) ("A trial court does not abuse [its] discretion when it excludes cross-examination that is irrelevant"). An abuse of discretion occurs when "no reasonable person would take the view adopted by the court," or when the ruling is "clearly against the logic and effect of facts and inferences before the court," or "beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 13–14 (1994) (citations omitted).

Our Supreme Court has recognized that the credibility of a witness is always relevant. *Devincentz v. State*, 460 Md. 518, 551 (2018) (citing *Smith v. State*, 273 Md. 152,

157 (1974); see also Md. Rule 5-616 (a) ("The credibility of a witness may be attacked through questions asked of the witness . . . ."). One way to impeach the credibility of a witness is to prove "that the facts are not as testified to by the witness." Md. Rule 5-616 (a) (2). However, extrinsic evidence is not admissible to impeach a witness regarding "facts that are collateral, irrelevant or immaterial to the issues of the case." *Smith*, 273 Md. at 158; *see also* Md. Rule 5-616 (b) (2) ("Other extrinsic evidence contradicting a witness's testimony ordinarily may be admitted only on non-collateral matters").

"Extrinsic evidence" is evidence that is "proved through another witness, or by an exhibit not acknowledged or authenticated by the witness sought to be contradicted." *Anderson v. State*, 220 Md. App. 509, 519 (2014) (citations omitted). The objective of the rule prohibiting extrinsic evidence on a collateral matter for impeachment purposes is "aimed at preventing inconvenience, loss of time, unfair surprise to the witness and confusion of the issues." *Id*. at 521 (quoting *Smith*, 273 Md. at 159).

Determining whether evidence is "collateral" is "whether the fact as to which the error is predicated *is relevant independently of the contradiction*; and not whether the evidence would be admissible in terms of satisfying the rules of evidence." *Anderson*, 220 Md. App. at 521 (emphasis added, quoting *Smith*, 273 Md. at 162). Admission of collateral extrinsic evidence is a matter of trial court discretion. *See* Murphy and Murphy, MARYLAND EVIDENCE HANDBOOK § 1304 [A] at 674 (5th ed. 2020, 2024 Supp) ("Under our 'new' rule, however, the trial judge has discretion to receive extrinsic evidence that impeaches a witness on collateral matters and that should, in fairness, be considered by the trier of fact"); *see also* Lynn McLain, 6 MARYLAND EVIDENCE STATE AND

FEDERAL § 607:4, at 556 (3d ed. 2013) (hereinafter "McLain") ("[E]xtrinsic evidence is likely to be permitted to impeach a witness's testimony concerning a collateral fact if 'as a matter of human experience [the witness] would not have been mistaken about [it] if his story was true.'") (citation and footnotes omitted).

Thus, our analysis returns to Rule 5-401 and whether the extrinsic evidence is relevant, "independent of the contradiction." *Smith*, 273 Md. at 161. "[T]he question is not whether the [witness's] *credibility* was a collateral issue; it is whether *the fact or matter that was being used to impeach his credibility* was a collateral issue." *Anderson*, 220 Md. App. at 524 (in a case where the "witness" was the defendant) (emphasis in original). As this Court explained:

> [A]n irrelevant fact that comes into evidence does not become relevant merely because there is extrinsic evidence to contradict it. Indeed, if that were so, the distinction in Rule 5–616(b)(2) between the admissibility of evidence on a collateral matter that impeaches by contradiction and the admissibility of evidence on a non-collateral matter that impeaches by contradiction would be meaningless. All such contradictory impeachment evidence would be on a non-collateral matter and therefore would be admissible.

Anderson, 220 Md. App. at 524.

In considering whether the trial court erred in not permitting Appellant to call one of the prosecutors to counter Griffin's testimony that he told them before trial he was afraid to identify Appellant at the scene, we first address the relevancy of that evidence. We recognize that a delay in reporting evidence is relevant to a witness's credibility because it tends to suggest the witness may be fabricating evidence. *See generally, Walter v. State*, 239 Md. App. 168, 198 (2018) (recognizing that testimony about delayed disclosures of minor sex abuse victims was relevant); *People v. Egegbara*, 211 N.Y.S.3d 359, 360

(concluding evidence that an eyewitness delayed reporting a shooting due to threats was relevant), *leave to appeal denied*, 242 N.E.3d 683 (2024).

