UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1634 & 2516

September Term, 2015

DAVID HUNTER

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: July 19, 2017

As a result of the fatal shooting of Henry Mills on June 14, 2011, on Greenmount Avenue in Baltimore City, appellant, David Hunter was charged with first-degree murder and related and included offenses. Following the 2015 trial in the Circuit Court for Baltimore City, a jury convicted Hunter of first-degree murder, use of a handgun in the commission of a felony, possession of a firearm by an unauthorized person, conspiracy to commit first-degree murder, and participation in - and murder for - the benefit of a criminal gang.[1]

Appellant submits two questions for our review:

> 1. Did the court err in denying appellant's motion for a new trial based on newly discovered evidence pursuant to a violation of *Brady v. Maryland*?[2]
>
> 2. Did the court err in excluding [] a portion of the "State's Supplemental Disclosure" provided to the defense in discovery authored by the Assistant State's Attorney?

For the reasons stated below, we answer both questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

As Hunter raises no issues relating to the sufficiency of the evidence, and we assume the parties familiarity with the underlying circumstances of the charges, we need not set out an extensive factual recitation. *See, Washington v. State,* 190 Md. App. 168 (2010).

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[1] The court sentenced appellant to life imprisonment for first-degree murder, a consecutive 20 years for use of a handgun, a concurrent ten years for possession of a handgun, a consecutive life sentence for conspiracy, and a consecutive 20 years for the gang count – in all, consecutive life sentences plus 40 years.

[2] 373 U.S. 83 (1963).

Although not relevant to the issues raised in this appeal, we provide the following abbreviated background for context.

On June 14, 2011, around 1:00 p.m., Jerome ("Boo Boo") Paige was walking on Greenmount Avenue between 24th and 25th Streets in Baltimore with his friend, Henry Mills. As was their routine, Paige and Mills were selling illicit drugs at the time. Paige testified that as they were walking, he heard two gunshots behind him. He saw Mills fall beside him, and he turned back to look at the shooter, who he identified as Hunter. Paige continued walking away from the scene and got into a vehicle driven by a man he knew as "Peanut" to leave the area. Paige later identified Hunter as the shooter from a photographic array shown to him by police investigators.

Sharon Hawkins corroborated Paige's account of the shooting. She testified that in 2011 she was a habitual drug user and, on the day of the shooting, she purchased a quantity of heroin from Mills. Hawkins stated she was not intoxicated at the time of the purchase. After the completion of the transaction, she saw Mills cross the street and walk away with Boo Boo. A short time later, Hawkins heard a "pop," and she turned to see Mills collapsing, and Boo Boo running away. Hawkins testified that she heard two gunshots. Then, she saw two men running toward her, one of whom she identified as Hunter, and she fled the scene. Hawkins later identified Hunter, from a photo array, as the shooter.

At trial, the State read into evidence the prior testimony of Kimberly Hollingsworth, another eyewitness, into the record.[3] She testified that she was inside a liquor store on Greenmount Avenue when she heard gunshots. As she left the store, she observed a man run by her, and the man was putting a gun into the waistband of his pants. Hollingsworth observed that Mills was dead, lying face down in the street. Hollingsworth later identified Hunter in a photographic array as the man she saw running.

Baltimore City Police Detective Joseph Landsman was the lead officer in the investigation.[4] Police retrieved surveillance footage from the liquor store security camera, as well as from two of the "blue light" cameras, which was played for the jury at trial.[5] Police also recovered two .40 caliber casings from the scene, which had been fired from the same gun.

Ultimately, police developed Hunter as the suspect in the murder and later arrested him on July 23, 2011. Landsman opined that Hunter killed Mills on behalf of a criminal gang known as the Black Guerilla Family ("BGF"), because Mills was selling drugs in an area controlled by the gang and/or in retaliation for Mills's killing of a high-ranking BGF

[3] Hollingsworth had testified in appellant's first trial in June 2014 – which resulted in a mistrial – and she was subsequently unavailable in the second trial.

[4] Detective Landsman has since been promoted to Sergeant. We will refer to him by his rank at the time of the crime in this case. We note, too, that all law enforcement officers in this case are members of the Baltimore City Police Department, unless otherwise noted.

