Circuit Court for Baltimore City
Case No. 117195002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2032

September Term, 2018

MIGUEL DUKE

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: September 13, 2019

A jury in the Circuit Court for Baltimore City convicted Miguel Duke of second degree murder, use of a firearm in the commission of a felony or crime of violence, and possession of a regulated firearm by a disqualified person. The jury acquitted him of first degree murder. On appeal, Mr. Duke contends that the circuit court erred in: (1) admitting a photo array containing a hearsay statement, (2) admitting an incomplete recording of a jailhouse phone call, (3) allowing expert testimony without proper notice, (4) allowing a detective qualified as an expert to testify about her investigation, and (5) admitting expert testimony on the meaning of the term "order up." Mr. Duke contends that the cumulative effect of the court's errors was not harmless. We agree with Mr. Duke, as does the State, that the circuit court erred in admitting hearsay and in allowing an expert to testify without adequate notice to Mr. Duke. We conclude, however, that those errors were harmless. We reject the remainder of Mr. Duke's contentions and, so, we will affirm.

BACKGROUND

On the night of May 29, 2017, Troy Horton Jr. was shot twice in the bedroom he shared with his girlfriend, Ruth Reynolds, in a row house on Ruxton Avenue. The State charged Mr. Duke, who is Ms. Reynolds's son, with murder and related charges.

Testimony of Ms. Reynolds

According to her testimony at trial, Ms. Reynolds was lying in bed with the victim on the night in question, when she heard a knock on the bedroom door. Ms. Reynolds got up to open it, and her sister, Jerria Raye, and Mr. Duke were at the door. After a brief conversation, Mr. Duke "went down the steps and I'm guessing he went out the door." Ms. Raye stayed longer and asked for money to buy food, which Ms. Reynolds found

"unusual" because it was late and businesses close early in the neighborhood. Ms. Reynolds did not have any money but offered Ms. Raye food instead. Ms. Raye also asked for toilet paper, which Ms. Reynolds provided, and then Ms. Raye "went down the steps and I assumed out the door as well."

Ms. Reynolds then went to the bathroom and shut the door. While she was in the bathroom, she recognized Mr. Duke's voice calling for her: "He said, ma, what, you in the bathroom? And I said yeah. And like a couple of minutes later . . . I just heard the two [gun] shots go off." Ms. Reynolds later testified that she did not "even think it was a whole minute that went by" from when she heard Mr. Duke's voice to when she heard the gunshots. She did not see Mr. Duke, but she "heard the steps like somebody . . . jumped down the steps, like, you know, running down the steps." Ms. Reynolds ran to the bedroom, found the victim bleeding, and called 911. Moments later, Ms. Raye came back into the Ruxton house to see what had happened.

Ms. Reynolds did not see Mr. Duke with a weapon. She also testified that she was unaware of any "bad blood" between her son and the victim. She admitted that the victim sold drugs out of their bedroom.

Ms. Reynolds's Prior Statements

The State introduced two statements that Ms. Reynolds made shortly after the murder. First, the State introduced a photo array that included a photo of Mr. Duke on which Ms. Reynolds wrote a statement when she was at the police headquarters following the murder. Mr. Duke objected on the ground that the statement was hearsay and that there was no issue of identification in the case. The State argued that the statement was

admissible as "a present recollection recorded." The court disagreed with the State's rationale but determined that the statement was "a present sense impression" and so overruled Mr. Duke's objection. The statement, which Ms. Reynolds then read out loud to the jury, states:

> The young man in the picture is my son, Miguel Duke Jr. He entered my boyfriend[']s home at 1714 ruxton ave with my younger sister so that she c[ould] ask me for $5 dollars for something to eat, I told her I didn't have no money so I gave her food as I gave her the food my son proceeded down the steps I then turn[e]d to close the door to put a shirt on to use the bathroom at that time my sister asked me for some tissue I gave her the roll she went down the steps I closed the door and went to the bathroom, as I[']m using the bathroom I hear my son call me and asked if I were in the bathroom I said yes then I heard two shots and heard him run.

At a later point in the trial, the State introduced video footage from Officer Zachary Serio's body camera that was taken shortly following the murder, in which Ms. Reynolds was recorded providing substantively the same account of the events to the police as she wrote on the photo array. In the video, Ms. Reynolds tells Officer Serio that Ms. Raye asked her for money, she gave Ms. Raye food instead, Ms. Raye asked her for tissue, which she provided, and then she proceeded to go to the bathroom.[1] Ms. Reynolds then states that while she was in the bathroom, she heard her son calling for her, and "[w]hen I told my son, I said 'yeah I'm in the bathroom,' I heard two shots and I heard him run down the steps."

