UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0401

September Term, 2015

DEAN LEE BENNER

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: August 3, 2016

In August of 2013, the Howard County Police Department received a report that appellant, Dean Lee Benner, had sexually abused a person when that person was a child.[1] When the police interviewed the victim, then 23 years old, he told them that between 1997 and 2003 Benner had sexually abused him on repeated occasions after holding a gun to his head or a knife to his throat and threatening that he would kill him and his family if he did not comply with Benner's sexual demands. The victim reported that during the sexual assaults, and at other unspecified times, Benner used an "instant-matic" [sic] camera to photograph him while he was naked. The victim said that the sexual abuse took place at Benner's residence, which Benner shared with his mother, as well as at a warehouse where Benner worked and at a farm owned by one of Benner's friends.

Benner was arrested and charged with child abuse, first-degree sexual offense, second-degree sexual offense, and third-degree sexual offense. A jury in the Circuit Court for Howard County found Benner guilty of all of the offenses that were submitted for its consideration.[2] The circuit court sentenced Benner to serve an aggregate sentence of life plus 215 years.[3]

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[1] To protect the person's privacy, we shall refer to him as "the victim" for the purposes of this opinion.

[2] The court granted Benner's motion for judgement of acquittal as to one count of child abuse, and the State entered a plea of *nolle prosequi* to two counts of second-degree sexual offense.

[3] The court sentenced Benner to serve 15 years for his child abuse conviction; four life sentences for his convictions for first-degree sexual offenses, to be served consecutively to the sentence for child abuse, but concurrently with one another; ten 20-year sentences for his convictions for second-degree sexual offenses, (continued…)

In his timely appeal, Benner raises five questions:

1. Did the motions court err in denying the motion to suppress the evidence seized pursuant to the search and seizure warrant?

2. Did the circuit court err in allowing the introduction of prejudicial other-crimes evidence?

3. Did the trial court err by admitting an accident report that was generated by police officers in violation of the rule against hearsay?

4. Did the trial court err in permitting the State to introduce irrelevant and prejudicial evidence?

5. Did the trial court fail to properly instruct the jury on the elements of first-degree sexual offense?

Seeing neither error nor abuse of discretion, we shall affirm the judgments.

DISCUSSION

I. Denial of Motion to Suppress Photographs

On the basis of the victim's statements, the police obtained a search warrant for the home that Benner shared with his mother. The warrant authorized the police to search for and seize the following items:

> 1) Indicia of occupancy or use consisting of articles of personal property tending to establish that Dean Lee Benner lives at the premises located at 6375 Greenfield Rd Apt 1503, Elkridge, Howard County, Maryland 21075 . . . .
>
> * * *

each to be served consecutively to his other sentences; and six ten-year sentences for his convictions for third-degree sexual offenses, to be served concurrently with the sentences for the second-degree sexual offenses.

2) Any and all instant-matic [sic] cameras . . . .

* * *

4) Any developed picture/photographs from an instant-matic [sic] camera. . . .

* * *

5) Any and all images of possible child pornography, such as but not limited to prints, photographs or pictures . . . .

6) Any and all images of possible child erotica, such as but not limited to prints, photographs or pictures . . . .

* * *

11) Photographs of the interior and exterior of the residence . . . .

12) Any and all pornographic material that would show an interest in having sex with young males . . . .

* * *

Pursuant to the warrant, the police seized a number of items, including a photograph of an unidentified boy and certain photographs contained in a green photo album and in a large bag of photographs. Benner moved to suppress those materials. The circuit court denied the motion, concluding that the seized photographs fell within the first provision of the warrant, "indicia of occupancy or use consisting of articles of personal property tending to establish that [Benner] lives at the residence."[4]

[4] At trial, the State introduced only a few photographs from the bag of photographs. The State offered neither the photograph of the unidentified boy nor the green album.

Benner contends that the suppression court erred in denying his motion, because, he says, those items fall outside the scope of the search warrant at issue. Specifically, Benner claims that because the photographs were neither "instant-matic" [sic] photographs, nor evidence of erotica or pornography, nor evidence of any crime, they did not fall within the scope of the warrant. Finally, he asserts that because police seized random items not specifically enumerated in the warrant, they turned the warrant into a "general warrant," which is constitutionally prohibited.

