Circuit Court for Prince George's County
Case No. CT150617B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2136

September Term, 2019

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JULIO JACOME-ROSALES

v.

STATE OF MARYLAND

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Graeff,
Reed,
Ripken,

JJ.

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Opinion by Graeff, J.
Concurring Opinion by Reed, J.

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Filed: December 14, 2021

Appellant was convicted by a jury in the Circuit Court for Prince George's County of second-degree murder, conspiracy to commit first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The court sentenced appellant as follows: 30 years for the conviction of second-degree murder, all but 20 years suspended; 50 years, concurrent, for the conviction of conspiracy to commit first-degree murder, all but 30 years suspended; 20 years, concurrent, for the conviction of robbery with a dangerous weapon, all but 9 years suspended; and 10 years, concurrent, for the conviction of conspiracy to commit robbery with a dangerous weapon.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in admitting into evidence portions of the transcript of appellant's custodial police interrogation, which included statements that another person allegedly made implicating appellant in the crime?

2. Did the circuit court err in admitting into evidence testimony that appellant was identified through the police department's Gang Unit?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

On the night of March 28, 2015, at approximately 8:30 p.m., Juan Lopez ("the victim") and a friend went to an apartment complex on Kanawha Street in Langley Park, Maryland.[1] They went to the residence of Mr. Armando Sanchez-Cabrera, who sold beer

[1] Because there is more than one person with the last name Lopez, we will refer to Juan Lopez as the victim.

out of his second-floor apartment. The victim stayed for approximately two-and-a-half hours, and he then left the residence.

At midnight, Mr. Sanchez-Cabrera left the living room and went to his bedroom. Rene Lopez, who also lived in the apartment and was "kind of" drunk, remained in the living room. The victim subsequently returned to the apartment, and he and Mr. Lopez fell asleep in the living room. Mr. Lopez woke up to find two other men, who had joined them in the living room. Mr. Lopez asked how they got into the apartment, and the men responded that the door was open.

Mr. Lopez recognized one of the men as "Elias," later identified as Sergio Serrano. Mr. Serrano asked for a beer, and when Mr. Lopez knocked on Mr. Sanchez-Cabrera's bedroom door, Mr. Sanchez-Cabrera said that he did not have any beer.

Mr. Lopez went to the bathroom while Mr. Serrano and his friend were talking to the victim. When Mr. Lopez returned, Mr. Serrano's friend was grabbing the victim by the neck. Mr. Lopez told the man to let go of the victim, but the man told him to "shut-up" and gave him a bloody nose. The man told the victim to stand up, and he ordered Mr. Serrano to grab the victim's wallet. The victim reached into his pocket, retrieved his wallet, and handed it to Mr. Serrano. Mr. Serrano and the man then dragged the victim out of the apartment, as the victim resisted. Mr. Lopez did not stop the men because he was afraid.

The men were inside the apartment for approximately 40 minutes before they left. Mr. Lopez testified that, while the men were in the apartment, he was not able to get a good look at Mr. Serrano's friend, but from a few glances, he noticed the man was taller and "chunkier" than him and "a little white."

When the men dragged the victim outside, the door to the apartment closed. Mr. Lopez locked the door and then sat in his chair. He heard banging and yelling in the stairway, which went on for approximately five minutes, after which there was silence. When the noise died down, Mr. Lopez got up "to smoke a cigarette" by the kitchen window for about three minutes. He did not go outside after the banging because he was fearful. Mr. Serrano then called Mr. Lopez's cellphone and said: "The next one is going to be you, dude."

The noise woke up Mr. Sanchez-Cabrera. It was approximately 2:30 a.m. He walked to the kitchen, looked out the window, and saw Mr. Serrano and another man he did not recognize running to building 1444, the complex next to Mr. Sanchez-Cabrera's apartment. Mr. Sanchez-Cabrera recognized Mr. Serrano because they lived in nearby buildings, and they occasionally would greet each other. Although Mr. Sanchez-Cabrera could not identify the man with Mr. Serrano, he observed that the man wore "some dark clothing."

Approximately 20 minutes after witnessing the two men running, Mr. Sanchez-Cabrera asked Mr. Lopez what had happened. Mr. Sanchez-Cabrera then went out of the apartment and saw the victim on the floor by the building's main entrance. There was blood, but the victim was still breathing.

Before calling the police, Mr. Sanchez-Cabrera went back into his apartment, and with Mr. Lopez's help, they grabbed some beer boxes and climbed over the victim to dispose of the boxes in the dumpster outside. They did not touch the victim. There was a shoe by the stairs that Mr. Sanchez-Cabrera picked up and threw "further down." Mr.

Lopez testified that there was a little blood on the floor outside the apartment, and Mr. Sanchez-Cabrera requested that he bring a rag to wipe it off. They threw the rag in the dumpster. Mr. Sanchez-Cabrera also threw away a doormat with blood on it. He testified that he did so to prevent trouble with the police for selling beer.

It took the men approximately 15 minutes to take the trash outside. Afterwards, Mr. Sanchez-Cabrera called an ambulance. He then went back into his bedroom, and Mr. Lopez laid down on the living room rug to sleep.