[1] While Ms. Reynolds is recounting the events, the audio cuts out for approximately six seconds.

Testimony of Ms. Raye

The defense's theory at trial was that Ms. Raye was responsible for the murder. Ms. Raye testified that on the night in question she was walking to the Ruxton house when Mr. Duke stopped her and asked her where she was going. When she told him she was going to the Ruxton house to get food, Mr. Duke told her he could go with her. Contrary to Ms. Reynolds's account, Ms. Raye testified that she left the house before Mr. Duke and that, while walking home, "[w]hen I got to like the middle of the block . . . I heard a shot." Also inconsistent with Ms. Reynolds's testimony, Ms. Raye testified that she did not turn back at the sound of the gunshot and simply kept walking home. She did not call the police or see if Ms. Reynolds and Mr. Duke were okay.

Other Evidence Introduced by the State

The State did not produce any physical evidence tying Mr. Duke to the scene of the crime. It did, however, admit excerpts of recordings of four phone calls that Mr. Duke made from jail after he was arrested.[2] Mr. Duke's claim on appeal relevant to the jail calls centers on the fourth call. In the excerpt of that call that was played for the jury, Mr. Duke states: "I'm going to keep – I'm trying to order her up, but my man – my man was like I can't – I tried to order her up. My man was like, yo, I can't do it, yo, I can't do it." After

[2] Mr. Duke has not provided this Court with a transcript of the phone calls as is required by Maryland Rule 8-411(a)(3). The transcript from the proceedings in the circuit court contains only portions of the second and fourth phone calls and none of the first and third phone calls. As a result, our discussion is based on the portions of the transcript that are in the record, the court's statements summarizing portions of the calls, and our own review of the audio of the calls.

the other individual utters something inaudible, Mr. Duke states again, "Yeah. I'm trying to order her ass up, yo."

After that excerpt was played to the jury, Mr. Duke objected on the ground that the State had not played an earlier portion of the call. The earlier portion, proffered Mr. Duke, was relevant "[b]ecause the caller tells Mr. Duke that his mother tried to order [Mr. Duke] up," and Mr. Duke's later comments were in reaction to hearing that. After summarizing the content of the four calls that had just been played,[3] the court asked whether Mr. Duke was making "a request by way of motion" or "an objection with regard to the fourth call as being incomplete." The court asked: "How would you like the court to treat the request, however you would characterize it?" Mr. Duke's counsel responded: "An objection as to the fourth call not being complete." The court then overruled Mr. Duke's objection, noting that the defense would be able to choose whether to present its own case after the State's case concluded.

On the second day of trial, the court informed counsel that it had received a note from a juror stating: "Judge, I am wondering if it would be possible to get a transcript of the audio of the defendant phone calls (?) Seems key to the case and I could not understand most of that was played in court." With the agreement of counsel, the court explained to

[3] The court summarized the phone calls as: (1) "[T]here had been talk of an intervention being needed according [sic] the purported caller, Mr. Duke"; (2) "There had been talk about she told them every f-ing thing in a prior call"; (3) "I can't believe she did this to me"; and (4) "All she got to do is not come to court."

the jurors that they would not be given a written transcript, but that the audio recording would be available to them to replay during deliberations.

Testimony of Detective Forsythe

The State called Detective Sandra Forsythe, the lead investigator on the case, to the stand and sought to have her qualified as an expert. Mr. Duke objected to her qualification as an expert on the grounds that the State had not provided adequate notice that she was going to give an expert opinion and that the opinion would not be of assistance to the jury. The State did not itself characterize the extent of Detective Forsythe's expected expert testimony, but agreed to the court's characterization that she would give "an opinion as to whether she developed a suspect and if so, why and who." As to notice, the State argued that it had complied with disclosure requirements through its initial disclosures, in which it indicated an intent "to introduce all the law enforcement experts as witnesses." The court admitted Detective Forsythe as "an expert in the field of homicide and violent crime investigations."

Detective Forsythe testified to her role in the investigation of the victim's murder, including (1) what she did when she arrived at the Ruxton house in the early hours of May 30, (2) the witnesses she spoke to, (3) her application for a search warrant, (4) her gathering of evidence, and (5) her application for a statement of charges. The only expert opinion testimony Detective Forsythe offered was as to the meaning of the term "order up":

> [THE STATE]: Detective, did there come a time when you reviewed jail calls in reference to this case?
>
> [DETECTIVE FORSYTHE]: Yes.
>
> [THE STATE]: And, Detective, in your ten years of experience investigating

homicide and violent crime, have you ever come across the term order up?

