UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1555

September Term, 2013

PHILLIP HERRELL

v.

STATE of MARYLAND

Krauser, C.J.,
Wright,
Hotten,

JJ.

Opinion by Hotten, J.

Filed: December 23, 2014

A jury in the Circuit Court for Baltimore City convicted Phillip Herrell, appellant, of first-degree murder and use of a handgun in the commission of a crime of violence.[1] The circuit court sentenced the appellant to a period of life plus fifteen years, the first five years without the possibility of parole pursuant to Criminal Law Article §4-204. On appeal, appellant presents two issues for our review, which we have rephrased:[2]

I. Whether the trial court erred or abused its discretion in admitting evidence regarding the extent of appellant's gang involvement.

II. Whether the trial court abused its discretion by limiting the defense's cross-examination of a prosecution witness.

For the reasons outlined below, we shall affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL HISTORY

Appellant does not challenge the sufficiency of the State's evidence. We have reviewed the record as a whole, but given the parties' familiarity with the record, we need only recite portions of the record for context. *See Westray v. State*, 217 Md. App. 429, 434 n.2 (2014). *See Hill v. State*, 418 Md. 62, 66 (2011); *Cure v. State*, 195 Md. App. 557, 561

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[1] Common law murder is divided into degrees by statute. *See Thornton v. State*, 397 Md. 704, 721 (2007) (quoting *Clemons v. State*, 392 Md. 339, 345 n. 2 (2006)). At the time of the events in this case, Md. Code (2002, 2006 Supp.), §§ 2-201(a), (b) of the Criminal Law Article ("Crim. Law") governed first degree murder and the applicable penalty. Use of a handgun in the commission of a crime of violence was proscribed by Crim. Law § 4-204.

[2] Appellant's original questions presented are as follows:

1. Did the trial court err in admitting extensive evidence about [a]ppellant's gang involvement?

2. Did the trial court err in limiting cross-examination into potential bias of a witness?

(2010) (only brief summary necessary), *aff'd on other grounds*, 421 Md. 300 (2011). *See generally Whitney v. State*, 158 Md. App. 519, 524 (2004); *Craig v. State*, 148 Md. App. 670, 674 n.1 (2002); *Pearlstein v. State*, 76 Md. App. 507, 520 (1988) (unnecessary to recapitulate all evidence presented at trial).

This case arises from the shooting death of Melvin Jordan ("Mr. Jordan") in the early morning hours of June 9, 2007 in the 900 block of Preston Street in Baltimore City.[3] Mr. Jordan was shot multiple times, sustaining at least one wound consistent with being shot at close range and while lying on the ground.

Latanya Kimber ("Ms. Kimber") lived in the 900 block of Preston Street in her stepfather's row house near the intersection with Ensor. At the time of the shooting, she was watching television in the living room, when she heard a loud argument. The living room is in the front of the house, so Ms. Kimber managed to look outside and observed several people arguing. Although she heard gunshots, she testified that she did not see the shooting, and when she again looked outside, Ms. Kimber saw the victim lying in front of the house, and recognized him as a person involved in the argument.

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[3] The indictment in this case misstates the offense date as "June 9, 2012." As far as we can discern from the record and briefs on appeal, this was not challenged. In any event, an incorrect offense date does not invalidate that charging document. "'[T]he exact date of the offense is not an essential element, and is not constitutionally required to be set forth [in an indictment.]'" *Thompson v. State*, 412 Md. 497, 518 (2010) (quoting *State v. Mulkey*, 316 Md. 475, 482 (1989)). *Cf. United States v. Ridens*, 362 F. Supp. 358, 359 (D. Pa. 1973) (noting that "courts have permitted a typographical error in a date (where time is not an element of the offense) to be corrected by amendment in the bill of particulars[.]")

Ms. Kimber did not speak with the police about this incident until a few days later, when she was arrested on unrelated charges. Investigators showed her photo arrays, from which she identified photographs of Kevin Dudley ("Mr. Dudley"), known to her as either "Glenny" or "Blaire," and Antonio Edwards ("Mr. Edwards"). She identified Mr. Dudley as standing outside with Mr. Edwards.

Appellant and Mr. Dudley are two of William Smith's ("Mr. Smith") nephews. Mr. Smith, who was also familiar with appellant's companion Antonio Edwards from the neighborhood, had resided in the 1000 block of East Preston Street for his entire life. On the morning of the shooting, Mr. Smith was walking up and down the block, accompanied by his girlfriend Tanielle Wendo. They joined a woman named "Joycie" on the steps of a vacant house, when two women started an altercation. This confrontation, referred to as a "girl fight," attracted a crowd.

During this event, Mr. Smith noticed Mr. Edwards, Mr. Dudley and appellant loitering near the corner of Ensor and Preston Streets. At one point, he saw a man, wearing a red shirt, standing by a laundromat on the other side of Ensor and Preston Streets. This person, later identified as the victim Melvin Jordan, was engaged in a telephone conversation. Mr. Smith saw Mr. Dudley, one of appellant's companions, walk across the street and approach the stranger. A conversation between the two men ensued, and, according to Mr. Smith, must not have been pleasant because they raised their voices.