Members of the Prince George's County Fire and Rescue Department and the Prince George's County Police Department ("PGPD") subsequently arrived at the scene. Officer Ayala arrived first, less than two minutes after receiving a call "sometime between 3:00 and 4:00 a.m." to respond to the scene. After climbing the first flight of stairs, he discovered an unresponsive body. His first thought was that the man was drunk, but after a failed attempt to wake the man on the floor, Officer Ayala observed the man closer and "noticed a small puncture wound on [the man's] chest," with a small amount of blood. The man was not breathing. Officer Ayala called for more help.

On redirect examination, Officer Ayala testified that it appeared that there had been a struggle, and the victim may have been pushed down the stairs. Once emergency personnel arrived, they performed "life-saving measures," to no avail.

Corporal Jerry Montgomery arrived to process the scene. He took pictures of the interior and exterior of the building and the victim's wound. Lying near the victim were three dollars and a magnet with a key. Corporal Montgomery also collected serology and

DNA swabs. He did not check or process the dumpster around the building because he was not notified that there was anything of evidentiary value in the dumpster.

Officers began knocking on the surrounding apartment doors. Eventually they reached the second floor, where Mr. Sanchez-Cabrera resided. Mr. Lopez was asleep, but Mr. Sanchez-Cabrera opened the door. Mr. Sanchez-Cabrera initially was reluctant to talk because he did not want to "get in trouble . . . [w]ith the law." Eventually, he told the police that he had seen Mr. Serrano and another man running away. He told the police where to find Mr. Serrano. Mr. Lopez woke up and related what he witnessed. The police then arrested Mr. Serrano.

Corporal Edgerton also helped with the investigation of the case. On March 29, 2015, he received information about a possible suspect named Burro. He later determined that Burro was appellant. The police went to appellant's location, where he was asleep in a bedroom. As the officers opened the door, appellant "jumped up out of the bed, reached into his pocket and pulled a knife out."

Corporal Edgerton grabbed appellant's hand, and the knife fell on the floor. The officers arrested appellant and took him to the Criminal Investigation Division ("CID"). Appellant was wearing "a black shirt, dark-colored jeans" and grey shoes, which appeared to have two spots of dry blood on them.

Detective Marcos Rodriguez interviewed appellant. At trial, the State sought to introduce into evidence the transcript of the interview. The parties agreed to redact portions of the interview, but they could not reach an agreement regarding other portions. Defense counsel objected to the admission of un-redacted portions of the interview that referenced

gang affiliations, drug use, and "statements made by the co-defendant who is not going to testify."

With respect to statements made by Mr. Serrano, defense counsel argued that they were inadmissible because they were hearsay and violated appellant's right to confrontation. Counsel also argued that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Counsel requested that those references, which will be discussed in more detail, *infra*, be redacted before the transcript was admitted into evidence. The State argued that the statements were not hearsay because it was not offering them for the truth of the matter asserted. The court denied defense counsel's request without elaboration.

Detective Rodriguez did not testify regarding those objected-to portions of the transcript, but he read other portions of the interview where appellant stated that the knife that was recovered from him belonged to his cousin, Mr. Francisco Salvador Ceron Hernandez, and he took it from his cousin's room by accident. When shown the knife at trial, Mr. Hernandez denied ownership and stated that he did not remember having seen it.

Detective Rodriguez also testified that, during the interview, he noticed that appellant had a cut on his right thumb, which Detective Rodriguez testified was consistent with an accidental cut made during a stabbing action. Appellant told Detective Rodriguez that he got the wound while cutting vegetables. Appellant's brother, Benjamin Antonio Jacome-Rosales, testified that he saw appellant at 3:00 a.m. on March 29. He stated that appellant cut his thumb while cutting up vegetables for the barbeque Benjamin was having later that day.

During the interview, Detective Rodriguez asked appellant where he was on the evening of March 28, 2015, and the next day. Appellant advised that he was at a nightclub with Mr. Hernandez. Mr. Hernandez, however, did not corroborate that claim at trial. He testified that, on the night of March 28, into the early morning hours of March 29, he was at a nightclub, but he did not see appellant there.

Detective Rodriguez testified that, in addition to his interrogation of appellant, he interviewed Mr. Lopez. He observed that appellant is taller and lighter than Mr. Lopez. As indicated, Mr. Lopez testified that the person that was with Mr. Serrano at the apartment on the night of the murder was taller than him, and "a little white."

Dr. James Locke performed the autopsy on the victim. He testified that the stab wounds on the victim's chest indicated a single-edge weapon, which was consistent with the knife recovered from appellant. Dr. Locke acknowledged, however, that the weapon used to stab the victim could have been a different knife, and there was no way to be certain it was the knife recovered from appellant. He concluded that the victim died from "multiple sharp-force injuries," and the manner of death was homicide.

A technician from the DNA lab testified that the blood stains from appellant's shoes contained a mixed DNA profile that included appellant and the victim. With respect to the knife retrieved from appellant, DNA swabs yielded a mixed DNA profile, with the majority profile attributed to an "unknown male contributor."[2] The DNA profile obtained from the victim's fingernails excluded appellant as a possible contributor.

