Circuit Court for Baltimore City
Case No. 117039006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1581

September Term, 2017

ANDREW BROWN

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Kenney, James A., III.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: October 22, 2018

A jury, in the Circuit Court for Baltimore City, convicted Andrew Brown, appellant, of two counts of attempted robbery with a dangerous weapon (Counts 7 and 8), two counts of reckless endangerment (Counts 25 and 26), two counts of conspiracy to commit robbery with a dangerous weapon (Counts 9 and 10), one count of assault in the second degree (Count 22), two counts of conspiracy to commit assault in the second degree (Count 17 and 24), one count of use of a handgun in the commission of a felony or crime of violence (Count 19), and one count of carrying a handgun (Count 20). According to his commitment record and the court's docket entries, Brown was sentenced to a term of 20 years' imprisonment, with all but 10 years suspended, on Count 7; a term of five years' imprisonment on Count 25, to run concurrent to Count 7; a term of 20 years' imprisonment, with all but 10 years' suspended, on Count 9, to run concurrent to Count 25; a term of 20 years' imprisonment, with all but 10 years suspended, on Count 8, to run concurrent to Count 9; a term of five years' imprisonment on Count 26, to run concurrent to Count 8; a term of 20 years' imprisonment, with all but 10 years suspended, on Count 10, to run concurrent to Count 26; and a term of 10 years' imprisonment on Count 19, to run consecutive to Count 10. All other convictions were merged for sentencing purposes. In this appeal, Brown presents the following questions, which we have reordered for the purposes of his appeal:

1. Did the court err in admitting photographic array evidence of appellant?

2. Did the court err in the manner in which it made appellant enter the courtroom?

3. Did the court err in admitting evidence regarding what the complainant told police?

4. Did the court err in admitting inadmissible lay testimony?

5. Must the commitment record, the docket entries, and the probation order be corrected because they do not reflect the sentence announced by the court?

For reasons to follow, we answer the first four questions in the negative and the fifth question in the affirmative. We therefore remand to the circuit court for the sole purpose of correcting the commitment record, probation order, and docket entries in accordance with this opinion. Otherwise, we affirm.

BACKGROUND

In the late evening hours on January 18, 2017, Demaris Glover was at the Horseshoe Casino in Baltimore, where he met a friend, William Rich. Approximately three hours later, Mr. Glover and Mr. Rich decided to leave the casino, at which time they met "two young ladies." Mr. Glover and Mr. Rich ultimately decided to accompany the women back to the women's home at 1015 Sterrett Street in Baltimore. All four individuals then got in Mr. Glover's car and traveled to 1015 Sterrett Street. According to Mr. Glover, the two women "were doin' a lotta text messagin'" during the trip and were "shield[ing] the phone" so that Mr. Glover could not see it.

After arriving at 1015 Sterrett Street, Mr. Rich and one of the women got out of the car and entered the residence while Mr. Glover and the other woman "lagged back maybe about a minute or two." Eventually, Mr. Glover and the woman got out of the car and entered the residence, at which point Mr. Glover observed "about 10 door lock sets on the

couch" and a pair of "men's shoes." A short time later, one of the women "started playin'" with the lock to the home's front door, which Mr. Rich had locked after Mr. Glover had entered. Mr. Glover and Mr. Rich then "kinda looked at each other and agreed without even speakin' that it was time to go."

Before Mr. Glover and Mr. Rich could leave, however, "there was a knock on the door." One of the women then opened the front door, and two individuals entered, one of whom was "holdin' a handgun." According to Mr. Glover, the armed individual, later identified as Andrew Brown, appellant, told him to "give it up" and then fired in his and Mr. Rich's direction. Both Mr. Glover and Mr. Rich were struck by gunfire. Mr. Glover managed to hit Brown's gun arm, causing him to drop the weapon. After a "tussle," Mr. Glover and Mr. Rich ran to a nearby friend's house. Mr. Glover was eventually transported to the hospital and treated for "trauma" to his head. Brown was later arrested and charged. One of the women who escorted Mr. Glover and Mr. Rich back to 1015 Sterrett Street, later identified as Sharlene Cromwell, was also arrested and charged. Brown and Cromwell were tried as co-defendants.[1]

At trial, following the *voir dire* of prospective jurors but before jury selection, the court recessed for lunch. When the court returned from the lunch break, the following colloquy ensued:

THE COURT: Thank you. Good afternoon. You may be seated.

(The Court had inaudible conversation on telephone.)

[1] Cromwell entered a plea of guilty at the conclusion of the first day of trial.

THE COURT: I know. Okay. They bring them in from the back unshackled now, so one of you need to be in the hall to assist them.

THE SHERIFF: They gonna do it – okay.

THE COURT: They do them in the hall, so it'll be the –

Deputy Coby? Corrections is going to be coming around with the Defendants. They unshackle them in the hall. You know that because you're down here.

THE SHERIFF: Right, right, right.

THE COURT: Can you go out and meet them?

THE SHERIFF: Yes.

THE COURT: Thank you.

Ladies and gentlemen, we'll be with you shortly. Thank everyone for returning promptly.

[DEFENSE]: If we can approach while waiting?

THE COURT: Yes.

(Whereupon, Counsel approached the bench and the following occurred.)

THE COURT: Yes?

[DEFENSE]: How logistically are our clients gonna come in the courtroom? If they just –

THE COURT: Because we have a new rule. These are secured halls. They unshackle them in the hallway and they bring them in.

[DEFENSE]: Are they just gonna come in by themselves or we just walk in as a group and just –

THE COURT: Judge – I don't know why the Public Defender's Office didn't get the memo. Judge Pierson sent out a memo to everyone as the new direction of this court. Nobody walks in with them. They walk in unshackled and they take their seats.

[DEFENSE]: Just wanna make the record clear. To me, it looks really bad in front of the jury.

