Circuit Court for Baltimore City
Case No. 118226010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1425

September Term, 2021

DAYON COOPER

v.

STATE OF MARYLAND

Friedman,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.
Concurring Opinion by Friedman, J.

Filed: November 17, 2022

On the afternoon of June 12, 2018, Cameron Anderson (age 17) was killed after being hit by a hail of bullets fired from a white Mercedes Benz ("the Mercedes"). Mr. Anderson's murder occurred outside a vacant house that was located on Cedonia Avenue in Baltimore City. After an investigation by the Baltimore City Police Department, Dayon Cooper (age 16) was indicted by a grand jury for the first-degree murder of Mr. Anderson. He was also charged with use of a handgun in the commission of a crime of violence, reckless endangerment, and possession of a handgun in a motor vehicle.

A Baltimore City jury, after a seven day trial, convicted Mr. Cooper of all the charges for which he was indicted. On November 2, 2021, the circuit court sentenced Mr. Cooper to a term of life imprisonment for the first-degree murder conviction. The sentences for all other convictions were to run concurrent with the life sentence. The trial judge made a recommendation that the Department of Corrections place Mr. Cooper in the Youthful Offender Program.

In this timely appeal, Mr. Cooper raises two questions that he phrases as follows:

> I. Did the trial court err by admitting fingerprint evidence and not sanctioning the State for [its] discovery violation when the State did not provide the expert report stating that Mr. Cooper's fingerprint was on the suspect vehicle?
>
> II. Did the trial court err by admitting a statement as substantive evidence without making the determination required by *Nance v. State*, 331 Md. 549 (1993) and Md. Rule 5-802.1(a)?

I.

FACTS DEVELOPED AT TRIAL[1]

A. Testimony of Donald Silver

On June 12, 2018, Donald Silver lived at 5409 Moore's Run in Baltimore City. An alley runs in back of his house. That alley is close to the spot where Mr. Anderson was murdered. Mr. Silver testified that at about 1:30 on the afternoon of the shooting, he was in his bedroom when he heard multiple gunshots coming from the aforementioned alley. He looked out of his bedroom window and saw a white car "coming down the alley" behind his house. The car he saw was proceeding "at a pretty good pace." He testified that he believed, but was not sure, that the vehicle he saw had a Mercedes emblem. He called a 911 operator and reported what he had seen.

B. Testimony of Baltimore City Police Detective Richard Moore

Detective Moore investigated the murder of Mr. Anderson. Based on information received, personnel at the Baltimore City impoundment lot were asked to be on the lookout for any white Mercedes vehicles that might be impounded. About one week after Mr. Anderson's death, the detective learned that a white Mercedes with light blue tinted windows was in the impoundment lot. A crime lab technician processed the Mercedes for potential DNA and fingerprint evidence. The technician recovered 41 latent prints which were placed on print cards.

[1] Our summary of the facts developed at trial is not intended to be comprehensive. We have summarized only those facts that are either directly related to the questions presented by Mr. Cooper or put those facts in context.

C. Fingerprint Expert Sean Dorr

Mr. Dorr examined the latent print cards from the Mercedes that the technician had recovered. He found sixteen suitable[2] prints. In his first examination, he identified from the 16 cards seven prints from one Derrick Anderson.[3] Mr. Dorr was then asked to compare the latent prints recovered from the car to the fingerprints of Mr. Cooper and the prints of one Darrell Truesdale. In his second examination, from print card 15A, he identified a fingerprint found on the outside of the driver's side front door as that of Mr. Cooper's left ring finger. Mr. Dorr's report concerning Mr. Cooper's left ring fingerprint was introduced into evidence as State's Exhibit no. 36. Palm prints were on three of the print cards, but because Mr. Dorr didn't have Mr. Truesdale's palm prints, he could not determine whether those prints were left by Mr. Truesdale.

D. Testimony of Kaniya Hawkins

Ms. Hawkins testified that on the afternoon of the date that Mr. Anderson was shot, Mr. Cooper picked her up from school. Next, Mr. Cooper dropped off another female passenger, whose first initial was S., at S.'s home. Mr. Cooper then picked up Rodney Pettit. After doing so, Pettit, Monay Dotkins, Ms. Hawkins and Mr. Cooper smoked marijuana in the white Mercedes Mr. Cooper was driving. Afterwards, Mr. Cooper drove back to S.'s house and parked in an alley behind her house. At that point, Ms. Hawkins

[2] A "suitable" print is one where there are enough friction ridges to make a comparison with other prints on file.

