Circuit Court for Montgomery County
Case No. 128373

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2079

September Term, 2017

RICO LEBLOND

v.

STATE OF MARYLAND

Fader, C.J.,
Nazarian,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: February 14, 2019

Rico Leblond was convicted of the first-degree murder of Zella Ziona after a (second) jury trial in the Circuit Court for Montgomery County. He argues on appeal that the court erred by admitting the former testimony of an unavailable witness and testimony from a detective that the unavailable witness previously had identified him as the shooter. He contends as well that he was prejudiced by the admission of a series of photographs that depicted him posing with firearms and when the court allowed the State to question a forensic expert in a way that implied that Mr. Leblond had a burden to investigate the physical evidence recovered from the crime scene.

The evidence presented at trial against Mr. Leblond, even excluding the evidence that he challenges, was substantial. Surveillance footage shows that he was in the area before and after the shooting. His DNA was found on clothing hidden at the crime scene that matched eyewitness descriptions of the shooter's attire. And he was identified by name by Ms. Ziona's best friend, who stood feet away when, she testified, Mr. Leblond pulled out a gun and fired. But although a jury certainly could have found Mr. Leblond guilty from those facts, we agree with three of his four arguments, and because we are unable to find beyond a reasonable doubt that the errors in the circuit court did not affect the verdict, we reverse his conviction and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Zella Ziona, a young transgender woman, was shot and killed in an alley behind a Petco in Gaithersburg on October 15, 2015. Ms. Ziona spent the hours leading up to her murder with her best friend, Dayvonne Elvis, who witnessed not only the shooting but the

events leading up to it. Ms. Elvis testified at Mr. Leblond's first trial and explained that before the shooting, Ms. Ziona had had a run-in with Mr. Leblond at the Lakeforest Transit Center:

> We were coming from a friend's house. . . . [A]s we got toward the [Lakeforest] transit, we came across a couple of people, one of them was Rico[1] which we walked past. Him and Zella had a confrontation. . . . I couldn't hear their conversation. All I heard was Rico get loud and say come across, step across the street . . . .

Hours later, Ms. Elvis and Ms. Ziona had another confrontation with three different men; Mr. Leblond was not involved. The incident turned physical, and Ms. Ziona was hit in the head with a tree branch. The confrontation concluded when Ms. Elvis pulled a knife from her purse and "chase[d] the boys towards the transit." Shortly after, back at the transit center, a group of men addressed Ms. Elvis and Ms. Ziona yet again, inviting them to "step across the street" and into the alley behind Petco:

> As I'm in the alley by myself I see Rico all the way at the bottom of the alley but I didn't pay no attention. And I see the rest of the boys picking up sticks, bricks and everything, walking towards me. . . . So once Zella came back, she came and hand me my knife and started walking, running right past me and I'm like hold on, don't go too fast Zella and next thing you know she was saying no, my mother's right there but as she's doing that it's like I, her, and Ikwon[2] is getting into like a physical conversation –
>
> ***
>
> So then as Zella walking towards [Ikwon], he's swinging [a knife] so I'm walking towards him with my knife about to

[1] Ms. Elvis was familiar with Mr. Leblond from before the shooting.

[2] Ikwon was one of the young men involved in the altercations leading up to Ms. Ziona's murder. The record doesn't reflect his last name.

> swing towards him. As I'm walking towards him, Zella mother comes . . . saying what the heck is ya'll doing, ya'll need to stop all this fighting and stuff. And next thing you know . . . I see Rico come from beside, behind the trashcan and go to, pulls out the gun. Well as he pulls out the gun, I turned around and started hearing gunshots.

In addition to identifying Mr. Leblond by name, Ms. Elvis provided a description of the shooter's attire: she said he was wearing a blue jacket and a facemask and that his dreadlocks emerged visibly from his raised hood. Surveillance footage from numerous locations confirmed that Mr. Leblond was in the area wearing a blue jacket, at times with a raised hood, in the hours before the shooting. Ms. Elvis was not present at the second trial, but her testimony from the first trial was admitted into evidence, over Mr. Leblond's objection, under Maryland Rule 5-804.

