Circuit Court for Baltimore City
Case No. 118081030

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1974

September Term, 2019

DERRIAN JAROD GEATHERS

v.

STATE OF MARYLAND

Kehoe,
Gould,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Kehoe, J.

Filed: July 15, 2021

Derrian Jarod Geathers was indicted in the Circuit Court for Baltimore City with premeditated murder and related crimes. His first trial ended in a mistrial after a jury was unable to reach a verdict. He was tried a second time. The jury acquitted him of premeditated murder but convicted him of first-degree felony murder, use of a handgun in the commission of a crime of violence, and wearing, carrying, or transporting a handgun on the person. Appellant was sentenced to life in prison for felony murder, with all but 60 years suspended. He also received a consecutive 10 years for use of a handgun, with the first five years without possibility of parole, and the court merged the remaining wearing, carrying, or transporting count. In his timely appeal, appellant asks us to address the following questions:

> 1. Did the hearing court err by denying appellant's pre-trial motion to suppress his statement to police detectives?
>
> 2. Did the trial court err by ruling that prior recorded testimony was admissible?

For the following reasons, we will affirm the judgments of the circuit court.[1]

[1] On May 25, 2021, proceedings in this appeal were stayed until July 25, 2021 to permit the Court to address issues in accessing and reviewing a trial exhibit. The stay is lifted.

BACKGROUND

Appellant does not challenge the legal sufficiency of the evidence against him. We will summarize the evidence produced at trial to give context to the parties' appellate contentions. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

On the afternoon of March 8, 2017, Sean Wood was shot to death on a Charm City Circulator bus near the intersection of 200 South Broadway and Gough Street in Baltimore City. The State's theory of the case was that the shooting followed on the heels of a botched theft of marijuana. According to the testimony of the bus driver, Broney Clanton, the incident began near the bus stop with two men arguing on the sidewalk. As Clanton was getting ready to shut the door and continue with his route, one of the men, later identified as Mr. Wood, tried to come through the front door, but tripped on the step. The second man then straddled the fallen man and shot him in the stomach with a black handgun. The shooter, described by Clanton as wearing all black and being "tall, slim, kind of dark skin, short haircut and tech shoes," then fled down Gough Street. Mr. Wood pleaded with the bus driver for help, and Clanton called for an ambulance.

Dana Smith was a passenger on the bus and a witness to the shooting. He testified that he was standing at the front of the bus when the shooting happened and "saw the whole thing." Smith related that the shooter and Wood were arguing on the sidewalk beforehand and then "wrestling" and "tussling" in the front of the bus, near the driver. Smith saw the second man shoot Wood in the stomach, using a black handgun. Smith identified appellant

in a photo array after the shooting. At the trial, Smith identified appellant as the shooter, testifying that he saw him "clearly" and that "I'll never forget it [sic] what his face looked like."

Officer Patrick Zelno was one of the first Baltimore City police officers to respond to the scene, at around 2:46 p.m. A video recording obtained from Officer Zelno's body-worn camera was admitted without objection and played for the jury during trial. Statements from unidentified speakers identified the shooter's race and described the shooter as a male in his early twenties and wearing a black shirt and pants. Mr. Wood was transported to Johns Hopkins Hospital, where he later died from his injuries. The medical examiner testified that he died of a gunshot wound to the abdomen and that the manner of death was homicide.

Baltimore City Police Detective Michael Vodarick testified that he had been the primary homicide investigator assigned to the case. He stated that appellant's name was provided as a possible suspect via a Metro Crimes Stopper tip. Video and still photographs from a City Watch closed-circuit camera located near South Broadway and Gough Street were admitted into evidence and displayed to the jury. Detective Vodarick testified that those photographs depict appellant, Mr. Wood, and several others near the bus stop shortly before the shooting.

In addition, and as will be discussed in part 2 of this opinion, still photographs from two video surveillance cameras from Acosta Dental Practice located on the corner of Broadway and Gough Street were admitted into evidence and presented to the jury over an

objection from defense counsel. Detective Vodarick identified appellant as being a person depicted on the video. He also testified that one image from the front of the dentist's office camera showed "Geathers holding what appears to be a gun."

As will be discussed in more detail, Detective Vodarick interviewed appellant following his arrest on April 28, 2018. A video of that interview was played for the jury during trial, over an objection from defense counsel. During the interview, appellant initially denied any involvement but later admitted that he was depicted in the video from Acosta Dental Practice.[2] Appellant told the police that the shooting was a "mistake" and an "accident." However, he also made several other inculpatory statements during the interview.