In an earlier appeal in which Benner unsuccessfully challenged another set of convictions that grew out of this very same search warrant, this Court rejected contentions that are identical to the ones that Benner is now making. *Dean Lee Benner v. State*, No. 633, Sept. Term 2015 (May 18, 2016). In brief, this Court reasoned that the photographs fell within the paragraph of the warrant concerning indicia of Benner's occupancy, as they were articles of personal property tending to show that he lived at the premises. *Id.* at 5. We have attached a copy of that opinion as an appendix to this opinion. Rather than reiterate the reasoning in the earlier opinion, we adopt it and incorporate it into this opinion. On the basis of the earlier opinion, we affirm the denial of Benner's motion to suppress.

II. Admission of Other-Wrongs Evidence

In the course of their investigation, the police collected evidence indicating that, during the period when Benner was sexually abusing the victim, he allowed the victim and other young boys under his supervision to play with firearms, drive forklifts, drink alcohol, and smoke marijuana. Before trial, the State moved *in limine* to allow the

admission of this "bad acts evidence" to "show the context of the crime" and the circumstances under which it occurred. Benner filed an opposing motion, requesting that the court exclude the evidence. The court granted the State's motion, ruling that the evidence was relevant to show opportunity and to "put things in context." In addition, the court ruled that evidence of availability of weapons was admissible to show a "fearful or intimidating atmosphere." The court found that Benner's participation in the other wrongs had been proven by clear and convincing evidence.

Benner asserts that the admission of this evidence at his trial "violated the prohibition against other crimes or bad acts evidence."

Maryland Rule 5-404(b) prohibits the admission of evidence of other wrongs committed by the defendant if it is presented "to show action in conformity therewith[.]" Md. Rule 5-404(b). That same evidence may be admissible, however, if it is presented for another purpose, such as demonstrating "proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.*

Preliminarily, we must determine whether Benner has preserved this issue for appellate review. It was not sufficient for Benner merely to raise the other-wrongs issue in a motion *in limine*, as he did; it was also incumbent upon him to make a proper objection when the State offered the objectionable evidence at his trial. *See, e.g.*, *Wilder v. State*, 191 Md. App. 319, 354 (2010).

A ruling on a motion *in limine* "is not a ruling on the evidence, but [ ] merely a procedural step prior to the offer of evidence, which serves the purpose of pointing out

before trial certain evidentiary rulings that the court may be called upon to make." *Brown v. State*, 90 Md. App. 220, 224 (1992) (citation omitted). An objection is waived unless it is made "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Md. Rule 4-323(a). "[T]o preserve an objection, a party must either object each time a question concerning the [matter is] posed . . . or request a continuing objection to the entire line of questioning." *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (citation and internal quotation marks omitted).

On many occasions during the course of Benner's trial, the State elicited evidence of Benner's other wrongs, including evidence that Benner allowed boys to drive forklifts around the warehouse where he was employed, encouraged the boys to drink alcohol and smoke marijuana that he provided, and permitted the boys to play with guns that he owned. Benner's attorney objected to virtually none of the State's questions. Because Benner's attorney neither made timely objections nor requested a continuing objection to this line of questioning, Benner did not preserve this issue; therefore, it is not properly before this Court for appellate review. Md. Rule 4-323(a); *Wimbish*, 201 Md. App. at 261.[5]

[5] Even if Benner had preserved the issue, we would conclude that the Court properly admitted this probative evidence to provide the context necessary to help the jury understand the circumstances of where and how the crimes were committed and why the victim was reluctant to report the abuse that he suffered. *See, e.g.*, *Merzbacher v. State*, 346 Md. 391, 409 (2007) (evidence from victim and others that defendant-teacher "used a combination of frivolity and fright to run his classroom" "served to explain and was particularly relevant to why [the sexual-abuse victim], either reasonably or unreasonably, waited to so long to reveal her story"); *id.* at 411 (affirming admission of evidence showing that defendant's "persistent and vicious conduct created (continued…)

III. Admission of Accident Report

At Benner's trial, the victim testified that he lived with Benner during a two-week period. During that period, the victim would sometimes go to work with Benner. On one occasion during that period, the victim was involved in an automobile accident while Benner was driving a vehicle that belonged to his employers. Benner's employers learned of the accident, and a copy of the police report of the accident was placed in Benner's personnel file.