THE COURT: Well, that – you need to take that up with Judge Pierson –

[DEFENSE]: To have –

THE COURT: - but that's our directive.

[DEFENSE]: I just wanna put it on the record, to have two –

THE COURT: Very well.

[DEFENSE]: - both our clients come out –

THE COURT: Okay. Do you think for one minute, Ms. Zeit, that these people don't know they're in jail? The law is they're not supposed to see them in the shackles and that's why we do that. So when we have this problem sometimes when they need to use the bathroom and we've had to find rooms for jurors and move jurors when we're on these floors and on the fifth floor where Judge Nance is, that's a secured hall as well. They are unshackled from the back and brought in. Okay? Thank you.

Later, during the State's case-in-chief, Mr. Glover testified and identified Brown as the man who shot at and tried to rob him. Mr. Glover was also shown a video taken by surveillance cameras at the Horseshoe Casino on the night of his altercation with Brown. According to Mr. Glover, the video, which was played for the jury, depicted him and Mr. Rich at the casino with "the two young ladies." Mr. Glover described one of the ladies as

being "light-skinned" and wearing "black jeans and [a] black halter top," and he described the other as being "a little heavier, dark-skinned" and wearing "a white skirt." Mr. Glover testified that the woman in the white skirt was the one who was "playin' with the lock" and who opened the door just prior to his altercation with Brown. Mr. Glover also testified that, during his "tussle" with Brown, he managed to "get the gun" and "run out the door," but that he fell and dropped the gun. At that point, Brown and the woman in the white skirt "came runnin' out of the house," and the three were "kinda tusslin' around" in the street before Mr. Glover broke free and ran to his friend's house.

Mr. Glover was then asked about his dealings with the police following his altercation with Brown:

[STATE]:	Did there come a time when you spoke to any detectives as far as this case?
[WITNESS]:	Yeah. I spoke to the detective at the hospital.
[STATE]:	Okay. And just at the hospital or at the hospital and another time?
[WITNESS]:	Well, initially at the hospital.
[STATE]:	Okay. What, if any, information did you provide the detectives as far as what had happened?
[WITNESS]:	At the – well, I just – at the hospital I told 'em – was that –
THE COURT:	I'm sorry?
[WITNESS]:	Oh, I don't, I don't –
THE COURT:	I meant what are you saying?

[WITNESS]: Oh, okay. I was just makin' sure –

THE COURT: You can tell us what you told them.

[STATE]: Right. What did you tell the detectives?

[WITNESS]: Oh. I just told 'em my car was over there on Sterrett Street and two young ladies, we left with two young ladies and they set us up.

[STATE]: Okay.

[DEFENSE]: Objection.

THE COURT: Overruled.

Mr. Glover further testified that, after he was released from the hospital, he went to the police station and was shown "some photographic arrays." The State then produced three photographic arrays, which Mr. Glover identified as being the same ones the police had shown him following his altercation with Brown. Each of those arrays included photographs of six different individuals. The arrays were arranged such that each individual's photograph was on a separate page, with each of those pages containing a frontal shot of the individual's face and then a profile shot of the same individual. Each page also included an "SID" number and a blank space for a written statement. No other identifying information was included.

Upon being shown the first photographic array, which included a photograph of Sharlene Cromwell, Mr. Glover identified Cromwell as "the lady in the white skirt in the surveillance." When the State moved to have the photographic array admitted into evidence, defense counsel objected, stating that Mr. Glover had "already identified her off

the video." The court overruled the objection. The State then asked Mr. Glover if he had provided any statements at the bottom of Cromwell's photograph. Defense counsel again objected, and the court again overruled the objection. Mr. Glover answered that he had written: "Set up robbery that resulted in shooting, allowed gentlemen access to home and participated as robbery was in progress."

The State then presented Mr. Glover with the second six-person photographic array, which, over objection, the court admitted into evidence. Mr. Glover testified that, upon being shown that photographic array by the police, he identified Melissa Williams as the second women at 1015 Sterrett Street on the night of the incident. Mr. Glover also testified that, upon identifying Williams to the police, he provided the following statement: "Present at robbery."

The State then presented Mr. Glover with the third six-person photographic array, which included a photograph of Brown. When the State moved to have the array admitted into evidence, the following colloquy ensued:

THE COURT: Any objection?

[DEFENSE]: Yes.

THE COURT: What is it? You want to come up?

(Whereupon, Counsel approached the bench and the following occurred:)

THE COURT: Okay.

[DEFENSE]: He's already been identified in the courtroom. Identity is not an issue in the case. We're not contesting that. Now it's just – to have his mug shot and photo array would be prejudicial –

THE COURT: Okay.

[DEFENSE]: - and unnecessary.

THE COURT: Thank you. Overruled.

Following the court's ruling, Mr. Glover again identified Brown as being "connected to this incident." Mr. Glover also testified that, upon identifying Brown to the police, he provided the following statement: "Robbed us, shot firearm."

Baltimore City Police Detective Anthony Forbes testified that, in the early morning hours on January 19, 2017, he received a report of a shooting and eventually responded to the hospital, where he met Mr. Rich and Mr. Glover, both of whom were being treated. Shortly thereafter, Detective Forbes traveled to 1015 Sterrett Street, where he encountered Brown and Cromwell. According to Detective Forbes, Brown then traveled to the police station, where he provided a recorded statement to the detective regarding the incident. In that statement, which was played for the jury, Brown stated that Cromwell was his fiancée; that, on the night of the incident, he and Cromwell were "goin' through things" and that he went to 1015 Sterrett Street to "get some clothes;" that, when he got to the residence, he found "dudes in there" and that one of them "got up and rushed him" so he "ran out;" that one of the men hit him with a gun; and that the two ended up fighting outside, whereupon Brown hit the man with a flowerpot and then ran away.