Ms. Ziona's mother, Tyshika Smith, also witnessed her daughter's murder. Ms. Smith was waiting for her ride home from work when she ran into a distressed Ms. Ziona near the Petco. When Ms. Ziona went into the alley, Ms. Smith followed her and started to dial 911, sensing "that something bad was about to happen." She then saw the shooting:

> A group of guys came out, looked like they huddled up, and turned around, and started moving forward toward my [daughter]. For whatever reason, I zoomed in on the short[3] one that was in the middle. I saw him pull the gun out. . . . I saw [him] go up to my [daughter] and shoot my [daughter]. I saw my [daughter] drop to the ground. . . . [T]hen he walked

[3] Mr. Leblond is 5'8".

> up over top of my [daughter] and shot [her] again. And then he turned towards [Ms. Elvis] and fired off a shot.[4]

Ms. Smith heard more gunfire as she ran into a nearby clothing store and completed her 911 call. She described the shooter as wearing a black half mask and a blue jacket. She stated she could not see his hair because he had a hood on his head.

James Cheng was sitting in his parked car in the alley at the time of the shooting. He dialed 911 and reported that he had seen a group of teenagers in the alley looking like they were going to fight. He then heard four or five shots and saw the shooter, a "black teenager" with a green jacket, jeans, and short hair running from the scene. He gave a statement to the same effect to police officers who responded to the scene. At trial, he claimed to have no memory of the incident, but a recording of his statement to the police was played for the jury. The transcript of Mr. Cheng's testimony from the first trial was admitted, with Mr. Leblond's consent, at the second.

Juan Orellana was also in the alley at the time of the shooting. He was talking on his cell phone outside a laundromat with its entrance in the alley and noticed a group of young people arguing. He then heard several gunshots, watched as the group ran and dispersed, and saw a body lying on the ground. Mr. Orellana particularly noticed one person running from the scene in a blue jacket or sweater. He was hooded and wearing a black mask.

[4] Ms. Smith used male pronouns when referencing Ms. Ziona throughout the record. But for the sake of consistency and out of respect for Ms. Ziona's identity, we refer to her exclusively with her preferred pronouns.

Later that night, Justin Moko contacted police to inform them that he had given Mr. Leblond a ride earlier that day. He testified that he had no knowledge that a murder had taken place when he picked Mr. Leblond up and came forward out of concern that either he or his brother, in whose name the vehicle was registered, would be suspected of some involvement in the crime. Mr. Moko identified Mr. Leblond in the courtroom as the individual he had picked up on the night of the murder and stated that he had been dressed in shorts at that time. Surveillance footage at a gas station where the men stopped briefly confirmed that Mr. Leblond had changed his clothing after the shooting; his blue jacket and long pants were gone, and he had changed into white tennis shoes, shorts, and a short-sleeved shirt.

At the crime scene, police recovered three live 40 caliber cartridges, as well as five 40 caliber cartridge casings. According to expert testimony at trial, the casings found at the scene were all fired from the same semi-automatic gun. Ms. Ziona's autopsy revealed that she had suffered multiple gunshot wounds that caused her death. She was shot once through the center of her forehead and twice in the genital area, all at close range. The murder weapon was never recovered. Police also recovered a blue jacket from the crime scene. The jacket was found underneath a U-Haul trailer in the alley and there was a black mask in the pocket. Expert DNA analysis revealed Mr. Leblond's DNA on both items.

Mr. Leblond's first trial concluded with a hung jury. At his second trial, the jury convicted Mr. Leblond, and the trial judge sentenced him to life in prison. Additional facts will be provided below.

II. DISCUSSION

Mr. Leblond identifies four errors during his trial that, he contends, unfairly prejudiced him and require us to reverse his convictions.[5] *First*, he argues that Ms. Elvis's testimony from the first trial should not have been admitted at the second under Maryland Rule 5-804, which allows into evidence the former testimony of an unavailable witness, because Ms. Elvis was not "unavailable." *Second*, he argues that the court improperly admitted, via Rule 5-802.1, hearsay testimony from Detective Janice Bates that Ms. Elvis had previously identified Mr. Leblond as the shooter because Ms. Elvis was not a live witness at trial. *Third*, he argues that a series of photographs, recovered from his cellphone, that depicted him posing with firearms were irrelevant and unduly prejudicial. And *finally*, he argues that the trial court erred when it allowed the State to question a forensic expert in a way that implied a burden on Mr. Leblond to conduct an independent investigation of the physical evidence. We find no error in the decision to admit Ms. Elvis's former

[5] Mr. Leblond listed three Questions Presented in his brief:

> 1. Did the trial court err in admitting evidence in violation of the Maryland Rules on hearsay and Appellant's constitutional right to confrontation?
> 2. Did the trial court err in admitting pictures purporting to show Appellant with firearms?
> 3. Did the trial court err by permitting the State to elicit testimony that the defense made no request to examine evidence from the crime scene?

