Circuit Court for Charles County
Case No. 08-K-16-001092

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1110

September Term, 2017

DEAVAN JEFFERSON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: June 26, 2018

Deavan Jefferson, appellant, was convicted by a jury sitting in the Circuit Court for Charles County of second-degree murder; use of a firearm in the commission of a crime of violence; wearing, carrying, or transporting a handgun; and possession of a regulated firearm by a person under the age of 21.[1] Appellant raises two questions on appeal, which we have rephrased slightly:

I. Did the trial court err in admitting certain statements appellant made in his videotaped police interview because the statements were allegedly irrelevant and/or unduly prejudicial?

II. Did the trial court err in admitting certain testimony from a State's witness because the testimony was allegedly irrelevant and/or unduly prejudicial?

For the following reasons, we shall affirm the judgments.

FACTS

On the evening of October 26, 2016, appellant shot and killed Reuel Hicks during a drug transaction behind the movie theater at the St. Charles Town Center in Waldorf. The State's theory of prosecution was that appellant, in firing a single gunshot to Hick's forehead, acted with no justification. Testifying for the State, among others, were two eyewitnesses, Jerran Rice and Darius Wilson, and several police officers. The theory of defense was that appellant had acted in self-defense when, during the drug transaction, Hicks attempted to assault and rob appellant. The defense called no witnesses. Viewing the evidence in the light most favorable to the State, the following was established.

[1] The jury acquitted appellant of first-degree murder. At sentencing, appellant pled guilty on an agreed statement of facts to a count of possession of a regulated firearm, which had been severed from the other counts prior to trial.

On the evening of October 26, 2016, three friends, Hicks, Rice, and Wilson, were "hanging out" at the St. Charles Town Center mall. According to Rice, while the friends were seated in the food court, appellant came up to him and asked him if he had any marijuana. Rice told appellant that he did not, and appellant walked away. Less than 30 minutes later, appellant followed the three friends out of the mall. When they reached the parking lot behind the AMC movie theater, Hicks told Rice and Wilson to stay back for a moment as Hicks and appellant walked a bit away. Within a few seconds Rice heard Hicks say, "If you gonna shoot me, shoot me." Rice then saw appellant pull out a gun, shoot Hicks in the head, and walk away.

Wilson testified similarly to Rice but said that while in the food court appellant approached and asked him if he had any marijuana for sale, to which he said he would ask Hicks, who replied that he did. About ten minutes later, all four walked out of the mall to the parking lot behind the movie theatre to accomplish the drug transaction. As they walked, Wilson heard Hicks and appellant, who were about ten feet away, arguing. When Wilson looked back, he saw appellant pull out a gun and Hicks ask, "You gonna shoot me?" Appellant then shot Hicks in the head and "walked off."

The police arrived shortly after the shooting. The police spoke to Rice and Wilson, who had remained at the scene. They described the shooter, which the police broadcast to other officers in the area. Although Wilson initially told the police that the shooting was just a "random act of violence" and the shooter was "some random guy[,]" he eventually identified the shooter as appellant, to whom Hicks was supposed to sell marijuana. Hicks was transported from the scene to a hospital where he later died.

Appellant was arrested within minutes of the shooting near a convenience store about 20 yards from the theater. Appellant denied shooting Hicks but told the police: "I was there, I saw who did it. It wasn't me, though, but I saw who did it." He pointed to a nearby person as the shooter and said that the person had "a bunch of drugs on him." The police spoke to the individual and concluded that the person had no involvement with the shooting.

Appellant was transported to a police station where he was interviewed after waiving his *Miranda*[2] rights. A copy of the audio and videotaped recording of his interview, with some portions redacted, was played for the jury. In his statement, appellant explained that he had gone behind the movie theater to buy marijuana from Hicks, that Hicks and one of his friends started to argue, and that Hicks said "so shoot me," and his friend then shot him. Appellant repeated this version of events several times.

When the detective confronted appellant that his statement did not match the information the police had gathered, appellant eventually admitted that he had shot Hicks. Appellant explained that when he walked behind the movie theater, he gave Hicks $40, but Hicks did not show him $40 worth of marijuana. Appellant asked, "[I]s that all you got?" and Hicks responded that he needed more money from appellant. Hicks then "swung at me. I caught it . . . I'm hyped, I'm on alert." According to appellant, Hicks's swing "completely missed" and did not make contact. Appellant then pulled out a handgun from his waistband. Hicks said, "Shoot me," and appellant did.