Detective Forbes testified that, shortly after Brown gave his statement, Mr. Glover was presented with the photographic arrays containing Brown, Cromwell, and Williams. Detective Forbes further testified that, after Mr. Glover made the "identifications," the

detective executed a search warrant at 1015 Sterrett Street. The State then presented Detective Forbes with several photographs that had been taken at the time of the execution of the search warrant:

[STATE]: And Detective, if you could describe what you see in those photographs?

* * *

[WITNESS]: The first picture is the front of the home.

THE COURT: Can you use the exhibit numbers, please?

[WITNESS]: I'm sorry. Exhibit 6-B, picture of the front of the home. 6-I is the red door showing the forced entry that was made. 6-N as well, showin' the, the hole in the blue couch suspected to be…the bullet hole.

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: Same thing with 6-P, and 6-Q showin' a hole to the ground. It's just showin' the trajectory from –

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: Showin' the trajectory from the couch, the bullet hole that hits the couch –

[DEFENSE]: Objection.

THE COURT: Overruled.

[WITNESS]: - and hits the floor. 6-R, a live round on, inside of the kitchen.

Detective Forbes was then asked if he "had occasion to view any surveillance footage from the Horseshoe Casino" and, if so, whether he saw anything that was "relevant to [his] investigation." Detective Forbes responded in the affirmative and testified that, based on his observation of the surveillance footage from the night of the incident, Cromwell and Williams "came to the casino at the same time," were "walkin' around interactin' with different men," and "later encounter[ed] Mr. Rich and Mr. Glover."

Brown was ultimately convicted. At the conclusion of Brown's sentencing hearing, the court announced his sentence as follows:

> Under indictment ending in 117039006, Count 7, attempted robbery with a dangerous weapon as to William Rich, the sentence of the Court is 20 years to the Department of Corrections. I'm going to suspend all but 10 years, place the defendant on supervised probation upon his release. As to Count 25, reckless endangerment as to William Rich, the sentence of the Court is five years to the Department of Corrections, that will run concurrent to Count 7. As to Count 9, conspiracy to rob with a dangerous weapon as to William Rich, the sentence of the Court is 20 years to the Department of Corrections. I'm going to suspend all but 10 years and place him on two years supervised probation to run concurrent with Count 25. As to Count 17, conspiracy to assault in the second degree of William Rich, that count will merge with Count 9. As to Count 8, attempted robbery with a dangerous weapon as to Demaris Glover, the sentence of the Court is 20 years to the Department of Corrections, suspend all but 10 years and place the defendant on two years supervised probation, that will run concurrent with Count 9. As to Count 22, assault in the second degree as to Demaris Glover, that will merge with Count 8. As to Count 26, reckless endangerment of Demaris Glover, five years to the Department of Correction and will run concurrent to Count 8. Count 10, conspiracy to rob with a dangerous weapon as to Demaris Glover, the sentence of the Court is 20 years, suspend all but time served, place him on two years supervised probation to run concurrent to Count 26. Count 24, conspiracy to assault in the second degree of Demaris Glover will merge with Count 10. Count 19, use of a handgun in the commission of a felony or crime of violence, 10 years to the Department of Corrections, first five without parole, will run consecutive to Count 10. Count 20, carrying a handgun

openly or concealed about his person will merge with Count 19. That's the sentence of the Court.

Following the pronouncement of the court's sentence, the court asked Brown if he understood his sentence:

MR. BROWN: Yes, ma'am, so –

THE COURT: Okay.

MR. BROWN: - I mean, I do have one question.

THE COURT: Sure.

MR. BROWN: Count 19, that's to be run consecutive?

THE COURT: Right. So what happens is, basically you got a 20 year sentence, suspend all but 10 and then the handgun, use of a handgun in a crime of violence runs consecutive so once you finish the – and you got to do at least five years without parole on that which, you know, they calculate that down for you, I'm not going to tell you it's not five years, it used to be three and a half, I'm not going to even start that with you because they'll calculate all of this out for you. Okay?

MR. BROWN: Okay.

THE COURT: So and then you will be on probation to me for two years once you're released. Okay?

MR. BROWN: Okay.

[DEFENSE]: So you have 20 years to serve; right?

THE COURT: 20 years suspend all but 10. Well, 20, yeah, altogether –

[DEFENSE]: 20 years to serve, yes.

THE COURT: Yes, but it won't be 20 –

[DEFENSE]: And whatever they calculate on that.

THE COURT: Yeah, whatever they calculate. Do you understand that?

MR. BROWN: (Nodding head in agreement.)

The clerk thereafter completed a docket entry, commitment record, and probation/supervision order, all of which included a description of Brown's sentence. In each of those documents, Brown was sentenced on Count 10, conspiracy to rob Demaris Glover, to a term of 20 years imprisonment, with all but 10 years suspended, and two years of probation.

DISCUSSION

I.

Brown first argues that the circuit court erred in admitting the photographic array that included his picture. Brown maintains that the photographic array was irrelevant because "there was no dispute" that he was the one involved in the incident with Mr. Glover. Brown also contends that the photograph used in the array implied he had a prior criminal record and that the manner in which it was introduced "unavoidably drew attention to its carceral source." Brown maintains, therefore, that the evidence was also inadmissible because it was prejudicial and because it contained improper "prior bad acts evidence."

The State responds that, although "photographs of a defendant that are recognizable as mug shots involve an inherent risk of some degree of unfair prejudice," they are not necessarily inadmissible but instead may be admitted subject to the court's discretion. The State argues that the court in the instant case was within its discretion in admitting the

photographic array, as the evidence was probative of Brown's identity as the perpetrator, which, despite Brown's assertions to the contrary, was not "undisputed." The State further contends that the court did not abuse its discretion in allowing the evidence, as any unfair prejudice inherent in the photograph did not substantially outweigh its probative value.