[2] Although the video footage from Acosta Dental is included in the record on appeal as State's Exhibit 11, it does not appear that the video was actually played for the jury during the trial because, as the prosecutor indicated during trial, it was "not cooperating [.]"

Upon our review, we note that the video depicts views from the front door of the dental practice on South Broadway and the side of the building along Gough Street. That video shows a man walking towards the bus stop near the corner in question. (The bus stop itself is off camera.) Moments later, several unidentified individuals are seen hurriedly walking away from the area. And, a moment after that, the same man seen earlier walking into the area is seen fleeing back whence he came, albeit now holding his hood down to conceal his face. Detective Vodarick testified that that the man was appellant.

ANALYSIS

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Appellant first asks us to review the motion court's ruling denial of his motion to suppress the recording of his statement to the police on the grounds that it was not made freely and voluntarily. The State responds that reversal is not warranted because, under the totality of the circumstances, appellant's statement was voluntary and not tainted by coercion or other impropriety.

A. The evidence presented at the suppression hearing

We begin with the record established at the motions hearing. Detective Vodarick testified that he had first developed appellant as a person of interest in the murder of Mr. Wood during the summer of 2017, and that the arrest warrant was issued in January 2018. Police arrested appellant at approximately 6:40 a.m. on February 28, 2018. Appellant was transported to a police station and arrived at around 7:00 a.m. He was placed in an interview room and his handcuffs were removed. There was an audio and video recording of what occurred in the interview room, including, but not limited to, appellant's interview by the police.

After transporting appellant to the police station, Detective Vodarick and other officers prepared and executed search warrants in connection with their investigation. During this period, which took approximately eight hours, appellant was confined in the interview

room. During those eight hours, appellant was offered food and drink, as well as the opportunity to use the bathroom.

Detective Vodarick returned to the station and began his interview of appellant at approximately 3:00 p.m., along with Detective Richard Moore. Both detectives were unarmed. The interview room was described as a square room, measuring around 10 feet by 10 feet, with a table and three chairs. Appellant sat on one side of the table and Detective Vodarick sat directly opposite. Detective Moore sat at one end of the table. The entire interview was video recorded.

At the start of the interview, appellant was read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Appellant agreed that he could read and write and, in fact, read the pre-printed *Miranda* form aloud. The detective agreed that appellant did "stumble" over a few words, but he appeared to understand those rights. He initialed next to each of the listed rights and signed the bottom of the form. Appellant then agreed to speak to the detectives.

The interview proceeded and lasted approximately one hour and forty-five minutes and a recording of that interview was entered as an exhibit at the motions hearing. Detective Vodarick testified that he did not threaten appellant, did not make him any promises, did not imply that appellant should "confess and walk away," and did not display any weapons

at any time during the course of the interview.[3] Appellant also did not appear to be under the influence of drugs or alcohol, although he informed the detectives that he "uses Percocets." The detective further testified that no one in the room raised their voice during the interview. Appellant also never asked for an attorney.

Detective Vodarick also testified that appellant seemed to understand the role of the detectives and why he was being interviewed. Asked by the court to clarify, the detective agreed that he did not tell appellant of the nature of any charges against him but did inform him that the police were investigating a shooting that happened on Broadway and Gough Street. The detective testified that he believed that appellant realized he was in custody for purposes of the interview.

Detective Vodarick testified that, at the time of the interview, appellant was 18 years old and had had prior experience with the juvenile justice system. Appellant informed the detective that he had an outstanding juvenile warrant at the time of the interview, but had been waiting until he turned 18 years old to resolve the matter. He also informed the detective that he was not currently attending school for fear that the juvenile warrant would be served. Towards the end of the interview, appellant asked to call his mother and Detective Vodarick confirmed that appellant was given an opportunity to do so.

[3] There is nothing in the video of the interview that suggests that Detective Moore made such statements either.

Over the course of the interview, Detective Vodarick showed appellant a series of photographs. Appellant identified a number of individuals in those photos, including himself. Then appellant informed the detectives that he knew about the underlying incident, and in fact, was involved in the shooting. As to this, Detective Vodarick testified:

> Q. Okay. Now, Detective, there came a time during the interview where Mr. Geathers actually indicated to you that he had been the person who shot the victim; is that correct?
>
> A. Correct.
>
> Q. Okay. Perhaps not in those words?
>
> A. Not in those exact words, no.

