UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0893

September Term, 2015

MARCAL DURON RAYNOR

v.

STATE OF MARYLAND

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

JJ.

Opinion by Krauser, C.J.

Filed: October 28, 2016

Convicted by a jury, in the Circuit Court for Wicomico County, of distribution of a fake controlled dangerous substance and conspiracy to distribute a fake controlled dangerous substance, Marcal Duron Raynor, appellant, presents the following issue for our review:[1]

> Whether the trial court erred in allowing a lay witness to testify that the substance possessed by appellant was heroin.

Finding no error, we affirm.

BACKGROUND

On October 7, 2014, Trooper William Elwell of the Wicomico County Narcotics Task Force was conducting "covert investigations" into drug trafficking, when he made telephone contact with a purported drug dealer, later identified as appellant, to arrange a purchase of narcotics. During the course of that conversation, Trooper Elwell agreed to purchase from appellant what he believed to be "a half gram of heroin" for $80 and to meet appellant at a local convenience store for the purpose of making that purchase. When Trooper Elwell arrived at the store, he saw appellant get out of a tan Chevy pickup truck. Appellant then walked over to Trooper Elwell's vehicle and told the trooper to leave his car and walk toward the pickup.

As the trooper walked toward the pickup truck, he observed another individual, later identified as Jonathan Byrd, in the driver's seat of the vehicle. Appellant told the trooper to hand the money to Mr. Byrd. When the trooper did as instructed, Mr. Byrd counted the

[1] Appellant phrased the question as: "Did the trial court err in allowing a lay witness to give prejudicial expert testimony?"

money and handed it to appellant. At this time, appellant "produced a Newport cigarette pack" and gave it to Mr. Byrd, who then handed it to Trooper Elwell. The only item inside of the cigarette pack was a "clear plastic baggie corner knot," which Trooper Elwell believed to contain heroin. When the transaction was completed Trooper Elwell walked back to his vehicle and left the area. The bag was then sent to the Maryland State Police Lab, which ultimately determined that the substance, in the "plastic baggie," was not a controlled dangerous substance.

DISCUSSION

Appellant contends that "the trial court erred in allowing a lay witness to give prejudicial expert testimony" at trial. Specifically, the court allowed Trooper Elwell, a non-expert, "to testify that he had seen heroin over 50 times in his experience as a police officer; that, 90 percent of the time, the substance seized was packaged in the same manner as heroin is; and he subsequently believed the substance at issue was heroin because of the way it was packaged, the way it appeared in the box, and the way the transaction had been set up."

Under Maryland Rule 5-701, testimony by a lay witness "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." *Id.* Expert testimony, on the other hand, is "based on specialized knowledge, skill, experience, training, or education . . . and] need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). But, before a witness may give expert testimony, the trial court must

determine: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702.

But, admittedly, the distinction between lay and expert testimony is not always clear, particularly when "at least one class of opinions potentially falls within both categories." *Id.* at 718. As the Court of Appeals explained:

> A witness who has personally observed a given event may nonetheless have developed opinions about it that are based on that witness's specialized knowledge, skill, experience, training, or education. The question then becomes whether the fact of the personal observation will permit admission of the opinion by a lay witness under Rule 5-701, or whether the "expert" basis of the opinion will require compliance with Rule 5-702 and admission as expert testimony.

Id.

The Court of Appeals discussed this issue at length in *Ragland, supra.* In that case, members of the Montgomery County Police Special Assignment Team ("SAT") observed an individual, Paul Herring, make a call from a pay telephone at a gas station, drive to another gas station, and make another call from a different pay telephone. *Id.* at 709. Herring then drove to a different location, "where a hand-to-hand transaction took place between Herring and the passenger of a yellow Cadillac[.]" *Id.* When both Herring and the driver of the Cadillac left the area, the officers stopped Herring's van, forced him to the ground, and recovered "a small object which they suspected to be crack cocaine." *Id.* at 710. While this was going on, other officers stopped the yellow Cadillac and arrested its

three occupants, including Jeffrey Ragland, who was sitting in the Cadillac's front passenger seat. *Id.*

Ragland was charged with distribution of a controlled dangerous substance. *Id.* At trial, two members of the SAT team, Officer Michael Bledsoe and Detective Kenneth Halter, testified regarding the events leading up to Ragland's arrest. *Id.* at 711, 713. Neither was called as an expert by the State nor qualified as an expert, by the court, under Maryland Rule 5-702. *Id.* Nevertheless, Officer Bledsoe testified that, based on his training and experience in investigating drug crimes, "what occurred was [a] drug transaction." *Id.* at 712. Although Detective Halter did not personally observe the transaction between Herring and Ragland, he, too, opined that, based on his training and experience, "a drug transaction had occurred." *Id.* at 713-14. Ragland was ultimately convicted of distribution of a controlled dangerous substance. *Id.* at 715. After he noted an appeal, the Court of Appeals granted certiorari. *Id.*

Before the Court of Appeals, Ragland argued that the officers' testimony constituted expert testimony and should have been excluded by the trial court. *Id.* at 716. The Court agreed, holding that "Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725. In so holding, the Court noted that both officers "devoted considerable time to the study of the drug trade [and] offered their opinions that, among the numerous possible explanations for the [observed events], the correct one was that a drug transaction had taken place." *Id.* at 726. The Court further observed that "[t]he connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit

by the prosecutor's questioning." *Id.* The Court therefore concluded that "[s]uch testimony should have been admitted only upon a finding that the requirements of Md. Rule 5-702 were satisfied." *Id.*