[DETECTIVE FORSYTHE]: Yes.

[THE STATE]: And in your expert opinion through your training and experience, what, if anything does the term order up mean?

[COUNSEL FOR MR. DUKE]: Objection.

[THE COURT]: Overruled.

[DETECTIVE FORSYTHE]: To have someone killed.

After deliberating for approximately four hours, the jury sent a note stating, "We the jurors cannot come to a conclusion/decision. What do we do next?" The court instructed the jury to continue deliberating and, after further deliberation, the jury returned a unanimous verdict of guilty. The court sentenced Mr. Duke to a total of 65 years' imprisonment. Mr. Duke appealed.

DISCUSSION

Mr. Duke argues that the circuit court erred by (1) admitting the photo array with the statement by Ms. Reynolds, (2) admitting the incomplete recording of the fourth jailhouse phone call, (3) allowing Detective Forsythe to testify as an expert without adequate notice, (4) allowing Detective Forsythe's testimony about her investigation, and (5) allowing Detective Forsythe's expert testimony that "order up" means to have someone killed. Mr. Duke also argues that the cumulative effect of the court's errors is not harmless.

A trial court's ruling on the admissibility of evidence is ordinarily reviewed for abuse of discretion. *Gordon v. State*, 431 Md. 527, 533 (2013). However, a "trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal." *Id.* at 538. "[T]he factual findings underpinning this legal conclusion necessitate a more deferential standard of

review" and "will not be disturbed absent clear error." *Id.* "Determining whether separate statements are admissible under the doctrine of verbal completeness is . . . reviewed for an abuse of discretion." *Otto v. State*, 459 Md. 423, 446 (2018).

"Discovery questions generally 'involve a very broad discretion that is to be exercised by the trial courts. Their determinations will be disturbed on appellate review only if there is an abuse of discretion.'" *Cole v. State*, 378 Md. 42, 55-56 (2003) (quoting *North River Ins. v. Mayor and City Council of Balt.*, 343 Md. 34, 47 (1996)). The question of whether a discovery violation occurred, however, is a question of law that we review de novo. *Cole*, 378 Md. at 56. "Where a discovery rule has been violated, the remedy is, 'in the first instance, within the sound discretion of the trial judge. The exercise of that discretion includes evaluating whether a discovery violation has caused prejudice.'" *Id.* (quoting *Williams v. State*, 364 Md. 160, 178 (2001)).

"[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Roy v. Dackman*, 445 Md. 23, 38-39 (2015) (quoting *Bryant v. State*, 393 Md. 196, 203 (2006)). The trial court's decision "may be reversed if founded on an error of law or some serious mistake, or if the trial court has clearly abused its discretion." *Gutierrez v. State*, 423 Md. 476, 486 (2011) (quoting *Raithel v. State*, 280 Md. 291, 301 (1977)). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Levitas v. Christian*, 454 Md. 233, 243 (2017) (quoting *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 241 (2011)) (emphasis removed).

I. THE CIRCUIT COURT ERRED IN ADMITTING MS. REYNOLDS'S WRITTEN STATEMENT ON THE PHOTO ARRAY, BUT THE ERROR WAS HARMLESS.

Mr. Duke argues that Ms. Reynolds's written statement on Mr. Duke's photo is inadmissible hearsay and that the court's error in admitting it was not harmless. The State concedes that the statement was not admissible, but argues the court's error in admitting it "was harmless because the same evidence was admitted without objection on two different occasions." We agree with the State.

A. Ms. Reynolds's Written Statement Is 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." Md. Rule 5-801(c). Hearsay is not admissible "[e]xcept as otherwise provided by [the Maryland] rules or permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. "If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Stoddard v. State*, 389 Md. 681, 689 (2005). Here, Ms. Reynolds's statement on the photo array is an out-of-court statement that was offered for the truth of the matters asserted. Therefore, the statement on the photo was inadmissible unless it fell within a hearsay exception.

The State argued at trial that the statement was admissible as Ms. Reynolds's past recollection recorded. The trial court disagreed, and the State has now abandoned that

theory of admissibility.[4] The court, however, admitted the statement as a present sense impression. The parties agree that this exception also does not apply, and we agree.

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Md. Rule 5-803(b)(1). Ms. Reynolds's statement, however, was not made while, or immediately after, she perceived the event. *See Washington v. State*, 191 Md. App. 48, 93 (2010) ("[T]he time interval between observation and utterance must be very short. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought." (quoting *Booth v. State*, 306 Md. 313, 324 (1986))). She placed the call to 911 to report the shooting at 11:39 p.m. on May 29. The statement on the photo array was made at 1:33 a.m. on May 30. Because the more than 90-minute time lapse is "sufficient . . . to have permitted reflective thought," the statement is not a present sense impression. *Id.* Lacking any applicable exception, the circuit court erred in admitting the statement.