While questioning the representative of Benner's former employer, Sharon Cugle, the State moved to admit a copy of the accident report. The report contains, among other things, a brief description of the accident; the time, date, and location of the accident; the names and addresses of the drivers and the passenger in Benner's vehicle; the year, make, and model of the vehicles involved; the vehicle identification numbers for those vehicles; the driver's license numbers for both drivers; the United States Department of Transportation number for the commercial vehicle that Benner was driving; and the identity of the insurers for both vehicles. The report lists the victim as passenger and states that his address is the same as Benner's.

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a threatening environment which suggested that [the victim] had little choice but to acquiesce in his advances"; such evidence was "highly relevant to the consent issue and was not offered to prove defendant's guilt based on propensity to commit crime or his character as a criminal") (citation and internal quotation omitted).

Benner contends that the court erred in admitting the police report. He contends that the report included a "second level of hearsay" that "did not fall under one of the recognized exceptions to the rule."

Hearsay is a statement "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay is inadmissible (Md. Rule 5-802) unless it falls within one of the many exceptions to the hearsay rule. Among the exceptions is Md. Rule 5-803(b)(6), which allows for the admission of records of a regularly-conducted business activity, or "business records." That exception provides that the hearsay rule does not exclude:

> A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Md. Rule 5-803(b)(6).

Whether a statement is hearsay and whether it falls within a hearsay exception are typically legal determinations that this Court reviews on a de novo basis. *See Gordon v. State*, 431 Md. 527, 538 (2013).

Generally, "those portions of the report of a police investigation which record the facts obtained by the direct sense impression of the investigating officer are admissible as

a business record while those portions which report objectionable hearsay and opinions of the investigator are inadmissible as a business record." *Holcomb v. State*, 307 Md. 457, 461-62 (1986); *see also Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 454 (1983) (holding that the portions of a "police report indicating that an accident occurred, the parties involved, etc., noting aspects of the accident observable by the investigating officer" are admissible as a business record, while "[s]tatements made by witnesses or parties to the accident to the officer" are not).

Had the State laid a proper foundation, some parts of the accident report might have been admissible as a business record – i.e., a record of a regularly conducted activity – of the Baltimore City Police Department, which prepared it. The report, however, was not a record of the regularly conducted activity of Benner's former employer. Nor did the report become a record of the employer's regularly conducted activities merely because someone placed it into one of the employer's files.

Without proof that the accident report was a record of the Baltimore City Police Department's regularly conducted activities, and without redactions to remove anything other than "the facts obtained by the direct sense impression of the investigating officer" (*Holcomb*, 307 Md. at 461-62), the report constituted inadmissible hearsay. The court, therefore, erred in admitting the report.

In our view, however, the error "was harmless beyond a reasonable doubt." Dorsey v. State, 276 Md. 638, 657-59 (1976). Benner was convicted after a four-day trial, in which the jury heard an abundance of evidence that corroborated the essential portions of the victim's account. That evidence included the testimony of three young

men, who corroborated the victim's testimony about Benner's grooming activities and, in the case of one witness, the victim's testimony about Benner's collection of guns and knives. One of the young men testified that, when the victim would become intoxicated and lie down, Benner took the others to an amusement center, gave them money, left them there, and returned to pick them up later on – presumably, after he had taken the opportunity to assault the victim. Therefore, while the accident report bolstered one of the many facets of the victim's account, we have no difficulty concluding, on the record in this case, that it had no effect on the jury's verdict. *Clark v. State*, 140 Md. App. 540, 564-65 (2001) (holding that admission of hearsay was harmless where it "only marginally bolstered [a witness's] credibility"); *see also Borchardt v. State*, 367 Md. 91, 131 (2001) (holding that admission of "corroborative hearsay statement" was harmless where there was other overwhelming evidence of guilt); *McClurkin v. State*, 222 Md. App. 461, 484-85 (2015) (holding that error in admission of hearsay was harmless where the statement was cumulative of other more prejudicial evidence and where the State presented a strong case overall); *Choate v. State*, 214 Md. App. 118, 149 (2013) (any error in admission statement was harmless because it "posed little or no risk of prejudice").