[3] Derrick Anderson is not to be confused with the murder victim, Cameron Anderson.

saw S., who was standing outside the vehicle, pointing at someone or something. She then heard gunshots from the driver's side of the car in which she was a front seat passenger. But, according to her testimony, she didn't see the shooting because she "blacked out" when she first heard the shots.

Ms. Hawkins acknowledged that she saw a gun under the driver's seat of the Mercedes, but did not see anyone retrieve or use it. The State, in an effort to impeach Ms. Hawkins, introduced a photographic array containing Mr. Cooper's picture. Below Mr. Cooper's picture, Ms. Hawkins wrote: "the driver of the car in the murder." The State also introduced, as a prior inconsistent statement, the recording of what transpired when Ms. Hawkins made the identification from the photographic array. The contents of that recording will be discussed, *infra*.

E. Testimony of Monay Dotkins

Ms. Dotkins, who was 15 at the time of Mr. Anderson's murder, corroborated Ms. Hawkins's testimony that on the afternoon of the murder, Mr. Cooper dropped S. off at her home, then picked up Rodney Pettit, then returned to S.'s house and drove to an alley behind S.'s home. Ms. Dotkins heard S. calling out the victim's name, then heard gunshots and also heard S. screaming. As the car in which she was a backseat passenger drove off, Ms. Dotkins saw Mr. Anderson laying on the ground.

Ms. Dotkins testified that she did not see the gun and did not know who fired the shots at Mr. Anderson. She also claimed that she did not remember Mr. Cooper pulling out a gun but she did remember seeing his arm "out the window." Despite that testimony, she acknowledged telling the police, prior to trial, that Mr. Cooper was involved in

Anderson's murder and she identified him as "the one that shot the gun." She also acknowledged telling the police, prior to trial, that Mr. Cooper "went and it's like he pulled a gun out. . . ." She also told the police that she saw the gun go off in Cooper's hand and that she knew Cooper was shooting.

F. Testimony of Rodney Pettit

Mr. Pettit testified that Mr. Cooper picked him up in a Mercedes on the date of the shooting. He got into the back seat behind the passenger and provided marijuana to the other occupants. After Mr. Cooper drove into an alley, Mr. Pettit saw S. point, then heard about five shots fired and saw Mr. Cooper "shooting." According to Mr. Pettit, he did not see the gun in the car but saw Mr. Cooper's upper body and arm hanging outside of the window. He testified that he had no doubt that Mr. Cooper fired the gun at Mr. Anderson.

G. Testimony of Darrell Truesdale

Darrell Truesdale, a good friend of Mr. Cooper, was a reluctant witness. Much of what he told the police that incriminated Mr. Cooper was recanted by him when he testified. According to Mr. Truesdale, the police told him what to say. The jury heard a two-hour tape of his statement to the police in which he told the police, among other things, that Mr. Cooper told him that he killed Mr. Anderson.

Mr. Truesdale admitted on direct-examination that he had seen Mr. Cooper driving a white Mercedes, and that he had been a passenger in that car on one occasion prior to the murder. On cross-examination, he said he had been a passenger in the white Mercedes that Mr. Cooper drove on a "couple" of occasions prior to the murder.

Additional facts will be set forth in order to answer the questions presented.

II.

THE DISCOVERY ISSUE

Mr. Cooper argues:

> The trial court erred when it did not exclude fingerprint evidence and did not sanction the State for failure to turn over the expert report of the fingerprint examiner in advance of trial in violation of Md. Rule 4-263.

With respect to any expert witnesses, Maryland Rule 4-263(d)(8) requires the State to provide, without request:

> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
>
> (C) the substance of any oral report and conclusion by the expert[.]