[2] Unknown male contributor means that the DNA profile "was not consistent with any of the references submitted," including the victim, appellant, and the witnesses.

On June 15, 2017, following appellant's convictions, the court sentenced appellant. Appellant's trial counsel failed to note a timely appeal, and in December 2019, the circuit court granted appellant post-conviction relief to file a belated appeal.

This appeal followed.

## DISCUSSION

### I.

Appellant's first contention is that the court erred in admitting into evidence portions of a transcript of his police interrogation where he was asked to respond to statements that Mr. Serrano allegedly made implicating him in the crime. He asserts that this evidence was inadmissible because the statements were hearsay, they violated his right to confrontation, and the probative value of the statements was substantially outweighed by the danger of unfair prejudice.

### A.

### Proceedings Below

The portions of the transcript that involve statements allegedly made by Mr. Serrano and relied upon by appellant are as follows:

> [DETECTIVE RODRIGUEZ]: Do you know [Mr. Serrano]?
>
> [APPELLANT]: No.
>
> [DETECTIVE RODRIGUEZ]: Well, he knows you.
>
> [APPELLANT]: Okay.
>
> [DETECTIVE RODRIGUEZ]: Okay? And he is the one that told us what happened last night.

[APPELLANT]: [Mr. Serrano], no.

[DETECTIVE RODRIGUEZ]: "*Burro*," this is your chance to – to tell the truth and to tell your version of the facts.

[APPELLANT]: I shouldn't say.

[DETECTIVE RODRIGUEZ]: Okay? He – he knows you and he told us what happened last night. There on Kanawha.

[APPELLANT]: From Kanawha we went to sleep already. We weren't – weren't getting into trouble.

* * *

[DETECTIVE RODRIGUEZ]: Well, he knows you very well and he says you are the one that stabbed the guy.

[APPELLANT]: I've seen him there on the 14th ...

* * *

[DETECTIVE RODRIGUEZ]: Well, it's – it's normal that I ask you questions to realize what happened. Look, we already know what it was that happened. Okay? Already, one of the people that [was] there already said what – what happened. The only thing I need to know is what it was – what was – what's your version of the facts.

[APPELLANT]: I wouldn't know what to tell you.

[DETECTIVE RODRIGUEZ]: Okay. That's why I'm telling you. I mean, you're – I mean, I already told you. I mean, I'm not asking you if you were or weren't there. Already – that I already know. What I'm asking you is what it was – was that you were doing there. Look, one of the things that happens many times is that when you do things with other people, those people are obviously going to tell what others did. They are not going to tell what they did. Okay?

[APPELLANT]: Thing's I wouldn't (hurt)…

[DETECTIVE RODRIGUEZ]: You – I know you were there. I tell you, the neighbors know you. The people know you. Let's say, for example, you are

Guatemalan but you're white. You know, most Guatemalans that go there are sometimes short, Indian-looking.

[APPELLANT]: Mm-hm.

[DETECTIVE RODRIGUEZ]: And those sometimes people get confused, they can't recognize them. But in your case it's different. Eh, the people know you. The people have seen you.

* * *

[DETECTIVE RODRIGUEZ]: [Mr. Serrano] has the rosary too. The guy knows you. He already identified you.

[APPELLANT]: I saw him, yes, around there but I've n- n- never ta-talked to him. No- no- no, at no time.

[DETECTIVE RODRIGUEZ]: No, he knows you. Okay? And there aren't many *"Burros"* that are called Julio Jacome.

[APPELLANT]: Uh-huh.

[DETECTIVE RODRIGUEZ]: There is really only one.

[APPELLANT]: Okay.

[DETECTIVE RODRIGUEZ]: And you – and, well, he says that you two were in a fight and that you stabbed that guy, that you tried to take his wallet.

[APPELLANT]: Much less stealing. I've never stolen or…

[DETECTIVE RODRIGUEZ]: That's what he said.

[APPELLANT]: I mean, I don't - don't - don't steal. He's telling a…

[DETECTIVE RODRIGUEZ]: That's what he says and – and, well, right now his version is the one that – that one that we have. What's your version?

* * *

[DETECTIVE RODRIGUEZ]: If there were – if it wasn't you, it was the other one. And if the other one says it was you but you say you aren't there, so who should we believe? Who should we believe?

[APPELLANT]: I don't know. I really don't know. I already told you what I had to tell you.

[DETECTIVE RODRIGUEZ]: Julio, who - who - should we believe?

[APPELLANT]: I don't know - I don't know, man. You guys know what you're doing.

[DETECTIVE RODRIGUEZ]: Believe the other one?

[APPELLANT]: You guys know what you're doing.

**B.**

**Hearsay and Confrontation Clause**

Appellant contends that the statements made to the police by Mr. Serrano, a non-testifying co-defendant, were inadmissible hearsay, and the admission of the statements violated his right to confrontation. He notes that, in *Bruton v. United States*, 391 U.S. 123, 137 (1968), the United States Supreme Court held that a defendant's right to confrontation is violated if the State offers for its truth a statement of a co-defendant to a police officer that implicates the defendant in the crime.