On cross-examination, Detective Vodarick indicated that appellant was transported to the police station by the Warrant Apprehension Task Force, after being arrested at around 6:40 a.m.~~,~~ and arriving at 7:00 a.m. He was then interviewed by Detective Vodarick at around 3:16 p.m. The police filled out a personal information form for appellant. The detective agreed that appellant was arrested approximately one year after the underlying incident. He was not free to leave, and the detective agreed that the building was a locked facility.

Detective Vodarick also agreed that, to his knowledge, appellant had never been arrested as an adult and had not been interviewed by a police officer before this incident. He then elaborated on his testimony about appellant's use of Percocet, agreeing that he used them the night before, used them on a daily basis, and that he, the detective, wrote on the personal information form that appellant was not sober. He explained that he wrote that

because appellant mentioned it, and that appellant did not appear to be under the influence during the interview. Appellant was "alert," "conversant" and the detective "saw no signs of any drugs." The detective further testified that he had worked narcotics for eight years and that he had seen people under the influence on other occasions.

Appellant indicated that he was in the 10th grade and was in school at Francis M. Wood High School. The detective agreed that he did not ask him if he was in any special education classes or had trouble reading. He reiterated that appellant told him he was not attending school because of the outstanding juvenile warrant.

Asked if appellant conveyed his understanding that he was being interviewed about this unrelated juvenile matter, Detective Vodarick responded that he thought he "made it pretty clear I was investigating the shooting on Broadway and Gough."

Detective Vodarick testified that he did not speak to appellant's juvenile probation agent nor his high school, but did speak to his mother, although not about his educational background.

Detective Vodarick agreed that, at some point during the interview, he told appellant "[w]e know you did it" and that "we have video." He also agreed that, at around 8 hours and 47 minutes into the recording, that appellant indicated that he did not want to talk anymore but, in fact, continued to talk. The detective agreed that he spoke to appellant about remorse, his mother, his children and taking care of his family. It was at that time that appellant suggested writing a letter to the victim's family.

A DNA swab was taken from appellant towards the end of the interview, and he was allowed to call his mother at that time. He was also fed around 10 hours and 33 minutes after arriving. The total time of the interview, from appellant's arrival to the conclusion was approximately ten hours.

The video of appellant's statement is included with the record. In addition to what he previously related about the interview, the recording shows that, after the detectives showed appellant photographs of the area near the crime, he initially denied any involvement. Further, after Detective Vodarick told him that he had video of the "whole incident," and suggests that appellant "want[ed] to get this off your chest," and "we know you did it," appellant again denied that he shot anyone. After further discussion by both detectives about the concept of remorse, and further denials by appellant, appellant agreed that he "made a mistake" and that the shooting was an accident. He also indicated that the gun was in "another state."

Detective Vodarick was the only witness to testify at the suppression hearing. After counsel presented their closing arguments, the court informed them that it would take the matter under advisement, would review the recorded statement as well as the exhibits that were admitted during the hearing. The court and the parties agreed that the issue before it was whether the appellant's statement was voluntary.

B. The suppression court's ruling

The court denied the motion to suppress. In doing so, it made several pertinent findings which we summarize:

Appellant was placed in the interview room at 7:03 a.m. on February 28, 2018, without handcuffs or shackles, and began to rest or sleep while seated at a table. Two and a half hours later, appellant was escorted to the bathroom. Upon his return, he again napped at the table until approximately 3:02 p.m., or roughly eight hours after he arrived. Ten minutes after waking, Detective Vodarick entered the interview room and appellant had another bathroom break.

At 3:14 p.m., Detective Vodarick, Detective Moore, and appellant returned to the interview room and the actual interview began. Appellant advised that he took Percocet "last night," and that he takes them every day. After that brief discussion, appellant was read his *Miranda* rights. Appellant followed along with the "instructions," which the court later clarified were the Miranda "advisements." Appellant read each of the advisements aloud and, after each one, he stated that he understood that advisement and initialed next to it on the form. Appellant then read the final part of the form, indicating that "I have been advised of an understand my rights. I freely and voluntarily waive my rights and agree to talk with police without having an attorney present." Appellant signed his name next to this waiver and then began speaking with the two police detectives.

The detectives then proceeded to the personal information sheet, which included biographical information about appellant. The court observed:

> As Detective Vodarick asks for Mr. Geathers' responses to questions and items on the personal history sheet, the Court observes that as to each question, Mr. Geathers responded quickly and clearly to each personal data question. Mr. Geathers did not seem to be under the influence and he did not

> seem to be operating with, if you will, a clouded mind or having any issue whatsoever with regard to understanding what was being asked of him about his personal characteristics and information that the form requires.

