Circuit Court for Anne Arundel County
Case No. C-02-CR-24-000663

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2092

September Term, 2024

KESHAWN DWAYNE HOWARD

v.

STATE OF MARYLAND

Wells, C.J.,
Kehoe, S.,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: June 17, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Anne Arundel County found Appellant, Keshawn Dwayne Howard ("Mr. Howard"), guilty of three counts of assault in the first degree, three counts of reckless endangerment, use of a firearm in the commission of a crime of violence, carrying a loaded handgun on his person, and carrying a handgun on his person. The court sentenced Mr. Howard to aggregate terms of thirty-five years of imprisonment.

The State's case relied almost entirely on analysis of closed-circuit television ("CCTV") surveillance video obtained from the apartment complex where the crimes were committed. In this timely appeal, Mr. Howard raises four questions for our review:

> 1. Is the evidence insufficient to sustain the convictions for first-degree assault and use of a firearm in commission of a crime of violence?
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> 2. Did the trial court abuse its discretion by admitting the [CCTV] footage without first requiring an adequate foundation to support a finding that it was authentic?
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> 3. Did the trial court abuse its discretion by permitting the prosecutor to argue facts not in evidence during closing argument?
>
> 4. Did the trial court err and abuse its discretion by permitting Detective Tolstoi to testify over defense counsel's objection where the State failed to disclose the detective as a witness?

Because the evidence is sufficient to sustain the convictions for first-degree assault and use of a firearm in commission of a crime of violence, and because the trial court neither erred nor abused its discretion, we affirm.

BACKGROUND

Shortly after 1:00 a.m. in the morning on November 7, 2023, a shooting occurred in the Harbour House public housing project in the Eastport neighborhood of Annapolis.[1] No victims ever sought assistance from either a medical facility or a law enforcement agency, nor did police ever find any "live persons" who "witnessed the incident." The community, however, has an extensive network of surveillance cameras, and police analysis of the footage from those cameras led detectives to conclude that Mr. Howard discharged a firearm multiple times in the direction of three people that night.

An indictment was filed in the Circuit Court for Anne Arundel County, charging Mr. Howard with three counts each of attempted first- and second-degree murder, first- and second-degree assault, and reckless endangerment as to each of three unidentified victims; use of a firearm in the commission of a crime of violence; carrying a loaded handgun on his person; and carrying a handgun on his person. A three-day jury trial was held. The first day was consumed by jury selection. The State presented its case-in-chief on the second day. The third day began with jury instructions, followed by closing arguments, and concluded with the verdict.

The State called three witnesses: Detective Abigail Ayers ("Det. Ayers") of the Annapolis Police Department; Detective Elijah Tolstoi ("Det. Tolstoi") of the Annapolis

[1] The term is spelled "Harbor" in the transcripts, but the official name is "Harbour House." *See* Housing Authority of the City of Annapolis, Harbour House/Eastport Terrace, available at https://www.hacamd.org/harbour-house/-eastport-terrace (last visited May 21, 2026).

Police Department; and Detective Andrew Kreft ("Det. Kreft") of the Annapolis Police Department. Mr. Howard exercised his constitutional right not to testify.

Det. Ayers, a patrol officer at the time of the shootings, testified that, in the early morning of November 7, 2023, she and other police officers responded to a call for shots fired at an address in the Harbour House community. Upon arriving there, while canvassing the area, she recovered a cell phone, which subsequently was linked to Mr. Howard. In "close proximity," she recovered four shell casings.

Det. Tolstoi identified Mr. Howard and testified that he had become "aware of a possible Instagram account that may be related to him[.]" Detective Tolstoi further testified that he "provide[d] that information to Det[.] Kreft[.]"

Det. Kreft's testimony was the heart of the State's case. After acknowledging that there were "no live persons" who witnessed the shooting and that citizens in the Harbour House neighborhood generally are uncooperative with the police, Detective Kreft explained that he used the network of CCTV surveillance cameras at the complex to piece together the events of that night. Through his testimony, State's Exhibits 3A and 3B were admitted into evidence over defense objection.[2]

Although there was no testimony as to what kind of video recording system was used, Det. Kreft explained that he was familiar with the video surveillance system in the Harbor House complex. In his capacity as a detective, he had reviewed hundreds of hours of video footage from the Harbor House complex. He had opportunities to calibrate the

[2] We will address this in greater detail at Section II *infra*.

time stamps on the videos and found them to be accurate. He had also reviewed videos in which he was filmed and found them to be accurate. He reviewed the videos in this case and testified that they fairly and accurately depicted what "transpired before, during and after the shooting." He had also reviewed a copy of the thumb drives that were submitted in evidence.

Det. Kreft worked backward from the location where Det. Ayers and Officer E. Stoner[3] had recovered the cell phone and shell casings, surmising that he might be able to identify a shooter in that vicinity if he examined the video from around the time police had received the call for service. By doing so, he determined that a man, wearing distinctive clothing, could be seen running across the field of view, immediately after what appeared to be a "muzzle flash;"[4] as the man ran, one could "see a light illuminated on the ground as they ran, consistent with their right hand, down on the ground."[5] Nearly simultaneously, on a different camera, three persons could be seen fleeing; Det. Kreft averred that it appeared that Mr. Howard had discharged his firearm in their direction, explaining that

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[3] Officer E. Stoner was one of the officers who responded to the service call shortly after the shooting. He apparently collected the cell phone and shell casings that Det. Ayers had spotted at the scene. His full name does not appear in the record.

[4] The subject emerges from behind what appears to be a dumpster at 1:08:08. He then walks across a street and a parking lot; at 1:09:18 he emerges from behind a parked vehicle and begins walking from right to left along a sidewalk in the foreground, momentarily leaving the field of view at 1:09:29. At 1:09:45 he reappears, running along the same sidewalk, in the opposite direction, from left to right.

[5] The prosecutor subsequently referred to the light on the ground as having been caused by a laser sight on the handgun Mr. Howard was wielding. We address this assertion at Section III *infra*.

there was a clear line of sight from his position toward the location of the three fleeing persons.

Through examination of the videos, Det. Kreft determined that the shooter had exited a particular building. Det. Kreft identified Mr. Howard as the suspected shooter by checking records from the Motor Vehicle Administration ("MVA"), which indicated that he lived at the address of the building from which the shooter could be seen leaving in the surveillance video.[6]

By examining the videos, Det. Kreft determined that, from the time of the shooting until the time when the cell phone and shell casings were recovered, no one had disturbed the area where they were found. Det. Kreft further determined from the video that "it appeared that the object dropped from" the shooter's person "illuminated where Officer Ayers ultimately located it."