The State contends that the circuit court properly "admitted the questions posed by Detective Rodriguez to [appellant] during his interview with the police." It asserts that the statements were offered for a non-hearsay purpose, and therefore, there was no violation of appellant's right to confrontation.

We begin our analysis by addressing whether the statements to which appellant objects are hearsay. If we agree with the State that the statements are non-hearsay, then there are no confrontation clause concerns. *See Crawford v. Washington*, 541 U.S. 36, 60

n.9 (2004) (The confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). *Accord Williams v. Illinois*, 567 U.S. 50, 57–58 (2012); *Swain v. State*, 459 S.W.3d 283, 285 (Ark. 2015).

In assessing this hearsay issue, we note that, although we generally review rulings on the admissibility of evidence using an abuse of discretion standard, *Wheeler v. State*, 459 Md. 555, 560 (2018), we employ the *de novo* standard in determining whether a statement constitutes hearsay. *Parker v. State*, 408 Md. 428, 436 (2009). When the issue is whether a statement was offered for a purpose other than proving the truth of the matter asserted, we review the court's ruling *de novo*. *Id*. at 437. This is in contrast to our review of a ruling that involves a weighing of the probative value in relation to unfair prejudice. In that situation, "we apply the more deferential abuse of discretion standard." *Id.* (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002)).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). The statements attributed to Mr. Serrano during appellant's police interrogation clearly were made "other than . . . while testifying at trial." Md. Rule 5-801(c). The key question in this case is whether they were "offered in evidence to prove the truth of the matter asserted." *Id.* A statement that is not offered for the truth of the matter asserted is not hearsay, and it is not excluded by the hearsay rule. *Stoddard v. State*, 389 Md. 681, 689 (2005).

The State contends that that it did not offer the statements to prove the truth of the matters asserted, i.e., that Mr. Serrano implicated appellant in the victim's murder. Rather, it argues that the statements were offered to provide context for appellant's statements to the police.

The Court of Appeals has recognized the general rule that a statement is not hearsay if "it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Graves v. State*, 334 Md. 30, 38 (1994). There are, however, limitations on that general rule. Appellant's argument that the statements should be excluded as hearsay relies on Court of Appeals cases addressing those limitations in the context of an extrajudicial statement to a police officer.

In *Parker*, 408 Md. at 431, a confidential informant advised the police that "a black male wearing a blue baseball cap and black hooded sweatshirt [was] selling heroin" at a specified corner. *Id*. at 431. A police officer went to the location and observed Parker, who matched the description. *Id*. The police subsequently stopped and searched Parker, and they found heroin on his person. *Id*. at 432.

On appeal from his conviction for possession of heroin, Parker argued that the circuit court erred in allowing the police to testify regarding the statement the officer had received from the informant. *Id*. at 434. The Court of Appeals recognized that an extrajudicial statement may be relevant and admissible to prove the non-hearsay purpose of showing why the police took certain actions. *Id*. at 440 (quoting *Graves*, 334 Md. at 39–40). It stated, however, that "the non-hearsay purpose of providing the basis upon which

the arresting officer acted is not relevant to the question of a defendant's guilt." *Parker*, 408 Md. at 439. Thus, when the information is too specific regarding the defendant's criminal activity, it is too "'likely to be misused by the jury as evidence of the fact asserted'" to be justified by the non-hearsay purpose of explaining why the officer conducted his investigation. *Id*. at 431, 440 (quoting *Graves*, 334 Md. at 39–40). Moreover, in that case, although the State proffered that it was offering the extrajudicial statement for a non-hearsay purpose, the State used the statement in closing argument to prove the truth of the matter asserted. *Parker*, 408 Md. at 444. Accordingly, the Court held that the circuit court erred in admitting the statement. *Id*. at 431, 446.

In *Graves*, 334 Md. at 33–34, the Court addressed an extrajudicial statement made to a police officer by a person arrested for assault. At trial, the officer testified that the person arrested told him that Graves was his accomplice. *Id*. at 35. The State argued that the evidence was not inadmissible hearsay "because it was not admitted for the truth of the matter asserted, but rather, it was properly admitted for the limited purpose of showing how the police came to assemble a photographic array." *Id*. at 37.

The Court recognized the general rule that a statement is not hearsay if "it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Id*. at 38. It noted that the rule was relied on in criminal cases where an extrajudicial statement was relevant to issues such as probable cause. *Id*. With respect to the issue of Graves' guilt of the crime, however, the only relevance of the testimony that another individual implicated Graves as an accomplice as non-hearsay was to show that the officer relied on

that information in preparing the photographic array. *Id.* at 42. This purpose could "have been just as effectively explained by testimony that his selection of the photographs was based 'on information received.'" *Id.* at 42. Weighing the limited probative value of the statement against the unfair prejudice to Graves because of "the likelihood that the jury would misuse that information as substantive evidence of guilt," the Court held that the circuit court abused its discretion in admitting the statement. *Id.*

Although appellant relies heavily on *Parker* and *Graves*, those case are distinguishable from the present case. In *Parker* and *Graves*, the statements were used for the purpose of showing the basis for the police officer's actions, which generally is not relevant to the defendant's guilt or innocence. Here, by contrast, the statements were offered for a different purpose. They were offered to provide context for appellant's statements to the police and to show that he changed his answers when confronted with the facts known to the officers.