Evidence is relevant if it makes "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. In other words, evidence is relevant if it is both material and probative. "Evidence is material if it bears on a fact of consequence to an issue in the case." *Smith v. State*, 218 Md. App. 689, 704 (2014). "Probative value relates to the strength of the connection between the evidence and the issue…to establish the proposition that it is offered to prove." *Id.* (citations and quotations omitted). Evidence that is relevant is generally admissible; evidence that is not relevant is not admissible. Md. Rule 5-402. We review the court's determination of relevancy under a *de novo* standard. *State v. Simms*, 420 Md. 705, 725 (2011).

Even when legally relevant, however, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith*, 218 Md. App. at 705. That said, "[t]o justify excluding relevant evidence, the 'danger of unfair prejudice' must not simply outweigh 'probative value' but must, as expressly directed by Rule 5-403, do so

'substantially.'" *Newman v. State*, 236 Md. App. 533, 555 (2018). "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

"Police identification photographs are recognized in Maryland as independently relevant substantive evidence which may be introduced under certain circumstances." *Straughn v. State*, 297 Md. 329, 334 (1983). Moreover, "[e]xtra-judicial photographic identifications made shortly after the incident are admissible in evidence, and lack the suggestiveness inherent in an in-court identification." *Savoy v. State*, 218 Md. App. 130, 158–59 (2014) (citing *Straughn*, 297 Md. at 332). Consequently, "[w]hen the identity of the perpetrator is an issue in the case, that the jury may recognize photos as mug shots and infer that the defendant had prior contacts with the judicial system is insufficient prejudice to warrant reversal." *Id.* at 159; *see also* Md. Rule 5-404(b) ("Evidence of other crimes, wrongs, or acts…may be admissible for other purposes, such as proof of…identity[.]").

"Of course, evidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial." *Straughn*, 297 Md. at 333; *see also* Md. Rule 5-404(b) ("Evidence of other crimes, wrongs, or acts…is not admissible to prove the character of a person in order to show action in conformity therewith."). "Maryland Rule 404(b) prohibits other bad acts evidence to protect against the risk that a jury will assume that because a defendant committed other crimes, he is more likely to have committed the crime for which he is on trial." *Smith v. State*, 232 Md. App. 583, 599 (2017). Therefore, when a trial court is faced with relevant "other crimes" evidence, it

"must weigh carefully the need for and probative value of the evidence against the potential prejudice to the defendant." *Straughn,* 297 Md. at 333–34. In those instances, the admissibility of the evidence is a discretionary matter for the trial court and will not be reversed "absent a showing of a clear abuse of discretion." *Id.* at 334.

Against that backdrop, we hold that the array containing Brown's photograph was legally relevant. Although Mr. Gordon provided an in-court identification of Brown, that identification came approximately six-months after the crime, and there is no evidence that Mr. Gordon knew Brown or had ever seen him before the identification. *See Wagner v. State*, 213 Md. App. 419, 454 (holding that a photographic array of the defendant was relevant to show that the witnesses, who had known the defendant for "only a few months," were able to accurately identify the defendant); *see also Lovelace v. State,* 214 Md. App. 512, 548–49 (2013) ("'[P]hotographs may be relevant and possess probative value even though they often illustrate something that has already been presented in testimony.'") (citations omitted). Moreover, Mr. Gordon's identification and subsequent testimony was the primary evidence implicating Brown in the alleged crimes, and there was other evidence, namely Brown's statements to the police, that contradicted Mr. Gordon's version of events. Thus, Mr. Gordon's pre-trial identification of Brown as the man who shot at and tried to rob him was relevant to show the accuracy of Mr. Gordon's in-court identification and account of events. *See Hof v. State*, 97 Md. App. 242, 303 (1993) ("Where identification is an issue and the mug shot that was selected pretrial helps, for example, to bolster the subsequent in-court identification, the probative value has been established.").

As noted, Brown argues that the photographic array was irrelevant because his identity was not in issue. Brown maintains that the defense's theory of the case, which defense counsel outlined during opening and closing arguments and was supported by Brown's statements to Detective Forbes, was that Brown did not try to rob anyone but in fact "got pistol-whipped" and "beaten" during "a physical altercation with two men…who were in his house at 5:30 in the morning." Brown contends, therefore, that "the State's need for identification evidence was zero."

We disagree. Although Brown did not dispute his presence at an altercation with Mr. Gordon, he denied being the person who shot at and attempted to rob Mr. Gordon and Mr. Rich. In so doing, Brown espoused a completely different version of events, one in which he was the victim and Mr. Gordon was the aggressor. That version of events directly contradicted Mr. Gordon's version of events, as well as his immediate identification of Brown as the perpetrator and the reliability of that identification. The State, in establishing the elements of the charged crimes, relied heavily on Mr. Gordon's identification and subsequent testimony. *See Brown v. State*, 169 Md. App. 442, 461, 463 (2006) ("A not guilty plea requires the State to prove every element of the crime.").

For those reasons, Brown's reliance on *Arca v. State*, 71 Md. App. 102 (1987) is misplaced. In that case, this Court held that the trial court erred in permitting the State to introduce into evidence a photographic array containing the defendant's "mugshot" where the defendant, who was on trial for first-degree murder, admitted to killing the victim but claimed that he did so in self-defense. *Id.* at 103–04, 106. In so holding, we noted that the

State "had absolutely no need" to introduce the photographic array because the defendant's identity as "the actor," *i.e.* the cause of the victim's death, "was never an issue at trial." *Id.* at 103, 106. Here, by contrast, Brown's identity as the actor – the person who shot at and attempted to rob the victims – was a disputed issue. As a result, the State had a discernible need to introduce the photographic array.