As mentioned earlier, the State's fingerprint expert was Sean Dorr. Prior to trial he wrote two reports. The first report concerned the latent print cards that were obtained from the Mercedes that contained sixteen suitable prints, seven of which he could link to a juvenile named Derrick Anderson. The first report, which was sent to counsel for Mr. Cooper prior to trial, was marked as State's Exhibit no. 35. After Exhibit no. 35 was sent to the Baltimore police department, Mr. Dorr received a request from a Baltimore City detective to compare the fingerprints of Mr. Cooper with those on the 16 print cards. Over defense counsel's objections, Mr. Dorr testified that when he compared the prints on a print card that had been taken from the exterior surface of the driver's side door of the Mercedes,

he identified that fingerprint as being from Mr. Cooper's left ring finger. The expert then prepared a second report (State's Exhibit no. 36) that revealed, *inter alia*, his findings as to Mr. Cooper's fingerprint from his left ring finger. He also said in his report that he was unable to find a match with Mr. Truesdale's palm print**s** because the police had not provided him with Mr. Truesdale's palm prints, even though he had asked a detective to do so**.** Although defense counsel, prior to trial, was not given a copy of the second report, defense counsel knew, long before trial, that his client's print was found on the Mercedes. This information was revealed in an application for statement of charges that was given to defense counsel and read:

> Following an analysis of the latent fingerprints recovered from the Mercedes[,] a partial latent fingerprint from lift/print 15A was identified as an impression of the right [sic] left ringer finger of Dayon Cooper . . . on the driver's side front door – exterior.

Even though defense counsel knew of the fingerprint evidence against his client before trial, he never asked the State for a copy of the expert's second report. Moreover, when the prosecutor, in opening statements, told the jury of the fact that one of Mr. Cooper's fingerprints had been found on the Mercedes, defense counsel did not raise any objection.[4] In fact, in defense counsel's own opening statement, he told the jury: "You'll hear, as the State says, the one fingerprint of Mr. Cooper. You'll also hear countless other fingerprints on another suspect or another individual."

[4] By not objecting at that point, the defense attorney deprived the court the option of imposing any sanction other than excluding both State's Exhibit no. 36, and Mr. Dorr's opinion reflected in that report.

On the third day of trial, the State's fingerprint expert took the stand. He testified, without objection, that he initially identified seven fingerprints on the Mercedes that belonged to someone other than Mr. Cooper. When Mr. Dorr testified that he received a request from a detective to compare the fingerprints of Mr. Cooper to those on the print cards, defense counsel objected on the grounds that he had not received a copy of the request for further examination or an expert report identifying Mr. Cooper's fingerprints as being on the Mercedes. The trial judge asked defense counsel: "So you're saying that you didn't know that your client's fingerprints came off the card?" Defense counsel responded: "There have been indications – ." The following colloquy then ensued:

> THE COURT: I knew it. They told me [referring to what was said in opening statement].
>
> [DEFENSE COUNSEL]: Pardon me?
>
> THE COURT: They told me, I heard it. But what you're saying is that you haven't received any –
>
> [DEFENSE COUNSEL]: We never received a report. There was mention in the statement of probable cause. However, I'm not going to ask for evidence to incriminate my client. I mean, I'll see it. I'm not asking for it.

The parties, at that point, reviewed the latent print disclosures that the State had made and it was confirmed that the State had not sent defense counsel a copy of the second report [State's Exhibit no. 36.] showing, *inter alia*, that one of Mr. Cooper's fingerprints was found on the driver's side door of the Mercedes.

The prosecutor argued that the defense was "on notice" of the fingerprint identification of appellant and therefore was not prejudiced by the failure of the State to give defendant a copy of Exhibit no. 36 prior to trial. Defense counsel countered that his

client was prejudiced by the failure to receive the report earlier, because the discovery violation deprived counsel of an adequate opportunity to prepare a defense to the fingerprint testimony. Counsel noted, for example, that in the second report, an attempt to compare the fingerprints of Darrell Truesdale had resulted in "inconclusive results," but because of the failure to provide a copy of State's Exhibit no. 36, the defense was unable to have its own expert determine whether Mr. Truesdale's palm prints were on the cards.[5]

The trial judge ruled that the defendant was not prejudiced by the State's failure to provide counsel with a copy of the second report. The trial judge said:

> I'm going to overrule your objection. The statement of charges put the defense on notice that there was a latent print on behalf of your client. Also, I knew that that was – that is alleged that a latent print (indiscernible) for your client also was involved in this case. I haven't found any prejudice to the defense by this late form being given to the defense. And so I'm going to overrule your objection.