Further examination of the cell phone failed to produce any useful leads. Det. Kreft prepared for internal distribution an Attempt to Identify, derived from the lockscreen photograph on the recovered cell phone, but the only tip generated led to a subject who

[6] Det. Kreft also testified that he watched surveillance video from the evening of November 6, 2023, seven hours before the shooting, and noticed the suspected shooter, wearing the same distinctive sweatshirt, accompanied by another man, walking their dogs. He used that information to confirm the identity of Mr. Howard when, several months after the shooting, he served a search warrant at Mr. Howard's residence and observed the same dog. Likely because of the presumptive inadmissibility of information about the search warrant and unrelated investigation, the prosecutor did not question Detective Kreft about serving the search warrant and observing the dog at that time.

weighed 250 pounds and stood five-feet nine inches tall, "which was not consistent with the person observed." Attempts to extract data from the phone were unsuccessful.[7]

Det. Kreft learned of Mr. Howard's phone number through Det. Tolstoi, who in turn had discovered that information from a confidential informant in an unrelated investigation.[8] Det. Kreft verified the phone number by obtaining a pen register, which enabled him to ping that phone and track its location, and thereby locate Mr. Howard.

Finally, Det. Kreft testified about certified records obtained from an Instagram account with username "*mr.nobody_5007*" that was associated with Mr. Howard. That Instagram account was linked to the same phone number that Det. Kreft otherwise had determined was Mr. Howard's. Among the text messages in Mr. Howard's Instagram account were references to his name; a conversation on November 7, 2023, at 9:42 a.m., in which Mr. Howard stated, "Yo I need u bad [right now,]" "I got into some bs[,]" and "Lost my phone;" and another conversation a few minutes later with a different person in which Mr. Howard stated, "Got into some shit dropped my phone but we should be able make it ashallah[.]"[9] In yet another conversation with a friend named Erica, around the same time

[7] Later, police successfully extracted data from the cell phone, but the prosecution inadvertently failed to inform the defense of that fact in discovery because the prosecutor was on leave. Therefore, the prosecution was barred from introducing any data recovered from the cell phone.

[8] To prevent unfair prejudice to the defense, the jury was not told about either the confidential informant or any unrelated investigation.

[9] It appears that "ashallah" may be a misspelling of "inshallah." "Inshallah" is an expression in the Arabic language, meaning "if God wills." *Inshallah*, Britannica.com, https://www.britannica.com/topic/inshallah.

that morning, Mr. Howard stated, "I lost my phone[,]"because he had gotten involved in "Dumb shit last night[,]" and that "3 n-ggaz by brook building" tried to "get me[.]"

The jury deliberated for two hours and forty-five minutes, and it was clear from the notes it sent that the jury's attention was focused on the video evidence.[10] The jury acquitted Mr. Howard of attempted first- and second-degree murder but found him guilty of first-degree assault and reckless endangerment as to each unidentified victim. The jury also found Mr. Howard guilty of use of a firearm in the commission of a crime of violence, carrying a loaded handgun on his person, and carrying a handgun on his person. The court sentenced Mr. Howard to twenty years of imprisonment, the first five years without the possibility of parole, on Count Sixteen (use of a firearm in the commission of a crime of violence); twenty-five years of imprisonment, with all but fifteen years suspended, on Count Three (first-degree assault of unidentified victim one), consecutive to Count Sixteen; and twenty-five year terms, all suspended, on Counts Eight and Thirteen (first-degree assault of the other unidentified victims), consecutive to Count Sixteen. The aggregate sentence was, thus, forty-five years of imprisonment, with all but thirty-five years suspended. Mr. Howard then noted a timely appeal.

Additional facts are included where pertinent to the discussion of the issues.

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[10] During deliberations, the jury sent three notes, two of which sought technical help in viewing the video evidence. The third note contained two questions: one asked the court to define a "limp," which was a reference to a remark Mr. Howard had made in the Instagram messages; and the other asked the court to define "intent." After conferring with counsel, the court wrote to the jurors in reply that they had received all the evidence in the case and that they should review the written jury instructions "as to intent."

DISCUSSION

I.

Mr. Howard contends that the evidence is insufficient to sustain the convictions for first-degree assault and use of a firearm in commission of a crime of violence. Citing *Dixon v. State*, 364 Md. 209 (2001), *Leary v. United States*, 395 U.S. 6 (1969), and *Yates v. United States*, 354 U.S. 298 (1957), he asserts that because the jury was instructed on more than one modality of assault and was not asked to specify on the verdict sheet which modality/modalities it found, then if the evidence is insufficient to establish *any* modality, we must conclude that it is insufficient generally, and we must vacate Mr. Howard's first-degree assault convictions. In this case, the State presented, and the jury was instructed on, two modalities of first-degree assault: attempted battery and intent to frighten.

Mr. Howard asserts that the evidence is insufficient to sustain his convictions for first-degree assault of the attempted battery variety because the State failed to prove that he had the specific intent to injure the victims or that he took a substantial step to do so. Those conclusions follow, according to Mr. Howard, because there was no evidence "that the shooter fired at the three individuals[.]"

Mr. Howard further asserts that the evidence is insufficient to sustain his convictions for first-degree assault of the intent-to-frighten variety because "the jury had no information from which to rationally infer that the three individuals ran *because they were being shot at* to rule out the inference that they were bystanders who ran *because they heard shots*[.]" According to Mr. Howard, "the facts proven were that (1) the shooter fired a gun and (2) three individuals were captured on camera running." Based on those facts, Mr.

Howard contends that the jury could not reasonably infer "that the three individuals were running because they were being shot at[.]"

Finally, relying upon *Hallowell v. State*, 235 Md. App. 484 (2018), Mr. Howard asserts that, because the evidence of first-degree assault is legally insufficient, his conviction for use of a firearm in the commission of a crime of violence also must be vacated, as there is no longer a predicate crime of violence underpinning it.