Mr. Dudley returned across the street to join appellant and Mr. Edwards. The three then began to walk toward the "girl fight." The trio paused at the "Cut Rate" bar, then soon returned to the area of Ensor and Preston Streets, to confront Mr. Jordan. When the three reached this intersection, Mr. Dudley and Mr. Edwards stopped while appellant continued across the street, approached and then shot Mr. Jordan. According to Mr. Smith, appellant used a black automatic 9-millimeter handgun, and fired three or four shots. He and his companions walked away from the scene.

Mr. Smith acknowledged that, in the interim, he and his girlfriend also left the scene without speaking to police. Mr. Smith would be arrested on unrelated charges in September, 2007. He told police at that time that he knew about the Jordan murder, although he did not elaborate on this disclosure. He gave a recorded statement the following October, and also identified appellant in a photo array. Identifying appellant's photograph, Mr. Smith wrote "I saw him shoot the guy that night at, on Ensor Street. It was three of them and his name is Phil."

Tanielle Wendo ("Ms. Wendo") testified that in 2007 she was Mr. Smith's girlfriend. Although she was homeless, Ms. Wendo indicated that Mr. Smith had lived on Preston Street his entire life. At trial, Ms. Wendo could not recall being outside on Preston Street on the morning of the shooting, and could not remember any of the events that occurred on that date.

Ms. Wendo was asked about statements she made to police two months after the murder. Ms. Wendo was arrested in August, 2008, on an unrelated narcotics charge. Detectives who were investigating the murder decided to ask Ms. Wendo about the events of June 9, 2007. According to Ms. Wendo, she acknowledged that she had heard about the murder but had not seen it. She also testified that she was a heroin addict at the time, and selected appellant's photograph from an array because detectives asked her whether she saw "Phillip." When she identified appellant from the photo array, Ms. Wendo wrote:

> Photo two is the person whom I saw walk past me in the ten hundred block of Preston Street with a gun in his right hand and began shooting in the 900 block of Preston Street and the person he shot was killed.

Ms. Wendo repeated this version of events in a later statement and before the grand jury.

When arrested in August, 2008, Ms. Wendo provided a recorded statement to police. In this statement, which was played for the jury, Ms. Wendo recounted that she was sitting outside in the 1000 block of Preston Street.[4] One of her companions remarked about a man, later identified as the victim, Mr. Jordan, who was wearing a red shirt. This caught their attention, she said, "because they are Crips and he had on a red T-shirt." When Mr. Jordan walked by a second time, Ms. Wendo's companions said something to him.

In her statement, Ms. Wendo said that appellant was a ranking member of the Crips, and that they wear blue colors. She explained that appellant's companions thought that it was

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[4] Ms. Wendo claimed that she was high and intoxicated when she gave this statement.

disrespectful for the stranger to walk through their block wearing a red shirt. They began to argue, and Mr. Jordan stated "[f]uck you all. I'll walk wherever I want to walk at and this and this and he said he had the red shirt, he was just coming home from jail or something. Something of that nature and he can walk where he wants." Mr. Jordan then produced his cell phone and made a call. Ms. Wendo recounted that he "proceeded to act like he was calling somebody to come and get him or maybe, you know, like it's going to be a problem[. . .]."

Appellant left, and returned a few minutes later armed with a handgun. At this time, Ms. Wendo ran into Mr. Smith's house and then heard ten or twelve gunshots. When she returned outside, she saw Mr. Jordan lying on the ground. She described the handgun as black, and thought that it looked like a 9-millimeter.

In her statement, Ms. Wendo said that the Crips later met to discuss the shooting. For awhile thereafter, appellant did not leave his house, and when he eventually did so, it was in disguise.

Kevin Dudley testified that he recalled the "girl fight" in June, 2007, in which members of his family participated. He lived on Preston Street at the time. He denied seeing appellant shoot anyone on June 9, 2007. Mr. Dudley disavowed any of his earlier statements that incriminated appellant, and distanced himself from his identification of appellant from a photo array. He denied telling a detective that appellant had shot anyone, and also claimed that his grand jury testimony was coerced. As to the latter, he explained that he testified

before the grand jury because an officer threatened to charge him unless he testified as directed. After hearing this testimony, which was played for the jury, Mr. Dudley acknowledged that it was true.

The State played Mr. Dudley's grand jury testimony at trial. Mr. Dudley testified that on the night of the shooting, he hosted a party at a bar on Preston Street. A stranger in a burgundy shirt who accompanied an acquaintance of Mr. Dudley was not admitted. At this point, an altercation started between some women at the party, and the fight migrated outside.