(Emphasis added.)

After the court made that ruling, the trial judge and both of appellant's defense counsel had a lengthy exchange concerning the question of whether defense counsel, once they had knowledge that there was a fingerprint of their client found on the Mercedes, was required to make a request for the fingerprint expert's report. That exchange was as follows:

[5] It was unclear, at that stage of the trial, why defense counsel would claim that he was prejudiced by not being able to hire his own expert to contradict Mr. Dorr's opinion that the prints lifted resulted in "inconclusive results" regarding Mr. Truesdale's palm prints because at that point, Mr. Truesdale had already testified that, prior to the murder, he had been a passenger in the Mercedes on at least one occasion.

> [DEFENSE COUNSEL 2]: And, Your Honor, I just want to preserve the record in terms of if this was coming in, if we needed someone to look at it –
>
> THE COURT: Well, *counsel, once again, you made no effort whatsoever* –
>
> [DEFENSE COUNSEL 2]: We don't have to – we don't have an obligation to –
>
> THE COURT: *Once again, I found no – I find that there's no prejudice at this particular time, counsel*.
>
> [DEFENSE COUNSEL 1]: If I may? (Indiscernible) Your Honor based upon (indiscernible) – I mean, I don't think the defense should be required to request (indiscernible) evidence against their own client. (Indiscernible) the whole (indiscernible) defense and all that. In this situation, I mean, we're obviously at a disadvantage (indiscernible). And it's giving an unfair advantage to the State and also we had this morning where there were the phone calls [from jail] that have not been disclosed. And all of a sudden, we're getting this report. So I just want – I'd like to add that.
>
> THE COURT: I think the phone calls are totally different because you didn't have any notice at all about the phone calls. *In this case, the statement of charges lays out that a latent print was discovered allegedly involving your client. Like I said, in opening arguments on the trial, that this was part of the State's case.*
>
> So I'm going to – once again, *I have found no prejudice at all from this late discovery notice given to defense*.

(Emphasis added.)

In this appeal, Mr. Cooper argues that the trial judge erred in three respects concerning the discovery violations. First, by not making a "specific finding" that a discovery violation had occurred. Second, by making a finding "that a mention of the fingerprint evidence in the district court charging document was sufficient notice of the State's intent to introduce such evidence through expert testimony and reports." Third, the

court erred when it found that Mr. Cooper had not been prejudiced by the failure to provide the second report.

Mr. Cooper's argument that the trial judge did not make an explicit determination that there had been a discovery violation is without merit. The trial judge plainly did recognize that the State had not fulfilled its discovery obligation. This is shown by two statements made by the trial judge in the two exchanges quoted, *supra*, that we have emphasized. First, as already mentioned, the judge said, "I haven't found any prejudice to the defense by this late form being given to the defense. And so, I'm going to overrule your objection." Later, the trial judge again recognized that there had been a discovery violation when he said, "So I'm going to – once again, I have found no prejudice at all from this late discovery notice given to defense." Saying the State gave "late discovery notice" is equivalent to saying the State did not fulfill its discovery obligation.

In regard to the second claim of error, appellant makes the following argument:

> The trial court erred in admitting this evidence because mention in a statement of probable cause does not meet the State's discovery obligations to produce reports generated by experts in advance of trial. Md. Rule 4-263(d)(8) – Reports or statements of experts. Rule 4-263 is clear in its command that "without the necessity of a request, the State shall provide to the defense" all evidence and information set forth in the Rule. Specifically, Rule 4-263(d)(8) unambiguously required the State to produce the report and opinion of the expert in discovery. There is no authority for the assertion that mere mention of evidence in a statement of probable cause is a surrogate for producing expert reports and statements.

As can be seen, the cornerstone of the above argument is the claim that the court ruled that the State's discovery obligation was fulfilled by providing the defense with a copy of the statement of probable cause. The short and complete answer to this assertion

is that the trial judge never ruled that the State had fulfilled its discovery obligation by production, pre-trial, of the statement of probable cause. Instead, the court, quite reasonably, ruled that because the statement of probable cause put defense counsel on notice, well before trial, that the State had evidence that appellant's fingerprints were on the Mercedes, appellant was not prejudiced by the failure to give the defense a copy of State's Exhibit no. 36 until the third day of trial.