[5] Detective Jesse Schmidt testified that he retrieved the blue light surveillance camera. He stated that the blue light cameras are owned by the City of Baltimore, and the police monitor the footage.

member. At trial, the State introduced evidence demonstrating that Hunter was a member of the BGF, and on the night of the murder, he was seen at a BGF meeting in the same clothing worn by the shooter.

DISCUSSION

Motion for a New Trial

Approximately two months after sentencing, Hunter filed a motion for a new trial on the basis of newly discovered evidence that he became aware of as the result of a separate trial involving the BGF.[6] In pursuing his motion, Hunter argued that the State failed to disclose favorable, material evidence in violation of its obligations pursuant to *Brady*. He alleged that a confidential informant, James Cornish, had informed police that Paul Wilson confessed to him (Cornish) that he (Wilson) had killed Mills in retaliation for Mills's killing of Naim King, a high-ranking BGF member. The circuit court denied the motion, concluding that although the State should have disclosed the statement, disclosure would not have altered the outcome of the trial. In ruling on the motion, the court noted that Cornish's statement was not corroborated.

Before this Court, Hunter contends that the evidence of Wilson's "confession" to Cornish was admissible under *Brady* and that the State's violation requires reversal and a new trial. He characterizes the Cornish statement as exculpatory evidence which showed that Hunter did not murder Mills. He argues further that the Cornish statement was clearly

[6] The trial referred to was held subsequent to Hunter's 2015 conviction from which this appeal is taken.

material to his defense and could have reasonably affected the judgment of the jury. With his assertion that the State committed a *Brady* violation, he intertwines an assertion that the State presented perjured testimony from Detective Landsman who, on the stand, denied that anyone other than Hunter had ever been identified as the person who shot Mills. Even if Landsman's testimony was not perjurious, Hunter maintains that a new trial is required because the Cornish statement presents a reasonable probability that the result of the trial would have been different.

The State responds that the circuit court acted within its discretion in denying Hunter's motion for a new trial. The State contends further that Hunter's argument as to the differing standards of review relevant to whether the State presented perjured testimony is not preserved for our review. Furthermore, the State denies that it presented perjured testimony at trial. Finally, the State contends there is not a reasonable probability that disclosure of the Cornish statement to the defense would have led to a different outcome at trial, simply because the statement was not admissible.

Maryland Rule 4-331(c) permits the filing of motions for a new trial based on newly discovered evidence.[7] Hunter contends that the State withheld evidence in violation of its obligations pursuant to *Brady*. "'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

[7] Specifically, the rule provides: "The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule[.]"

prosecution.'" *Johnson v. State*, 228 Md. App. 391, 435 (2016) (quoting *Brady*, 373 U.S. at 87)). To constitute a *Brady* violation, evidence must meet three requirements: "'[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" *Id.* (quoting *Yearby v. State*, 414 Md. 708, 717 (2010)).

This Court has noted that "[i]f the alleged *Brady* violation pertains to the failure to disclose favorable evidence, the evidence is 'material' if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Raynor v. State*, 201 Md. App. 209, 232 (2011) (quoting *Wilson v. State*, 363 Md. 333, 347 (2001)), *aff'd*, 440 Md. 71 (2014), *cert. denied*, 135 S. Ct. 1509 (2015). "'A reasonable probability of a different result is . . . shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.'" *Yearby*, 414 Md. at 718 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). If the undisclosed evidence indicates that the State presented perjured testimony, however, then the materiality standard is whether there is a reasonable likelihood that the perjured testimony could have affected the judgment of the jury. *See id.* at 717 n.5. We note, too, that the defendant bears the "burdens of production and persuasion regarding a *Brady* violation[.]" *Id.* at 720.

The Perjury Assertion

At the outset, we reject the State's preservation argument. We are unaware of any case – and the State does not cite one – in which we have held that a standard of review is

not preserved. Accordingly, we consider whether the undisclosed evidence reveals that the State presented perjured testimony.

Hunter's trial occurred in July and August of 2015. At the new trial motion hearing, it was established that Baltimore police interviewed Cornish on October 10, 2013. In this interview, Cornish, a BGF member, informed police that Wilson, another BGF member, told Cornish that Wilson had killed someone in retaliation for the killing of King. Additionally, Cornish told police that Hunter was in jail for the murder that Wilson committed. One of the interviewing detectives informed the prosecutor in Hunter's case of Cornish's statement. Landsman had also testified in a separate proceeding that he was aware of the statement made by Cornish, but that further investigation did not corroborate it.