We likewise disagree with Brown's contention that the prejudicial impact of the photographic array outweighed its probative value.[2] Although the photographs of Brown used in the array could be interpreted as "mugshots," that factor alone is insufficient to constitute unfair prejudice. *Straughn*, 297 Md. at 337; *see also Hof*, 97 Md. App. at 302 ("Even when it is clear that mug shots are mug shots, however, they are nonetheless frequently admissible in the discretion of the trial judge."). The array was introduced solely for identification purposes; none of the pictures contained in the array were ever referred to as "mug shots;" nothing about the manner in which the array was introduced called any special attention to the nature of the photographs contained within; and, aside from his contention that his photograph resembled a "mug shot," Brown presents no evidence to suggest that the picture was particularly inflammatory. *Straughn*, 297 Md. at 336–37; *see also Odum v. State*, 412 Md. 593, 615 (2010) ("It has been said that '[p]robative value is

[2] Citing *Straughn v. State*, 297 Md. 329 (1983), Brown maintains that, for the photographic array to be admissible, three factors must be present: 1) the government must have a need for the photographs; 2) the photographs must not imply that the defendant has a prior criminal record; and 3) the manner in which the photographs are introduced must not draw attention to the source of the photographs. *Id.* at 335. Brown is mistaken. The Court of Appeals never stated that those factors were dispositive or even required; rather, the Court merely cited them as "useful" in guiding a court's decision. *Id.* at 336.

outweighed by the danger of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.'") (citations omitted) (emphasis in original). Thus, the circuit court did not abuse its discretion in admitting the photographic array into evidence.[3]

II.

Brown next contends that the circuit court erred in "the manner in which it made [him] enter the courtroom," which prejudiced him in front of the prospective jurors. Brown asserts that the trial judge "abused her discretion by failing to exercise discretion, strictly adhering to a 'directive' from [the Administrative Judge of the Circuit Court] regarding courtroom security." Brown further asserts that the security measure imposed was "not reasonable and posed an unacceptable risk of prejudice" because the court, by "forcing [Brown] to enter the courtroom with his co-defendant and without counsel," conveyed to the jury that he was "in jail" and that he was "either dangerous or untrustworthy."

The State contends that the issue was waived because Brown "expressly accepted the jury as empaneled." We agree with the State. "Generally, a party waives his or her voir dire objection going to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire if the objecting party accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process." *State v. Stringfellow*, 425 Md.

[3] Brown argues that the circuit court erred when it "summarily overruled [his] objection without engaging in the requisite analysis." We disagree, as the record reflects that the court did consider Brown's objection before ruling. And, although the court did not articulate its findings on the record, "silence on the issue does not imply an abuse of discretion." *Sinclair v. State*, 214 Md. App. 309, 325 (2013).

461, 469 (2012). "Objections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, is directly inconsistent with the earlier complaint about the jury, which the party is clearly waiving or abandoning." *Id.* at 470 (citations and quotations omitted).

Here, defense counsel's objection at trial to the manner in which Brown was to be brought into the courtroom clearly went to the inclusion/exclusion of prospective jurors. Brown did not, however, reiterate that objection when the jury was empaneled; rather, both he and defense counsel unqualifiedly accepted the jury panel as satisfactory. Accordingly, that issue was waived.

Even so, we cannot see how the court abused its discretion. To begin with, Brown's claim of error is based solely on defense counsel's colloquy with the court prior to Brown being brought into the courtroom. Any "prejudice" Brown may have incurred is purely speculative, as there is nothing in the record to show exactly how Brown was brought into the courtroom or whether any of the prospective jurors actually witnessed it. *See DiMeglio v. State*, 201 Md. App. 287, 314 (2011) ("'It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed.'") (quoting *Mora v. State*, 355 Md. 639, 650 (1999)). In any event, Brown fails to cite, and we did not find, any case in which this Court or the Court of Appeals held that a trial court erred in having an otherwise unremarkable defendant enter the courtroom with another defendant but without his attorney. *See Williams v. State*, 137 Md. App. 444,

452–53 (2001) (holding that the trial court did not err in having the defendant enter the courtroom wearing a prisoner identification bracelet, despite the fact that the bracelet may have revealed the defendant's "status as a detainee[.]").

III.

Brown next contends that the circuit court erred in admitting the statements contained in the three photographic arrays that were admitted into evidence. Brown maintains that, because "identity was not an issue," the statements were irrelevant. With respect to the statements contained in Mr. Glover's identification of Cromwell, in which Brown indicated that Cromwell had "set up the robbery" and "allowed gentlemen access," Brown contends that the statements were also inadmissible hearsay not subject to any hearsay exception. Brown further contends that Mr. Gordon's testimony, in which he stated that he told the police that the "two young ladies…set us up," was inadmissible as irrelevant, impermissible lay opinion testimony, and hearsay.

Regarding Brown's first claim of error, that the statements contained in the three photographic arrays were irrelevant, we disagree. As discussed in greater detail *supra*, Brown's, identity as the criminal actor was an issue. Because the photographic arrays, along with the statements contained therein, were probative of that issue, the evidence was relevant.

As for the statements contained in the photographic array of Cromwell, we hold that the evidence was properly admitted as an exception to the rule against hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(a). Such out-of-court statements are inadmissible unless they are permitted by applicable constitutional provisions or statutes, or unless they fall under one of the hearsay exceptions recognized by the Maryland Rules. Md. Rule 5-802. One such exception is "[a] statement that is one of identification of a person made after perceiving the person[.]"[4] Md. Rule 5-802.1(c).

Here, Mr. Gordon testified that he provided the statements at the same time he identified Cromwell in the photographic array. He also testified that he was shown the array shortly after the attempted robbery. Thus, the statements contained in the photographic array were admissible pursuant to Rule 5-802.1(c). *See* Lynn McLain, 6A Maryland Evidence, § 801(3):1 (June 2018) ("This exception…contemplates identifications at line-ups, show-ups, or from photo arrays[.]").