[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellant explained that he and Hicks knew each other and had fought a couple of times in middle school. Appellant said that Hicks was known to rob people, and that appellant believed that either Hicks or his two friends had a gun. Appellant admitted, however, that Hicks did not have a gun, and Hicks never threatened him. Appellant told the police that had Hicks not swung at him, he never would have died.

About a week after the shooting, two detectives with the Charles County Sheriff's Department spoke to Wilson at his home. One of the detectives testified at trial that Wilson had admitted to them that he, Rice, and Hicks were going to rob appellant prior to the shooting. Wilson said that they had robbed people before, explaining to the detectives that they would lead a person who wanted to buy marijuana to a secluded area and either walk off with their money or give them fake marijuana. Wilson told them that the three of them had not specifically discussed robbing appellant but knew they would merely by how they "looked at each other in the food court[.]" Wilson also told them that he did not see Hicks punch appellant, but he had heard what sounded like a punch.

Wilson contradicted the detective's trial testimony. Wilson testified that he had no intention of robbing appellant the night he was killed, explaining that no one in their group had a gun. Wilson admitted that he did tell the detectives that he and Hicks had robbed people for money on prior occasions but did not remember telling the detectives that they were going to rob appellant the night of the shooting, that they gave each other a "certain look" at the food court to indicate their intent to do so, or that in the previous robberies they led the person attempting to buy marijuana to a secluded area. Rice likewise testified at trial that the three had not attempted to rob appellant behind the movie theatre.

Michael Robinson, a friend of appellant's who was with appellant on the night of the shooting, testified that while in the food court, Hicks told appellant that he could sell him some marijuana. The group walked outside where Robinson saw appellant and Hicks walk behind the movie theater. Within minutes, Robinson heard a gunshot. When appellant walked out from behind the movie theater, he told Robinson that Hicks had swung at him and missed, and that Hicks had then said shoot me and he had. Shortly thereafter appellant texted a friend, who had been with him earlier at the mall but had left shortly before the shooting, that he "had to leave the mall. Somebody was trying him." The friend believed that appellant meant that he was "going to get into a fight."

Nicole Tunney testified that on October 28, two days after the shooting, she was chained next to appellant when they appeared in court for a bail review hearing. Appellant admitted to her that he was the person who "shot the boy behind the mall." When she asked him why he did it, appellant said "because the boy wanted to be a gangster that day" and "the boy told him to shoot him, so he did." Appellant added that the shooting, "was over $50.00 worth of weed."

DISCUSSION

I.

Appellant argues that the trial court committed reversible error when it allowed the State to play for the jury two remarks he made in his videotaped statement to the police. He argues that the remarks were inadmissible because they were irrelevant and unduly prejudicial. The first remark was: "I'm a pistol expert . . . I shoot bottles and rats and shit. So I know for a fact my aim is vicious." The second remark occurred after the detective

told appellant that Hicks had died and appellant replied, "Well, that's one less n**g*r out the way. He was a snake anyway." In addition to appellant's relevance/undue prejudice argument, he also argues that his first remark contained inadmissible "other crimes" evidence. The State responds that appellant has not preserved his "other crimes" argument for our review and that both remarks were relevant and not unduly prejudicial. We agree with the State. We shall first address the preservation argument.

Preservation

Prior to trial, appellant filed a motion in limine to exclude the above two remarks because they were irrelevant and unduly prejudicial. At no point did he argue that the remarks were inadmissible because they contained other crimes evidence. At trial, appellant objected to the two remarks for the same reasons he raised in his motion in limine – that they were not relevant and unduly prejudicial. He again made no argument that the remarks were inadmissible because they contained other crimes evidence.

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8–131(a). Md. Rule 4–323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." "It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999) (citations omitted). *See also Gutierrez v. State*, 423 Md. 476, 488 (2011) ("[W]hen an objector sets forth the specific grounds for his

objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.") (quotation marks and citations omitted).