At trial, on direct examination, Landsman testified as to the people he interviewed in the course of his investigation and the identifications made by each. Then, the following ensued:

> [STATE]: Have I shared with you all or most of the individuals to whom you showed photographic arrays or photographs in the course of your investigation?
>
> [LANDSMAN]: Yes, you have.
>
> [STATE]: How would you describe the willingness of these individuals to speak with you, based on their demeanor?
>
> [COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled. Willingness.
>
> [LANDSMAN]: I think each one was different.

THE COURT: Thank you. Next question.

[STATE]: The individuals that we have discussed so far – how would you describe their willingness to speak with you?

[COUNSEL]: Objection.

THE COURT: Overruled.

[LANDSMAN]: They were willing.

THE COURT: Next question.

[STATE]: The individuals to whom you did not show photos or photographic arrays – how would you describe their willingness to speak with you or other law enforcement members?

[COUNSEL]: Objection.

THE COURT: Overruled. You may answer.

[LANDSMAN]: Not very willing.

THE COURT: Next question.

[STATE]: Court's indulgence, Your Honor . . . . Sergeant, **in the course of your investigation, do you know of any individuals who identified another person as responsible for the murder on June 14, 2011, in the 2400 block?**

[COUNSEL]: Objection.

* * *

THE COURT: Objection noted. Overruled. I will allow the answer to the question. "Was anyone else identified" was the question. Yes or no?

[LANDSMAN]: No.

(Emphasis added).

Based on the above, Hunter contends that Landsman's answer constitutes perjured testimony because he was aware of the Cornish statement in which Wilson was identified as Mills's murderer. The State maintains that in the context of the State's line of questioning, the testimony was not false. "False" has two relevant meanings: first, that something is untrue in the sense of being inaccurate; and second, that something is *intentionally* untrue or inaccurate. *See* BLACK'S LAW DICTIONARY 718 (10th ed. 2014) (defining "false" as "1. Untrue (a false statement). 2. Deceitful; lying (a false witness). 3. Not genuine; inauthentic (false coinage). What is false can be so by intent, by accident, or by mistake."). We need not decide whether Landsman's testimony was deliberately misleading, that is perjurious, because an inaccurate statement, even if made in good faith, can be the basis of a *Brady* violation. *See Johnson*, 228 Md. App. at 435 ("'th[e] evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" (quoting *Yearby*, 414 Md. at 717)). We are not persuaded by the State's "context" argument.

The prosecutor asked Landsman if, in the course of his investigation, he had knowledge that anyone else had been identified as Mills's murderer. Because Landsman was aware of the Cornish statement, his answer of "No" was inaccurate. In fact, Landsman reiterated his affirmation on cross-examination without the supposed "context" that the State asserts. As such, the non-disclosure of this evidence is material if there is a reasonable likelihood that the evidence would have affected the jury's judgment. *See Yearby*, 414 Md. at 717 n.5.

The Cornish Statement

The State does not contest the potential favorability of the statement to Hunter, and concedes that the statement may not have been disclosed to his counsel. Accordingly, we must determine if Hunter suffered prejudice as a result of the State's violation.

Hunter contends that the statement was material, would have been used as exculpatory evidence or to impeach Landsman, and thus would have affected the jury's judgment. The State counters that the Cornish statement is not material because it was not admissible and, alternatively, the impeachment value of the statement as to Landsman was insufficient to affect the jury's judgment in Hunter's favor.

This Court has held that "to be material, the evidence must be admissible, useful to the defense, and capable of clearing or tending to clear the accused of guilt or of substantially affecting his possible punishment." *Tobias v. State*, 37 Md. App. 605, 628 (1977). Hunter particularly contends that the Cornish statement was admissible as a statement against interest. The State, however, maintains that the Cornish statement was inadmissible 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.'" *Muhammed v. State*, 223 Md. App. 255, 265 (2015) (quoting Md. Rule 5-801(c)). Hearsay is ordinarily not admissible. *See id.* (citing Md. Rule 5-802). "Whether evidence is hearsay is an issue of law that we review *de novo*, as is whether hearsay evidence properly was admitted under an exception to the rule against hearsay." *Id.* at 265-66 (citing *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)).