IV. Admission of Employment Documents

The victim and other witnesses testified that, on multiple occasions, Benner had allowed them to accompany him to the warehouse where he worked. On the evenings when they were at the warehouse, Benner permitted the victim and other witnesses to drink alcohol, smoke marijuana, drive forklifts, run around, and run or jump across the pallets of food that were stored at the warehouse.

To corroborate this testimony, the State sought to admit two employee-reprimand letters that Benner's employer issued to him. The letters stated that Benner had allowed visitors into the warehouse, outside of business hours, after his employer had instructed him not to do so. Defense counsel objected that the letters were irrelevant to the charges against Benner. The court overruled the objections.

Benner contends that the trial court abused its discretion by allowing the admission of the two letters, which, he contends, "were clearly irrelevant to the crimes charged."

Evidence is relevant if it has "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." Md. Rule 5-401. Generally, "all relevant evidence is admissible." Md. Rule 5-402. Even relevant evidence may, however, be inadmissible, if its probative value is substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403. An appellate court conducts a de novo review of a trial court's determination of relevance. *State v. Simms*, 420 Md. 705, 725 (2011). The decision to admit relevant evidence is a matter left to the sound discretion of the trial court, and the appellate court may reverse that decision only upon clear showing of an abuse of discretion. *Id*.

Though the reprimand letters did not directly prove or disprove Benner's guilt of the sexual offenses with which he was charged, their content corroborated the State's witnesses' testimony about the after-hours "parties" that Benner threw at the warehouse where he was employed. We conclude, therefore, that the trial court did not err in concluding that the letters were relevant or abuse its discretion in admitting them into

evidence. *See, e.g.*, *Ware v. State*, 370 Md. 650, 672-73 (2000) (a "trial court is afforded great deference in its rulings on admissibility of evidence," and "rulings as to relevancy will not be disturbed on appeal unless there is a clear abuse of discretion"); *Merzbacher v. State*, 346 Md. 391, 404-05 (1997) ("[o]nce a finding of relevancy has been made, we are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion").

V. Jury Instruction on First-Degree Sexual Offense

The State charged Benner with committing multiple second-degree sexual offenses. A second-degree sexual offense is prohibited by CL § 3-306, which provides, in pertinent part:

> (a) A person may not engage in a sexual act with another:
>
> (1) by force, or the threat of force, without the consent of the other; [or]
>
> * * *
>
> (2) if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim.

Md. Code (2002, 2012 Repl. Vol.), § 3-306(a) of the Criminal Law Article ("CL").

The State charged also Benner with committing multiple first-degree sexual offenses. A first-degree sexual offense is prohibited by CL § 3-305, which provides, in pertinent part:

> (a) A person may not:

> (1) engage in a sexual act with another by force, or the threat of force, without the consent of the other; and
>
> (2) (i) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;
>
> * * *

CL § 3-305(a).

Because a first-degree sexual offense entails engaging in a sexual act with another by force, or the threat of force, without the consent of the other, it contains all of the elements of a forcible second-degree sexual offense in violation of CL § 3-306(a)(1). A first-degree sexual offense also entails the additional element of employing or displaying a dangerous weapon (or a physical object that the victim reasonably believed to be a dangerous weapon).

Before instructing the jury about first-degree sexual offenses, the court ordinarily would give the pattern instruction about forcible second-degree sexual offenses. *See* Maryland Criminal Pattern Jury Instruction ("MPJI-CR") 4:29.5, Notes on Use (instructing the court to give the instruction regarding forcible second-degree sexual offenses immediately before the instruction on first-degree sexual offenses).