We have separated his first question, which references both Ms. Elvis's former testimony and her prior identification, into two distinct issues because they implicate different rules of evidence that compel different outcomes.

testimony, but we hold that the court erred when it admitted Ms. Elvis's prior identification through the testimony of Detective Bates, when it admitted the photographs of Mr. Leblond, and when it overruled Mr. Leblond's objection to the challenged portion of the State's redirect of its forensic expert.

A. The Circuit Court Did Not Abuse Its Discretion By Admitting Ms. Elvis's Former Testimony.

A witness's former testimony may be admitted at trial in lieu of her appearance in person when she is "unavailable" to testify. Md. Rule 5-804(b)(1). But unavailability for these purposes does not mean a mere scheduling conflict—the proponent bears the burden of proving the witness not only isn't available, but that the proponent made reasonable efforts to secure her appearance. We review the trial court's finding of unavailability for abuse of discretion. *Muhammad v. State*, 177 Md. App. 188, 298 (2007) ("the trial judge's ultimate determination that the witness is, indeed, unavailable and that [Rule 5-804] has therefore been satisfied is subject to review by the abuse of discretion standard").

We start with the Confrontation Clause of the Sixth Amendment, which guarantees criminal defendants the right to face their accusers. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."); *Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices"). The Maryland Declaration of Rights guarantees as well "[t]hat in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him [and] . . . to examine the

witnesses for and against him on oath. . . ." MD. CONST., Decl. of Rts. Art. 21. The right to confront and cross-examine witnesses is fundamental to a fair trial. *State v. Breeden*, 333 Md. 212, 221 (1993).

Because a fundamental right is at stake, a party seeking to substitute prior testimony for the real thing bears a difficult burden outlined in *Crawford v. Washington*. 541 U.S. 36. In that case, the Supreme Court determined that the Sixth Amendment requires the proponent to prove both that the witness is unavailable *and* that the opponent had a prior opportunity for cross-examination, abrogating the previous standard that had required only unavailability and "adequate indicia of reliability." *Crawford*, 541 U.S. at 68; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. at 68. Admitting former testimonial evidence without a prior opportunity for cross-examination is "alone sufficient to make out a violation of the Sixth Amendment." *Crawford*, 541 U.S. at 68.

Taking the second half of the *Crawford* standard first, we agree with the State that Mr. Leblond had and took full advantage of the opportunity to cross-examine Ms. Elvis during his first trial. There was one wrinkle: at his second trial, Mr. Leblond argued that he was entitled to impeach Ms. Elvis's credibility with two theft convictions that occurred in the time between the two trials.[6] But the State stipulated to those convictions and notified the jury of them, and Ms. Elvis had acknowledged in her testimony during the first trial

[6] Mr. Leblond's trial counsel did not, as the State asserts in its brief, challenge Ms. Elvis's credibility because of her "decision to transition." To the contrary, the defense corrected the State's repeated misgendering of Ms. Elvis and asked the court to use female pronouns when referring to her.

that she had a history of stealing. This may have been a lagniappe for Mr. Leblond, since it's not obvious that Ms. Elvis's theft convictions qualify as "infamous crime[s] or other crime[s] relevant to the witness's credibility." Md. Rule 5-609(a)(1). We're satisfied, though, that Mr. Leblond had an appropriate opportunity to cross-examine Ms. Elvis's former testimony.

Whether or not Ms. Elvis was unavailable for *Crawford* purposes is a closer call. 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). There is no dispute that Ms. Elvis was absent; the question is whether the State undertook reasonable means to find her.