Citing *Tyler v. State*, 342 Md. 766 (1996), Brown argues that Mr. Gordon's statement concerning Cromwell did not fall within the exception outlined in Rule 5-802.1(c) because the statement was not one of identification but instead was "a narrative describing an event and the persons participating in it." We disagree. In *Tyler*, the Court of Appeals held that a witness's statement, which "contained a detailed description of [the witness's] and [the defendant's] trip to the Prince George's Plaza Mall, the events leading up to the [crime], and the [crime] itself," was too detailed and "consisted of far more than

[4] The Rule also requires that the declarant testify at trial and be subject to cross-examination. Md. Rule 5-802.1. Neither of those requirements is in dispute in the present case.

a mere identification" for Rule 5-801.1(c) to apply. *Id.* at 779. Here, by contrast, Mr. Gordon's very brief statement, which could hardly be considered a "narrative," contained only that information germane to his identification of Cromwell and her exact role in the crime. *See Brown*, 169 Md. App. at 461, 463 (holding that witness's statements that the defendant was "the one who shot [her] in the leg" and who "shot [her] friend," which were written on the back of a photographic array she used to identify the defendant, were admissible pursuant to Md. Rule 5-802.1(c)).

Finally, regarding Brown's claim that the court erred in permitting Mr. Gordon to testify that he told the police that the "two young ladies…set us up," we hold that the issue was not preserved. As the Court of Appeals has explained:

> The Maryland Rules provide [] that "an objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise the objection is waived[.]" Md. Rule 4-323(a). Therefore, "if opposing counsel's question is formed improperly or calls for an inadmissible answer, counsel must object immediately. Counsel cannot wait to see whether the answer is favorable before deciding whether to object."

Bruce v. State, 328 Md. 594, 627 (1992) (citation omitted); *see also Cantine v. State*, 160 Md. App. 391, 409 (2004).

When the State first asked Mr. Gordon whether he provided any information to the police, Mr. Gordon hesitated, which prompted the court to assure Mr. Gordon that he could "tell us what you told them." The State then asked Mr. Gordon what he told the detectives, and Mr. Gordon responded that his "car was over there on Sterrett Street and two young ladies, we left with two young ladies and they set us up." At that point, defense counsel

objected. Given that both the court and the State told Mr. Gordon to testify as to what he told the detectives, defense counsel's objection at the conclusion of Mr. Gordon's answer was untimely to preserve the hearsay issue.

Assuming, *arguendo*, that the issue were preserved, any error in permitting the testimony was harmless. As discussed, Mr. Gordon's statement that he provided on the photographic array, in which he indicated that Cromwell had "set up robbery," was admissible and nearly identical to the subject testimony. *See Potts v. State*, 231 Md. App. 398, 408 (2016) (noting that evidence presented in error may be harmless where that evidence was cumulative to properly admitted evidence). Moreover, Mr. Gordon's overall testimony, when considered in conjunction with his properly admitted statement of identification, strongly suggested that Cromwell had, in fact, set up the robbery. Thus, we are persuaded that the cumulative effect of that evidence, when compared to any prejudice that may have resulted from the admission of Mr. Gordon's testimony, was such that "there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded." *Id.* at 409 (citations omitted).

IV.

Brown next argues that the circuit court twice erred in permitting Detective Forbes to provide "inadmissible lay testimony." The first instance occurred when Detective Forbes testified that the hole in the couch at 1015 Sterrett Place was a suspected bullet hole and that the hole in the ground showed the trajectory of the bullet. According to Brown, Detective Forbes should have been qualified as an expert before giving that testimony, as

it was "based upon specialized knowledge, skill, experience, training or education." The second instance occurred when Detective Forbes, upon being asked to describe what he saw upon viewing the surveillance video from the casino, testified that Williams and Cromwell "came to the casino at the same time," were "walkin' around interactin' with different men," and "later encounter[ed] Mr. Rich and Mr. Glover." According to Brown, Detective Forbes' "narration" was impermissible because Maryland Rule 5-701 "prohibits a lay witness from offering a conclusion that may be made by an ordinary jury analyzing the facts of the case." Brown also asserts that Detective Forbes' "narration" was impermissible because he "did not have personal knowledge of [those] events."

Maryland Rule 5-701 provides that testimony by a lay witness "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Expert testimony, on the other hand, is "based on specialized knowledge, skill, experience, training, or education…[and] need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). Before a witness may give expert testimony, however, the witness must be qualified as an expert by the trial court. Md. Rule 5-702. In so doing, the court must determine: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702.

The Court of Appeals discussed the difference between lay opinion testimony and expert testimony in *Ragland v. State.* In that case, Jeffrey Ragland was arrested and charged with distribution of a controlled dangerous substance after members of the Montgomery County Police Special Assignment Team ("SAT") observed Ragland and several other individuals involved in what they believed to be a drug transaction. *Ragland,* 385 Md.at 709–10. At trial, two members of the SAT team testified regarding the events leading up to Ragland's arrest. *Id.* at 711, 713. Neither was called as an expert by the State nor qualified as an expert by the court under Maryland Rule 5-702. *Id.* Nevertheless, both officers testified that, based on their training and experience in the investigation of drug crimes, what they observed was a "drug transaction." *Id.* at 712–14. Ragland was ultimately convicted of distribution of a controlled dangerous substance. *Id.* at 715.

On appeal, Ragland argued that the officers' conclusions constituted expert testimony and should have been excluded by the trial court. *Id.* at 716. The Court of Appeals agreed. *Id.* at 725. In so doing, the Court noted that both officers "devoted considerable time to the study of the drug trade [and] offered their opinions that, among the numerous possible explanations for the [observed events], the correct one was that a drug transaction had taken place." *Id.* at 726. The Court further observed that "[t]he connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning." *Id.* The Court concluded that "[s]uch testimony should have been admitted only upon a finding that the requirements of Md. Rule 5-702 were satisfied." *Id.*

The Court of Appeals similarly held, in *State v. Blackwell*, 408 Md. 677 (2009), that testimony about the results of a horizontal gaze nystagmus ("HGN") test constituted expert testimony "subject to the strictures of Md. Rule 5-702."[5] *Id.* at 691. In that case, the defendant, Paul Blackwell, was convicted of driving under the influence after a police officer testified that Blackwell failed an HGN test. *Id.* at 684–85. On appeal, Blackwell contended that the trial court erred in admitting the officer's testimony because the officer had not been offered or qualified as an expert witness. *Id.* at 685–86.