We turn next to appellant's contention that he was prejudiced by the fact that his counsel did not receive a copy of State's Exhibit no. 36 until after trial commenced. Appellant argues:

> [T]he State's Attorney must provide mandatory disclosures without request, "within [30] days after the earlier of the appearance of counsel or the first appearance of [the defendant] before the court pursuant to Rule 4-213[c]." Rule 4-263([h]).
>
> Once it was established that the defense did not have the second report in advance of trial, in exercising its discretion over sanctions for a discovery violation, a trial court should consider (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; and (3) any other relevant circumstances. *Thomas v. State*, 397 Md. 557[, 570-71] (2007) *citing Taliaferro v. State*, 295 Md. 376, 390 (1983).
>
> A court should consider the least punitive sanction, but the least punitive sanction is a continuance of the trial date. As this was at the end of trial, this was unavailable to the trial court. Therefore, the proper inquiry – not conducted by the trial court – is whether Appellant was prejudiced and, therefore, entitled to have the evidence excluded. *Thomas*, 397 Md. at 572; *Warrick v. State*, 302 Md. 162 (1985) (holding the exercise of a trial court's discretion in imposing sanctions for discovery violations includes evaluating whether the party has been prejudiced by the violation).
>
> The failure of the State to turn over the expert report in advance of trial completely deprived Appellant of the opportunity to challenge the report and opinions through cross-examination and expert testimony on behalf of the defense. On this basis alone, Appellant suffered prejudice. When

> fingerprint evidence is the only evidence outside of accomplice testimony placing a criminal defendant at the scene of a crime that defendant is severely prejudiced by the failure of the State to turn over the forensic report in advance of trial. The failure of the Court to consider the prejudice, find that Appellant was prejudiced, and to, therefore, exclude the evidence constitutes reversible error.

Before discussing the merits of appellant's claim of prejudice, it is useful to briefly touch upon the standard of review here applicable. That standard was succinctly stated by the Court in *Alarcon-Ozoria v. State*, 477 Md. 75, 108-09 (2021) where the Court said:

> "[W]hen a discovery violation comes to light in the course of trial, whether any sanction is to be imposed and, if so, what it is to be, is in the first instance committed to the discretion [of] the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice." *Warrick* [*v. State*], 302 Md. [162,] 173 [(1985)] (citations omitted). The rule "does not require the court to take any particular action *or any action at all.*" *Bellard v. State*, 229 Md. App. 312, 340 (2016) (quoting *Thomas* [*v. State*], 397 Md. [557,] 570 [(2007)] (emphasis added).
>
> The determination of the circuit court "will be disturbed on appellate review only if there is an abuse of discretion. That review, however, does not involve a search of the record for grounds, not relied upon by the [circuit] court, which the appellate court believes could [or could not] support the [circuit] court's action." *North River Ins. Co. v. Mayor and City Council of Baltimore*, 343 Md. 34, 47-48 (1996). "An appellate court does not reverse a conviction based on a [circuit] court's error or abuse of discretion where the appellate court is satisfied beyond a reasonable doubt that the [circuit] court's error or abuse of discretion did not 'influence the verdict' to the defendant's detriment." *Hall v. State*, 437 Md. 534, 540-41 (2014) (citations omitted). A discovery violation that unfairly surprises a defendant and prejudices the ability of a defendant to mount an adequate defense generally "cannot be construed as harmless error." *Collins* [*v. State*], 373 Md. [130,] 148 [(2003)]; *Thomas*, 397 Md. at 574 (explaining that prejudice pursuant to Md. Rule 4-263 turns on the harm resulting from delay in disclosure).

As previously mentioned, the reason the trial judge found no prejudice was because defense counsel knew, well before trial, that the State had evidence that the defendant's fingerprint was on the white Mercedes. It is true, as appellant argued in the trial court, that