Where a witness in a criminal case is purported to be unavailable "because [they] cannot be located, the State has the burden of showing that it has made a diligent inquiry in a good faith effort to ascertain the witness' whereabouts." *Coleman v. State*, 49 Md. App. 210, 226 (1981). If the State has made a diligent inquiry in good faith, it has satisfied the "other reasonable means" requirement of Rule 5-804(a)(5). *Breeden*, 333 Md. at 222; *see, e.g.*, *Coleman*, 49 Md. App. at 227. There is no checklist of required steps—the lengths to which the State must go to procure the witness is a question of reasonableness that depends on the circumstances of the case and the witness. *Breeden*, 333 Md. at 221 (*quoting Roberts*, 448 U.S. at 74). The State need not engage in obviously futile attempts to bring a witness to court in person, but if there is a possibility that affirmative measures might locate the witness, "the obligation of good faith *may* demand their effectuation." *Id.* (emphasis in

original); *see also, e.g.*, *Higgins v. State*, 41 Md. App. 177, 186 (1979) (State's efforts were "negligent and wholly insufficient" when it only used a four-year-old address and better information was available); *Breeden*, 333 Md. at 225 (State did not meet its burden when it failed to invoke the Uniform Act to Secure Attendance of Witnesses in time).

In this case, the State did make efforts to find Ms. Elvis and bring her to testify in person. A prosecutor personally served Ms. Elvis after tracking her down at a scheduled appearance in district court. Ms. Elvis indicated at that time that she would come to court, but would not testify against Mr. LeBlond because she had been threatened. She did agree, however, to attend a pre-trial meeting with the prosecution, and a meeting was scheduled. But Ms. Elvis did not come to this meeting, so the State—which had no current address, no phone number, and no access to Ms. Elvis via social media—was left to find her indirectly. Prosecutors called and left a voicemail on what they believed to be Ms. Elvis's mother's cell phone, and also asked Ms. Elvis's lawyer to assist them in reaching her. Neither of these attempts yielded any result.

As the trial began, the State and the court left open the possibility that Ms. Elvis might be located. But as the trial went on, the State still hadn't found her, and the court found her unavailable:

> [The State has] satisfied the Court that [] [Ms. Elvis] is an unavailable witness pursuant to the definition of unavailability under Rule 5-804. . . . I find that the State has . . . made every reasonable effort to try and locate and have [Ms.] Elvis appear to testify. . . . [T]here's no way that the State can, can locate [her]. I'm not going to order that the sheriffs, to engage in an exercise in futility. It would be easier to find a needle in a haystack than to find somebody that's got no address, no phone

> number, and I can't imagine taking yourself off social media, but the person did that, and there's no way you can find a person with [] no address, no phone number, no social media, no way to do it.

It's possible, as Mr. Leblond argues here, to hypothesize other steps the State could have taken to find Ms. Elvis. But we do not assess the record with the benefit of hindsight, nor do we substitute our retrospective judgment about what is reasonable for the circuit court's. *Roberts*, 448 U.S. at 75. Although perhaps the police could have driven around or tried other ways to find Ms. Elvis, the circuit court had no reason to believe that any omitted step was reasonably calculated to locate her. We cannot say that the court abused its discretion in finding, on this record, that she was unavailable to testify. *See, e.g.*, *Coleman*, 49 Md. App. at 226–27. And as a result, we agree with the State that the court did not err in admitting Ms. Elvis's testimony from Mr. Leblond's first trial in lieu of her appearance in person at the second.

B. The Circuit Court Erred By Allowing The Detective To Testify To Ms. Elvis's Identification of Mr. Leblond.

Beyond admitting the transcript of Ms. Elvis's former testimony, though, the circuit court also allowed Detective Bates to testify, over Mr. Leblond's objection, that Ms. Elvis had identified Mr. Leblond as the shooter when she interviewed her. This was not an in-court identification: Detective Bates was allowed to testify that during her investigation, she asked Ms. Elvis who shot Ms. Ziona and Ms. Elvis had replied "Rico Leblond." The Detective testified as well that she showed Ms. Elvis a photograph of Mr. Leblond that Ms. Elvis had signed, which confirmed that the photo showed Mr. Leblond and identified him as the shooter. Mr. Leblond objected and argued that this prior witness identification wasn't

admissible under Rule 5-802.1(c). We agree with Mr. Leblond that the identification wasn't admissible.