In the meantime, according to his grand jury testimony, Mr. Dudley and appellant were approached by a cousin, who informed them about someone standing on a street corner wearing a burgundy shirt. Mr. Dudley explained to the grand jury that many neighborhood residents are members of the Crips or Black Guerilla Family ("BGF"), and that the colors of these gangs are blue and black, while burgundy is a color for the Bloods. He also said that appellant was a member of the Crips.

Mr. Dudley told the grand jury that appellant and a man named Darryl went through the alley towards Ensor Street. At that point, he saw appellant shoot at the man in the burgundy shirt while the latter was backing up, and that the man then fell to the ground.

The police interviewed appellant, who provided a statement contradicting the testimony of State's witnesses. He indicated that there were no gangs in the Preston Street neighborhood; and that he was not in a gang. Although he had heard that a shooting took place and someone was killed, appellant said that he was babysitting at the time of the

shooting, and remained inside with the mother of his child during that period. Despite having friends and family in the Preston Street neighborhood, appellant preferred to spend time in another neighborhood with the mother of his child.

On July 24, 2013 a jury convicted appellant as noted above. On September 26, 2013 the trial court sentenced him to life imprisonment for first-degree murder and a consecutive fifteen years' incarceration for use of a handgun in the commission of a crime of violence with the first five years without the possibility of parole, pursuant to Criminal Law Article § 4-204.

Appellant noted a timely appeal to this Court. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

DISCUSSION

I. Evidence of Gang Involvement

Appellant complains of the trial court's allowance of testimony related to his involvement in gangs. He first asserts that the trial court "committed reversible error in admitting extensive gang testimony when there was no clear and convincing evidence that the crime was gang related." He also claims that the trial judge's error was compounded by the fact that evidence of his gang membership was "received in front of the jury[.]" He further assails the unduly prejudicial nature of such evidence. We find no reversible error and explain.

i.

The State filed a pre-trial motion *in limine* for a ruling on the admissibility of "other crimes evidence," specifically evidence of gang involvement. According to State's motion, "[b]ased on information developed in the investigation, State submits that part of the motive for the murder was gang related." The State averred that appellant "shot and killed" Mr. Jordan because of the latter showed "disrespect" by wearing a red shirt in a neighborhood with the reputation of being rival gang territory.

The trial court conducted a hearing on State's motion just prior to trial. After the prosecutor submitted on the it's pleading, appellant's counsel explained his opposition:

> [APPELLANT'S COUNSEL]: Your Honor, there's a lot of issues that I have involving this situation. Here's why. I admit that I did do research on this case and there have been cases recently in which the Court of Appeals and Court of Special Appeals has in certain instances deem that the State's Attorney's Office or the prosecution has been able to get through the necessary steps to allow this certain type of other crime evidence in, but there's been one important thing that's not here that happened in every single other of those cases and every case the State cited and I researched and used this as a critical factor in deciding whether the gang evidence should come in and that's an expert witness from either a Police Department or something of that nature to discuss the gang situation. None of them allowed, no cases I could find allowed a lay witness in testimony whether it be from someone who may have been in the gang, people in the neighborhood who her [sic] hearsay he might have been in the gang. None other case allowing, allowed that evidence that I could find that only involved layman's testimony. Every single case the State cites in here particularly Borrows v. State [*Burris v. State*, 435 Md. 370 (2013)] required and discussed as an important factor in whether the State met the clear and convincing burden that's going to be in part of my [sic] down the road to allow this information in, that, that expert testimony about gang relations and types of gangs and the way the gangs work and what was required by every court that I had found.

Counsel further argued that evidence of gang involvement would be unduly prejudicial, and that it would undermine one theory of the defense that Mr. Dudley shot the victim because of a "bad drug transaction."

The trial court took the matter under advisement, pending development of the evidence. The court initially indicated its reluctance to permit this evidence as to motive:

> THE COURT: I'm going to reserve on this and I am going to listen to the witnesses and see how this is built up to this point and how it fits into the, the examinations and cross-examinations that have been provided, but I must tell you that I'm reluctant to allow it as a possible motive.

The trial court confronted this issue during trial just prior to the testimony of Ms. Wendo. When the State sought to examine her about her prior statements to police and testimony before the grand jury, appellant's counsel objected because she had referred to gang involvement. The trial court disagreed:

> [APPELLANT'S COUNSEL:] I still don't think even with what this witness says in her statement that that aspect clear and convincing threshold required based on everything else that the case law says in this matter.
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> THE COURT: I have spent some time over the weekend thinking about that. For the bad acts evidence to come in, the evidence must be clear and convincing that the person has committed the bad act. The bad act in question is that he's in a gang. It can't come in unless you have clear and convincing evidence that he is a gang member and testimony of others particularly including this woman, he is a gang member, very well can be clear and convincing evidence. The evidence does not have to be clear and convincing that the bad act is the motive for the crime, but rather for motive to crime, it has to be one that can reasonably drawn from all the circumstances

> surrounding it. There's no clear and convincing evidence on the ILA[5] [sic] standard. The [*Ayala*] standard is, is taking all the circumstances together sort of a totality of the circumstances, can a trier of fact glean this motive. So, on clear and convincing, I mean I could strike it all at the end if, if other witnesses are not going to testify that he was in fact a member of that gang, but the State has, has said repeatedly that they have evidence to back up that allegation.