The State counters that Mr. Howard's claim concerning the sufficiency of the evidence to sustain his convictions of the attempted battery modality of assault is unpreserved because he did not raise it at trial in his motion for judgment of acquittal. The State further asserts that as long as the evidence is sufficient to prove *any* modality of first-degree assault on which the jury was instructed, then Mr. Howard's first-degree assault convictions should be affirmed.[11]

But in any event, according to the State, the evidence in this case is sufficient to sustain Mr. Howard's convictions for both modalities of assault on which the jury was instructed. The State maintains that the report that multiple shots were fired; the video and forensic evidence showing that a shooter (shown by circumstantial evidence to be Mr. Howard) fired at least four times (established by the shell casings found at the scene) in the direction of the unidentified victims; and the video evidence showing that three persons were fleeing at the same time the shots were fired, amounted to sufficient evidence to prove

[11] According to the State, the authorities cited by Mr. Howard do not apply to the question of evidentiary sufficiency.

attempted battery first-degree assault. The State further maintains that the same evidence, augmented by the Instagram evidence suggesting Mr. Howard's awareness of the three unknown victims at the time of the shooting, amounted to sufficient evidence from which the jury could infer that Mr. Howard intended to frighten the victims and that, under *Smith v. State*, 415 Md. 174 (2010), the State was not required to rule out every "reasonable hypothesis of innocence."

The State further asserts that, because the evidence is sufficient to prove first-degree assault, it is sufficient to sustain Mr. Howard's convictions for use of a firearm in the commission of a crime of violence. In the alternative, the State requests a *Twigg*[12] remand if we were to agree with Mr. Howard that the evidence is insufficient to sustain some of the convictions.

Additional Facts Pertaining to the Claim

After the close of the State's case-in-chief, the defense moved for judgment of acquittal, stating in relevant part:

> With respect to first[-]degree assault, I think there is evidence lacking in terms of, was a gun actually pointed at any individual? We don't know from the evidence that we have and no testimony from any of these individuals. For the first-degree assault, they must be either placed in fear or be fired upon, and that has not been shown by the State's evidence.
>
> *The other charges, second-degree assault on each,* reckless endangerment, use of a firearm and loaded handgun, *I think, are legitimate*

[12] *Twigg v. State*, 447 Md. 1 (2016) (holding that where a trial court erroneously fails to merge a conviction for sentencing purposes, then an appellate court has discretion to vacate all the sentences imposed and to remand for resentencing, subject only to the constraint that the resentencing should comply with Maryland Code, Courts and Judicial Proceedings Article § 12-702(b)).

> *jury questions at this point.* I don't have any argument as to those, but I would argue as the attempt first[-]degree murders, second-degree murders, and first-degree assault charges.

(Emphasis added.)

The prosecutor replied in part:

> I think the testimony from Det[.] Kreft was clear that there was a clear line of sight between where the gun was pointed and where the victims were, and that it was directionally when it happened. I think the video supports that, as well as the aerial view.
>
> And just because something happens quickly doesn't mean the intent [isn't formed]. [*Mitchell vs. State*, 408 Md. 368 (2009)] specifically references the fact that intent can be formed between the first and second trigger pulls. And, here, we have four -- four shell casings.
>
> So, the -- the pointing of the gun gets us to first. The firing of the gun gets us to second. . . .

The court denied the motion for judgment of acquittal, declaring in relevant part:

> Okay. I think, at this point, he walks slowly and then all of a sudden, gunshots go off and he runs. The walking slowly, I think, gets it to the jury on those counts. It doesn't necessarily -- I'm not sure I would be, if I were the finder of fact, but I'm not; so, that's good for me.
>
> But having said that, I think you raised the issue sufficiently. Whether or not you're successful with the jury or not is a different question as to all of those counts, and I think that it's ultimately the jury's purview to determine what, if any, crimes whoever it was who did this shooting did, did it. So, I'm going to deny the motion at this time.

After Mr. Howard waived his right to testify, defense counsel renewed her motion for judgment of acquittal. The court denied it once again, stating, "I still think it's a jury question at this point."

Analysis

Preservation

Maryland Rule 4-324(a) provides:

> (a) **Generally.** A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

The particularity requirement has been strictly construed; thus, a criminal defendant "is not entitled to appellate review of reasons [why a motion for judgment of acquittal should be granted] stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008). "Fundamentally, when moving for a judgment of acquittal at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence, the defendant must state with particularity all the reasons why the motion should be granted." *Tarray v. State*, 410 Md. 594, 613 (2009).

In the present case, Mr. Howard asserted, in moving for judgment of acquittal as to the first-degree assault charges,

> With respect to first[-]degree assault, I think there is evidence lacking in terms of, was a gun actually pointed at any individual? We don't know from the evidence that we have and no testimony from any of these individuals. For the first-degree assault, they must be either placed in fear or be fired upon, and that has not been shown by the State's evidence.
>
> *The other charges, second-degree assault on each,* reckless endangerment, use of a firearm and loaded handgun, *I think, are legitimate jury questions at this point.* I don't have any argument as to those, but I would

> argue as the attempt first[-]degree murders, second-degree murders, and first-degree assault charges.

(Emphasis added.)

Before addressing preservation, it behooves us to review briefly the applicable law. First-degree assault consists of all the elements of second-degree assault plus one of the three enumerated aggravators in Maryland Code (2002, 2021 Repl. Vol.), Criminal Law Article ("CR") § 3-202(b). *See* Md. Criminal Pattern Jury Instruction ("MPJI-Cr") 4:01.1A (First Degree Assault) (MSBA 2025 3d ed.). The two aggravators at issue here are "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another," CR § 3-202(b)(1), and "commit[ting] an assault with a firearm[.]"[13] CR § 3-202(b)(2).

Second-degree assault may be accomplished in three ways: battery, attempted battery, and placing a victim "in reasonable apprehension of an imminent battery," *Lamb v. State*, 93 Md. App. 422, 428 (1992), also known as intent-to-frighten assault, *Snyder v. State*, 210 Md. App. 370, 382, *cert. denied*, 432 Md. 470 (2013). The State did not proceed on a theory of battery in this case.

The elements of the attempted battery variety of second-degree assault "are that the defendant actually tried to cause physical harm to the victim, the defendant intended to bring about physical harm to the victim, and the victim did not consent to the conduct." *Id.* at 385. "An assault of the attempted battery variety requires a specific intent to perpetrate a battery." *Lamb*, 93 Md. App. at 443–44.

[13] The third aggravator, "intentionally strangling another," CR § 3-202(b)(3), is not relevant in this case.

The elements of intent-to-frighten second-degree assault are "that the defendant commit[ted] an act with the intent to place another in fear of immediate physical harm," that "the defendant had the apparent ability, at that time, to bring about the physical harm," and that the victim was "aware of the impending battery."[14] *Snyder*, 210 Md. App. at 382. The defendant's apparent ability to perpetrate an intent-to-frighten assault "is judged from the perspective of the victim." *Id.* at 385 n.7. Intent-to-frighten second-degree assault "requires a specific intent to place the victim in reasonable apprehension of an imminent battery." *Lamb*, 93 Md. App. at 445.