Turning to other factors, the court observed that appellant indicated he had a tenth-grade education from Francis M. Wood High School. Appellant also indicated that he felt "a little bit under the influence from taking Percocet last night," but that he was "pretty clear-minded" given the time that had elapsed. Appellant also provided the name of his mother as his contact person, that he was dating a 25-year-old woman, that he knew a victim in some other, unrelated case being investigated by the detective, and then indicated that he did not know why he was being interviewed.

As for his age and education, the court noted that it had not been presented with "any psychological records of Mr. Geathers that would go toward the existence, if any there may be, of any learning disability." The court also stated, as appellant points out in his brief, that appellant was "a bit above, I'll say, or beyond the age of 18, as of the date of the alleged commission of this offense and was a very, very young man when in the custody of Baltimore police for purposes of the statement that he gave on February 28th, 2018."

The court further observed that appellant had not been going to school because he knew that the police were looking for him in connection with a juvenile warrant for another case. The court then stated:

> And when asked why he hadn't been going to school, Mr. Geathers offers that he had run from the juvenile warrant. He decided to do that until he's 18 and then he thought he could squash it. That suggests a certain level of savvy that belies a tenth grade education and a person who is barely 18 years of age

> but who would otherwise not have any contacts with the criminal justice system to, frankly, preserve and protect one's liberty interest. Mr. Geathers, according to his statement, appears to have made a choice that he would have a pretty good idea where the authorities would look for him whether it be at home or, if he had been working, a place of employment, in this case from school, and just decided to stay away from school.

At that point, the court noted that appellant was shown photographs of the underlying incident. Appellant agreed that he was depicted in one of those photos, and that he was there to buy marijuana. He initially stated that he was there doing "a mundane errand going to the store for his mother with his friend." Appellant agreed that he heard gunshots while he was there, and that he, like everyone else, started running at the sound.

Noting that the detectives discussed appellant's age and the possibility that someone involved in the shooting might feel remorse for the victim and the victim's family, the court stated that the detectives communicated to appellant that he was

> a very, very young man and that he may not have intended to do what he did and that he has, on balance, all things being relative, given his youth of age of 18 at the time, a long life ahead of him and that this matter [wouldn't] be the end of his life per se and he would have another opportunity to make right on a second opportunity and chance if he were to first acknowledge his remorse.

The court further summarized the "tenor" of the dialogue between appellant and the detectives:

> At no time did the Court observe that either of the detectives threatened Mr. Geathers verbally, emotionally or physically. At no time does the Court observe that Mr. Geathers is coerced or made to feel as if he [had] to accept culpability for something that he did not do. In other words, to take a rap for somebody else.

* * *

> Mr. Geathers appeared to the Court, frankly, to be very, very capable of, notwithstanding [his] relative youth, of holding his own in an intellectual and philosophical conversation with two homicide detectives. And Mr. Geathers ultimately acknowledged responsibility and having human emotions appears to be overcome, however briefly toward the end of the interview, by grief over his actions as to the grief that it caused others. He does not at all appear to be emotionless. He does not at all appear to be so cold that he's apathetic about the impact of this homicide on family of other people. He is very attuned with his thoughts and sensitive to his role notwithstanding his young age of 18 as being, as I observed it, the financial provid[er] at least in part, if not wholly, for his mother and his little sister who, at the time, was eight years of age. And he wonders aloud what the impact will be on them because of his actions. That is, in the view of the Court, remarkable deep thought for any 18 year old. And he then asks, when he's asked if he'd like to make a call, if he can call his mother suggesting, of course, that he make the call to his mother to explain this predicament to her, his level of involvement in it and have that what I can only imagine was incredibly difficult discussion with his mom.

Having made these findings, the court then considered whether appellant's statement was made freely, knowingly, and voluntarily. As appellant recognizes, the court considered the applicable law and summarized the aforementioned findings of fact. Notably, the court agreed that appellant was under arrest and that he was detained for eight hours prior to his interrogation, but that the actual interview lasted only approximately two hours. Appellant was not physically restrained, was advised of and waived his *Miranda* rights, and appeared to have no mental or physical condition that impaired his statement. Noting that appellant indicated he had taken Percocet the night before, the court found that, based on its

observations of the statement, that appellant did not show "any indicia of being under the influence of any drug to the end of his motor skills being affected."