Appellant states that there are no cases in Maryland directly on point regarding the issue here, i.e., whether statements made by a police officer during custodial interrogation, which include alleged statements of a co-defendant implicating the defendant in a crime, are admissible as non-hearsay. That may be true, but this Court has addressed a similar issue.

In *Ashford v. State*, 147 Md. App. 1, (2002), a police sergeant testified regarding his interrogation of Ashford. The sergeant testified that Ashford initially denied any involvement in the murder, but when the sergeant told Ashford that his wife had told the police that appellant was involved with other named individuals, Ashford "admitted to his

involvement." *Id*. at 58-59. This Court rejected the argument that this testimony included inadmissible hearsay. Judge Charles Moylan, writing for this Court, stated that, even if Ashford's wife had told the sergeant that Ashford was involved,[3] "[t]he assertion by the wife was offered to show not the truth of the thing asserted, but simply to show that the appellant heard that assertion and reacted to it. The assertion in question was not hearsay."

Other jurisdictions have addressed the specific issue presented here and held that, where a law enforcement officer's questioning of a defendant includes statements allegedly made by a co-defendant, such evidence is admissible if it is not admitted for the truth of the matter asserted, but rather, it is offered to provide context for the defendant's statements. For example, in *Swain*, 459 S.W.3d at 289, the Supreme Court of Arkansas held that the detective's references in Swain's interview with the police to the co-defendant's statements were not hearsay because the "statements were not introduced into evidence to prove the truth of the matters asserted." *Id*. at 287. Rather, the purpose of introducing the transcript was to give context to Swain's responses, showing how her responses changed when she was confronted with information regarding what the detectives already had been told. *Id*. at 286. It further held that, because the statements were not hearsay, Swain's confrontation clause argument had no merit. *Id*. at 287.

Similarly, in *Estes v. State*, 249 P.3d 313, 315–16 (Ala. 2011), the court held that there was no error in admitting the police interview with Estes, where the interview

[3] The Court noted that it was a "familiar interrogation technique to mislead a suspect and to deceive him into believing" that another person implicated him in the crime. *Ashford v. State*, 147 Md. App. 1, 67 (2002).

contained out-of-court statements purportedly made by her husband, also a suspect, implicating her in the murder. The court held that the evidence was not hearsay because it was not offered to show that her husband said those things (if he did say them), but rather, it was offered for a non-hearsay purpose, i.e., to provide context for understanding the statements Estes made when she responded to those assertions. *Id*. Because many of Estes' responses were "brief statements of agreement or brief denials," the "responses would be unintelligible unless one knew the context of the gestures that prompted these responses." *Id*. at 316.

Other courts similarly have looked at the purpose of the testimony and concluded that evidence that a witness made a statement to the police implicating a defendant in a crime is not hearsay if it is offered for the nonhearsay purpose of showing the effect the statement had on the defendant. *See McWatters v. State*, 36 So.3d 613, 638 (Fla. 2010) (Permitting the State to play portions of McWatters' taped police interview, which included police statements regarding statements of other people implicating appellant in crime, was not error because the statements were not offered for their truth but to give context to McWatters' responses and to provide the circumstances in which McWatters admitted his culpability after initially denying all involvement in the crimes.); *Commonwealth v. Santana*, 82 N.E.3d 986, 996–97 (Mass. 2017) (No error in permitting officer to testify that he told Santana that he had information that Santana was in the apartment at the time because "the accusation was not offered for its truth, but rather to contextualize" Santana's response to the accusation.); *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000) (Statements made during police interview about what others said were not hearsay because

they were not offered "for their truth, but rather to give context to Tovar's responses and admissions on the tape.").

We agree with the analysis set forth in these cases.[4] We hold that evidence of police questioning, which includes a statement from another individual, including a codefendant. implicating the defendant in a crime, may, in appropriate circumstances, be admissible for the non-hearsay purpose of showing the defendant's response or giving context to that response.

Here, the State proffered at trial that the statements of Mr. Serrano were not being offered for the truth of the matter asserted. On appeal, it reiterates that the State did not include the statements "to establish that Elias, in fact, implicated [appellant] in" the murder, noting that there was no evidence adduced that Mr. Serrano actually said anything to the police. Rather, the State asserts that the statements were admitted to provide context for appellant's responses.

We agree. The statements showed that appellant initially denied knowing Mr. Serrano. After appellant was advised that Mr. Serrano said that appellant stabbed the victim, appellant changed his story and acknowledged that he knew Mr. Serrano. The statements were relevant for the non-hearsay purpose of giving context to appellant's

[4] We recognize that not all courts have permitted such evidence to be introduced as non-hearsay. In *State v. Brown*, 988 N.E. 2d 924, 933 (Ohio Ct. App. 2013), the court rejected the State's argument that it was proper to allow into evidence a video of police interrogation that included a representation that a co-defendant had implicated Brown for the non-hearsay purpose of showing Brown's reaction. The court stated that the evidence was probative only to support the truth of the matter asserted. *Id*. Here, as we explain, we are persuaded that the evidence was probative for a non-hearsay purpose.

responses and helping the jury to judge his credibility. Thus, they were not inadmissible hearsay, and the admission of the statements did not violate appellant's right to confrontation.