At the outset, the detective's rendition of Ms. Elvis's statements is hearsay when, as here, offered for their truth. But prior witness identifications can be admitted under an exception to the general prohibition on hearsay if they meet the conditions outlined in Rule 5-802.1(c). That Rule provides that "[a] statement that is one of identification of a person made after perceiving the person" is admissible when that statement is "made by a witness *who testifies at the trial* or hearing and who is *subject to cross-examination concerning the statement.*" Md. Rule 5-802.1(c) (emphasis added). The State argues that because Ms. Elvis's testimony from the first trial was admitted, the exception should apply as if she had testified as a live witness—that her former testimony should satisfy the requirement that the declarant witness testify at the trial.[7]

The problem is that Ms. Elvis's former testimony didn't contain the identification offered by the detective in the second trial. It occurred during the investigation, and Ms. Elvis didn't testify about it at the first trial. So even if we accepted the State's theory for the first half of the Rule 5-802.1(c) analysis, that testimony still didn't include an opportunity for cross *on the subject of the identification*. The result is that the detective was allowed to offer a hearsay identification of Mr. Leblond, a seriously prejudicial error in a

[7] The sole case the State relies on for this proposition is *Holland v. State*, 122 Md. App. 532 (1998). But unlike this case, the declarant witness in *Holland* testified at trial and was subject to cross-examination about the identification. We also found that two other hearsay exceptions applied to the statement at issue there.

case that, as this one did, turned significantly on eyewitness identifications of him as the shooter.

C. The Circuit Court Erred By Admitting Mr. Leblond's Firearm Selfies.

Next, Mr. Leblond challenges the circuit court's decision to allow into evidence a series of eleven photographs of him posing with firearms, some pointed at the camera and others at himself. Judging by the camera angle, it appears that Mr. Leblond took the photos himself. Police recovered the pictures from Mr. Leblond's cell phone when it was seized five months before Ms. Ziona's murder, during a search incident to arrest for an unrelated offense. The circuit court admitted all eleven of the photos into evidence on the theory that they demonstrated Mr. Leblond's access to guns and his comfort and familiarity with them.[8] Mr. Leblond objected at trial, and argues now that the photographs are irrelevant and were unfairly prejudicial.

All evidence admitted at trial must be relevant. Under Rule 5-401, relevant evidence

[8] The State argues that the photographs are admissible under Rule 5-406 as habit evidence. That Rule provides that "[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." The sheer number of photos, the State argues, indicates that Mr. Leblond was in the habit of carrying a firearm. There is a dearth of caselaw on habit evidence, but a habit is defined as "the person's regular practice of meeting a particular kind of situation with a specific kind of conduct." *Rosebrock v. E. Shore Emergency Physicians, LLC*, 221 Md. App. 1, 19 (2015) (quoting the Federal Rules of Evidence ("FRE") 406 advisory committee note; Rule 5-406 was derived from FRE 406 without substantive change). Rule 5-406 is meant to allow into evidence "the type of nonvolitional activity that occurs with invariable regularity." *Id.* at 19 (*quoting Weil v. Seltzer*, 873 F.2d 1453, 1459–60 (D.C. Cir. 1989). But the fact that a person is photographed multiple times with a gun does not, without more, indicate that they invariably carry a firearm, volitionally or otherwise. *Id.*

tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." We review determinations of legal relevance *de novo*. *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013). From there, a trial court must then consider whether proffered relevant evidence's probative value is "substantially outweighed by the danger of unfair prejudice." Rule 5-403. We review those findings for abuse of discretion. *Brooks v. State*, 439 Md. 698, 708–09 (2014).

The circuit court found that Mr. Leblond's relationship with guns, as shown in his selfies, made it more likely that he would have committed this crime:

> It [] shows he has access to guns, it shows he has familiarity with guns, it shows he's comfortable with guns. The state's theory is that the victim was killed by a gun, and I think it's certainly relevant and I don't find it's unduly prejudicial. . . .[9]

[9] Both parties also argue for the photos' admission or exclusion under Rule 404(b), although they weren't admitted on that theory at trial. Rule 404(b) relates to evidence of prior bad acts:

> Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

The record contains a single reference to a 5-404(b) motion filed in Mr. Leblond's first jury trial. That is the only mention of the rule, and no such motion was filed during the trial at issue here. The circuit court did not make its ruling based on Rule 5-404(b), in fact it "kind of agree[d]" with Mr. Leblond's argument that holding guns was not a prior bad act. Instead, the court found that the photos were relevant and not unduly prejudicial, and we review only those findings.