The trial court later ruled that Ms. Wendo's statement in its entirety could be admitted if the evidence showed that appellant was a member of the Crips.

The next day, State presented the testimony of appellant's uncle, William Smith, who said that appellant was a member of the Crips and that the neighborhood around Preston and Ensor Streets was known as Crips territory. Following this testimony, State renewed its request to examine Ms. Wendo about gang activity in the neighborhood and to publish her statements. The trial court ruled in favor of the State, granted the defense a continuing objection, and explained:

> THE COURT: The question is, has clear and convincing evidence been presented that of [appellant's] involved in a gang and it is the sworn testimony of this witness that he has admitted that he's a member of the gang and associates with other admitted members of the Crips.
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> [STATE]: Yes.
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> [APPELLANT'S COUNSEL]: And I just renew my continuing objection. I'll just keep the same argument as I've had throughout the trial and just ask that my objection, my continuing objection continue to be granted throughout.
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> THE COURT: Very well. I think for the purpose of establishing a motive pursuant to [*Ayala*], the evidence is sufficient to allow the prior conduct of

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[5] We agree with the State that this is an apparent reference to this Court's decision in *Ayala v. State*, 174 Md. App. 647 (2007).

> [appellant] to be admitted in conjunction with the events of that night. I do believe that the prejudicial value as it will have prejudicial value or wouldn't be sought by evidence by one side or the other, but I do believe the prejudice, the, the relevance to the trial of providing a motive outweighs any impermissible prejudice and that the evidence that has been presented to this point is in my interpretation clear and convincing of [appellant]'s involvement in the gang. So, I am going to allow that to be discussed. . . .

This issue was implicated during the testimony of several State witnesses. William Smith recounted that he knew that the neighborhoods in the vicinity of Preston and Ensor Streets were controlled by the Crips and BGF gangs.[6] Appellant had told Mr. Smith that he was a member of the Crips, and Mr. Smith further testified, over objection, that Mr. Edwards was also a Crips member. Mr. Smith was not surprised that Mr. Dudley would confront a person wearing red, because to him that signified that the person was a member of the Bloods, a rival gang. Mr. Smith also recalled that, following the shooting, appellant began to wear hats with his dreadlocks tucked underneath.

ii.

This issue turns on the application of the "propensity rule" set forth in Maryland Rule 5-404(b). This Rule relevantly provides:

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[6] State was not required to present expert testimony regarding the intricacies of gang structure or about the general character of gang structure. The testimony in this case is a straightforward description of the fact that certain gangs in the neighborhood of the witnesses wore certain colors, that symbols painted on walls marked the territory, and that members of certain gangs did not like members of others. The colors and symbols were meant for a lay audience – residents of the neighborhood and strangers who entered – and their meaning was not esoteric and they could be described for the jury by lay witnesses whose testimony was "rationally based on [their] perception[.]" Md. Rule 5-701.

> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Md. Rule 5-404(b).

"[Maryland] Rule 5–404(b) 'embodies the Maryland common law of evidence concerning other crimes [ ], which existed prior to the adoption of the Rule.'" *Odum v. State*, 412 Md. 593, 610 (2010) (quoting *Boyd v. State*, 399 Md. 457, 482 (2007)). "[Maryland] Rule 5–404(b) is a rule of exclusion, grounded in the reality that substantive and procedural protections are necessary to guard against the potential misuse of other crimes or bad acts evidence and avoid the risk that the evidence will be used improperly by the jury against a defendant." *Burris v. State*, 435 Md. 370, 385 (2013) (citations and internal quotation marks omitted). *See Streater v. State*, 352 Md. 800, 806 (1999). "Evidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner*, 314 Md. 630, 633 (1989). Thus, the "general rule in this [S]tate . . . is that . . . evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial . . . is irrelevant and inadmissible." *Ross v. State*, 276 Md. 664, 669 (1976) (citations omitted). In short, "a court may not admit evidence of other crimes, wrongs, or acts that is offered 'to prove the character of a person in order to show action in conformity therewith.'" *Gutierrez v. State*, 423 Md. 476, 489 (2011) (quoting Md. Rule 5-404(b)).