On appeal, Mr. Howard contends that the evidence of attempted-battery first-degree assault is insufficient because there was no proof that he "actually tried to cause physical harm" to the three unidentified victims or that he "intended to bring about physical harm" to any of them "because he was unable to shoot directly at them." In other words, Mr. Howard claims on appeal that the evidence of the underlying attempted-battery *second*-degree assault is insufficient, and therefore, so is the evidence of attempted-battery *first*-degree assault. At minimum, this claim is not preserved and arguably is waived because defense counsel expressly acknowledged that the evidence is sufficient to prove second-degree assault.

Mr. Howard's claim that the evidence is insufficient to prove intent-to-frighten first-degree assault fares no better. He contends on appeal that the evidence is insufficient

[14] The pattern jury instruction expresses this element as "that [the victim] reasonably feared immediate physical harm[.]" MPJI-Cr 4:01.

to prove intent-to-frighten first-degree assault because "the jury was required to speculate that the three individuals ran because they were the intended targets of the shots that were fired[,]" or in other words, the State failed to rule out the inference that the victims "were bystanders who ran *because they heard shots*[.]" He claims that "the facts proven [at trial] were that (1) the shooter fired a gun and (2) three individuals were captured on camera running[,]" and therefore, the inference that the three persons "were running because they were being shot at . . . cannot be legitimately drawn." At bottom, this claim is, once again, a claim that the State failed to prove an element of the underlying *second*-degree assault. It was never raised at trial in the motion for judgment of acquittal, and arguably is waived because of defense counsel's acknowledgment that the evidence of second-degree assault is sufficient.

Merits of the Claim

Even if the claims raised on appeal had been preserved, we would find that they have no merit. Mr. Howard's contention that the evidence of attempted-battery first-degree assault is insufficient because there was no proof that he "actually tried to cause physical harm" to the three unidentified victims or that he "intended to bring about physical harm" to any of them "because he was unable to shoot directly at them[,]" ignores Det. Kreft's testimony that there was a clear line of sight from the shooter's position toward the location of the three fleeing persons. Combined with the evidence of a "muzzle flash," the four shell casings, and the cell phone found in the same place from which the shots appeared to have been fired, as well as Mr. Howard's Instagram messages referring to losing his phone and being involved in an altercation with "3 n-ggaz," there is sufficient evidence from which

the jury reasonably could conclude that Mr. Howard shot at the three unidentified victims at least four times and therefore committed three attempted battery first-degree assaults.

As for Mr. Howard's claim that the jury was required to speculate in finding him guilty of intent-to-frighten first-degree assault, he ignores the principle, articulated in *Smith*, *supra*, that "[w]e do not second-guess the jury's determination where there are competing rational inferences available." 415 Md. at 183. Here, there were two competing permissible inferences that could be drawn from the victims' flight. Merely because one of those inferences could have absolved Mr. Howard of the crimes does not require that the jury have adopted it. The jury reasonably could have inferred from the video of the victims fleeing, nearly simultaneously with the "muzzle flash" and considered through the lens of Det. Kreft's testimony that the shooter had a clear line of sight in the direction of the victims, that the reason they were fleeing was because they surmised that they were being fired upon. Therefore, the evidence is sufficient to prove intent-to-frighten first-degree assault.

Because Mr. Howard has failed to show that we must vacate his convictions for first-degree assault, we also leave intact his conviction for use of a firearm in the commission of a crime of violence.

II.

Mr. Howard contends that the trial court abused its discretion in admitting the CCTV footage without proper authentication. Mr. Howard analogizes this case to *Washington v. State*, 406 Md. 642 (2008), in which our Supreme Court reversed a defendant's convictions because a surveillance recording, introduced through the

testimony of a mom-and-pop businessman, who did not know how the recording system worked or how a technician (who did not testify) had recovered the footage, was held to be improperly authenticated. *Id.* at 646, 655–56, 658. Mr. Howard asserts additionally that "the court's admission of the CCTV footage presents additional problems[,]" specifically, that Det. Kreft acknowledged that he "had never reviewed the files on the flash drives[,]" and the exhibits admitted into evidence were never "published to the jury during the trial." And finally, Mr. Howard asserts that the purported error in admitting the exhibits was not harmless because the "State had no case without the video."

The State counters that, under *Campbell v. State*, 267 Md. App. 248, 303–04 (2025), we should conclude that the surveillance videos were authenticated through circumstantial evidence. But even if, as the State suggests, the trial court may have "prematurely" authenticated the surveillance videos, any error was harmless because the subsequently introduced evidence furnished the necessary authentication.

Additional Facts Pertaining to the Claim

Through Det. Kreft's testimony, a map of the surveillance camera network at Harbour House, marked as State's Exhibit 4, was introduced into evidence. Det. Kreft explained to the jury that when "a shooting happens and there aren't any civilian witnesses," he relies upon the surveillance camera network to perform his investigation. The map helps him to view an event from more than one angle and to track the movements of people over time.

Det. Kreft testified that he has reviewed "[h]undreds" of hours of surveillance video from the Harbour House system during his career. He further stated that he has "[n]ever

found there to be any inaccuracies" either in the videos or their timestamps. He also explained that "there have been occasions" when he has matched the timestamps on Harbour House videos "with timestamps on body-worn cameras" and that he has never encountered "any inaccuracies" when doing so. Det. Kreft testified that he has walked through the neighborhood and then subsequently verified that his image appeared on the videos at the correct times and places.

Det. Kreft then explained that State's Exhibits 3A and 3B "are flash drives containing data which has the [CCTV] relevant to this incident." He further declared that they contain "the same video" that he had "reviewed in conjunction with this case" and that he did not "find there to be any errors or inaccuracies on those particular videos[.]" Finally, Det. Kreft testified that "those videos fairly and accurately depict what [he] reviewed and what transpired before, during, and after the shooting[.]"

When questioned by defense counsel, Det. Kreft clarified that he had reviewed his own copies, which were on the hard drive of his laptop, instead of the copies he had made on the flash drives, but that the flash drives contained the "[s]ame data[.] Defense counsel approached the bench and objected, declaring:

> I would object as Det[.]Kreft is certainly not any custodian of cameras and records from [Harbour] House. I don't know if the State has, apparently not based on the witness list, any representative from [Harbour] House to talk about the camera system. I understand that Det[.]Kreft has experience with their camera system. He's just indicated also that he hasn't actually reviewed State's Exhibits 3 and -- 3-A and 3-B; therefore --

The court replied:

> He reviewed his copy of it and the Court is going to take judicial notice that when you make these . . . thumb drives . . . that they're identical copies.
>
> * * *
>
> So, from that perspective, I'm going to overrule the objection.