B. The Court's Error in Admitting Ms. Reynolds's Hearsay Statement Was Harmless.

"[E]rror in admitting [alleged] hearsay is subject to a harmless error review." *Frobouck v. State*, 212 Md. App. 262, 283-84 (2013) (quoting *Webster v. State*, 151 Md. App. 527, 553 (2003)). "To prevail in a harmless error analysis, the beneficiary of the

[4] The State's concession is wise. Not only did Ms. Reynolds not claim insufficient recollection of the events while on the witness stand, which is a precondition to the exception's applicability, but the exception would only have permitted the statement to be read into evidence, not introduced as an exhibit. Md. Rule 5-802.1(e).

alleged error must satisfy the appellate court 'that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.'" *Frobouck*, 212 Md. App. at 284 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Frobouck*, 212 Md. App. at 284 (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008)) (internal quotation marks omitted).

"[W]e will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (quoting *Grandison v. State*, 341 Md. 175, 218-19 (1995)). "Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." *Yates*, 429 Md. at 120 (quoting *Jones v. State*, 310 Md. 569, 588-89 (1987)); *see also DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection.").

The State introduced Ms. Reynolds's story regarding the events leading up to the shooting three times: (1) in her live testimony; (2) in the video footage from Officer Serio's body camera; and (3) through the statement written on the photo. Mr. Duke only objected to the third. As he acknowledges on appeal, the only difference between Ms. Reynolds's live account and the written statement is that in her live testimony she stated that she heard

"somebody" running down the steps, while in the written statement she identified that somebody as Mr. Duke. That same identification, however, is also contained in the video footage, which the court admitted without objection. There, Ms. Reynolds told the police: "When I told my son, I said 'yeah I'm in the bathroom,' I heard two shots and I heard him run down the steps." Because Ms. Reynolds's identification of Mr. Duke as the individual going down the stairs was separately presented to the jury without objection, we find no prejudice from the erroneous introduction of the statement on the photo. *See Yates*, 429 Md. at 120.

Mr. Duke argues that we should disregard the similarity between Ms. Reynolds's account written on the photo and her account given on the body camera footage because, he claims, the jury would not have "heard and understood" the statement made in the video because there is "cross-talk" and "[t]he audio inexplicably cuts out for extended periods while Reynolds appears to be talking." Our review of the video, however, confirms that although some other portions of the audio are difficult to hear, the relevant portion is quite clear.[5]

[5] Mr. Duke also argues the body video camera footage "'is of a different quality' than the wrongly admitted hearsay, and therefore may not be considered cumulative for purposes of the harmless error analysis." (quoting *State v. Simms*, 420 Md. 705, 740 (2011)). We disagree. The statement on the video camera may be on a different medium—written versus spoken—but it is not of lesser quality. They are both statements by Ms. Reynolds to the police following the incident recounting her version of events. *Cf. Simms*, 420 Md. at 740 (noting that recorded conversations between the defendant and his mother looking for alibis were "of a different quality than a prepared and filed document listing the name and address of an alibi witness who [was] never called to the stand" for purposes of the harmless error analysis). Indeed, the video statement was at least arguably of a

Moreover, even if we were to discount the body camera footage, we are not persuaded that the difference Mr. Duke identifies between the live testimony and the written statement is significant. In both statements, Ms. Reynolds stated that she was behind a closed door in the bathroom when she had a verbal exchange with her son and then heard gunshots. In the live testimony, she said that she then heard "somebody . . . running down the steps." In the written statement, she said she "heard him run." The essential facts are the same. In both statements, Ms. Reynolds identified three relevant sounds in the same, close-in-time succession: (1) Mr. Duke speaking to her; (2) gunshots; and (3) someone running. Neither statement purports to identify with any substantively greater or lesser clarity that it was Mr. Duke running, as it is clear from both that Ms. Reynolds assumed the person running was Mr. Duke based on the sequence and the sounds. The written statement provides no other reason for believing that the person she heard was Mr. Duke and the live testimony provides no reason for believing it was anyone other than him. For that reason as well, we conclude that the error was harmless beyond a reasonable doubt.