As appellant notes, in some of the out-of-state cases cited, the court gave a limiting instruction advising the jury not to consider the statements for the truth of the matter asserted. *See Swain*, 459 S.W.3d at 284–85, 286–87; *McWatters*, 36 So.3d at 638; *Santana*, 82 N.E.3d at 997. Although a limiting instruction is appropriate in some circumstances, the failure to give one in this case does not lead to the conclusion that the court erred in admitting the evidence.

Maryland Rule 5-105 provides: "[w]hen evidence . . . is admissible . . . for one purpose but not admissible . . . for another purpose, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added). Here, appellant did not ask for a limiting instruction. Thus, any claim that the court erred in failing to give such an instruction would not be preserved for review. *See* Maryland Rule 8-131(a) (court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court."); *Tovar*, 605 N.W.2d at 725 (declining to find plain error in failing to give a limiting instruction regarding statements made during police interview where there was no request for such an instruction). Perhaps recognizing the preservation problem, appellant, although pointing out the limiting instruction given in other cases, does not raise the failure to give such an instruction as an error on appeal.

Indeed, defense counsel may have made a tactical decision not to request such an instruction. Given that the State did not address these statements in testimony or argument,

and the statements were merely submitted as part of a 46-page transcript, asking for an instruction regarding the statements may have highlighted a statement that the jury did not even see. The failure to give a limiting instruction here, where it was not requested, was not error, and it does not make the court's decision to admit the evidence erroneous.

**C.**

**Probative Value vs. Prejudicial Effect**

Appellant next contends that the court abused its discretion in admitting into evidence portions of the police interrogation transcript, which included the statements by Mr. Serrano, because the probative value of this evidence was outweighed by the danger of unfair prejudice. He argues that this evidence had limited probative value, as evidenced by the fact that the State did not rely on the challenged portions of the transcript in its case-in-chief. He asserts that this limited probative value was outweighed by the substantial danger of unfair prejudice from the admission of repeated statements that Mr. Serrano directly implicated him in a crime.

The State contends that the court did not abuse its discretion in admitting the evidence because the probative value outweighed the potential for unfair prejudice. The State argues that the evidence was probative for several reasons. It notes that the transcript showed appellant's reaction to the alleged accusation by Mr. Serrano that appellant stabbed the victim, which was that appellant had seen Mr. Serrano "on the 14th." The State asserts that reaction was significant because: (1) appellant's initial response was not to deny the accusation; and (2) appellant initially denied knowing Mr. Serrano, "but then backtracked," which was relevant to his credibility throughout the interview.

With respect to prejudice, the State notes that the statements were not offered for their truth, and the State did not rely on them in their case-in-chief, which signaled to the jury, even if it read the statements in the 46-page transcript, that they were less significant than the ones highlighted by Detective Rodriguez in his testimony. Moreover, there was no evidence adduced at trial indicating that Mr. Serrano actually implicated appellant in the crime, making it is "less likely that the jury would believe that [Mr. Serrano] [] made such a statement," thereby reducing any potential for unfair prejudice.

Pursuant to Maryland Rule 5-403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Here, as indicated, we conclude that the evidence was probative to show that appellant's statements to the police changed when confronted with information shared by the police, and it was probative regarding appellant's credibility.

The next step is to balance the probative value of the evidence against the danger of unfair prejudice. As indicated, this type of decision is reviewed for an abuse of discretion. *Parker*, 408 Md. at 437. An abuse of discretion is found when the circuit court's decision is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Devincentz v. State*, 460 Md. 518, 550 (2018) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

In balancing the probative value against the danger of unfair prejudice, we note that the fact that evidence prejudices a party, "'in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.'" *Burris v. State*, 435 Md. 370, 392 (2013) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)). "Rather, evidence is considered

unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Id.* Therefore, the more probative the evidence, "'the less likely it is that the evidence will be unfairly prejudicial.'" *Id*.

Here, as indicated, the State argues, and we agree, that the evidence was probative because it went to appellant's credibility. With respect to the danger of unfair prejudice, it is significant that the challenged portions of the transcript were not discussed at trial or in the State's closing argument; rather, they merely were included in a 46-page transcript admitted into evidence. Even if the jury read that whole transcript and saw those statements, the fact that the State did not reference them, and there was no evidence admitted at trial that Mr. Serrano actually implicated appellant in the crime, diluted any potential prejudice the statements may have had.

Accordingly, under these circumstances, it was not an abuse of discretion to conclude that the probative value of the statements was not outweighed by the danger of unfair prejudice. The circuit court did not err or abuse its discretion in allowing into evidence the challenged portions of the transcript.

**II.**

**Identification by the Gang Unit**

Prior to trial, the defendant filed a motion in limine to exclude any references to gang affiliation. The State advised that gang membership may be relevant regarding how and where appellant was located, noting that he was taken into custody at a house where the PGPD Gang Unit has observed known MS-13 members. The court granted the motion

and instructed the State to advise its witnesses "that there is no need to bring up any gang activities" given the posture of the case.