With respect to his age, the court stated:

> He was 18, I believe at the time of this interview. I've spoken about his age and I've spoken about already his formal level of education. There is nothing in the way of evidence before the Court that calls into question the level of intelligence of Mr. Geathers. He did not have any problem appearing to understand questions that were being asked of him as to the personal history form. And he did respond clearly and immediately upon being asked those questions.
>
> His thought was – his speech, rather, was thought-based and focused as to questions that were being asked of him, topics that were raised by the detectives during the course of the interview. He responded to them directly and he was not, if you will, one who evidenced any tangential thought, meaning one who spoke about things that were not at all the subject of the discussion.

The court then stated that it "resoundingly finds that there's no evidence of physical mistreatment, physical intimidation or psychological pressure." The court then concluded:

> [U]pon the observations just articulated here on the record, that there is no credible evidence that would lead this Court to conclude that Mr. Geathers' statement was involuntary under the Maryland—under Maryland nonconstitutional law or that it was involuntary under the due process clause of the Fourth Amendment of the United States and Article 22 of the Maryland Declaration of Rights. And the Court further finds and concludes that that statement given by Mr. Geathers was elicited in conformance with the mandates of *Miranda* and its progeny. The Court noting *Costley v. State*, 175 Md. App. 90 at 106, a 2007 opinion.
>
> Upon the motion, the Court does conclude that the State has proven by a preponderance of the evidence that Mr. Geathers' inculpatory statement was freely and voluntarily made, noting *Winder v. State*, 362 Md. 275.

> Respectfully then, the defense motion to suppress Mr. Geathers' statement is denied.

C. The standard of review

On review of the denial of a motion to suppress, we look solely to the evidence adduced at the suppression hearing-and view it in the light most favorable to the prevailing party on the motion. *Gonzalez v. State*, 429 Md. 632, 647 (2012). "The first-level factual findings of the suppression court and the court's conclusions regarding the credibility of testimony must be accepted by this Court unless clearly erroneous." *Thomas v. State*, 429 Md. 246, 259 (2012) (quoting *State v. Tolbert*, 381 Md. 539, 548 (2004) (other citations omitted)). Although we defer to the suppression court's findings of fact, we "make our own independent constitutional appraisal, by reviewing the relevant law and applying it to the facts and circumstances of this case." *Madrid v. State*, 247 Md. App. 693, 714 (2020), *cert. granted*, 472 Md. 312 (2021), (quoting *Lee v. State*, 418 Md. 136, 148–49 (2011)).

In Maryland, a confession may be admitted against an accused only when it has been "determined that the confession was '(1) voluntary under Maryland non-constitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the mandates of *Miranda*.'" *Brown v. State*, 452 Md. 196, 209 (2017). "[T]he burden of proving the admissibility of a challenged confession is always on the State." *Smith v. State*, 186 Md. App. 498, 519 (2009) (citing *State v. Tolbert*, 381 Md. 539, 557 (2004)).

In *Hoey v. State*, 311 Md. 473 (1988), the Court of Appeals explained the overlapping tests a confession must satisfy to be deemed voluntary: First, under Maryland non-constitutional law, a confession is voluntary if it was "freely and voluntarily made at a time when the defendant knew and understood what he was saying.'" *Id*. at 481 (cleaned up). Second, a confession must satisfy the coterminous protections afforded by the Due Process Clause of the Fourteenth Amendment of the federal constitution, and Article 22 of the Maryland Declaration of Rights.[4] *Hoey*, 311 Md. at 480 n.2. The test for voluntariness for constitutional purposes turns on "'the crucial element of police overreaching.'" *Id*. at 485 (quoting *Colorado v. Connelly*, 479 U.S. 157, 163 (1986)). A confession is deemed voluntary unless there was improper "'police conduct causally related to the confession.'" *Id*. (quoting *Connelly*, 479 U.S. at 163).

Whether a confession is voluntary depends upon the "totality of the circumstances." *Knight*, 381 Md. 517, 533 (20004). In conducting that analysis, courts:

> look to all elements of the interrogation, including the manner in which it was conducted, the number of officers present, and the age, education, and experience of the defendant. Not all of the multitude of factors that may bear on voluntariness are necessarily of equal weight, however. Some are transcendent and decisive. We have made clear, for example, that a confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, notwithstanding any other factors that

[4] *See, e.g.*, *Lee v. State,* 418 Md. 136, 160 (2011) ("We therefore hold that Petitioner's confession . . . did not violate the Due Process Clause of the Fourteenth Amendment, and, for the same reason, did not violate Article 22 of the Maryland Declaration of Rights.").

> may suggest voluntariness, unless the State can establish that such threats or promises in no way induced the confession.