Although a rule of exclusion, disputed "other acts" evidence may be admitted if it satisfies three requirements. The evidence must hold some substantial relevance to some contested issue in the case. A defendant's involvement in the other acts evidence must be demonstrated by clear and convincing evidence. Finally, the probative value of the disputed evidence must outweigh its prejudicial effect on the defense. *See Gutierrez*, 423 Md. at 489-90 (citations omitted). Before ruling on the admission of "other crimes" or "other acts" evidence, the trial court must conduct a three-step test:

> First, the evidence must fall within one of the exceptions listed in Rule 5–404(b), or otherwise have special relevance to some contested issue in the case[.] Second, after determining whether the contested evidence falls within an exception to the general bar on the use of other crimes evidence, the court must find that the accused's involvement in the other crimes is established by clear and convincing evidence.[7] Third, if that requirement is met, the trial court then must weigh the necessity for, and probative value of, the other crimes evidence against any undue prejudice likely to result from its admission.

Donati v. State, 215 Md. App. 686, 738 (citation omitted), *cert. denied*, 438 Md. 143 (2014).

iii.

This Court "review[s] the trial court's rulings on the admissibility of evidence under an abuse of discretion standard." *Wilder v. State*, 191 Md. App. 319, 335 (2010) (citing *Bernadyn v. State*, 390 Md. 1, 7 (2005)). "With respect to the admission of 'bad acts' or

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[7] The "label we put on an exception . . . is not that important, just so long as the evidence of 'other crimes' possesses a special or heightened relevance and has the inculpatory potential to prove something other than that the defendant was a 'bad man.'" *Minehan v. State*, 147 Md. App. 432, 449 (2002) (citation and certain internal quotation marks omitted).

'other crimes' evidence," our review of the trial court's legal determination of whether the disputed evidence has "special relevance" is *de novo*. *Id.* (citing *Streater v. State*, 352 Md. 800, 809 (1999)). The trial court's assessment of the prejudicial impact of otherwise relevant evidence is reviewed for an abuse of discretion. *See Alban v. Fiels*, 210 Md. App. 1, 24 (2013).

iv.

Appellant first maintains that the State failed to present clear and convincing evidence of his relationship to the Crips gang, and that, assuming the strength of such evidence, the court erred by admitting the factual predicate for a finding of gang involvement before the jury. We disagree.

Certainly, the "evidence must be clear and convincing in establishing the accused's involvement in prior bad acts." *Burris*, 435 Md. at 385-86 (citation and internal quotation marks omitted). We are satisfied that the evidence is both sufficient to demonstrate this element, and that its admission is not unduly prejudicial.

At the outset, we are not persuaded by the argument that factual evidence must be presented *in camera*. *Cf. Gutierrez*, 423 Md. at 495-96 (factual, threshold evidence presented at trial). Further, the record is clearly sufficient to demonstrate appellant's involvement in the Crips by clear and convincing evidence. Appellant's uncle, William Smith, said that the neighborhood was dominated by Crips and the BGF. He testified that "mostly everybody that come around Preston and Ensor know it's a Crip area." People could tell that the

neighborhood was gang turf, for they would see "[m]ostly like signs on walls, different writings . . . [b]lue stars, stuff like that." Ms. Wendo also said that the neighborhood was a Crips area because she was from "out there." She knew that blue was the Crips color, and assumed that anyone wearing a red shirt would provoke unwelcome attention because "they [rival gangs] don't like each other . . . [t]hey like robbers or something. I guess that's the word." In her statement to police, which was published to the jury, Ms. Wendo recounted how the confrontation between the deceased, appellant and his companions, developed. She knew appellant as a "high ranking" member of the Crips. In her grand jury testimony, Ms. Wendo, when asked whether there was a "problem with wearing a red T-shirt in the 900 block of Preston[,]" answered "[y]es" and explained that "[i]t's Crips down there." Finally, appellant's cousin Kevin Dudley told the grand jury that "a lot of people in our neighborhood is in a gang[,]" that the gangs represented in the neighborhood are the "Crips and BGF," and that one of them was appellant.

This testimony satisfies State's burden of demonstrating appellant's gang affiliation by clear and convincing evidence. *See Minehan v. State*, 147 Md. App. 432, 449 (2002) ("clear and convincing proof" from testimony and defendant's statement). Although a State witness may have a change of heart at trial, *see generally Nance v. State*, 331 Md. 549 (1993), the assessment of the witness rests with the trier-of-fact.

v.

Maryland Rule 5-401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Irrelevant evidence is inadmissible. Md. Rule 5-402. The disputed evidence of gang involvement was relevant to the issue of motive. The State's case was constructed on the theory that Mr. Jordan's appearance in the neighborhood dressed in a red or burgundy shirt was an act of disrespect for the dominant neighborhood gangs, the Crips and Black Guerilla Family. *See Ayala v. State*, 174 Md. App. 647, 659-60 (2007). Indeed, even though State's witnesses had identified appellant as the shooter, proof of the motive for this otherwise inexplicable act was necessary, especially where, as here, the prosecution seeks to prove [appellant]'s intent in this first-degree murder case.[8]

Maryland Rule 5-403, in turn, constrains the introduction of evidence that may prove unduly prejudicial. Appellant insists that, even if relevant, the exhibit was unduly

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[8] As stated by the Massachusetts Supreme Judicial Court:

> The defendant asserts that evidence about his gang affiliation should have been excluded because it did not help to identify him specifically as the individual responsible for the murder. Such a showing, which is required when prior bad acts are used for identification purposes, *see Commonwealth v. Baker*, 440 Mass. 519, 530–531, 800 N.E.2d 267 (2003), is beside the point when evidence of gang affiliation is used for purposes of showing motive or joint venture.