Mr. Duke makes an additional argument that the court's error was not harmless, this one based not on any differences among Ms. Reynolds's statements, but on their similarity. Relying on *McCray v. State*, 122 Md. App. 598 (1998), Mr. Duke argues that "[t]he fact that the hearsay is 'consisten[t]" with other cumulative evidence "'is the very nature of the

higher quality, as it was closer in time to the events and the jury could see Ms. Reynolds making it herself.

harm' that demands reversal." (quoting *McCray*, 122 Md. App. at 610). We disagree. In *McCray*, the trial judge allowed a witness, who was the mother of the defendant's accomplice, to testify regarding what the accomplice told her about a murder. *Id.* at 602, 607-08. On appeal, McCray argued the court erred in admitting the witness's hearsay statements as prior consistent statements. *Id.* at 604-05. The State argued that even if the statements were improperly admitted, any error was harmless because the same evidence had been placed before the jury during the accomplice's own testimony. *Id.* at 610. Therefore, according to the State, any error "was cumulative and not prejudicial." *Id.* This Court found the witness's statement was not admissible as a prior consistent statement "to attack an implication of fabrication or improper influence or motive because [the accomplice] made the statements after the motive to fabricate existed." *Id.* at 610; *see also id.* at 609 ("[A] prior consistent statement . . . 'is admissible only if it precedes the alleged fabrication, improper influence, or motive.'" (quoting *Holmes v. State*, 350 Md. 412, 429 (1998))). We explained that although the prior consistent statements were cumulative, "that does not make them harmless because it is their consistency that is the very nature of the harm." 122 Md. App. at 610. "By allowing [the witness] to testify about [the accomplice's] prior consistent statements, the State impermissibly bolstered [the accomplice's] credibility." *Id.*

Mr. Duke's reliance on *McCray* is misplaced. As an initial matter, if it were true that any error in admitting a statement that is cumulative of other testimony is necessarily prejudicial, then the rule of *Yates*—"that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony

have already been established and presented to the jury *without objection* through the prior testimony of other witnesses," 429 Md. at 120 (quotation omitted)—would not exist. Instead, *McCray* involved the specific circumstance of a statement introduced as a prior consistent statement to rehabilitate a witness even though the statement itself "was made after her motive to lie arose," 122 Md. App. at 608, thus giving rise to a specific harm that does not exist here. By contrast, Ms. Reynolds's statements here were not rehabilitative and they did not suffer from any similar defect. Moreover, as discussed above, the written statement was not the only corroboration of Ms. Reynolds's trial testimony that was roughly contemporaneous with the murder. We therefore find the court's error in admitting the written statement to be harmless beyond a reasonable doubt.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY OVERRULING MR. DUKE'S OBJECTION TO THE ADMISSION OF THE INCOMPLETE PHONE CALL.

Mr. Duke contends that the circuit court abused its discretion when it overruled his objection to the admission of a portion of the fourth jailhouse phone call and "fail[ed] to apply any 'guiding principles' when denying [Mr. Duke's] completeness objection." Mr. Duke argues that the earlier part of the fourth call should have been admitted under the doctrine of verbal completeness and that "[n]o reasonable person could . . . not come to the conclusion that 'in fairness' the part of the recording requested should have been played." We disagree. To avail himself of the benefit of the verbal completeness doctrine, Mr. Duke needed to have requested that the court admit the part of the recording that was not played. When asked whether he was objecting to the portion that had already been played coming in or asking for the omitted portion to be played, Mr. Duke's counsel stated unequivocally

that he was objecting to the portion that was played. The court properly overruled that objection. Moreover, even had Mr. Duke requested that the remainder of the call be admitted at that time, we would not have found a denial of that request to be an abuse of discretion.

A. Mr. Duke Objected to the Introduction of the Excerpt Played to the Jury Rather than Seeking Admission of the Excluded Portion.

The Court of Appeals examined the doctrine of verbal completeness in *Otto v. State*, 459 Md. 423 (2018). The Court explained that the doctrine, which "finds its roots from two sources: the common law and Maryland Rule 5-106," allows for a party to respond to the introduction of a part of a statement or conversation by seeking admission of the remainder of that statement or conversation. *Id.* at 447. "At common law, a party seeking to admit evidence" under this doctrine, "could admit the remaining conversation or writing during the party's case-in-chief." *Id.* Rule 5-106, the Court explained, codified the common law doctrine of verbal completeness and modified it so as to "allow[] writings or recorded statements to be admitted earlier in the proceeding than the common law doctrine." *Id.* Rule 5-106 provides: "When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." "[W]here the evidence sought to be admitted is not otherwise admissible, the evidence may be admitted, in fairness, 'as an explanation of previously-admitted evidence and not as substantive proof.'" *Otto*, 459 Md. at 447 (quoting *Conyers v. State*, 345 Md. 525, 541 (1997)). Rule 5-106 "does not change the

requirements for admissibility under the common law doctrine," so the doctrine "is the proper lens through which to analyze [the] claim." *Id.* at 447-48.