We disagree, and hold that the photos' minimal probative value was "substantially outweighed by the danger of unfair prejudice." Md. Rule 5-403.

"The real test of admissibility of evidence in a criminal case is 'the connection of the fact proved with the offense charged, as evidence which has a natural tendency to establish the fact at issue.'" *Dorsey v. State*, 276 Md. 638, 643 (1976) (*quoting MacEwen v. State*, 194 Md. 492, 501 (1950)). In *Smith v. State*, also an appeal from a murder conviction involving a firearm, we concluded that evidence "regarding [the defendant's] ownership of unrelated firearms and ammunition was minimally relevant, at best, and highly prejudicial, and should have been excluded from the trial . . . ." 218 Md. App. 689, 705 (2014). "[T]o admit evidence of a highly incendiary nature, the evidence must greatly aid the jury's understanding of why the defendant was the person who committed the particular crime charged." *Id.* (internal quotations omitted). Mr. Leblond's photographs were at least as disconnected from the alleged crime as evidence about the defendant's possession of guns in *Smith*,[10] and the visual impact of these photos is dramatically more striking. They show Mr. Leblond with one or two guns in his hands, some pointed at the camera, and some pointed toward his own head. In some, he is shirtless, with his many tattoos on display. In others, his face is almost entirely obscured by dreadlocks. In one, he has one cigarette in his mouth and another tucked into his hair, keeping his hands free to

[10] The State argues that the photos may show Mr. Leblond with the murder weapon, but no evidence supports that possibility. The murder weapon was never recovered.

brandish two firearms at once. In none is he smiling. In his own words, the photos depict Mr. Leblond as "nothing but a 'thug,' a menace to both himself and others."

It is difficult to discern their relevance to this case, but easy to see the potential for real and unfair prejudice. Evidence with such limited probative value risks creating an inference that the defendant "had a propensity to commit crimes" or "was a person of general criminal character." *Williams*, 342 Md. 724, 738 (1996); *see also Snyder v. State*, 210 Md. App. 370, 395 (2013) (A court cannot admit evidence that may lead a jury to "convict a defendant because of something other than what he did in that case.") (quoting *Odum v. State*, 412 Md. 593, 611 (2010)). In this case, the photographs not only posed that risk, the trial judge and prosecutor acknowledged as much, citing what amount to propensity grounds as the reason for admitting them. The morning after his initial ruling, the trial judge added to the record:

> [The photos are] something that he, you would say ostensibly be proud of because they were on his own phone. And then he basically was saying to the world or his close friend, this is me. . . . [I]t makes a stronger case for the Court to allow all the photographs because the defendant himself had selected those to basically let the world know . . . this is me.

And in its closing argument, the State said of the photos "they show you how he wants himself to be perceived. Menacing, threatening." But Mr. Leblond's supposed pride and apparent desire to appear menacing say nothing about his participation in this crime. Instead, they indicate precisely what is not permitted under the Rules of Evidence—that his menacing persona suggests that he is the kind of person who would commit a violent crime. Md. Rule 5-404(a)(1) ("evidence of a person's character or character trait is not

admissible to prove that the person acted in accordance with the character or trait on a particular occasion.") Without more to link the photos to Ms. Ziona's shooting, they fail to overcome the requirement that "[relevant evidence] should be excluded by the trial court, if the probative value of such evidence is determined to be substantially outweighed by unfair prejudice," and the trial court abused its discretion by allowing them into evidence. *Carter v. State*, 374 Md. 693, 705 (2003) (internal quotations omitted); *see also Hannah v. State*, 420 Md. 339 (2011).

D. The Circuit Court Erred By Allowing The State's Questions About The Defense's Access To Physical Evidence.

Finally, Mr. Leblond argues that the trial court erred by permitting the following line of questioning during the State's redirect examination of Chandra Christensen, the forensic scientist who took samples from the blue jacket and black mask recovered at the crime scene:

> Q: Now, counsel asked you at length with respect to the items that you selected and not selected on areas of the person. Have both of these pieces of evidence been in the custody of the Montgomery County Crime Lab since October of 2015?
>
> A: Yes
>
> Q: And at any point could these items have been released to any other expert for any analysis had a request been made?
>
> ***
>
> Q: Is that correct, ma'am? Are you familiar with defense witness experts in your field?
>
> A: Yes
>
> Q: And at any point in time, does your lab allow those two pieces of items or any pieces of items to be tested by other experts?