defense attorneys are under no obligation "to request . . . evidence against their own client." But if a defense attorney, as here, willfully decides not to ask the State for information that defense counsel knows will incriminate his or her client, the defendant should not be rewarded by exclusion of the evidence that defense counsel knows exists. In this case, it is clear that counsel for the defendant intentionally did not ask for the report so that they could raise a discovery objection. Moreover, we are not convinced that the failure to turn over the expert report in advance of trial deprived appellant of the opportunity "to challenge the report and opinions through cross-examination and expert testimony on behalf of the defense." Defense counsel was given a chance, prior to cross-examining the expert witness, to examine State's Exhibit no. 36. While cross-examining Detective Moore, defense counsel noted Mr. Dorr's request for Mr. Truesdale's palm prints and elicited the fact that the detective never gave those prints to Mr. Dorr. During his closing argument, defense counsel minimized the fingerprint evidence by noting that defendant's fingerprint was found on the exterior of the car but none were found within the vehicle. He also pointed out that several prints were identified as belonging to another individual and that the police failed to follow-up on the inconclusive results for Mr. Truesdale's palm prints.

If appellant had received Exhibit no. 36 prior to trial, it is, of course, true that he could have retained his own expert. But, since appellant's lawyer knew long before trial about the incriminating fingerprint, nothing prevented defense counsel from hiring an expert to rebut the State's evidence.

Lastly, we reject appellant's contention that the fingerprint evidence was the only evidence "outside of accomplice testimony placing . . . [him] at the scene of [the] crime[.]"

Three eyewitnesses placed appellant in the Mercedes when the murder was committed. There was no evidence, whatsoever, that any of those three eyewitnesses were accomplices of Cooper. For all of the above reasons, we hold that the trial judge did not abuse his discretion when he found that appellant was not prejudiced by the failure of the State to provide defense counsel with a copy of State's Exhibit no. 36 prior to trial.

III.

THE MARYLAND RULE 5-802.1(a) ISSUE

Maryland Rule 5-802.1(a) provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

Maryland Rule 5-802 codifies what the Maryland Court of Appeals held in *Nance v. State*, 331 Md. 549 (1993).

During Kaniya Hawkins's testimony, she said that she referred to the defendant by his nickname, which was "Coop." While Ms. Hawkins was on the stand, the State introduced into evidence State's Exhibit no. 22, which was a photographic array containing Mr. Cooper's picture. State's Exhibit no. 22 was shown to Ms. Hawkins by the police prior to trial. The exhibit shows that below Mr. Cooper's picture, Ms. Hawkins wrote the words "Coop the driver of the car in the murder." Mr. Cooper challenges the admission of

Hawkins's written identification of him on State's Exhibit no. 22. He claims that what Ms. Hawkins wrote was inadmissible hearsay and assumes that the trial judge admitted that evidence as a prior inconsistent statement pursuant to Md. Rule 5-802.1(a). The State argues that the trial judge did not err in admitting State's Exhibit no. 22 because what was written on that exhibit, although clearly hearsay, nevertheless came within the hearsay exception set forth in Maryland Rule 5-802.1(c), which allows the admission of an out-of-court assertion that is a statement of identification. We agree with the State. Ms. Hawkins's identification of Mr. Cooper and State's Exhibit no. 22 clearly fit within the just mentioned hearsay exception.[6]

The trial judge also admitted, over objection, a video recording of what Ms. Hawkins said when she was presented with the photographic array. That video was admitted by the trial judge in reliance on Md. Rule 5-802.1(a). In regard to the admission of State's Exhibit no. 23, appellant makes two arguments. First, he claims that prior to admission of State's Exhibit no. 23**,** the trial judge made no determination that Ms. Hawkins's statements at trial were clearly inconsistent with what was said on the tape even though such a determination must be made before the hearsay exception set forth in Md.

[6] Even if Ms. Hawkins's written statement did not fit within the identification exception to the hearsay rule, any contention that the hearsay rule was violated was waived because, prior to the introduction of State's Exhibit no. 22, Ms. Hawkins, without objection, admitted that she wrote on the bottom of appellant's picture in the photographic array, the words "Coop, the driver of the car that was in the murder." That unobjected to statement was almost identical to the statement on Exhibit no. 22, *i.e*., "Coop, the driver of the car in the murder." As stated in *DeLeon v. State*, 407 Md. 16, 31 (2008): "Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection."