The instruction regarding forcible second-degree sexual offenses contains language concerning the use of force and submission to the use of force. *See* MPJI-CR 4:29.4. By contrast, the instruction regarding first-degree sexual offenses contains no such language (*see* MPJI-CR 4:29.5), because the instruction contemplates that it ordinarily will be given immediately after the court has given an instruction that contains

that language – the pattern instruction regarding concerning forcible second-degree sexual offenses. Indeed, the pattern instruction for first-degree sexual offenses specifically states that "to convict the defendant, the State must prove," among other things, "all of the elements of forcible second degree sexual offense." MPJI-CR 4:29.5.

This case was unusual in that the State pursued the second-degree sexual offense charges on the basis of the differences in age between the defendant and the victim under CL § 3-306(a)(2), and not on the basis of force and lack of consent under § 3-306(a)(1). For that reason, the court had not given an instruction on forcible second-degree sexual offense, including an instruction concerning the use of force or submission to the use of force, when the time came to instruct the jury about first-degree sexual offenses. Consequently, to instruct the injury about the crime of first-degree sexual offense, the court had to modify the pattern instruction to include the instructions about the use of force or submission to the use of force.

In modifying the pattern instruction on first-degree sexual offenses, the circuit court quoted verbatim from the portions of the pattern instruction on second-degree sexual offenses that concern the use of force or submission to the use of force. In other words, the court modified the instruction on first-degree sexual offenses to include the exact language that the jury would have heard had the State pursued a theory of forcible second-degree sexual offense, rather than a theory of second-degree sexual offense based on the differences in age between Benner and his victim.

Benner asserts that the trial court erred by including the use-of-force language in the instruction about first-degree sexual offenses. He contends that the language about

the use of force or submission to the use of force rendered the instruction inaccurate as a matter of law. He argues that "[s]ince the State chose to charge [him] with second-degree sexual offense based on age, the issue of consent, force, or the threat of force did not apply to [his] case."

Benner's argument is unmeritorious. The State charged Benner with committing first-degree sexual offenses, which require proof of force or the threat of force. The pattern jury instruction for first-degree sexual offenses expressly contemplates that the jury will have already heard about force or the threat of force through the instruction concerning forcible second-degree sexual offenses. Because the State did not pursue a charge of forcible second-degree sexual offenses in this case, however, the jury had not heard that instruction. Consequently, the court quoted the relevant language from the instruction about forcible second-degree sexual offenses. Had the court given the pattern jury instruction on first-degree sexual offense instead, it would have instructed the jury that the State had to "prove all of the elements of forcible second degree offense," which would have made no sense, as the jury would not have known what those elements were. The court did not abuse its discretion in fashioning that instruction. *See Johnson v. State*, 223 Md. App. 128, 142-47 (2015) (holding that trial court did not err or abuse its discretion in modifying pattern jury instruction to accurately reflect those instructions generated by the evidence).

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0633

September Term, 2015

DEAN LEE BENNER

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: May 18, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Convicted, upon an agreed upon statement of facts, in the Circuit Court for Howard County, of three counts of second-degree sexual offense, Dean Lee Benner, appellant, contends that the circuit court erred in denying his motion to suppress evidence seized from his home. Finding no error, we affirm.

SUPPRESSION HEARING

The evidence presented at the suppression hearing, which we are required to view in a light most favorable to the prevailing party[1] – in this instance, the State – shows that on August 29, 2013, police initiated an investigation of appellant after receiving a report that appellant had sexually abused an individual, whom we shall refer to as "the victim," during his childhood. When the police interviewed the victim, then twenty-three years old, he told them that between 1997 and 2003, appellant had repeatedly sexually abused him after holding either a gun to his head or a knife to his throat and threatening him that he would kill him and his family if he did not comply with appellant's sexual demands.

The victim reported that the sexual abuse took place at appellant's residence, which appellant shared with his mother, as well as at a warehouse where appellant worked, and at a farm owned by one of appellant's friends. He further told police that appellant used an "instant-matic" camera to photograph him during the sexual assaults, while he was naked, or performing a sex act, as well as at other unspecified times. The police then sought to obtain a search warrant for his residence.