Defense counsel continued, insisting that Det. Kreft is "not a custodian[,]" he is "not in control of the camera system[,]" and he is not "an appropriate witness with which to get in the video footage from the [Harbour] House cameras." The court replied:

> And I would have agreed with you until recent case law came down on these type of cameras[15] and I think he has done enough in this case that they -- they -- he authenticated them, given that they're films; that there's an exact -- there's a notice for the case right on the courthouse website.
>
> * * *
>
> . . . So, I'm going to overrule the objection.

State's Exhibits 3A and 3B then were admitted into evidence.

After the prosecutor's direct examination of Det. Kreft had concluded, the prosecutor asked to approach, and the following occurred:

> [PROSECUTOR]: I think I'm done with Det[.]Kreft, but there are -- well, the -- the main videos, I thought it would be better to swap out his hard drive for the two flash drives because we know that that works.
>
> THE COURT: Yeah, but on the hard drive there's a bunch of other [stuff].
>
> [PROSECUTOR]: There's not. That's just -- that's just his -- it's only --

[15] Neither the trial court nor the parties cited any particular case law. We assume that the trial court was referring to *Mooney v. State*, 487 Md. 701 (2024).

THE COURT: But is it only the things that were admitted?

[PROSECUTOR]: Both of the flash drives were all the videos -- they -- they were already admitted.

THE COURT: No, no, my question to you is, while all the flash drives have only what we talked about, does the hard drive have more than just what we talked about?

[PROSECUTOR]: No. The flash drives have more than what we talked about. The flash drives have all the baseline video data.

THE COURT: You can only get in what you talked about.

[PROSECUTOR]: That wasn't my -- I generally admit the whole thing in case, candidly, in case defense wants to use any of it too --

THE COURT: Okay.

[PROSECUTOR]: -- because I don't know what they might find -- might find relevant.

THE COURT: What's your position?

[DEFENSE COUNSEL]: I thought that the exhibit would be limited to what Det[.]Kreft was looking at, commenting on, what was displayed --

THE COURT: That's what I thought too.

[DEFENSE COUNSEL]: -- in court.

[PROSECUTOR]: Well, then, I can -- because the other thing I did was I broke out the relevant things onto two separate other flash drives, but some of it is a little bit longer. So, I would have to get him to go through it again, a little -- some of it again.

THE COURT: I don't know what to tell you --

[PROSECUTOR]: Okay.

THE COURT: -- but you're only getting in what is relevant. I don't want to put in stuff, and I don't -- I think you're putting us back in a significantly --

[PROSECUTOR]: Okay.

THE COURT: -- compromised position if she lets anything else in.

[PROSECUTOR]: Well, that's why I came up on it, to make sure --

[DEFENSE COUNSEL]: I appreciate it.

[PROSECUTOR]: -- and clean it up beforehand.

[DEFENSE COUNSEL]: I assumed you were referring to 3-A and 3-B having only what --

THE COURT: We had talked about.

[DEFENSE COUNSEL]: -- Det[.]Kreft was asked about.

[PROSECUTOR]: Yeah.

THE COURT: So, can you get that cleaned up and --

[PROSECUTOR]: I have -- I have it cleaned up and I can actually --

THE COURT: Give it to her to look at one more time.

[PROSECUTOR]: Okay.

THE COURT: And then we'll go from there.

After Det. Kreft had finished testifying, and the State had concluded its case-in-chief, the court and the parties conferred over jury instructions and other housekeeping items. Near the conclusion of that bench conference, the matter of State's Exhibits 3A and 3B came up again:

COURT CLERK: . . . Oh, while you're on the record, do you want to go ahead and do the switch on the exhibits?

[PROSECUTOR]: Yes. So, the -- what was previously Exhibit 3-A and 3-B were removed and replaced with the cropped portions of the video that were played. Three A -- let me verify which one is which.

COURT CLERK: So, nine and ten, those flash drives that were with nine and ten are now 3-A and 3-B. Nine is 3-A and ten is 3-B.

[PROSECUTOR]: Correct.

COURT CLERK: So, there is no nine and ten now.

[PROSECUTOR]: Correct.

COURT CLERK: Those weren't admitted or anything. They were just identified, or not even, they were just marked.

[PROSECUTOR]: Right, and --

THE COURT: No, there is no nine and ten.

COURT CLERK: There -- yeah, they were marked, but then --

THE COURT: That's not --

COURT CLERK: -- I -- so, in the system, they're just, like, returned because they're not anything.

[PROSECUTOR]: And I believe [Defense Counsel] reviewed those and is in agreement that they are relevant portions that can go back to the jury.

[DEFENSE COUNSEL]: That's correct.

THE COURT: Where are they? Where are they? So, 3-A and 3-B are now admitted, right?

[PROSECUTOR]: Yes.

THE COURT: That's the bottom line.

[PROSECUTOR]: 3-A and 3-B were previously admitted, just with different referenced flash drives. We replaced them with flash drives containing the information the jury saw.

Near the beginning of the third and last day of trial, after the case was recalled, the matter of the swapped exhibits came up one more time:

> THE COURT: That's okay, I don't -- you're clear on Exhibit 3A and 3B, correct?
>
> [PROSECUTOR]: Yeah, yes we already swapped them out.
>
> THE COURT: [Defense Counsel], are you fine with that?
>
> [DEFENSE COUNSEL]: Yes, that's -- it was 9 and 10, we swapped out for 3A and 3B?
>
> [PROSECUTOR]: Yes.
>
> [DEFENSE COUNSEL]: I did have an opportunity to review them before that swap was made.

Later, during closing argument, the prosecutor explained to the jury, without objection:

> Now, what we did -- just a couple procedural things. I wanted the detective to show you, I know it got a little tedious how he put these videos together and how he pieced this case together. But what we did was we combined the videos that he showed you and agreed on sort of what the relevant portions would be and put them on two flash drives to make things a little bit easier on you if you decide to watch those videos when you go back to deliberate. If you have any questions, the court has IT people that can help you out, if you have any problems.
>
> * * *
>
> . . . What we did was sync them all up time-wise, so do you remember when he discussed the individual leaving the building and then walking past the dumpster and, ultimately, walking across here and then you see the muzzle flashes and the dropped cell phone. Here he is right now. So rather than bounce around yourself with whatever that application was that they go do over 50 million times, you can just take a look at this[.]