Commonwealth v. Smith, 879 N.E.2d 87, 92 (Mass. 2008).

prejudicial. We disagree. Maryland Rule 5-403 provides that relevant evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice." Of course it was prejudicial, as is any evidence that points to a defendant's guilt. But, the prejudice envisioned by the rule is that which diverts the jury from its role as the finder of fact, and causes it to assess credibility and weigh the evidence based on emotion and an abandonment of logic. The evidence in question must have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *United States v. Martinez*, 938 F.2d 1078, 1082 (10th Cir. 1991). There is no showing that the evidence of gang involvement influenced the jurors to form an emotional response to State's case such that, as Chief Judge Barbera wrote for the Court of Appeals, "logic cannot overcome prejudice or sympathy needlessly injected into the case." *Odum v. State*, 412 Md. 593, 615 (2010) (citation and internal quotation marks omitted).

In the case at bar, "[t]his was a crime alleged to be gang related. Gang membership was obviously important, and evidence tending to show it was highly relevant." *People v. Olguin*, 31 Cal. App. 4th 1355, 1373 (1994). Without evidence of gang involvement, appellant's act is virtually "inexplicable." *See People v. Tolliver*, 807 N.E.2d 524, 541 (Ill. App. 2004).

The trial court did not err in granting State's motion *in limine* and admitting evidence of gang involvement.

II. Limits on Cross-examination

We turn to appellant's complaint that the trial court erred by limiting the cross-examination of a detective regarding any agreement between Kevin Dudley and the prosecutor. The intent of this examination was to demonstrate Mr. Dudley's bias.

The right to cross-examine an adverse witness is a "right guaranteed by the common law." *Myer v. State*, 403 Md. 463, 476 (2008). The right to confront one's accuser is also guaranteed both by the Sixth Amendment, *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986), and by Article 21 of the Maryland Declaration of Rights.[9] *See Martinez v. State*, 416 Md. 418, 428 (2010); *Owens v. State*, 170 Md. App. 35, 101 (2006). The "Confrontation Clause 'commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)). *Accord*, *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Certainly, the cross-examination of State's "star" witness plays a crucial role for a criminal defendant. *See Washington v. State*, 180 Md. App. 458, 489 (2008) (cross-examination with respect to

[9] The Sixth Amendment applies to the States through the Fourteenth Amendment. *Washington v. State*, 180 Md. App. 458, 488 n. 7 (2008) (citing *Pointer v. Texas*, 380 U.S. 400, 403 (1965) and *Merzbacher v. State*, 346 Md. 391, 411-12 (1997)). Further, "Article 21 of the Maryland Declaration of Rights (MDR) is Maryland's counterpart to the Confrontation Clause and provides that 'in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him.' The Court of Appeals has construed the Confrontation Clause and Article 21 of the MDR to be in *pari materia*." *Griner v. State*, 168 Md. App. 714, 740 n. 9 (2006) (citing *Simmons v. State*, 333 Md. 547, 555 n.1 (1994) (further citation omitted)).

motive or bias). In *Lewis v. State*, 71 Md. App. 402 (1987), we emphasized that the "credibility of any witness is a proper subject of cross-examination[,]" especially so where the "weight of the State's case rests almost exclusively upon the testimony of th[at] witness[.]" *Id.* at 412.

"It is well accepted that cross-examination may be used for impeachment purposes[,]" and "a witness may be cross-examined on such matters and facts as are likely to affect his credibility, test his memory or knowledge, show his relation to the parties or cause, his bias, or the like." *Lyba v. State*, 321 Md. 564, 569 (1991). *See Pettie v. State*, 316 Md. 509, 514 (1989). Hence, "it is proper to allow any question which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or which tends to test his accuracy, memory, veracity, character, or credibility." *Lyba,* at 569 (citations omitted). As aptly stated by Professor Lynn McLain:

> A witness's inability to perceive, remember, or communicate the facts in issue – or difficulty in perceiving, remembering, or communicating them – is a proper subject for impeachment. For example, an eyewitness who has made an in-court or pretrial identification may be asked about her bad eyesight, the poor lighting conditions at the time of the event in question, or the suggestiveness of circumstances during a pretrial identification in the case, or misidentifications made by the witness in the same case.
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> * * *
>
> If the witness is examined about, but denies or otherwise "fail[s] to admit" the truth of impeaching facts regarding her ability to perceive (including lack of first-hand knowledge), remember, or communicate, the impeaching party may present extrinsic evidence of them. If the interests of justice require, extrinsic evidence may be admitted even absent such an examination of the witness (as,

> for example, with regard to a non-testifying hearsay declarant, whose out-of-court statement has been admitted for its truth).