Maryland Rule 5-804(b)(3) provides: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: A statement which was at the time of its making . . . so tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." Importantly, the rule continues: "A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* Stated another way, for a statement to be admissible as a statement against interest, "the proponent of the statement must convince the trial court that '1) the declarant's statement was against his or her penal interest; 2) the declarant is an unavailable witness; and 3) corroborating circumstances exist to establish the trustworthiness of the statement.'" *Jackson v. State*, 207 Md. App. 336, 348 (2012) (quoting *Stewart v. State*, 151 Md. App. 425, 447 (2003)).

Assuming, *arguendo,* that Wilson's statement to Cornish[8] was against Wilson's penal interest and that Wilson was unavailable as a witness, we are not persuaded that Hunter has proffered sufficient corroborating circumstances to establish the trustworthiness of Wilson's statement. In considering corroborating circumstances of a statement against interest, a court should consider "'whether there are present any other facts or circumstances, including those indicating a motive to falsify on the part of the declarant, that so cut against the presumption of reliability normally attending a statement

[8] And, assuming further that Wilson actually made such a statement to Cornish.

against interest that the statements should not be admitted.'" *Roebuck v. State*, 148 Md. App. 563, 582 (2002) (emphasis omitted) (quoting *State v. Matusky*, 343 Md. 467, 480 (1996)). We have stated that the timing and consistency of a declarant's statement, as well as whether the statement was made spontaneously or under police questioning, are also important considerations in assessing corroboration. *Id.* at 583-85.

Cornish related Wilson's alleged statement more than two years after Mills's murder during a police interrogation of Cornish as to the activities of various BGF members. Furthermore, during police questioning, Cornish did not recall when Wilson made the alleged statement to him nor did he provide a general timeframe. Moreover, both Cornish and Wilson had a motivation to lie because both were BGF members: indeed, the trial judge noted that gang members often fabricated stories to deflect blame from other gang members. In denying the motion for a new trial, the court noted:

> We do not shy away from the fact is that BGF is established and well-known as a gang and the persons in question were part of that gang with a military-like operation. That in so doing, somebody sometimes has to fall on the sword and take the weight I suspect, that under the circumstances, whether or not it's usable to disrupt the facts and circumstances of a trial as it's going or afterwards is not farfetched.

Accordingly, the Cornish statement was not admissible as a statement against Wilson's penal interest because it was not corroborated. As such, it is not material and the State's failure to disclose it to counsel does not constitute a *Brady* violation.

Moreover, we are not persuaded that the statement had significant impeachment value as to the testimony of Landsman. We cannot conclude that use of the statement to impeach the testimony of Landsman would have created a reasonable likelihood that it

would have affected the judgment of the jury in the face of the multiple and unrelated witnesses who, just after the incident, had identified Hunter as the shooter.

Evidentiary Issue

As part of the discovery process, the State provided Hunter's counsel with, among other things, a "State's Supplemental Disclosure," which included three photographs of unknown men that Mills had allegedly shown to his wife. The State's disclosure further provided that Mills had allegedly told his wife that the men depicted in the photos might want to see him dead. Hunter is not depicted in these photographs.

At trial, both Mills's wife and Landsman acknowledged that the wife produced the photos, but denied that Mills's wife had identified the three men as people who wanted to see Mills dead. On cross-examination of Landsman, defense counsel sought to introduce part of the State's Supplemental Disclosure filing into evidence, characterizing it as the "statement of a party opponent." The court denied admission of the disclosure, but permitted Hunter to attempt to refresh Landsman's recollection with reference to the disclosure. After having been shown the disclosure, Landsman again denied that Mill's wife had said that the three photos were depictions of men who wanted to see Mills dead.

On appeal, Hunter contends that the court erred because the disclosure should have been admitted as the statement of a party opponent. He argues that the State adopted a position about the photos, and their import, by adding the description in the disclosure filing, and he should have, accordingly, been able to introduce that position as the statement of a party opponent. Hunter emphasizes that the court's error was not harmless because the State's characterization of the photos could have cast doubt on the identifications of the

eyewitnesses and, as a result, on his guilt, especially because he maintains that he had successfully impeached the testimony of each of the eyewitnesses.