After Mr. Duke made his objection, the court explicitly asked whether he was requesting "by way of motion" to have the first portion of the call introduced, or whether, instead, Mr. Duke was "objecti[ng] with regard to the fourth call as being incomplete." Mr. Duke's counsel responded: "An objection as to the fourth call not being complete." The court then denied the objection. Here, Mr. Duke does not argue that the excerpt of the call that was played for the jury was not relevant or otherwise inadmissible. Instead, his only argument is that it was not complete and, therefore, that the earlier portion of the call should also have been played. But, as the trial court took care to clarify, that is not the request he made at the time. We find no error or abuse of discretion in the court's denial of his objection to the portion of the jail call that was played for the jury.

B. The Court Would Not Have Abused Its Discretion in Declining to Admit the Excluded Portion of the Call Under the Doctrine of Verbal Completeness.

In any event, had Mr. Duke requested, by way of motion, that the court admit the first portion of the phone call under the verbal completeness doctrine, and had the court denied that motion, we would find no abuse of discretion.

The Court in *Otto* iterated the rules and limitations on the doctrine of verbal completeness originally expounded in *Feigley v. Baltimore Transit Co.*, 211 Md. 1 (1956), *Richardson v. State*, 324 Md. 611 (1991), and *Conyers*, 345 Md. at 525. First, there are three principles limiting an opposing party's right to introduce the remainder of a statement or conversation placed into evidence:

> [1] No utterance irrelevant to the issue is receivable;
>
> [2] No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> [3] The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

Otto, 459 Md. at 449-50 (quoting *Feigley*, 211 Md. at 10). Second, "where the remaining evidence, if otherwise inadmissible, is more prejudicial than probative, a trial court may exclude the evidence." *Otto*, 459 Md. at 451. And third, "a statement does not have to be independently admissible" to come into evidence, but "evidence that is otherwise inadmissible does not become admissible purely because it completes the thought or statement of the evidence offered pursuant to the doctrine of verbal completeness." *Id.* at 451-52. "Inadmissible evidence will only be admitted by the rule of completeness if it is particularly helpful in explaining a partial statement and that explanatory value is not substantially outweighed by the danger of unfair prejudice, waste of time, or confusion." *Id.* at 452.

Here, Mr. Duke proffered that the unplayed portion of the call should have been played because in it, the other participant told Mr. Duke that his mother had tried to order him (Mr. Duke) up. Mr. Duke argues that this would have disposed of "any implication of consciousness of guilt" from Mr. Duke's later statements about trying to order up his mother, "and the jury instead would have understood that the statement was made not as a serious attempt to quiet Reynolds, but as retaliatory bravado in response to hearing that Reynolds tried to 'order up'" Mr. Duke.

We disagree. As the State points out, the first three calls that were played for the jury demonstrate that Mr. Duke was upset with his mother's cooperation with the police before the fourth call took place. As summarized by the circuit court, in those calls, Mr. Duke stated that "an intervention" was needed with his mother, that he was upset that "she told [the police] every f-ing thing," that he "c[ould]n't believe she did this to me," and that "[a]ll she got to do is not come to court." In addition, our own review of portions of the first three calls that were played for the jury reveals that Mr. Duke also stated, in reference to his mother:

- "This shit is over for me; I cannot let her (inaudible); she's telling these people every fucking thing yo."
- "You're my momma. How do you do that shit crazy yo."
- "Yo, I might have to call on you to do that thing for me that you don't want to do, for real yo."

It is also notable that, in the portion of the fourth call that was played for the jury, Mr. Duke indicates not that he had just decided to order her up at that moment—which could more readily be perceived as a response to the caller's earlier statement—but that he had already been engaged in efforts to do so, without success.

In light of these statements, we would not conclude that the circuit court abused its discretion if it had determined that the first portion of the call was not actually explanatory of Mr. Duke's statements that "I'm trying to order her up, but my man – my man was like I can't – I tried to order her up. My man was like, yo, I can't do it . . . ." *See Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 219 (2011) (noting that "an abuse of discretion occurs when a decision is 'well removed from any center mark imagined by the

reviewing court and beyond the fringe of what that court deems minimally acceptable'" (quoting *King v. State*, 407 Md. 682, 711 (2009))).