Analysis

Maryland Rule 5-901(a) states that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 5-901(b) lists several "examples of authentication or identification conforming with the requirements of" the Rule, including "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be," Md. Rule 5-901(b)(1), "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be," Md. Rule 5-901(b)(4), and "[e]vidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result," Md. Rule 5-901(b)(9). The proponent of the evidence bears the burden to prove by a preponderance of the evidence that the evidence is what it purports to be. *Mooney v. State*, 487 Md. 701, 728 (2024). That burden is "slight." *Jackson v. State*, 460 Md. 107, 116 (2018).

In the present case, although we think it is a better practice to broadcast to the jury the same video as that introduced into evidence, we cannot say that the trial court abused its discretion in admitting the videos. First and foremost, defense counsel agreed to the swap of the flash drives because the original flash drives contained additional video that she did not want sent to the jury. Furthermore, we cannot say that the trial court abused its discretion in taking judicial notice that a copy of the video files, apparently made by Det. Kreft, was "identical" to the original files on his hard drive.

And most importantly, we agree with the State that the video evidence in this case was adequately authenticated through circumstantial evidence. Md. Rule 5-901(b)(4). As the State points out, Det. Kreft's testimony that the "first thing" he does when investigating a shooting in the Harbour House community without known witnesses is to "review the camera footage," using the map (State's Exhibit 4) as a "cheat sheet"; that he has reviewed "[h]undreds" of hours of footage from that community; and that he has reviewed Harbour House surveillance video footage "in real time[,]" support an inference that he has personal access to the surveillance system at Harbour House. Furthermore, Det. Kreft was able to identify the responding police officers from his analysis of the surveillance video, as well as the location to which they responded, and he was able to link the timestamps on the video to the time of the service call. In addition, Det. Kreft testified that he did not find "any inaccuracies" either in "the video itself, or the timestamps[.]" Moreover, Det. Kreft testified that the "time is contiguous" between different video cameras; thus, multiple camera angles simultaneously showed the same person walking past the dumpster and, later, the same car turning into the parking lot. Det. Kreft did not passively accept the video recordings. Instead, he reviewed them to determine whether they accurately depicted what they purported to depict. The internal consistency across different cameras is strong circumstantial evidence of their authenticity. We hold that the trial court did not commit reversible error in admitting State's Exhibits 3A and 3B.

III.

Mr. Howard asserts that the trial court abused its discretion in permitting the prosecutor to argue facts not in evidence during closing argument. Specifically, he

contends that there was no evidence that the handgun used in the shootings had a laser sight and that the trial court should have sustained the defense objection to the prosecutor's assertion during closing argument that it did. Mr. Howard further avers that the error in overruling the defense objection to the prosecutor's improper comment was not harmless due to the closeness of the case. He then shifts gears and asserts that the prosecutor made *multiple* improper comments during closing argument, which blunted the effect of any curative instructions the trial court gave.

The State counters that the prosecutor's argument "was a fair inference to draw from the surveillance footage, which showed [] a light trailing on the ground as the shooter carried the gun." In the alternative, the State asserts that any purported error in failing to sustain the defense objection to the prosecutor's comment was harmless in light of the jury instructions, the weight of the evidence, and the jury's acquittal of the attempted murder charges.

Additional Facts Pertaining to the Claim

During the State's closing argument, the prosecutor was describing the manner in which the video footage from different cameras had been combined so that the jurors could interpret the events as recorded simultaneously from several angles, explaining that if the jurors had any questions, "the court has IT people" that can assist. The following occurred:

> [PROSECUTOR]: There we go. What we did was sync them all up time-wise, so do you remember when he discussed the individual leaving the building and then walking past the dumpster and, ultimately, walking across here and then you see the muzzle flashes and the dropped cell phone. Here he is right now. So rather than bounce around yourself with whatever that application was that they go do over 50 million times, you can just take a

look at this and sort of, again, *my humble suggestion would that Det[.]Kreft has been doing this awhile and you can rely on what he told you,* but --

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: You can, obviously, and should judge for yourself.

[DEFENSE COUNSEL]: Ask to strike the previous line, Your Honor.

THE COURT: You're ultimately the judge of the facts in this case, therefore, it's ultimately up to you to decide.

[PROSECUTOR]: Agreed, a hundred percent. Again, you're going to be able to watch this as many times as you see fit, but there are a couple of things I wanted to point out because this is my only opportunity to do so before you go back and decide this case. Bless you. The individual who's walking across here, that's the shooter. See the muzzle flash. Now, you see a little light that's trailing as he's running, that's not the cell phone. *That's, like, a laser site on the gun.*

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Move to strike.

[PROSECUTOR]: Can we approach, Your Honor?

THE COURT: You may.

(Emphasis added.) A bench conference ensued, at which the court and counsel further discussed the matter, leading the court to change its mind and overrule the defense objection:

THE COURT: There's no evidence to that effect that it was a laser.

[PROSECUTOR]: It's in the video. You can see it plain as day. He had the gun in his hand. It's on. It's trailing all across the ground --

> THE COURT: [Defense Counsel].
>
> [DEFENSE COUNSEL]: I never had a thought that there was a laser on that item. There's been, obviously, no evidence to it.
>
> THE COURT: You can argue. I'm going to overrule the objection because I think you can argue.

When the bench conference concluded, the court advised the jury that "what you hear in closing is not evidence." The prosecutor then argued to the jury that "[y]ou can see it for yourself. *It's a laser altogether.*" (Emphasis added.) The prosecutor explained that he did not want the jury to conflate the laser sight and the shooter's cell phone, which flashed on as the shooter was receiving a text message, because the location of the shell casings was, according to the prosecutor, linked to the position from which the shots had been fired.[16]

---

[16] During rebuttal closing argument, the prosecutor made an improper comment, asserting:

> They [defendants] deserve every inch, ounce, second, minute of your consideration, but they're not the only one.
>
> It's those three people who had to run from some gunshots. Keep in mind, we don't know why they ran. Fear? Could be. We don't know why they didn't come forward. Fear? Could be. *It's not just the defendant and those three people, it's people that have to live in this neighborhood that have to deal with gunfire at 1:00 in the morning*.

(Emphasis added.)

Defense counsel objected, asserting that "it's not quite golden rule, but I think we're getting there, talking about the impact on others; that there's no evidence of that." The trial court sustained the objection and instructed the jury, "Disregard that last statement by the State."