At trial Detective Andre Brooks testified that, during his investigation, he developed a suspect with the nickname "Burro." When asked what he did with that information, he stated:

> Well, on the scene, the Gang Unit, they normally come out when we have a homicide in Langley Park. It's customary for them to come out. Actually, they come out on everything. So they were already there. So we provided that name to them. They tapped their database and - -

Before the detective could answer, defense counsel objected and moved to strike. At a bench conference, the prosecutor said that he was fine striking the reference to the database, and the court then sustained the objection and instructed the jury to disregard the last sentence.[5] Detective Brooks then testified that, based on the information that he "provided to the Gang Unit," the police were able to determine "the actual name of Burro." The court overruled defense counsel's objection.

Appellant contends that the circuit court abused its discretion in admitting into evidence testimony that the PGPD Gang Unit identified appellant after it was given the name Burro as a suspect. He asserts that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.[6]

[5] The court asked if the prosecutor had spoken with the witness, and the prosecutor indicated that he had. The court advised the prosecutor to again remind the witness.

[6] Appellant argued in his opening brief that the court abused its discretion in admitting evidence that appellant was identified through the "PGPD Gang Unit's database." In his reply brief, he acknowledged that the court advised the jury to disregard

Appellant argues that the evidence that he was identified by the Gang Unit had no probative value, given that there was no evidence that he was a gang member or that the crime was gang-related. He asserts that the State simply could have said that he was identified as a suspect "through subsequent investigation." The mention of his identification by the Gang Unit, however, was unfairly prejudicial because, "once the jury heard that [appellant] was a gang member, and that is what the jury heard regardless of what was actually said, any remaining reasonable doubt would have evaporated."

The State contends that the circuit court properly admitted testimony that, based on information that the police provided to the Gang Unit, they identified appellant as "Burro." It argues that, because appellant's "defense centered on the quality of the police's investigation, the means by which they identified him as 'Burro' was highly relevant to the State's case." Moreover, it asserts that "the reference to the Gang Unit's limited involvement in the case did not unfairly prejudice" appellant because it did not establish that appellant was affiliated with a gang or involved in gang activities. In any event, the State asserts that, even if it was error to admit the evidence, any error was harmless.

As indicated, Detective Andre Brooks testified that, in the course of interviewing witnesses, they developed the name "Burro" as a second suspect, along with Mr. Serrano. They provided that name to the Gang Unit, which typically was on the scene when there

that portion of the detective's testimony, and therefore, it did not admit testimony regarding the database. Appellant indicated, however, that he maintains his claim that the circuit court erred in admitting testimony that the PGPD Gang Unit identified appellant by the name "Burro."

was a homicide in the area. Based on that information, the Gang Unit was able to determine the actual name of Burro.[7]

Evidence that the Gang Unit was able to connect the name "Burro," a person whom the police believed to be involved in the crime, to appellant was relevant to appellant's identity as the perpetrator. Moreover, because the defense challenged the proprietary of the police investigation, evidence relating to how the police linked the nickname "Burro" to appellant was important to the State's case.[8]

In balancing the probative value of the evidence against the danger of unfair prejudice, we note the potential for unfair prejudice associated with gang evidence "because of its 'highly incendiary nature . . . and the possibility that a jury may determine guilt by association rather than by its belief that the defendant committed the criminal acts.'" *Burris*, 435 Md. at 393 (quoting *Gutierrez v. State*, 423 Md. 476, 495 (2011)). The circuit court recognized the potential prejudice relating to gang evidence, and it took steps

[7] In its closing argument, the State referenced this testimony. It stated that the police "get the name, Burro, and that name is now referred directly to the Gang Unit. They give them the name, Burro. The Gang Unit investigates that name." Defense counsel objected. At the bench conference, counsel explained that she objected to any reference to the Gang Unit. She said she let it slide the first time, but she asked that it "be stricken and not continued." The court noted that the evidence was that the Gang Unit connected the name to appellant, but it advised the prosecutor not to make any more references to the "gang unit." The State then proceeded with its closing, stating that they learned that the suspect named Burro was appellant.

[8] Among other things, appellant's trial counsel questioned the police failure to search the dumpster where Mr. Sanchez-Cabrera and Mr. Lopez dumped the beer boxes and "bloody rag," alleged mishandling or contamination of appellant's shoes and other evidence at the police station, and noted the police failure to test certain evidence for fingerprints and track appellant's phone records.

to limit testimony regarding gangs. The only testimony that was admitted merely indicated that the Gang Unit linked appellant with the name Burro. There was no testimony, however, that appellant was affiliated with a gang, and the testimony that did come in, that the police gave the name Burro to the Gang Unit did not suggest that appellant was part of a gang, or that the crime was gang-related. Rather, the testimony was that this unit went to the scene of all homicides in the area.

Given all the testimony, the circuit court did not abuse its discretion in determining that the evidence was not so prejudicial that it outweighed the probative value of the evidence. The court did not err in admitting this evidence.

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

Circuit Court for Prince George's County
Case No. CT150617B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2136

September Term, 2019

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JULIO JACOME-ROSALES

v.