[1] *See Briscoe v. State*, 422 Md. 384, 396 (2011).

In support of the warrant, police submitted the affidavit of Detective Aaron Miller, Child Abuse Sexual Assault Investigator for the Howard County Police Department, who had interviewed the victim and recounted the victim's description of the sexual abuse at issue in the affidavit. The detective also described, in his affidavit, typical characteristics of child sexual predators, based on his training and experience. Those characteristics included the practice of collecting "trophies" of sexual and non-sexual interactions with target children so that the predator could re-live those encounters and add to the fantasies the predator had as to those encounters. Those "trophies," he stated, could be items or photographs of the victim, which the sexual predator typically retained, for many years, together with other memorabilia.

The warrant ultimately obtained by police authorized them to search for and seize the following items:

> 1) Indicia of occupancy or use consisting of articles of personal property tending to establish that Dean Lee Benner lives at the premises located at 6375 Greenfield Rd Apt 1503, Elkridge, Howard County, Maryland 21075 . . . .
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> * * *
>
> 2) Any and all instant-matic cameras . . . .
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> * * *
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> 4) Any developed picture/photographs from an instant-matic camera . . . .
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> * * *
>
> 5) Any and all images of possible child pornography, such as but not limited to prints, photographs or pictures . . . .

> 6) Any and all images of possible child erotica, such as but not limited to prints, photographs or pictures . . . .
>
> * * *
>
> 11) Photographs of the interior and exterior of the residence . . . .
>
> 12) Any and all pornographic material that would show an interest in having sex with young males . . . .

Pursuant to that warrant, the police seized from appellant's home, among other things, a green photo album, a bag of photographs, ammunition, a West Virginia Sporting License application, an application to purchase a regulated firearm, gun parts, a Cannon camera, a Polaroid One Step camera, a Pentax camera, a gray plastic box with a brown wallet, a photograph of appellant with a gun to his head and a photograph of an unidentified boy.

Prior to trial, however, appellant moved to suppress only the seizure of the photograph of the unidentified boy and certain photographs contained in the green photo album and in the large bag of photographs. The court denied that motion, concluding that the seized photographs fell within the first provision of the warrant, "indicia of occupancy or use consisting of articles of personal property tending to establish that [appellant] lives at [the premises]." In so ruling, the court stated:

> Clearly, what we have here in the context of the warrant are photo albums and bags of photos that would tend to show he lives at this certain address because that's where you keep those things that are near and dear to you. So, as it relates to the remaining items, the Court is going to find that they would be covered as indicia of occupancy of use as his personal property to show he lives at 6375 Greenfield Road, Apartment 1503, Elkridge, Maryland.

STANDARD OF REVIEW

In considering the denial of a motion to suppress evidence, we review only the record of the suppression hearing. *State v. Nieves,* 383 Md. 573, 581 (2004)(citation omitted). In so doing, "[w]e review the evidence and inferences that may be drawn therefrom in the light most favorable to the party who prevails on the motion." *Briscoe*, 422 Md. at 396. Then, "in resolving the ultimate question of whether the [search] of an individual's person or property violates the Fourth Amendment, we 'make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.'" *Crosby v. State*, 408 Md. 490, 505 (2009)(quoting *State v. Williams*, 401 Md. 676, 678 (2007)).

DISCUSSION

Appellant contends that the suppression court erred in denying his motion to suppress the seized photographs, because those items, he maintains, were outside the scope of the search warrant at issue. Specifically, appellant claims that, because the photographs were not "instant-matic" photographs, nor evidence of erotica or pornography, nor evidence of any crime, they did not fall within the scope of the warrant. Finally, he asserts that because police seized random items not specifically enumerated in the warrant, they, in effect, turned the warrant into a "general warrant," which is constitutionally prohibited.

A. The seized photographs were within the scope of the search warrant.

It is well settled that a search warrant must "particularly describe the 'things to be seized.'" *Shoemaker v. State*, 52 Md. App. 463, 484 (1982). This requirement "ensures that the executing officer is able to distinguish between those items within the scope of the

warrant and those that are not." *Garcia-Perlera v. State*, 197 Md. App. 534, 553 (2011)(citations omitted).