The Court of Appeals agreed with Blackwell, holding that the officer's testimony "about Blackwell's performance on the HGN test was clearly expert testimony within Md. Rule 5-702." *Id.* at 693–94. The Court noted that the officer "reported, among other things, that Blackwell had 'lack of smooth pursuit' and 'distinct nystagmus at maximum deviation' in each eye." *Id.* at 691. The Court found this significant because "the HGN test is a scientific test, and a layperson would not necessarily know that 'distinct nystagmus at maximum deviation' is an indicator of drunkenness; nor could a layperson take that measurement with any accuracy or reliability." *Id.*

In *In re Ondrel M.*, 173 Md. App. 223 (2007), by contrast, this Court held that an officer's testimony regarding the smell of marijuana was properly admitted as lay opinion and did not require expert qualification. *Id.* at 238. In that case, the respondent, Ondrel

[5] HGN is "a lateral or horizontal jerking when the eye gazes to the side." *Blackwell*, 408 Md. at 686 (citations and quotations omitted). "Although HGN is a natural phenomenon, alcohol magnifies its effects." *Id.* As a result, "law enforcement officials have looked to HGN as an indicator of alcohol consumption for several decades." *Id.* at 687.

M., was a passenger in a vehicle that had been stopped by the police. *Id.* at 227–28. Upon approaching the vehicle, the officer "smelled an odor of marijuana emanating from inside." *Id.* at 228. A search of the vehicle revealed marijuana, and Ondrel M. was arrested. *Id.* At trial, the officer testified as a non-expert that "in his training at the police academy and in his work in the field as a police officer, he had been exposed previously to the smell of burning marijuana and therefore could recognize its smell." *Id.* Ondrel M. was subsequently found guilty. *Id.* at 229.

Relying on *Ragland*, Ondrel M. argued, on appeal, that the trial court erred in admitting the officer's lay opinion because it was based on the officer's training and experience as a police officer. *Id.* at 238. We disagreed, noting that certain testimony, even if given by a police officer, is not expert testimony if it is rationally based on the witness's perceptions:

> No specialized knowledge or experience is required in order to be familiar with the smell of marijuana. A witness need only have encountered the smoking of marijuana in daily life to be able to recognize the odor. The testimony of such witness thus would be "rationally based on the perception of the witness." *Ragland*, 385 Md. at 717.

In re Ondrel M., 173 Md. App. at 243.

More recently, in *Prince v. State*, 216 Md. App. 178 (2014), we determined that a police officer's testimony regarding his placement of "trajectory rods" through suspected bullet holes was permissible lay testimony. *Id.* at 202–03. There, the defendant, Joshua Prince, was arrested and charged after it was alleged that he had fired a rifle at his estranged girlfriend's vehicle. *Id.* at 184–85. At trial, Officer Ryan Costello, who was not qualified

as an expert, testified on direct examination that he performed a "reconstruction" analysis on the vehicle "to show trajectory or the path that was taken by a suspected bullet through the vehicle." *Id.* at 190–91. The officer explained that part of his analysis involved placing "trajectory rods" through the "suspected bullet holes to show the directionality of travel." *Id.* at 191. The State then showed the officer photographs he had taken of Prince's girlfriend's vehicle during the reconstruction analysis. *Id.* The officer explained that the photographs depicted "the trajectory rods that [he] spoke of," which he had placed in the vehicle. *Id.*

Following his conviction, Prince noted an appeal, arguing that the trial court "should not have permitted [Officer Costello] to testify as [a lay witness] regarding information that was properly the subject of expert testimony. *Id.* at 192. Although we ultimately held that the issue was unpreserved, we nevertheless concluded that the admission of the officer's testimony was proper. *Id.* at 198, 203. In so doing, we noted:

> A police officer who does nothing more than *observe* the path of the bullet and place trajectory rods (in the same manner as any layman could) need not qualify as an expert to describe that process. Officer Costello relied on his own observations and placed the rods into the holes made by the bullet fired by Mr. Prince. He conducted no experiments, made no attempts at reconstruction, and "was not conveying information that required a specialized or scientific knowledge to understand." *People v. Caldwell*, 43 P.3d 663, 668 (Colo. App. 2001). In *Caldwell*, police recovered two bullets from the vehicle, and an investigating officer testified regarding "the appearance AND location of the two bullet holes on the outside of the car, the hole inside the car, and the dimpling of the metal inside the car. From his own observations and the use of a dowel and string, the technician testified that he tracked the paths of two bullets." *Id.* at 667. The Colorado Court of Appeals (affirming the conviction) held that although the officer had not been qualified as an expert, none of the information that he testified to required that he rely on his expertise – and "he testified about the location

> of the bullet holes and the paths of the bullets that were evidence from the photographs without any additional explanation." *Id.* at 668.
>
> The same is true here. Even if Mr. Prince's counsel had objected in a timely manner, Officer Costello's opinion fell well within the universe of lay testimony, and the trial court properly admitted it.

Id. at 202–03 (emphasis in original).