6 LYNN MCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL § 607:3 a and b at 542, 544 (3d ed. 2013) (footnotes omitted). Further, Md. Rule 5-616(b)(3) provides that "[e]xtrinsic evidence of bias, prejudice, interest, or other motive to testify falsely may be admitted whether or not the witness has been examined about the impeaching fact and has failed to admit it."

This issue first arose during the cross-examination of Kevin Dudley. Appellant's counsel intended to ask Mr. Dudley whether he had changed his testimony in an unrelated case because he feared the consequences of not cooperating with the State.

At the time of trial, Mr. Dudley was serving a ten-year sentence for conspiracy to distribute drugs and a related handgun charge. Appellant's counsel intended to demonstrate that Mr. Dudley's sentence in an unrelated case exceeded the original term under a plea agreement. At a sidebar, State argued that "there's been nothing to establish that there is any agreement in this case." The trial court noted that Mr. Dudley had not been charged in this case, and told appellant's counsel that would be a matter of argument for the jury.

With respect to any cooperation agreement in the other case, the trial court permitted the defense to make some preliminary inquiry:

> THE COURT: And that's, those are matters for argument to the jury, but for right now, defense wants to get into whether Mr. Dudley has a reason to fear not cooperating with the State and if, if you wish to bring out that in his case he was originally supposed to get a certain sentence, do you know what that sentence was?

[APPELLANT'S COUNSEL]: That's what I'm not, that's the only thing I don't know the exact figure of.

[STATE]: Right, there was a cooperation agreement.

* * *

[STATE]: And I think that there was a disagreement on his level of cooperation. This is so ambiguous that it's not more probative. In fact, it's, it's somewhat prejudicial in terms of [no one], [no one] really knows what happened except for Mr., the original State's Attorney . . . as well as this witness. Furthermore, Your Honor, there hasn't been any, if he wants to ask are you concerned if you don't cooperate with the State that you are going to be charged in this case, that is what is relevant, not what happened in the past.

The trial court permitted the defense to inquire about Mr. Dudley's conspiracy charge and whether he had entered into a cooperation agreement. The court continued:

THE COURT: I will allow you to ask him that and I will also . . . allow you to ask him, did you get the benefit of that bargain and then if he says, no, I got ten years. You can ask him why if you want or somebody else can if they want.

* * *

THE COURT: All right, but that's as far as it goes.

[APPELLANT'S COUNSEL]: Fair enough.

When appellant's counsel asked Mr. Dudley whether he had an agreement to cooperate in the conspiracy case, he responded "[n]o, sir."

The State presented the testimony of Detective Thomas Martin. During cross-examination of the detective the following day, appellant's counsel sought to elicit testimony

regarding any arrangements between Mr. Dudley and the State in the conspiracy case. Counsel requested a sidebar, and the following was discussed:

> [APPELLANT'S COUNSEL]: Your Honor, this is the detective's note from his meeting with Mr. Dudley and Mr. Dudley tells the detective that he cooperated with the State's Attorney regarding Keyon Robinson and received ten years on that which he denied on the stand yesterday.
>
> [STATE]: So Your Honor, we approached yesterday to have a discussion about this. [Appellant's counsel] had information. Didn't have a contract. He asked Mr. Dudley if he in fact had a contract with the State's Attorney and Mr. Dudley indicated, no. Those, hold on, I believe are Detective Martin's notes, but if there are notes about what Mr. Dudley said or didn't say to him about the existence of something that Mr. Dudley has denied, it's proper impeachment for the defense attorney to ask that of Mr. Dudley. It's not proper impeachment for him to ask that of the detective since the only person that knows what occurred would be Mr. Dudley and that State's Attorney. [Appellant's counsel] is absolutely free to show the contract to Mr. Dudley, do all of that stuff, but he can't do it through Detective Martin.
>
> THE COURT: Isn't it a collateral matter?
>
> [STATE]: A hundred percent.
>
> [APPELLANT'S COUNSEL]: Except for the fact that one, the witness denied. In fact, even if I asked him are you sure there was no contract involved with specifically Keyon Robinson, he said, no. Secondly, it was important enough to Detective Martin and that he spoke to Detective Martin that this is actually something that he said and it goes to show that there was the contract that was with the State's Attorney's Office in which he received ten years for which goes into the fact that his cooperation with the State's Attorney in this matter.
>
> THE COURT: I understand, but how are we not getting into extrinsic evidence on a collateral matter?

The trial judge did permit the defense to show the detective the cooperation agreement, and to pursue the matter to some extent. The court further informed counsel that

it "may allow a very brief foray into this if the detective after reviewing his notes is clear on what the witness had to say about that[,]" to which appellant's counsel responded "[t]hat's all I'm asking." Appellant's counsel then showed the cooperation agreement to Detective Martin and asked whether it refreshed his memory. He responded "[y]es" when asked whether the document "help[ed] refresh [his] recollection to anything Mr. Dudley may have told [him] about his involvement in other cases[.]"