Although an appellant may present an appellate court with a more detailed version of an argument made at trial, the Court of Appeals has refused to require trial courts "to imagine all reasonable offshoots of the argument actually presented to them before making a ruling on admissibility." *Starr v. State*, 405 Md. 293, 304 (2008) (quotation marks and citation omitted). *Cf. Sifrit v. State*, 383 Md. 116, 136 (2004) (when the defendant's theory of relevance on appeal was different from the theory he presented to the trial court, the Court of Appeals held that the theory advanced on appeal was not preserved). Specifically, when a defendant objects on grounds of relevance at trial, the defendant fails to preserve for appellate review, the argument that the evidence was unduly prejudicial or consisted of "other crimes" evidence. *See Klauenberg*, 355 Md. at 541 (Court of Appeals held that an objection at trial to testimony limited to relevance did not preserve an appellate argument that the testimony was improper "bad acts evidence") and *Jeffries v. State*, 113 Md. App. 322, 340-42 (appellate argument that evidence was unduly prejudicial and improper other crimes evidence not preserved where objection below was only that evidence was irrelevant), *cert. denied*, 345 Md. 457 (1997).

Based on the above law, appellant has not preserved his "other crimes" evidence argument for our review because he did not raise that argument below. We now turn to the appellant's relevance and undue prejudice argument.

Relevant and/or unduly prejudicial?

Md. Rule 5-401 defines "relevant evidence" as "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." *See Snyder v. State*, 361 Md. 580, 591 (2000) (a trial court will find evidence to be relevant when "its admission increases or decreases the probability of the existence of a material fact.") (citations omitted). "Evidence that is not relevant is not admissible." Md. Rule 5-402. A finding of relevance "is generally a low bar[.]" *State v. Simms*, 420 Md. 705, 727 (2011). Even if evidence is relevant, however, it may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Whether evidence is "unfairly" prejudicial is not judged by whether the evidence hurts one's case but whether it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (quotation marks and citations omitted).

Relevancy is a legal determination that we review *de novo* on appeal. *Fuentes v. State*, 454 Md. 296, 325 (2017) (citation omitted). However, we give significant deference to a trial court's determination that probative evidentiary value outweighs any danger of prejudice. *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 373 (2012) (citations omitted), *aff'd*, 430 Md. 431 (2013). *See Sifrit*, 383 Md. at 128 ("the admission of evidence is committed to the considerable discretion of the trial court.") (citing *Merzbacher v. State*,

346 Md. 391, 404 (1997)). An abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court. Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Fontaine v. State*, 134 Md. App. 275, 288, *cert. denied*, 362 Md. 188 (2000) (quotation marks and citations omitted).

A. First remark: "I'm a pistol expert . . . I shoot bottles and rats and shit. So I know for a fact my aim is vicious."

Appellant argues that his first remark "had no probative value because it failed to prove anything about the series of events that culminated in the act of the shooting." The State disagrees and argues that it went to appellant's intent to kill, making it "somewhat more likely that he intended to kill the victim when he shot him in the head." We agree with the State that appellant's remark was relevant for it suggests that the shooting was intentional and not accidental. Appellant offers no explanation as to how his remark unduly prejudices him, and we agree with the State that the remark was not unduly prejudicial because there is no correlation between "target practice on bottles and rodents" and an intent to kill a person. Accordingly, we find no error by the trial court in permitting that testimony.

B. Second remark: "Well, that's one less n**g*r out the way. He was a snake anyway."

Appellant argues that his second remark was irrelevant for it was merely an "after-the-fact reaction" that had no bearing on whether he acted in self-defense during the drug transaction. The State disagrees and argues again that it went to appellant's intent. The State explains that the remark had a "tendency to make it more likely than not that

[appellant] had a strong dislike or callous disregard for the victim and thus intended to kill him." We agree with the State that appellant's remark was relevant because, as with the above remark, it suggested that the shooting was not an accident. Appellant also argues that the remark was unduly prejudicial. However, the only argument appellant puts forth to support that argument is completely conclusory, i.e., "the danger in admitting such a questionably relevant and highly prejudicial statement is that the jury will give it undue weight." This argument fails to explain why the remark was unduly prejudicial. Clearly, there was no love lost between appellant and the victim and, given that the remark has some relevance as to whether appellant intended to kill the victim, we are also persuaded that the remark was prejudicial but not unduly so.