Applying the above principles to the facts of the instant case, we hold that the circuit court did not abuse its discretion in allowing Detective Forbes to testify as to the suspected bullet holes and trajectory of the shots fired. *See Warren v. State,* 164 Md. App. 153, 166 (2005) ("The decision to admit lay opinion testimony is vested within the sound discretion of the trial judge."). Unlike the officers in *Ragland* and *Blackwell,* Detective Forbes did not rely on any scientific or technical analysis requiring specialized explanation or measurement, nor did he cite to any specific training when proffering his testimony. Instead, like the officers in *In re Ondrel M.* and *Prince*, Detective Forbes relied on his own observations and merely explained, as any layman would, what he observed upon executing the search warrant at 1015 Sterrett Street. As a result, any opinions he expressed fell within the ambit of "lay opinion" subject to the strictures of Maryland Rule 5-701. And, because those opinions were rationally based on events the officer witnessed first-hand and helpful to the trier of fact in understanding the evidence, the trial court did not abuse its discretion in admitting Detective Forbes' testimony. *See Bruce v. State,* 328 Md. 594, 630 (1992) ("[L]ay opinions which are derived from first-hand knowledge, are rationally based, and are helpful to the trier of fact are admissible.").

We likewise disagree with Brown's contention that Detective Forbes did not have sufficient "personal knowledge" to testify to Williams and Cromwell's actions at the casino. That testimony was based on Detective Forbes own observations of the casino's surveillance footage. At no time did the officer provide anything other than a factual recitation of what he saw.[6] Moreover, given Mr. Gordon's pre-trial identification of Brown, Williams, and Cromwell and Detective Forbes conversation with Mr. Rich at the hospital following the incident, the officer was sufficiently familiar with those individuals to comprehend what he was watching and then relate his observations. *See Paige v. State*, 226 Md. App. 93, 125 (2015) ("The personal knowledge prerequisite requires that even if a witness has perceived a matter with his sense, he must also have the experience necessary to comprehend his perceptions.") (citations and quotations omitted).

Finally, Detective Forbes testimony regarding his observations of the casino footage was helpful to the jury in understanding the officer's investigation of the incident, which is the purpose for which the testimony was offered. Thus, although the jurors may have been capable of watching the video and drawing their own conclusions about what they saw, they would likely not be able to watch the video and understand what Detective Forbes' observed and, importantly, what effect those observations had on the officer's investigation.

Detective Forbes testimony was also relevant to the issue of Williams and Cromwell's role in the crime. In that vein, Detective Forbes, who was the lead detective

[6] Brown, in claiming that Detective Forbes "narrated the video," seems to imply that the officer described the video as it was being played for the jury. That was not the case.

in the case and had personal contact with most, if not all, of the perpetrators and victims in the case, was in a better position than the jurors to identify Williams and Cromwell on the surveillance video. *See Moreland v. State*, 207 Md. App. 563, 572–73 (2012) ("'[A]lthough the witness must be in a better position than the jurors to determine whether the image capture by the camera is indeed that of the defendant, this requires neither the witness to be intimately familiar with the defendant nor the defendant to have changed his appearance.'") (citations omitted). Whether Detective Forbes had sufficient "familiarity" with Williams and Cromwell to make that identification went to the weight of his testimony, not its admissibility. *Id.* at 573.

V.

Brown's final contention is that the transcript from his sentencing hearing unambiguously reflects that the court sentenced him on Count 10, conspiracy to rob with a dangerous weapon as to Mr. Glover, to a term of 20 years' imprisonment, suspend all but time served. Brown notes, however, that his commitment record, his probation order, and the court's docket entries all state that he was sentenced on Count 10 to a term of 20 years' imprisonment, suspend all but 10 years. Brown claims, therefore, that the commitment record, docket entries, and probation order must be amended to reflect the sentence announced by the sentencing court.

We agree. "When there is a conflict between the transcript and the commitment record, unless it is shown that the transcript is in error, the transcript prevails." *Lawson v. State*, 187 Md. App. 101, 108 (2009) (citations and quotations omitted); *see also Id.* (noting

that a "similar rule applies to docket entries."). Here, the transcript from the sentencing hearing, which the State concedes is accurate, shows that the court's sentence on Count 10 was "20 years, suspend all but time served." The transcript also shows that the court's sentence on Count 19, use of a handgun in a crime of violence, was to run consecutive to its sentence on Count 10. Therefore, all relevant documentation, including Brown's commitment record and the court's docket, must be amended to reflect that sentence.

The State argues that the sentencing court "clarified [its] intentions" with regard to Brown's sentence on Count 10 when, following the pronouncement of its sentence, the court responded to a question from Brown by stating that he would "basically…get a 20 year sentence, suspend all but 10 and then the handgun, use of a handgun in a crime of violence runs consecutive[.]" The State maintains that the court's "clarification" constituted a correction pursuant to Maryland Rule 4-345(c).

We find the State's argument unconvincing.[7] To be sure, Maryland Rule 4-345(c) provides that a court "may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding." We do not, however, read the court's colloquy with Brown as a "correction." At best, the court's statements, which did not even indicate the conviction or count to which the court was referring, casts some doubt over the court's intentions with

[7] In its appellee brief, the State argues that Brown's sentence on Count 10 was illegal and that we should vacate all sentences and remand for resentencing. As that issue was not raised by Brown in his brief, we shall not address that issue here. *See Kunda v. Morse*, 229 Md. App. 295, 302 n. 4 (2016) ("[I]f a timely cross-appeal is not filed, we will ordinarily review only those issues properly raised by the appellant.") (citation and quotations omitted).

regard to its sentence on Count 10. That said, fundamental fairness dictates that if "there is doubt as to the penalty, then the law directs that [a defendant's] punishment must be construed to favor a milder penalty over a harsher one." *Robinson v. Lee*, 317 Md. 371, 380 (1989).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; CASE REMANDED FOR THE SOLE PURPOSE OF CORRECTING THE COMMITMENT RECORD, PROBATION ORDER, AND DOCKET ENTRIES TO REFLECT THE CORRECT SENTENCE IN ACCORDANCE WITH THIS OPINION; COSTS TO BE PAID BY APPELLANT.