Id. at 533 ((cleaned up).

Looking to these factors, appellant was interviewed after he was taken into custody on February 28, 2018, at around 6:40 a.m. He was placed in an interview room at the police station, where he waited from 7:00 a.m. until he was interviewed by two police detectives, Detectives Vodarick and Moore, at around 3:16 p.m. The interview room was a 10 by 10 foot room containing a table and three chairs. Although appellant was not free to leave the confines of the police station, he was offered food and drink and the opportunity to use the bathroom. In the several hours between appellant's arrest and the beginning of his interview, police had been obtaining and serving a search warrant.

At all times during the interview, appellant was seated on one side of the table and the detectives on the other. Both detectives were unarmed. Appellant was read, and waived, his *Miranda* rights before agreeing to speak with the detectives. Appellant never asked for the assistance of counsel. Detective Vodarick testified that, although appellant was not told of the specific charges until the end of the interview, he was informed that the police were investigating the shooting that occurred on the corner of Broadway and Gough on the day in question. The entire interview was video recorded and lasted approximately one hour and forty-five minutes. And, the total time involved, from appellant's arrival to the interview's conclusion, was approximately ten hours. These facts suggest that the manner of the police interview was non-coercive under the circumstances.

Turning next to appellant's age, education and experience, we bear in mind that special caution is required in assessing the voluntary nature of admissions by juveniles. The Court of Appeals has stated that the following factors are important in considering whether a juvenile's confession is voluntary under the totality of the circumstances approach (emphasis in original):

> First, the United States Supreme Court has held that youth is a crucial factor in determining, in the totality of the circumstances, whether the juvenile defendant's confession was voluntary under the due process clause of the Fourteenth Amendment. Second this Court noted that the United States Supreme Court has emphasized that admissions of juveniles require special caution. Third, although a juvenile's request to see a parent does not constitute an invocation of the right to remain silent, that a denial of parental access to a juvenile charged as an adult with a crime is a factor, *and a very important one*, in applying the totality of the circumstances test is entirely clear." Fourth, also to be factored into the totality test is whether the juvenile defendant's statement was exculpatory and was given shortly after his arrival at the police station.

Moore v. State, 422 Md. 516, 532 (2011) (cleaned up).

In his brief, appellant correctly points out that the suppression court erred when it stated that he was eighteen years old at the time of the offense. In fact, appellant was seventeen and seven-and-a-half months old at the time of the offense. However, and to the point, appellant was eighteen when he was interviewed. It is appellant's age at the time of his statement that concerns us. Additionally, appellant asserts that the suppression court should have placed more weight than it did on his age and the fact that he was in tenth grade at

Francis M. Wood High School.[5] The suppression court addressed this issue: The court noted that appellant told his interviewers that he was enrolled at Francis M. Wood but that he was not attending school, because he had prior experience with the juvenile justice system and was concerned that police would serve an outstanding juvenile warrant on him if he attended school. The court concluded that all of this suggested "a certain level of savvy" on appellant's part "that belies a tenth grade education." We believe that this is a reasonable inference.

Finally, appellant points out that he told the interviewing officers that he had taken Percocet the night before and that he felt a "little bit" under the influence of the drug at the time of the interview. The suppression court addressed this issue in its findings and concluded that appellant appeared to have no mental or physical condition that impaired his statement. Appellant asserts that those facts "should have been weighed more heavily" by the suppression court and urges us to do so. However, and based upon our own review of the recording of the interview, we agree with the suppression court.

After our own independent review of the record and the recording of the interrogation, and giving proper weight to the suppression court's first level findings of fact, we conclude

[5] Appellant points out that Francis M. Wood High is identified as an "alternative placement" school on the Baltimore City Public Schools website. Appellant does not point to anything that suggests that only developmentally disabled students attend Francis M. Wood much less that appellant himself is developmentally disabled or cognitively impaired.

that the State met its burdens in this case. We are not persuaded that appellant's free will was compromised by his age, education and experience, or by the way that the interview was conducted. Taking his youth and inexperience into consideration, appellant did not appear to be intimidated by the officers or confused by their questions. After considering these factors in their totality, we are persuaded that the motions court did not err in concluding that appellant's statement was voluntary.

2.

Appellant also contends that the trial court erred by admitting the prior recorded testimony of Alexandria Mejia, the custodian of record for the video and photographs from Acosta Dental Practice. He asserts that this testimony was hearsay and the State failed to adequately establish that Ms. Mejia was unavailable to testify. The State responds that the witness was unavailable and that her testimony from appellant's first trial was admissible as an exception to the rule against hearsay. We conclude that the State is correct.