II.

Appellant argues that the trial court committed reversible error when it allowed the State to elicit certain testimony from Tunney about her interactions with appellant as they waited for a bail review hearing because the testimony was allegedly not relevant and unduly prejudicial. The first remark occurred when Tunney testified that appellant said he would shoot her, if she pushed him. The second remark occurred when Tunney testified that appellant was laughing and showed "no remorse" when he described shooting Hicks. The State responds that the remarks were relevant and not unduly prejudicial.

A. First remark

After the State elicited from Tunney that appellant told her that he shot the victim because "the boy wanted to be a gangster that day[,]" the following occurred:

[STATE'S ATTORNEY]: And did [appellant] say what the boy said?

[WITNESS]: He said that the boy told him to shoot him, so he did.

[STATE'S ATTORNEY]: And then, did you ask him something?

[WITNESS]: I asked him if –

[DEFENSE COUNSEL]: I'm going to object, Judge. Can we approach?

[THE COURT]: You can approach the bench, yes.

[DEFENSE COUNSEL]: I think what I anticipate the witness's answer is going to be is, "I asked him, if I told you to shoot me, would you shoot me? And the defendant said, "Probably."

So I don't . . . I think that that's highly prejudicial, I think it's character evidence, and it goes to his propensity to commit murder in general. And I think that it should be inadmissible.

[THE COURT]: *I think if it's a statement that was made, it's a statement that was made. I'm not going to fine-tune it that much. So, I don't think it's overly prejudicial. I mean, again, you know, I think, in terms of just a matter of evidence, it's a simple matter of evidence*. . . .

* * *

[STATE'S ATTORNEY]: So, Ms. Tunney, did you say something had happened?

[WITNESS]: Uh-hum.

[STATE'S ATTORNEY]: And what did you ask him?

[WITNESS]: *If I asked him to shoot me, would he shoot me*?

[STATE'S ATTORNEY]: What was his response?

[WITNESS]: *If I pushed him*.

(Emphasis added).

Appellant argues that the above italicized portion of Tunney's testimony was not relevant, but even if relevant, it was unduly prejudicial because it tended to show a

"criminal disposition" toward "murdering people." The State responds that her testimony was properly admitted because it "made it somewhat more probable that [appellant] intended to shoot the victim, as opposed to merely acting in self-defense" and that the testimony was not unduly prejudicial because it "was in the nature of boasting or 'trash talk' by young people."

Appellant objected to the testimony below on grounds that it was unduly prejudicial, not on grounds that it was irrelevant. "[T]he thrust of an unfair prejudice argument is that the prejudicial effect outweighs the *acknowledged* relevance. If the evidence were truly totally irrelevant, it would have little, if any, capacity to prejudice." *Jeffries*, 113 Md. App. at 342 (emphasis added). Therefore, appellant's relevancy argument is not preserved for our review because he did not raise it below, and, in fact essentially acknowledged that it was relevant. *See* Md. Rules 8–131(a), 4–323(a), and *Jeffries*, *supra*. As to appellant's prejudice argument, we are not persuaded that the trial court abused its discretion in admitting the testimony. We can think of circumstances where a person might, with justification, shoot someone "if pushed" – namely where the elements of self-defense exist, which was the theory of defense. Therefore, we are not persuaded that the trial court erred in admitting the testimony.

B. Second remark

Appellant also directs us to the following colloquy that occurred shortly after the above testimony:

> [STATE'S ATTORNEY]: Now, how was [appellant's] demeanor when you were talking with him?

[WITNESS]: He acted like he didn't care.

[DEFENSE COUNSEL]: Now, Judge, I'm going to object to that evidence.

[THE COURT]: Overruled.

[STATE'S ATTORNEY]: And at any point, was he laughing?

[DEFENSE COUNSEL]: Judge, I object.

[THE COURT]: Overruled.

[DEFENSE COUNSEL]: *I really don't see what the relevance is, Judge, but I do object.*

[THE COURT]: *I get it. Overruled*.

[DEFENSE COUNSEL]: Okay.

[STATE'S ATTORNEY]: Was he laughing at any point?

[WITNESS]: I know he's young.