The warrant at issue, here, did precisely that. It specified that the items to be seized included items constituting indicia of occupancy or use, that is, articles of personal property tending to establish that the appellant lived at the premises. The photographs in question appeared to be appellant's personal property, and they were seized in his bedroom, thereby evidencing that appellant occupied the premises described in the search warrant. Moreover, the propriety of recognizing such evidence as indicia of occupancy is well established. *See State v. Gore*, 758 S.E.2d 717, 723 (S.C. 2014)(holding that non-prejudicial photographs seized from defendant's residence were sufficient to link defendant to residence); *State v. Anderson*, 842 So.2d 1222, 1228-229 (La. Ct. App. 2003)(holding that evidence of photographs of defendant, utility bills and uniforms with defendant's name on them were sufficient to establish defendant's constructive possession of contraband in a residence pursuant to a search warrant); *Herrera v. State*, 561 S.W.2d 175, 178-79 (Tex.Crim.App. 1978)(holding that photographs, receipts, addressed envelopes, utility statements, and a copy of contract and lease were properly seized from defendant's apartment pursuant to a warrant for purpose of showing defendant's joint occupancy of apartment); *State v. McGuinn,* 232 S.E.2d 229, 232 (S.C. 1977)(finding that photographs and letters seized during a search of defendant's house helped police establish who resided at the address and served as evidence of actual residency).

B. The seizure of photographs as evidence of indicia of occupancy did not render the warrant a "general warrant."

Appellant further contends that any photographs seized that were not "instant-matic" photographs,[2] were beyond the scope of the warrant and thereby rendered the warrant an unlawful "general warrant."

"A general warrant, broadly defined, is one which fails to sufficiently specify the place or person to be searched or the things to be seized, and is illegal, since, in effect, it authorizes a random or blanket search in the discretion of the police[.]" *Frey v. State*, 3 Md. App. 38, 46 (1968). The standard to be applied in reviewing a challenge to particularity is "does the warrant gives proper notice to the party whose property is being searched and does it sufficiently constrain the discretion of the officer by making clear what he may look for and take?" *Brock v. State,* 54 Md. App. 457, 468, *cert. denied,* 297 Md. 338 (1983).

We conclude that the search warrant at issue was sufficiently specific in authorizing the seizure of items constituting indicia of occupancy. In a case such as this, where the appellant was not the only occupant of the premises, it was reasonable for the warrant to authorize the police to seize evidence confirming that appellant, in fact, lived at the premises. The trial court properly found that the photographs seized reasonably fit within that description.

[2] The fourth item on the list of property to be seized in the search warrant specified "any developed picture/photographs from an instant-matic camera."

C. The photographs were properly seized as evidence of criminal activity.

We agree with the State that there were other grounds for finding that the photographs were properly seized, namely, that the police had probable cause to believe that the photographs were evidence of criminal activity. In other words, there was a nexus between the evidence seized and appellant's criminal activity. *See Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)("There must, of course, be a nexus – automatically provided in the case of fruits, instrumentalities or contraband – between the item to be seized and criminal behavior."). As this Court stated in *Crawford v. State*, 9 Md. App. 624, 627 (1970)(citations omitted), "if this nexus exists, the items the police may reasonably seize under a constitutionally valid warrant and search are not confined to those specifically designated in the warrant."

The seized photographs at issue depicted young boys engaging in the type of "grooming" activities described by the victim, including a boy driving a forklift at appellant's place of employment, and photographs of the farm and barn where appellant brought the victim and other young boys "to party." The photographs were also consistent with "trophies" kept by sexual predators, as noted in the affidavit of Detective Miller, who was present during the search. The officers therefore seized items of the same nature that were described in the warrant and which they had probable cause to believe was evidence of criminal activity. *See Anglin v. State*, 1 Md. App. 85, 91 (1967). Hence, there was a

sufficient nexus between the seized photographs and the criminal conduct in which the appellant was believed to have engaged.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.