III. THE CIRCUIT COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING DETECTIVE FORSYTHE'S TESTIMONY.

Mr. Duke next contends the circuit court erred in allowing Detective Forsythe to testify as an expert: (1) without adequate notice; (2) about her own investigation; and (3) on the meaning of the phrase "order up." We conclude that Detective Forsythe gave appropriate lay testimony on her own investigation and appropriate expert testimony on the meaning of the phrase. Although the court erred in allowing Detective Forsythe to testify as an expert without adequate notice, the error was harmless beyond a reasonable doubt.

A. Detective Forsythe's Testimony Was Predominantly Lay Testimony.

Although Mr. Duke's complaints relate entirely to Detective Forsythe testifying as an expert, most of her testimony was lay testimony.[6] Rule 5-701 provides that a lay "witness's testimony 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." Md. Rule 5-701. Rule 5-702 provides that "[e]xpert testimony may be admitted, in the

[6] The Maryland Rules on lay and expert testimony are derived from the Federal Rules of Evidence. *See* Md. Rule 5-701. As the Committee note on the Federal Rule on lay witnesses states, the rules "do[] not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case." *Ragland v. State*, 385 Md. 706, 723 (2005) (citation omitted).

form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." It further provides that 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.

When the State sought to have Detective Forsythe qualified as an expert, Mr. Duke argued, among other things, that her testimony would not be of assistance to the jury. The Court assumed, and the State agreed, that Detective Forsythe would give a helpful "opinion as to whether she developed a suspect and if so, why and who." The court ultimately admitted Detective Forsythe as "an expert in the field of homicide and violent crime investigations."

The bulk of Mr. Duke's argument is based on the incorrect premise that Detective Forsythe then testified in accordance with her expert designation. In fact, she did not. Instead Detective Forsythe testified primarily about her role in the investigation: what she did when she arrived at the Ruxton house in the early hours of May 30, the information she gathered, her processing of the crime scene, the witnesses she spoke to, her application for a search warrant, and her application for a statement of charges. This was lay testimony, based on personal knowledge of events she witnessed and experienced. *See Walker v. State*, 373 Md. 360, 388 n.8 (2003) ("[T]he threshold standards for calling any fact witness are merely that the witness have personal knowledge of the matter attested to and that the matter be relevant to the case at hand."). Thus, to the extent Mr. Duke objects to this

testimony as inappropriate because it did "nothing to assist the jury in rendering a verdict," that complaint is inapposite because that standard is inapplicable to lay testimony. Detective Forsythe's lay testimony was relevant and the court did not err in allowing her to provide it.

B. Detective Forsythe Was Qualified to Give an Expert Opinion on the Meaning of the Phrase "Order Up."

The only portion of Detective Forsythe's testimony that qualifies as an expert opinion came when the State asked her whether, "in [her] ten years of experience investigating homicide and violent crime," she has "ever come across the term order up?" After she responded that she had, the State asked her "in [her] expert opinion through [her] training and experience, what, if anything does the term order up mean?" Following the court overruling Mr. Duke's objection, Detective Forsythe responded: "To have someone killed."

Mr. Duke argues that Detective Forsythe was not qualified to provide an opinion on jargon. But Detective Forsythe was qualified as "an expert in the field of homicide and violent crime investigations." The jargon used to refer to homicides invariably falls within this qualification. Further, the State adequately laid the foundation for her expert testimony on the definition of the phrase when Detective Forsythe testified that she had, in fact, come across the phrase "order up" in her years investigating crimes. It was thus within the circuit court's discretion to admit the expert testimony.

Mr. Duke's reliance on *Johnson v. State*, 408 Md. 204 (2009), is misplaced. There, a police officer was qualified as "an expert in the area of canine police work." *Id.* at 225.

The Court of Appeals found that the police officer was not "qualified to express an opinion about the percentage of cash that is contaminated with drug residue." *Id.* The Court noted that "[t]he mere fact that a witness has been accepted to testify as an expert in a given field is not a license to testify at will. Such a witness only will be allowed to testify as an expert in areas where he or she has been qualified and accepted." *Id.* (quoting *In re Yves S.*, 373 Md. 551, 613 (2003)). Here, unlike in *Johnson*, understanding jargon for "to have someone killed" is directly related to homicide and violent crime investigation. We thus reject Mr. Duke's contention that the meaning of the phrase "order up" was beyond Detective Forsythe's qualification for expert testimony.

C. The Circuit Court Erred in Allowing Detective Forsythe to Testify as an Expert Without Proper Notice. The Error, However, Was Harmless.

Mr. Duke's final argument is that the court erred in allowing Detective Forsythe to testify as an expert witness because the State did not provide adequate notice. The State concedes there was a discovery violation[7] but argues the error was harmless.[8] We agree with the State.