Rule 5-802.1(a) may be applied. Secondly, appellant contends that during her testimony Ms. Hawkins did not materially recant what she had said in State's Exhibit no. 23; instead, according to appellant, she merely "clarified the circumstances under which she had made the initial statements." We shall discuss these contentions in reverse order. In the video recording, Ms. Hawkins told the police that Mr. Cooper had "everything to do with it" and that Mr. Cooper "was the person that killed somebody." But at trial, she testified that she "blamed [the murder] on" S. and said she "blacked out" as soon as the shooting started. Her testimony in this regard was as follows:

> [PROSECUTOR]: Did – at any time did you tell detectives that Coop had everything to do with the murder?
>
> MS HAWKINS: No. I blamed it on somebody – I blamed it on [S.]. I told them that I blacked out, I didn't have – I didn't see anything. I heard shots, I blacked out.

She also testified that she told the police that Cooper had "a gun" but did not say that he had "the gun" involved in the murder. When the prosecutor asked Ms. Hawkins how S. had "everything to do with it," Ms. Hawkins responded: "Like what was she pointing at." When the prosecutor asked if S. was "responsible for the murder of Cameron Anderson because she pointed," Ms. Hawkins replied, "No." When the prosecutor then asked who was responsible for the murder, Hawkins testified, "I didn't see who shot Cameron Anderson; I heard it, I didn't see it."

Prior to the admission of State's Exhibit no. 23, defense counsel contended that Ms. Hawkins's trial testimony was not materially different from what she said in the recorded statement. The following exchange ensued:

THE COURT: What did she recant?

[DEFENSE COUNSEL]: - but, yeah, I don't –

THE COURT: What exactly was it that she recanted – she's recanted?

[PROSECUTOR]: She – the detective asked, "What did Coop have to do with this?" She said, "Everything."

The detective asked, "What did Coop do?" And she said, "The person that killed somebody."

THE COURT: I'm going to allow the State, over your objection, to play that portion –

We hold that the out-of-court statement that Ms. Hawkins made as reflected in State's Exhibit no. 23, was materially different from her trial testimony. In her trial testimony, she blamed S. for the murder and denied telling the police that Mr. Cooper had "everything to do with it" or that he "was the person that killed somebody." This testimony clearly contradicted her pretrial statement as shown by State's Exhibit no. 23 in which she implicated Mr. Cooper as the murderer. *See Stewart v. State*, 342 Md. 230, 239 (1996), finding witness's pretrial statement of being "positive" that Stewart shot the victim inconsistent with trial testimony in which the witness "denied knowing the person who killed" the victim. Lastly, contrary to appellant's contention, the trial judge did impliedly at least, find that Ms. Hawkins's pretrial statement was inconsistent with her trial testimony. This is shown by the colloquy quoted above where the trial judge, immediately after the prosecutor explained the inconsistency, made his ruling that State's Exhibit no. 23 was admissible. For the above reasons, we hold that the trial judge did not err when he

allowed the State to admit into evidence State's Exhibit no. 23 and to allow the jury to hear Ms. Hawkins's pretrial statements to the police.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

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Concurrence by Friedman, J.

Filed: November 17, 2022

Sometimes it is a matter of emphasis. I concur with my colleagues, but I write separately to emphasize three points.

First, let me say loudly and clearly, the Office of the State's Attorney violated its obligation under Maryland Rule 4-263(d)(8) to produce all expert reports without request. The origin of this discovery obligation is constitutional. That is, the free and unfettered access to expert reports is necessary to ensure that criminal defendants receive a fair trial. This is not a discovery requirement about which there can be any debate. It is not subject to interpretation. And, in my view, the State's Attorney's failure to comply with this discovery obligation is a serious breach of professional ethics.

Second, the fact that the Office of the State's Attorney mentioned the fingerprint evidence in the statement of charges, slip Op. at 7, did not cure its failure to produce the expert reports. Readers of our opinions would badly miss the boat if they took from this opinion the idea that they can cure a discovery violation in this way. That argument below, mostly abandoned on appeal, is an absolute nonstarter.

Third, there is never an obligation on defense counsel to request a report that the State has an obligation to produce without request. Slip Op. at 13-14. I reject any suggestion that criminal defendants should request something that is their right to receive without request. That isn't sandbagging; that's zealous advocacy.

After determining that there was a discovery violation in this case, the trial court then determined that the discovery violation did not cause prejudice to the defendant. That determination was not an abuse of the trial court's discretion. I also agree with my

colleagues that the trial court did not err in admitting Ms. Hawkins's prior inconsistent statements. I, therefore, concur in the judgment.