The State argues that it did not adopt a position on the photographs by providing them to Hunter in discovery, and urges us to affirm the trial court. Moreover, the State argues that the statement is inadmissible hearsay.

Maryland Rule 5-803(a)(2) provides that a statement, although hearsay, may be admissible as the statement of a party opponent if the statement is offered against the party and is "[a] statement of which the party has manifested an adoption or belief in its truth[.]"

Hunter relies principally on *Bellamy v. State*, 403 Md. 308 (2008). Bellamy had been convicted of murder. *Id.* at 311. He appealed his conviction contending the trial court committed reversible error for failing to admit, as a statement of a party opponent, an exculpatory proffer of facts that the State had used in a separate proceeding to support a co-defendant's guilty plea.[9] *Id.* at 319. At his trial, the State argued that Bellamy had fired both gunshots that killed the victim. *Id.* at 315. Bellamy, however, maintained that another individual – Welch – was the murderer, and he attempted to introduce statements from the co-defendant's – Saunders – guilty plea hearing into evidence. *Id.* at 315-16. Saunders had pleaded guilty to being an accessory after the fact to the murder that Bellamy was

[9] Bellamy contended the statement should have been admissible on three grounds: as an admission of a party opponent; a declaration against penal interest; or as a residual hearsay exception under Rule 5-803(b)(24). Having found that the statement should have been admitted as an admission of a party opponent, the Court of Appeals declined to address the latter two arguments. *Id.* at 319.

charged with. *Id.* at 315. At his plea hearing, the State proffered that Welch pulled a gun on the victim and fired the first shot. *Id.* at 317. The State also proffered that Saunders ran after the first gunshot and, approximately seven seconds later, he heard a second gunshot. *Id.* Approximately 20 seconds after the second shot, Welch caught up to Saunders, and Saunders observed that the grip of a gun was sticking out of Welch's pants.[10] *Id.* At Bellamy's trial, he attempted to introduce part of the statements made at Saunders's plea hearing into evidence. *Id.* at 318. The State argued that the statements were inadmissible hearsay, and the trial court agreed. *Id.*

On appeal, the Court of Appeals concluded that the State had adopted a belief in the veracity of the statements. *Id.* at 326. Specifically, the Court noted that in presenting the proffer at Saunders's plea hearing, the prosecutor stated, "'And it is our belief, based on our investigation and review of everything, is that he's [Saunders] been truthful,' 'We want him to be truthful and we believe he has been,' and, 'But our understanding is the truth has been reduced to writing and the statement he provided to us.'" *Id.* The Court of Appeals considered this to be an express in-court adoption of the truth of Saunders's statements. *Id.* Furthermore, the Court concluded, the prosecutors were clearly agents of the State at Saunders's plea hearing. *Id.* at 326-27. In *dicta*, the Court recognized a balancing test used by other courts: "'[t]he cases ruling against admissibility involve statements by agents at the investigative level, with statements by government attorneys after the initiation of

[10] The proffer also included information the State had received from a jail informant that Bellamy told him he had also shot the victim, suggesting that Bellamy was responsible for the second shot Saunders heard, but did not see. *Id.* at 318.

proceedings being held admissible.'" *Id.* at 329 (quoting 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 259 (6th ed. 2006)). Stated another way, the statements of the State held to be admissible were regarded as testimonial in nature. *Id.* at 329-30.

We conclude that the State never adopted a position on the truth of the purported statement to police by Mills's wife when she gave them the photos. Rather, the State merely described the photos in its supplemental disclosure. We agree with the State that if the State should be held to have adopted a position on the truthfulness of evidence by merely describing it in disclosing it to defendants, then the State's obligations under *Brady* would be "turn[ed] . . . on its head." Maryland Rule 4-263(d) requires the State to disclose certain evidence to the defense, whether or not the State believes the evidence to be credible. There is no conclusion, express or implied, that the State adopts a position as to each item of disclosure by mere compliance with the *Brady* mandates.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN BOTH NO. 1634 AND No. 2516; COSTS IN BOTH APPEALS ASSESSED TO APPELLANT.