We further recognize that, in this case, the trial court admitted evidence directly on point questioning the timing of Griffin's disclosure at trial, through both the cross-examination of Griffin and the testimony of Detective Jordan. However, the issue presented is whether it was also relevant that Griffin did not tell the prosecutors two days before he testified. We are not persuaded that specific evidence, whether Griffin told the prosecutors two days earlier, was relevant. Indeed, we conclude that calling a prosecutor to testify would amount to simple contradiction of a collateral matter.

Furthermore, were we to hold otherwise, i.e., that the evidence was, in fact, relevant, that did not prevent the court from excluding it at trial. *See* Md. Rule 5-403; *Newman v. State*, 236 Md. App. 533, 556 (2018) (recognizing that the abuse of discretion standard is "highly deferential") (citation omitted). In considering the trial court's exclusion of that evidence, both parties direct our attention to cases concerning when a trial court may permit a prosecutor to serve as a witness in the same case. "[T]he decision whether to allow the defense to call the prosecutor to testify is within 'the broad discretionary right of the trial judge to control the trial of the case.'" *Raines v. State*, 142 Md. App. 206, 213 (2002) (citing *Johnson v. State*, 23 Md. App. 131, 142 (1974)). "The prosecutor's 'testimony must be relevant and material to the theory of the defense; it must not be privileged, repetitious, or cumulative.'" *Id.* at 214 (quoting *Johnson*, 23 Md. App. at 142). On appeal, we review the circuit court's decision not to allow a witness to testify "under the abuse of discretion

standard applicable to exclusion of evidence in general." *Kelly v. State*, 392 Md. 511, 532 (2006).

In *Raines*, Raines was convicted of two counts of second-degree sex offense and one count of child abuse of his adopted daughter when she was under the age of 16. *Raines*, 142 Md. App. at 208-09. One issue on appeal concerned whether, after inserting a vibrator in the victim's vagina, Raines turned the vibrator on. *Id.* at 210. Raines attempted to impeach the victim with a prior statement she gave on the subject. *Id.* As part of her testimony, the victim testified that she had conveyed information about this incident to the prosecutor before trial. *Id.*

Prior to trial, Raines sought to call the prosecutor to the witness stand to testify concerning the prior meetings with the victim. *Raines*, 142 Md. App. at 211. The prosecutor, in turn, advised the court that she took notes, but there was no information about this subject, and she had no recollection of the matter being discussed. *Id.* The prosecutor further indicated that an investigator with her office was present during the meetings, also took notes, and there was no information in those notes whether the vibrator was turned on by appellant. *Id.* Although the investigator was called to testify and offered evidence consistent with this information, Raines still wanted to call the prosecutor. *Id.* at 211-12. The court denied the request, and we found, according to our summary of the issue, that "[the investigator's] testimony was sufficient on that point; and it would be unfair to both parties to have the prosecutor's credibility put in issue while she was an advocate in the case." *Id.* at 212.

This Court concluded that the trial court did not abuse its discretion in denying Raines's request to call the prosecutor as a witness. *Raines*, 142 Md. App. at 214-16. We explained:

> It is well established in Maryland that a prosecuting attorney is competent to serve as a witness. Courts usually are reluctant, however, to permit a prosecutor to serve as a witness in a case he is prosecuting, except in extraordinary circumstances. Often, that reluctance stems from a "concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors." *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir.1998). In general, courts have held that in those cases in which the prosecutor is a necessary witness for the prosecution, it is within the sound discretion of the trial court to require the prosecutor to withdraw from the case, and testify as a witness.

Id. at 212-13 (cleaned up).