Analysis

"The regulation of argument rests within the sound discretion of the trial court." *Fuentes v. State*, 454 Md. 296, 319 (2017) (quoting *Grandison v. State*, 341 Md. 175, 224 (1995)). Although a prosecutor is afforded "wide latitude" during closing argument, *Degren v. State*, 352 Md. 400, 430 (1999), "not all statements are permissible during closing arguments." *Donaldson v. State*, 416 Md. 467, 489 (2010). Specifically, a prosecutor "may not comment on facts not in evidence" or "state what he or she would have proven." *Mitchell*, 408 Md. at 381 (quotation marks and citation omitted). Indeed, "[a]rguing facts not in evidence is highly improper." *Fuentes*, 454 Md. at 319. Thus, a prosecutor "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom," *Degren*, 352 Md. at 430 (citation and quotation omitted), but it is improper for a prosecutor to comment in a way "that invite[s] the jury to draw inferences from information that was not admitted at trial," *Spain v. State*, 386 Md. 145, 156 (2005).

Immediately after the "muzzle flash," the shooter ran across the field of view (as seen from Camera 12), and, as he ran, there was a visible light "illuminated on the ground as [he] ran, consistent with [his] right hand, down on the ground." That light was not caused by his cell phone, which he had dropped near the location of the "muzzle flash," as could be seen eleven minutes later, when the phone "illuminated where Officer Ayers ultimately located it[]" as a result of receiving either an incoming call or text message. Based on this evidence, we hold that the prosecutor's comment, that Mr. Howard's weapon had a laser sight, was a reasonable inference to be drawn from that evidence. *Degren*, 352 Md. at 430.

The trial court did not abuse its discretion in overruling the defense objection to the prosecutor's comment because that comment was not improper.

Our conclusion is bolstered by the trial court's appropriate action in sustaining defense objections to two other prosecutorial comments that were improper: the suggestion to the jury that "you can rely on what [Det. Kreft] told you" and the comment that the jury should consider "people that have to live in this neighborhood that have to deal with gunfire at 1:00 in the morning." We find no fault with the trial court's regulation of closing argument in this case.

IV.

Finally, Mr. Howard asserts that the trial court abused its discretion in denying the defense motion to exclude the testimony of Det. Tolstoi because of a discovery violation. According to Mr. Howard, that abuse of discretion was not harmless beyond a reasonable doubt because the detective's testimony was crucial in connecting him "to the alleged crimes."

The State counters that the trial court did not abuse its discretion in finding a discovery violation but permitting Det. Tolstoi to testify on a limited basis, related only to what the State had disclosed in discovery. Given the pre-trial disclosures, the State avers, "Mr. Howard was not surprised by the information the trial court allowed to be admitted, nor was Mr. Howard's ability to prepare a defense unduly impaired." In the alternative, the State asserts that any error in permitting Det. Tolstoi to testify was harmless for three reasons: (1) the substance of his testimony "stayed within the limits imposed and included only information that the State had provided Mr. Howard in discovery"; (2) the Instagram

records were self-authenticating business records, admissible without Det. Tolstoi's testimony; and (3) "the State could connect Mr. Howard to the Instagram records because they contained his first and last name, as well as his phone number."

Additional Facts Pertaining to the Claim

The Statement of Charges included the following information:

> On 1/30/2024, Det. Tolstoi provided me [i.e., Det. Kreft] with the known Instagram account of Ke'shawn Dwayne Howard, as well as a picture from this account depicting Mr. Howard, dated November 19, 2023. I authored and obtained a search warrant for this account.
>
> On 2/20/2024, I obtained this data. Within this data is the same picture of Mr. Howard that Det. Tolstoi provided. Also within this data, Mr. Howard messaged a person on 11/7/2023 from 0942 hrs to 1001 hrs. In this conversation, Mr. Howard told this person that he "dropped [his] phone in a situation lastnight [sic]" and that he "cant [sic] be here". In a different conversation, with a different person in the morning hours of 11/7/2023, Mr. Howard told a person that he dropped his phone after he got into an altercation with three people in an area near "Brook['s] building". Through my knowledge of the Harbor House community, I believe that this reference to Brooke Cevaughn Wallace, who resides in the [redacted] Madison St building, which is extremely close to where the shooting occurred.
>
> In doing so, Keshawn Dwayne Howard (M/B [DOB redacted]) identified himself as the suspect that exited [redacted] Madison St, fired a handgun at three unidentified persons, dropped his phone, then ran away.

Included in the State's discovery was an Annapolis Police Department Criminal Investigations Section *Investigative Supplement Report*, authored by Det. Kreft and dated February 20, 2024. In relevant part, that report stated that Det. Kreft "spoke with Det. Tolstoi, who provided [him] with Mr. Howard's known Instagram account, *mr.nobody_5007*." Det. Kreft "then preserved this under Meta #8414904." Det. Kreft thereafter obtained a search warrant for data from that Instagram account, and his report

provided a detailed summary of pertinent information obtained from the execution of that warrant. Much of the Instagram data subsequently was introduced at Mr. Howard's trial through Det. Kreft's testimony.

During jury selection, the State sought to add Det. Tolstoi to its witness list, and his name was included among the list of witnesses during voir dire.[17] After trial had concluded for the day, the defense moved in limine to preclude Det. Tolstoi from testifying and to exclude the Instagram records that the State sought to admit into evidence.

The following day, the State called Det. Tolstoi to the witness stand, prompting a defense objection because of the State's failure to give notice that he would be testifying. The following colloquy occurred:

> [DEFENSE COUNSEL]: So, I do object to Det[.]Tolstoi testifying at all, in that he was not put on the State's witness list. We were not given notice that the State might be calling him as a witness. The only references to Det[.]Tolstoi in discovery give no indication of what the substance of his testimony may be.
>
> So, I would ask for a proffer outside the presence of the jury, if the Court is considering allowing the State to call him, despite the fact that we weren't notified that they would be calling him.
>
> THE COURT: [Prosecutor]?
>
> [PROSECUTOR]: So, Det[.]Tolstoi, I was going to keep this super bland. Got to know the defendant through investigations; I wasn't going to

[17] The State's witness list was added to the record through a motion to correct the record, which we granted. For reasons that are unclear, we note that not only Det. Tolstoi, but also Det. Ayers, is missing from the witness list, yet defense counsel objected only to Det. Tolstoi being called. Whether that was because the prosecutor filed an amended witness list between June 28, 2024, and the beginning of trial in October, or for some other reason, we cannot determine on this record. It is undisputed, in any event, that the prosecutor did not include Det. Tolstoi on the witness list at any time prior to trial.

couch it like that. I was going to couch it through -- as a detective, you're tasked with getting to know members of the community, and have him identify the defendant.