[7] The State's concession is well taken as the discovery violation in this case was egregious. The State's disclosure did not name any witnesses individually, fact or expert, and merely referred generally to testimony that might be provided by any or all of its "law enforcement experts." Such a violation in a different case could provide grounds for sanctions by a trial court or reversal on appeal.

[8] The State also argues that Mr. Duke did not preserve that issue for review because "[a]t no point did defense counsel ever argue to the court that she had not been given notice that Detective Forsythe would testify about the meaning of 'order up.'" A general objection, the State contends, was not sufficient to preserve a claim "based on a factual assertion collateral to the issues presented at trial." We disagree. Mr. Duke specifically objected to Detective Forsythe testifying without proper notice and then generally objected again to the expert testimony. That is sufficient to preserve the claim for review.

> Maryland Rule 4-263 provides, with respect to expert witnesses:
>
> Without the necessity of a request, the State's Attorney shall provide to the defense:
>
> . . .
>
> (8) *Reports or Statements of Experts*. As to each expert consulted by the State's Attorney in connection with the action:
>
> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
>
> (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
>
> (C) the substance of any oral report and conclusion by the expert[.]

Md. Rule 4-263(d)(8). The State's disclosure did not provide Detective Forsythe's name as someone who would offer expert testimony. All that the State provided was a general reference to "All Reports Attached," which included Detective Forsythe's investigation report, and a generic statement "of its intent to call all of the police officers [and] law enforcement officials . . . disclosed as witnesses in this case" as potential experts. We agree with Mr. Duke and the State that this is not adequate notice under Rule 4-263(d)(8) and, therefore, Detective Forsythe should not have been permitted to provide expert testimony.

Discovery violations, however, are subject to harmless error review. *See Williams v. State*, 364 Md. 160, 169 (2001) ("If the trial judge erred because the State did in fact violate the discovery rule, we consider the prejudice to the defendant in evaluating whether such error was harmless."), *abrogated on other grounds by State v. Jones*, __ Md. __, No. 52, Sept. Term 2018 (Aug. 28, 2019); *see also Hutchinson v. State*, 406 Md. 219, 227-28 (2008) (applying harmless error standard to a discovery violation and concluding the error

was not harmless). Mr. Duke argues that the error was not harmless because Detective Forsythe was allowed "to improperly bolster the inference that the circumstantial evidence suggested [Mr. Duke] was responsible" through her testimony as "to why and who she developed as a suspect." (internal quotations and citations omitted).

Again, however, Mr. Duke's argument is based on the incorrect premise that Detective Forsythe's testimony about her investigation was expert opinion. Had the circuit court declined to qualify Detective Forsythe as an expert, the State could nonetheless have called her to testify as a fact witness and give lay testimony on her investigation. Our harmless error review thus focuses on only Detective Forsythe's expert testimony as to the meaning of the phrase "order up." As to that phrase, we conclude "that there is no reasonable possibility" that Detective Forsythe's testimony "may have contributed to the rendition of the guilty verdict," *Frobouck v. State*, 212 Md. App. 262, 284 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)), and, therefore, that the error was harmless.

On the jail phone calls that were admitted into evidence, Mr. Duke expressed his shock that Ms. Reynolds, his mother, had told the police "everything" and that he needed to do something to prevent her from testifying. He told one caller that he "might have to call on you to do that thing for me that you don't want to do, for real yo," and that an "intervention" was needed. On another call, Mr. Duke stated: "This shit is over for me; I cannot let her (inaudible); she's telling these people every fucking thing yo." Then, in the fourth call, he stated he "tried to order her up" but his "man was like, yo, I can't do it." These statements provided sufficient context for the jury to deduce the meaning of "order up" without Detective Forsythe's testimony. At the very least, the statements demonstrated

that Mr. Duke was attempting to induce someone else to silence his mother, which is all that was necessary to demonstrate consciousness of guilt. The court's evidentiary error was thus harmless beyond a reasonable doubt.

IV. THE CIRCUIT COURT'S ERRORS WERE HARMLESS.

Mr. Duke last argues that "[t]he cumulative adverse effect of the multiple errors . . . compel reversal even if this Court finds that each error, standing alone, could be dismissed as harmless." We disagree. The circuit court committed two errors in this case: (1) admitting the photo array containing Ms. Reynolds's statement, and (2) allowing Detective Forsythe to testify as an expert to the meaning of the phrase "order up." As discussed above, the substance of the statement in the photo array was admitted, without objection, through Officer Serio's body camera, eliminating any prejudicial effect. Left only with Detective Forsythe's expert testimony, there was no cumulative error.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.