In *Raines*, we recognized that a similar issue was decided in *Johnson v. State*, 23 Md. App. 131 (1974), *aff'd*, 275 Md. 291 (1975). *See Raines*, 142 Md. App. at 213-14 (discussing *Johnson*). In that case, Johnson's two brothers were indicted for the 1972 murder of Gaston Ashley inside the Sportsman's Bar in Baltimore City. *Id.* at 133. Prior to trial, Johnson met with the prosecutor and confessed to the murder, which he claimed was committed in self-defense. *Id.* In an attempt to verify this admission, Johnson and his two brothers, as well as three other men, were placed in a line-up. While his brothers were identified by eyewitnesses, Johnson was not. *Id.* Thereafter, appellant's brothers were tried by a jury. Appellant testified that he committed the murder in self-defense. Appellant's brothers were acquitted. *Id.* at 134.

The State then charged appellant with the murder. *Johnson*, 23 Md. App. at 134. Appellant's former testimony at his brothers' trial was admitted over objection. *Id.* Johnson sought to admit a portion of a bench conference at the prior trial wherein the State proffered that it had rejected Johnson's admission of guilt. *Id.* The State's objection at Johnson's murder trial was sustained. *Id.* Defense counsel then sought to call the

prosecutor to testify to these events, but that attempt was also rejected by the trial court. *Id.* at 135-36.

On appeal, we adopted the standard that it is within the trial court's discretion to determine whether to permit a defendant to call a prosecutor as a witness. *Johnson*, 23 Md. App. at 141-43. We recognized that "'an accused's right to call relevant witnesses and to present a complete defense may not be abrogated for the sake of trial convenience or for the purpose of protecting a [prosecutor] from possible embarrassment while testifying if he possesses information vital to the defense.'" *Id.* at 142 (citation omitted).

We continued that "[t]his does not mean, however, that defense counsel has an uncontrolled right to call the trial prosecutor to the stand. 'We are aware of the defense ploy-albeit infrequent and not present in this case-of 'trying the prosecutor'; it is not our intent to place such a sword in the hand of defense counsel." *Johnson*, 23 Md. App. at 142 (citation omitted). We concluded that Johnson failed to show the excluded testimony, from the prosecutor stating he had rejected Johnson's testimony at the earlier trial of Johnson's brothers, was relevant or material. Therefore, the court did not abuse its discretion in excluding it. *Johnson*, 23 Md. App. at 143.

Likewise, applying these lessons to the facts in *Raines, supra*, we concluded there that the trial court did not abuse its discretion in not permitting the defendant to call the prosecutor because the evidence was not relevant or material to the defense. *Raines*, 142 Md. App. at 214. Because the act itself of inserting a vibrator into the victim's vagina constituted a "sexual act" as defined by statute, whether or not Raines turned the vibrator on was irrelevant. *Id.* We also concluded that, given the investigator's testimony on the same subject matter, the prosecutor's testimony would have been cumulative. *Id.* at 214-15. Notably, defense counsel referred to the investigator's testimony to attempt to impeach

the victim's credibility. *Id.* at 215; *see also United States v. Roberson*, 897 F.2d 1092, 1098 (11th Cir.1990) (when another witness could testify as to a conversation between the defendant and the prosecutor, the defendant did not show a compelling need to call the prosecutor as a defense witness) (cited in *Raines, id.*); *State v. Colton*, 663 A.2d 339, 346 (Conn. 1995) (defendant wishing to call prosecutor as witness must show that testimony is necessary, rather than merely relevant, and that all other sources of comparable evidence have been exhausted). (cited in *Raines, id.*), *cert. denied*, 516 U.S. 1140 (1996). Under these circumstances, this Court concluded that the court had properly exercised its discretion. *Raines*, 142 Md. App. at 215.

We arrive at a similar conclusion in this case. As defense counsel acknowledged during closing argument, Detective Jordan testified that Griffin did not tell anyone at the pretrial meeting that fear was the reason he failed to identify the shooter to first responders. Even if relevant, calling the prosecutors to testify to the same evidence would have been cumulative, and we conclude the trial court properly exercised its discretion in excluding the evidence.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID
BY APPELLANT.