> Mr. [LEBLOND'S TRIAL COUNSEL]: Objection. May we approach?

In the bench conference that followed, the defense argued that by inquiring about whether defense experts had examined the evidence, the State had implied improperly that "the defense has the burden to do something" when the burden in a criminal case rests entirely with the State. The State argued that the line of questioning was proper because Mr. Leblond had "opened the door" by asking Ms. Christensen why she had sampled only some areas of the jacket and mask but not others. The trial judge agreed with the State and found that the defense had implied on cross-examination that the evidence had been in the exclusive control of the State, and that the redirect was proper because the witness was "just indicating that [the evidence] wasn't locked under key with nobody having access to it." The questioning continued and repeated the point:

> Q: All right, I was asking you about the mask and the jacket. It's been at the Montgomery County Crime Lab since October of 2015, correct?
>
> A: Yes.
>
> Q: And you're familiar that there are – is there a process by the lab to allow other people that are not employed by the Montgomery County Crime Lab access to these items for testing?
>
> A: I believe so.
>
> Q: Okay, and in your knowledge, no requests were made in this case, correct?
>
> MR. [LEBLOND'S COUNSEL]: Objection
>
> THE COURT: Overruled
>
> THE WITNESS: No.

Mr. Leblond's argument rests largely on the Court of Appeals' decision in *Eley v. State*, a case focused on a defendant's right to comment on the State's failure to produce evidence or investigate a crime adequately. 288 Md. 548, 550 (the trial court erred by refusing to allow defense counsel to comment on the absence of fingerprint evidence on the alleged escape vehicle). In a footnote, the Court of Appeals cautioned that its holding should never be interpreted to imply the inverse:

> Our decision today must not be interpreted as an invitation to the prosecution in a criminal case to comment upon the defendant's failure to produce evidence to refute the State's evidence. Such comment might well amount to an impermissible reference to the defendant's failure to take the stand. Moreover, even if such a comment were not held tantamount to one that the defendant failed to take the stand it might in some cases be held to constitute an improper shifting of the burden of proof to the defendant.

Id. at 555 n. 2.

Because the considerable burden of proof in a criminal prosecution rests solely on the State, it is within a defendant's rights to bring attention to "possible relevant evidence not introduced" to cast doubt upon the State's case. *Henderson v. State*, 51 Md. App. 152, 153 (1982). "[A] defendant has the right to raise a defense based on the lack of evidence presented by the State," and Mr. Leblond's cross-examination of Ms. Christensen accomplished exactly that. *Atkins v. State*, 421 Md. 434, 452 (2011). Mr. Leblond's inquiry about the specifics of Ms. Christensen's testing sought to probe the thoroughness with which the physical evidence in this case was tested. But nothing in Mr. Leblond's cross-examination suggested that the State had the physical evidence under its exclusive control,

and he did not, as the State contends, "open the door" for the State to imply that Mr. Leblond could and should have tested the physical evidence himself. By asking Ms. Christensen if she was familiar with defense experts, then inquiring if any such experts had sought to conduct independent testing in this case, the State implied that Mr. Leblond had a burden to conduct his own investigation to prove his innocence. The court erred by overruling Mr. Leblond's objection to this line of questioning.

E. The Circuit Court's Errors Were Not Harmless

Having found three errors at trial, our final question is whether we must reverse Mr. Leblond's conviction. Not all errors at trial necessitate reversal. *Simpson v. State*, 442 Md. 446, 458 (2015). Errors in the trial court are harmless when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey*, 276 Md. at 659. The State bears the burden of proving that any errors had no bearing on the verdict, and if the State meets that burden, the conviction will stand. *Simpson*, 442 Md. at 458.

In this case, we cannot find beyond a reasonable doubt that the jury arrived at the same conclusion it would have had the erroneously admitted evidence and testimony been excluded. Although each error, viewed in isolation, may have been overcome by the undeniable strength of the evidence against Mr. Leblond, there is no way that we can find that the erroneous admission of a prior identification *and* an extremely prejudicial array of photographs *and* a line of questioning that projected an erroneous burden on Mr. Leblond left no impact on the verdict. We must, therefore, reverse Mr. Leblond's conviction and

remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED AND REMANDED. APPELLEE TO PAY COSTS.