* * *

And as part of him being able to identify him, he got to know which building he lived in and which apartment. And then, you know, obviously provided the Instagram information he had to Det[.]Kreft, and I wasn't going to get into why.

THE COURT: I'm not sure that I'm -- I'm not -- *I think he can put him on, but I don't think you can get that detail because you didn't get it out in discovery.*

[DEFENSE COUNSEL]: We also have -- if I may, *the State has made clear this morning that they intend to introduce an MVA record for Mr. Howard,* which shows the building and apartment, same address he's seeking to elicit from Detective Tolstoi. So, that would be, you know, the cumulative of what I expect will be coming in already.

THE COURT: *I'm not going to let you. You didn't tell her in discovery that Tolstoi knew that this was the address.*

[PROSECUTOR]: So --

THE COURT: It may come out later in other information, but you haven't done -- *you didn't give her any information about Tolstoi.* The fact that Tolstoi did an investigation as a result of that investigation, he was able to develop -- *there was a suspect that's clear from the discovery. After that, I don't think it's clear.*

[PROSECUTOR]: Okay. *I'll keep it to just the IDing the Instagram and cover it off there.*

THE COURT: Okay. But I -- *I am going to overrule your objection. I think you were on notice that some investigation was done by Tolstoi.* You had the ability through a motion to suppress . . . any information that came from the search warrant, *but I do agree that, to the extent that you weren't given additional discovery as it related to the things he wants to testify about, I will sustain the objection.*

[DEFENSE COUNSEL]: Yes, I would -- I just --

THE COURT: Thank you.

[DEFENSE COUNSEL]: -- would like to be clear that the only information in discovery is that Tolstoi provided a name of an Instagram account.

THE COURT: He basically, based on his --

[DEFENSE COUNSEL]: That's not in discovery. It's not --based on nothing.

THE COURT: No, no, no, no, no, no, no, no. All he said was he developed him as a suspect.

[DEFENSE COUNSEL]: That's not even in discovery. It's literally, he provided the Instagram account name. That's it.

THE COURT: But you -- but the thing is, with that is, you had the ability in that case, based on the search warrant, to follow up with that, but --

[DEFENSE COUNSEL]: That's not my obligation to figure out what Tolstoi did.

THE COURT: Okay. You understand what your marching orders are?

[PROSECUTOR]: I believe I do, yes.

[DEFENSE COUNSEL]: And may I have a continuing objection --

THE COURT: Absolutely.

[DEFENSE COUNSEL]: -- to him testifying?

THE COURT: You can have a continuing objection based on that.

(Emphasis added.)

Det. Tolstoi testified very briefly. The substantive part of his testimony was as follows:

> [PROSECUTOR]: Now, as really part of your roles and responsibilities as a police officer in general, is it your job to get to know the community?
>
> [DET. TOLSTOI]: Yes.
>
> [PROSECUTOR]: And do you know an individual named Keshawn Howard?
>
> [DET. TOLSTOI]: Yes.
>
> [PROSECUTOR]: Is that person present in the courtroom today?
>
> [DET. TOLSTOI]: Yes.
>
> [PROSECUTOR]: And could you please point him out and note an article of clothing he's wearing for the Judge and jury?
>
> [DET. TOLSTOI]: A purple button-down shirt.
>
> [PROSECUTOR]: Now, in conjunction with that, did you -- or were you aware of a possible Instagram account that may be related to him?
>
> [DET. TOLSTOI]: Yes.
>
> [PROSECUTOR]: And did you provide that information to Detective Kreft?
>
> [DET. TOLSTOI]: Yes.

Analysis

Maryland Rule 4-263(d)(3) requires that the State, "[w]ithout the necessity of a request," furnish to the defense:

> (3) *State's Witnesses.* As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-912 (b), the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged[.]

Rule 4-263(n) governs a trial court's authority to impose sanctions for discovery violations. It provides:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike any or all testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Rule 4-263 does not, "on its face," require "the court to take any action; it merely authorizes the court to act." *Thomas v. State*, 397 Md. 557, 570 (2007). Accordingly, the court "has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Id.* A trial court should consider the following factors in deciding what sanction, if any, to impose for a discovery violation:

> (1) the reasons why the disclosure was not made;
>
> (2) the existence and amount of any prejudice to the opposing party;
>
> (3) the [feasibility] of curing any prejudice with a continuance; and
>
> (4) any other relevant circumstances.

Id. at 570–71 (footnote omitted).

"[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Id.* at 571. "Exclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed." *Id.* at 572. "[B]ecause the exclusion of prosecution evidence as a

discovery sanction may result in a windfall to the defense, exclusion of evidence should be ordered only in extreme cases." *Id.* at 573.

"If the circuit court made no specific finding as a matter of law that the State violated the discovery rule, we exercise independent *de novo* review to determine whether a discovery violation occurred." *Alarcon-Ozoria v. State*, 477 Md. 75, 91 (2021) (quotation marks and citation omitted). In such a case, we review for harmless error. *Id.* But if the trial court has found a discovery violation, we review for abuse of discretion its "decision to impose, or not impose a sanction for a discovery violation." *Mason v. State*, 487 Md. 216, 239 (2024) (quoting *Alarcon-Ozoria*, 477 Md. at 91). "[A]n abuse of discretion should only be found in the extraordinary, exceptional, or most egregious case." *Id.* (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 199 (2005)). "The circuit court's decision must be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* (quoting *Devincentz v. State*, 460 Md. 518, 550 (2018)) (cleaned up).

In the present case, it is clear that the trial court found a discovery violation. It is equally clear that the trial court carefully considered the sanction it would impose, and it soundly exercised its discretion in limiting Det. Tolstoi's testimony to a few basic facts. When viewed in the context of the discovery actually provided to the defense (the Statement of Charges and the *Investigative Supplement Report*) and the greatly circumscribed testimony Det. Tolstoi was permitted to give, Mr. Howard cannot plausibly

claim unfair surprise under these circumstances. We hold that the trial court did not abuse its discretion in determining an appropriate sanction for the State's discovery violation.[18]

CONCLUSION

For the foregoing reasons, we affirm the judgments of the Circuit Court for Anne Arundel County.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[18] We further agree with the State that the Instagram documents, which included a Certificate of Authenticity from Meta's Custodian of Records, were admissible as a self-authenticating business record. Md. Rule 5-902(12). Thus, even if the trial court had granted the defense motion to preclude Det. Tolstoi from testifying, the result of the trial would have been the same, and therefore, Mr. Howard cannot prove prejudice.