Prior to the start of appellant's second jury trial, the State moved in limine to admit video surveillance from Acosta Dental, located near the scene of the incident. The State proffered that the custodian of records for that recording, Ms. Mejia, had testified under oath and had been subject to cross-examination at the first trial. At some point after the end of the first trial and the beginning of the second, Ms. Mejia moved out of state, apparently to Texas. The prosecutor told the court that "Dr. Acosta at the dental practice advises me

that Ms. Mejia was the only custodian of record[s], and that there is nobody trained on that video system at this time." The prosecutor continued:

> Your Honor, Ms. Mejia is an unavailable witness to the State, given the fact that service was attempted on her, that the State has no authority to serve her in Texas, that the fact that the trial was specially set at the time the service was rendered, while the State did not have an opportunity to attempt an interstate compact, there would've not have been time to do so for this hearing given the notice that was provided by the Acosta Dental Practice.

Appellant objected on the grounds that the State did not make sufficient efforts to secure Ms. Mejia's attendance, considering that the first trial ended in January 2019, and this second trial was set to start some four to five months later in May 2019. Appellant also noted that the video surveillance was "a crucial part of the State's case," and it should not be admitted without the testimony from the custodian.

In response to further questioning by the court, the State proffered that "Dr. Acosta advises me that [the] only information he has is that she moved to Texas. He does not have any other information as to her whereabouts[.]" The State then informed the court that it had only learned of Ms. Mejia's absence three days prior to the start of the second trial and had not obtained any further information about her location. Asked if she had attempted to find Ms. Mejia, the prosecutor conceded she had not, and indicated that she did not have her "personal contact information," and that she was identified prior to trial by Dr. Acosta as a person who was "familiar with the video system." The State continued:

> I will indicate that Ms. Mejia is a foreign national. She, I believe, is here on an immigrant status. I am not certain of what that status is. She does travel in and out of the country, as does Dr. Acosta, himself. In fact, when subpoenas

> were left with Dr. Acosta, they were left at his office in March and in April. He just contacted me [three days before the second trial began.] He had been out of the country traveling. [When he returned to the office,] one of his employees advised him [that] the detectives have been seeking him.
>
> [Dr. Acosta] is the sole dentist at this location. He runs a crew with one additional person. Most of them do not speak much English. Ms. Mejia was sent [to testify] because she was the English speaker who was familiar with the camera system.
>
> At this point, Dr. Acosta advises that he is not personally familiar with the system itself. That he could try to come in and speak about his cameras, but that that is not something he did, that it was Ms. Mejia who was in charge of it. That she suddenly left his practice, moved out of state. Knows she went to Texas, and that is the only information that he has of her whereabouts.

The State added that, with respect to this same video footage, appellant identified himself on the image and admitted he was present at the time. The State averred that police detectives "attempted on multiple occasions" to serve the custodian of records at the dental practice, including both Ms. Mejia and Dr. Acosta, and in fact, "[t]hey left those subpoenas at the practice with the person who just mans the front desk while Dr. Acosta is out of the country." The State also noted that, prior to the first trial, Ms. Mejia "[d]id not want to come" but, regardless, she was now outside the State's subpoena power. The State concluded that "[u]nless this Court would consider a postponement of the case in order to allow the State to comply with the terms of the interstate compact,[6] that is the only way to render Ms. Mejia as an available witness to the State at this time."

[6] The prosecutor appeared to be referencing the Maryland Uniform Interstate Depositions and Discovery Act, codified as Md. Code, Courts & Jud. Proc. § 9-402; *see*

Ultimately, the court granted the State's motion:

> I'm going to grant your motion in limine. I'm going to find that the State has attempted to locate Ms. Mejia, and has attempted to serve Ms. Mejia, that all efforts through investigation to get a forwarding address, of a means to communicate with Ms. Mejia have been futile through the doctor, through the detectives. There's no forwarding address, no forwarding phone number available to the State, and so I'm going to grant your motion in limine, and I will allow the video in.

The court then noted further argument from defense counsel after this ruling, and counsel argued the State could have contacted the United States State Department or the Immigrations and Customs Enforcement Agency to attempt to ascertain Ms. Mejia's location prior to trial.