[STATE'S ATTORNEY]: *Okay, that's not what I asked you. I said, was he laughing at any point?*

[WITNESS]: *I'm just saying. Yes, there was no remorse*.

(Emphasis added).

Appellant argues that Tunney's testimony, "Yes, there was no remorse[,]" was not relevant and was unduly prejudicial because it painted him "in a bad light." Appellant adds that the danger in admitting the remark "in the context of a case involving self-defense is that the jury will give it undue weight." The State responds that that testimony "had some relevance to [appellant's] state of mind and intention to kill." The State again adds that the statement was not unduly prejudicial because it "was in the course of boastful talk by a young person." The State argues that even if admitted in error, reversal is not required

because the error was harmless -- appellant's "demeanor, attitude and lack of remorse were on full display to the jury during his video recorded interrogation by police."

"A person's post-crime behavior often is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind." *Thomas v. State*, 372 Md. 342, 352 (2002). "As with other forms of circumstantial evidence, however, 'the probative value of "guilty behavior" depends upon the degree of confidence with which certain inferences may be drawn.'" *Decker v. State*, 408 Md. 631, 641 (2009) (quoting *Thomas*, 372 Md. at 352). "Applying our accepted test of relevancy, 'guilty behavio[ ]r should be admissible to prove guilt if we can say that the fact that the accused behaved in a particular way renders more probable the fact of their guilt.'" *Thomas*, 372 Md. at 352 (citation omitted).

Here, the evidence of appellant's behavior when discussing the crime – laughing and expressing no remorse – occurred two days after the crime. Additionally, the testimony that appellant expressed no remorse was a conclusion based on Tunney's perception. We are persuaded that appellant's behavior and Tunney's interpretation of appellant's behavior was not relevant because it does not render more probable that appellant intentionally killed Hicks. Nonetheless, we shall affirm because we find the isolated remark harmless beyond a reasonable doubt.

In Maryland, harmless error is governed by the standard first adopted by the Court of Appeals in *Dorsey v. State*, 276 Md. 638 (1976).

> We conclude that when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent view of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way

> influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded — may have contributed to the rendition of the guilty verdict.

State v. Hart, 449 Md. 246, 262-63 (2016) (quoting *Dorsey*, 276 Md. at 659) (footnote omitted). Maryland appellate courts have "steadfastly maintained" that the State has the burden to prove harmlessness. *State v. Yancey*, 442 Md. 616, 628 (2015) (citations omitted). "The harmless error standard is highly favorable to the defendant[.]" *Perez v. State*, 420 Md. 57, 66 (2011) (citation omitted).

The "essence of this test" is to determine "whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded." *Ross v. State*, 276 Md. 664, 674 (1976). *See also Lawson v. State*, 389 Md. 570, 600 (2005) (in a "harmless error" analysis, we must consider the "cumulative effect" of the improper comments). In *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), the Supreme Court set forth five factors that an appellate court should use to guide its decision in determining to what extent an error contributed to the verdict: the importance of the tainted evidence; whether the evidence was cumulative or unique; the presence or absence of corroborating evidence; the extent of the error; and the overall strength of the State's case.

Here, the remark was isolated and unique, and occurred during a five-day murder trial. Moreover, there was much evidence to support the jury's finding that appellant had not acted in self-defense. Eyewitness Rice testified that before appellant shot Hicks in the

head, Hicks said to appellant, "If you gonna shoot me, shoot me[.]" Likewise, eyewitness Wilson testified that Hicks asked, "You gonna shoot me?" and then appellant shot him. Robinson, appellant's friend, testified that when he asked appellant as he ran away from the area what happened, appellant said that Hicks had swung at him, missed, and so appellant shot him. Appellant told the police that he had shot Hicks after he swung at him, stating that had Hicks not swung at him, he never would have died. Appellant also told the police that Hicks did not have a gun and never threatened him. Additionally, we are not persuaded that the error could have contributed to the verdict. Appellant admits in his appellate brief that his remark to Tunney "could just have easily been an exhibition of grandiosity or an emotional expression about having been victimized by an attempted robbery." We agree and are persuaded beyond a reasonable doubt that the error in no way contributed to the verdict. Accordingly, we shall affirm.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.