STATE OF MARYLAND

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Graeff,
Reed,
Ripken,

JJ.

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Concurring Opinion by Reed, J.

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Filed: December 14, 2021

I write separately because, in admitting the testimonial evidence regarding the gang activity and gang unit, the Circuit Court for Prince George's County committed error but ultimately harmless error. While in Maryland, there is no bar to introducing gang related evidence in trials, evidence should be weighed in the light in which its probative value is not outweighed by the probability of unfair prejudice. In many cases where evidence that ties a defendant to any gang related activity was admitted, relatedness of the conduct of the gang and the crime at bar are considered. *See generally Dawson v. Delaware*, 503 U.S. 159, 165-166 (1992) (it is constitutional error to admit stipulation of defendant's membership in a white racist prison gang where the gang related evidence was not relevant to any issue being decided at the punishment phase); *Gutierrez v. State*, 423 Md. 476 (2011) (expert testimony relating to information about gangs is permissible where factual evidence establishes that the crime charged was gang related and the probative value of the testimony is not substantially outweighed by any unfair prejudice to the defendant); *Baires v. State of Maryland*, 249 Md. App. 62 (2021) (evidence of unrelated gang actions in which the defendant had no knowledge was not admissible); *But see Cruz-Quintanilla v. State*, 228 Md. App. 64 (2016) (evidence of gang membership during the sentencing phase may be considered). To be frank, any effort to clean up the error might not have been enough under the circumstances presented in this case.

In the case at bar, the court granted a motion in limine to exclude any references to gang activity. The circuit court instructed the State "to advise [its] witnesses that there is no need to bring up any gang activities given the posture of the crimes that [Appellant's] charge[d] [with] here."

The State did not follow the court's instruction and introduced testimony during direct examination of Detective Andre Brooks and the State's closing arguments mentioning gangs. While testifying, Detective Brooks stated, "[w]ell, on the scene, the Gang Unit, they normally come out when we have a homicide in Langley Park . . . [i]t's customary for them to come out . . . [a]ctually, they come out on everything . . . [s]o they were already there . . . [s]o we provided that name to them . . . [t]hey tapped their database and —". The court sustained the objection and asked the statement to be stricken from the record. However, the State then asked, "[b]ased on the information that you provided to the Gang Unit, were they able to determine the actual name of Burro?" Officer Brooks answered, "yes." The court overruled the Appellant's second objection and allowed the testimony connecting the Gang Unit and the Appellant's gang nickname "Burro" into evidence. Finally, the State, in their closing arguments explains, "[t]hey get the name, Burro, and that name is now referred directly to the Gang Unit . . . [t]hey give them the name, Burro . . . [t]he Gang Unit investigates that name, that name is then —". Appellant objected, and court sustained the third objection, but unlike the first statement, did not instruct the jury to strike that statement**.**

Gang related evidence is "highly incendiary" in nature and in *Gutierrez v. State*, 423 Md. 476 (2011), the Court of Appeals remained "ever-cognizant of . . . the possibility that a jury may determine guilt by association, rather than by its belief that the defendant committed the criminal acts." *Gutierrez*, 423 Md. at 495. The crime committed by Appellant was not gang related. The circuit court recognized and instructed the State to direct its witnesses to not refer to any gang related activities, but the State disregarded the

instruction and the circuit court admitted the evidence. Since there was no relevance of Appellant's gang association to the crime, charges at bar and gang related evidence is "highly incendiary" in nature, any gang related testimony admitted by the circuit court is a clear error.

However, I do believe that the circuit court's error in admitting the evidence was harmless. The Court of Appeals states "[e]ven where there is error, this Court will not reverse a lower court's judgment for harmless error. Rather, the complaining party must demonstrate that the error was prejudicial, or in other words, 'the error was likely to have affected the verdict below.'" *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 49 (2016) (citing *Crane v. Dunn*, 382 Md. 83, 91 (2004)). "Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice." *Brown v. Daniel Realty Co.*, 409 Md. 565, 584 (2009) (quoting *Flores v. Bell*, 398 Md. 27, 34 (2007)). The appellate inquiry focuses "not [on] the possibility, but probability, of prejudice." *Crane*, 382 Md. at 91.

I believe that the error committed is harmless because the jury had significant amounts of evidence apart from the evidence admitted in error. *See Baires v. State of Maryland*, 249 Md. App. 62, 90 (2021). "Looking to the other evidence on the record, we are confident that the [gang related testimony] would not have persuaded the jury to render a guilty verdict when it would not have otherwise done so." *Gutierrez*, 423 Md. at 500 (2011). As the State concludes, "[t]he lynchpins of the State's case were the presence of both Lopez's and [Appellant's] blood on [Appellant's] shoes, the cut on [Appellant's] right hand, and his possession of a knife at the time of his arrest." Based on the substantial

amount of other non-gang related evidence before the jury, the evidence admitted by the court tying Appellant to a gang would likely not have persuaded the jury to deem Appellant guilty, where they otherwise would have rendered another verdict. Thus, given the serious nature and abundance of other evidence considered by the jury, the error seems unlikely to have affected the outcome of the verdict and was harmless.