At trial, and over a continuing objection, the court admitted the former testimony of Ms. Mejia. In the prior trial, Ms. Mejia testified that she was the office manager for Acosta Dental Practice, located at the corner of South Broadway and Gough Street. The practice had five external surveillance cameras, one of which was near the front door on Broadway, and another was along the side of the building along Gough Street. Ms. Mejia testified to the operation of those cameras, as well as the storage of the images on an internal computer system. Ms. Mejia gave the pertinent recordings from the day of the shooting to the police investigators and still photographs from those recordings were admitted at this second trial.

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generally, Bartell v. Bartell, 278 Md. 12, 19 (1976) ("Obviously, the subpoena powers of the State of Maryland stop at the state line.").

In reviewing decisions by trial courts to admit or exclude evidence, three different standards of review apply, depending on the nature of the ruling. "The standard of appellate review of an evidentiary ruling turns on whether the trial judge's ruling was based on a pure question of law, on a finding of fact, or on an evaluation of the admissibility of relevant evidence." *Brooks v. State*, 439 Md. 698, 708 (2014). Many evidentiary rulings involve the exercise of discretion, which "will ordinarily not be disturbed on appeal." *State v. Walker*, 345 Md. 293, 324 (1997). For example, such discretionary decisions include whether to admit hearsay statements under an exception, whereas the determination of whether a statement is hearsay is a question of law, which is reviewed *de novo* for legal correctness. *See Brooks*, 439 Md. at 708–09.

Under the Maryland Rules, hearsay is defined as "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(c). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802.

Maryland Rule 5-804(b) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness in any action or proceeding or in a deposition taken in compliance with law in the course of any action or proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an

> opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Thus, the admission of former testimony is allowed when "(1) the witness has given testimony under oath; (2) the witness is unavailable to testify; and (3) the accused had an opportunity to cross-examine the witness at the prior trial or hearing where the testimony was elicited." *Tyler v. State*, 342 Md. 766, 774 (1996) (citing *Huffington v. State*, 304 Md. 559, 566 (1985)). There is no dispute that Ms. Mejia testified under oath at the first trial and was available for cross-examination. Therefore, her unavailability is the only issue before us.

A witness is unavailable when the declarant "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." Md. Rule 5-804(a)(5). The Court of Appeals has stated what is required to determine unavailability:

> In a nutshell, the "unavailability" of a material witness includes one who is absent from a trial and the proponent of the statement of the witness has been unable to procure the witness's attendance by process or other reasonable means. "Other reasonable means" require efforts in good faith and due diligence to procure attendance.

State v. Breeden, 333 Md. 212, 222 (1993).

Further, "the State bears the initial burden of showing diligence and good faith in its effort to obtain the missing witness[.]" *Muhammad v. State*, 177 Md. App. 188, 298 (2007), *cert. denied*, 403 Md. 614 (2008). We review for abuse of discretion a trial judge's "ultimate determination" that the witness is unavailable, and whether the requirements of the rule

have been satisfied. *See Breeden*, 333 Md. at 216; *Muhammad*, 177 Md. App. at 298.

According to the prosecutor's proffer, the State attempted to serve the custodian of records at Acosta Dental Practice, multiple times before the second trial. Ms. Mejia was the only person identified by Dr. Acosta who had knowledge of the video surveillance system. She had moved to Texas and her whereabouts were unknown both to the prosecutors and Dr. Acosta. Although the State did not attempt to locate her in Texas, it did note that Ms. Mejia was a foreign national and frequently traveled in and out of the country. This information became known to the State approximately three days prior to the second trial. Appellant did not challenge any of the facts proffered by the prosecutor.

A trial court abuses its discretion when the ruling in question "is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable" in terms of judicial decision-making. *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *North v. North*, 102 Md. App. 1, 13–14 (1994)).

In light of the unchallenged facts before it, we conclude that the trial court did not abuse its discretion in admitting the transcript of Ms. Mejia's testimony to authenticate the video and photographic evidence from Acosta Dental.[7]

[7] The State argues that any error on the trial court's part in admitting Ms. Mejia's testimony was harmless. The State correctly points out that, in his statement to the police, appellant conceded that he was depicted on the Acosta security tapes. And certainly there was a substantial amount of other evidence inculpating appellant. But the jury was unable to reach a verdict in appellant's first trial, which included all of the evidence presented at the second trial as well as Ms. Mejia's live testimony. Therefore, we cannot conclude

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANT TO PAY COSTS.

beyond a reasonable doubt that that any suppositional error on the trial court's part in admitting Ms. Mejia's testimony was harmless. *Dionas v. State*, 436 Md. 97, 108–09 (2013).

The fact remains, however, that the trial court did not abuse its discretion in concluding that Ms. Mejia was unavailable.