When appellant's counsel pursued the matter, State objected, and the trial court sustained the objection as to the form of the cross-examination:

> [APPELLANT'S COUNSEL:] What does that refresh your recollection as to?
>
> [STATE]: Objection.
>
> THE COURT: I'll sustain the objection as to the form of the question.
>
> * * *
>
> [APPELLANT'S COUNSEL:] Did Mr. Dudley tell you what his role was in that other case?
>
> [STATE]: Objection.
>
> THE COURT: This is cross-examination and you can be far more specific. So, I'll sustain the objection as to the form of the question.
>
> By [appellant's counsel]:
>
> Q. Specifically, did Mr. Dudley inform you that he was a witness in another matter?
>
> [STATE]: Objection.

THE COURT: Did he tell you he was a witness in a prior case?

THE WITNESS: Yes, sir.

THE COURT: Next question.

Following this, appellant's counsel was able to ask Detective Martin whether he had met with Mr. Dudley on other occasions with a prosecutor present. Counsel did not ask for any further significant details about any cooperation agreement.

During closing argument, appellant's counsel highlighted the fact that not one of the three witnesses who implicated appellant as the shooter was charged in this case:

> One of them, I could see being an accident, but every single witness that identifies [appellant] as a shooter in this case who was charged with the crime or allegedly involved in a crime either having their cases dismissed, not charged, that's not coincidence. That's consistent.

Appellant's counsel continued, and implied that Mr. Dudley had received favorable treatment:

> The State said it was so hard for him to sit in that stand and testify against his cousin. Let me ask you, what's harder, sitting next to him facing a first degree murder charge or sitting in that desk at that table. He's already been doing ten years now. He doesn't want to do more time and he wasn't charged. So, he doesn't have to worry about it. That's why his version is completely inconsistent[.]

We are mindful that "[t]he point of a bias inquiry is to expose to the jury the witness' special motive to lie by revealing facts such as interest in the outcome of the trial[.]" *United States v. Hankey*, 203 F.3d 1160, 1171 (9th Cir. 2000) (citations omitted). *See generally,*

Pettie v. State, 316 Md. at 514-15. Further, in *United States v. Abel*, 469 U.S. 45 (1984), the Supreme Court pointed out:

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.

United States v. Abel, 469 U.S. at 52.

In *Calloway v. State*, 414 Md. 616 (2010), which relies on Md. Rule 5-616(a)(4), the Court of Appeals ruled that the defendant, Leon Calloway ("Mr. Calloway"), could cross-examine a State's witness regarding that witness's expectation of leniency for information given to the prosecutor. The witness was Mr. Calloway's former cell-mate at a county correctional facility. He had contacted the State and offered to testify in the case against Mr. Calloway. *Id.* At 619. The defense intended to question the witness about the anticipated benefits he would expect in return for his testimony. State attempted to pre-empt this cross-examination by filing a motion *in limine*, seeking a ruling from the trial court prohibiting defense counsel from examining the witness about "whether he had volunteered to testify for the State in the hope that he would receive some benefit in the cases that were pending against him[.]" *Calloway*, 414 Md. at 619. The trial court agreed with the State, and prohibited any inquiry along these lines.

The Court of Appeals reversed. The Court ruled that the trial court had erred by precluding cross-examination of State's witness regarding any pending matters. Writing for the Court, Judge Murphy explained:

> While it is clear that the trial judge is not obligated to allow cross-examination about every charge pending against a State's witness, Md. Rule 5-616(a)(4) grants the criminal defendant the right to question a State's witness about facts that are of consequence to the issue of whether "the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely." Circumstantial evidence of a witness's self-interest is admissible[.]

Id. at 633 (citation omitted).

We conclude that the trial court did not abuse its discretion relative to appellant's cross-examination of Detective Martin. Essentially, the defense acquiesced in the trial court's rulings, and, in any event, managed to conduct the cross-examination it sought. The court permitted the defense to ask Mr. Dudley whether he had a cooperation agreement with the State in the unrelated conspiracy case. Appellant's counsel also managed to ask Detective Martin whether Mr. Dudley had told him about his "involvement in other cases[,]" presumably the conspiracy case that led to Mr. Dudley's prosecution and incarceration. Although the trial court sustained the State's objection to the "form" of two questions, the trial court concluded this line of questioning by posing its own inquiry, *viz*., whether Mr. Dudley had told the detective that he had been a witness in a prior proceeding. Appellant's counsel then moved to a different line of questioning. On this record, we are unable to

conclude that the trial court denied appellant the opportunity to cross-examine Detective Martin.

We discern no error in the trial court's evidentiary rulings and control of cross-examination. We shall affirm in all respects.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANT TO PAY COSTS.