The Court of Appeals similarly held in *State v. Blackwell*, 408 Md. 677 (2009), that testimony about the results of a horizontal gaze nystagmus ("HGN") test constituted expert testimony "subject to the strictures of Md. Rule 5-702."[2] *Id.* at 691. In that case, the defendant, Paul Blackwell, was convicted of multiple offenses, including driving under the influence, after a police officer intimated during trial that Blackwell had "failed" an HGN test. *Id.* at 684-85. On appeal, Blackwell contended that the trial court erred in admitting the officer's testimony regarding the administration and results of the HGN test because the officer had not been offered or qualified as an expert witness. *Id.* at 685-86.

Applying its holding in *Ragland*, *supra*, the Court of Appeals agreed with Blackwell, holding that the officer's testimony "about Blackwell's performance on the HGN test was clearly expert testimony within Md. Rule 5-702." The Court noted that the officer "reported, among other things, that Blackwell had 'lack of smooth pursuit' and 'distinct nystagmus at maximum deviation' in each eye." *Id.* at 691. The Court found this significant because "the HGN test is a scientific test, and a layperson would not necessarily know that 'distinct nystagmus at maximum deviation' is an indicator of drunkenness; nor

[2] HGN is "a lateral or horizontal jerking when the eye gazes to the side." *Blackwell*, 408 Md. at 686 (internal citations and quotations omitted). "Although HGN is a natural phenomenon, alcohol magnifies its effects." *Id.* As a result, "law enforcement officials have looked to HGN as an indicator of alcohol consumption for several decades." *Id.* at 687.

could a layperson take that measurement with any accuracy or reliability." *Id.* The Court also drew a distinction between the HGN test, which requires expert testimony, and other field sobriety tests, which may not:

> [T]he HGN test does differ fundamentally from other field sobriety tests because the witness must necessarily explain the underlying scientific basis of the test in order for the testimony to be meaningful to a jury. Other tests, in marked contrast, carry no such requirement. For example, if a police officer testifies that the defendant was unable to walk a straight line or stand on one foot or count backwards, a jury needs no further explanation of why such testimony is relevant to or probative on the issue of the defendant's condition. A juror can rely upon his or her personal experience or otherwise obtained knowledge of the effects of alcohol upon one's motor and mental skills to evaluate and weigh the officer's testimony. However, if a police officer testifies that the defendant exhibited nystagmus, that testimony has no significance to the average juror without an additional explanation of the scientific correlation between alcohol consumption and nystagmus. In effect, the juror must rely upon the specialized knowledge of the testifying witness and likely has no independent knowledge with which to evaluate the witness's testimony.

Id. at 691-92 (*quoting State v. Murphy*, 953 S.W.2d 200, 202-03 (Tenn. 1997)).

Although the foregoing cases make clear that a witness's specialized training and experience is key in distinguishing expert from lay testimony, the language of *Blackwell* implies that such training and experience, by itself, is not necessarily dispositive of the issue. In other words, a lay opinion does not become an expert opinion merely because the witness had some prior training and experience, particularly, when the fact-finder need not rely on said training and experience in assessing the validity of the witness's claim.

This Court expounded upon this distinction in *In re Ondrel M.*, 173 Md. App. 223 (2007). In that case, the respondent, Ondrel M., was a passenger in a vehicle that had been stopped by the police. *Id.* at 227-28. Upon approaching the vehicle, Officer Brett Tawes

"smelled an odor of marijuana emanating from inside." *Id.* at 228. A search of the vehicle revealed marijuana, and Ondrel M. was arrested. *Id.* At trial, Officer Tawes testified as a non-expert that "in his training at the police academy and in his work in the field as a police officer, he had been exposed previously to the smell of burning marijuana and therefore could recognize its smell." *Id.* Ondrel M. was subsequently found guilty. *Id.* at 229.

Relying on *Ragland*, Ondrel M. argued, on appeal, that the trial court erred in admitting the officer's lay opinion because it was based on the officer's training and experience as a police officer. *Id.* at 238. This Court disagreed and held that Officer Tawes' testimony was properly admitted as lay opinion and did not require prior qualification. *Id.* Relying on the Court of Appeals reasoning in *Blackwell, supra*, this Court reiterated that certain testimony, even if given by a police officer, is not expert testimony if it was rationally based on the witness's perceptions:

> No specialized knowledge or experience is required in order to be familiar with the smell of marijuana. A witness need only have encountered the smoking of marijuana in daily life to be able to recognize the odor. The testimony of such witness thus would be "rationally based on the perception of the witness." *Ragland*, 385 Md. at 717.

In re Ondrel M., 173 Md. App. at 243.

We further pointed out that, "[i]n determining whether an opinion offered by a witness is lay opinion or expert testimony, it is not the status of the witness that is determinative. Rather, it is the nature of the testimony." *Id.* at 244. Specifically, "[t]here are certain fields where a witness may qualify as an expert based upon experience and training, however, use of the terms 'training' and 'experience' do not automatically make someone an expert." *Id.* (internal citations omitted). Accordingly, "the fact that Officer

Tawes based his opinion regarding the odor of marijuana on his prior training and experience as a police officer does not render the opinion, *ipso facto*, an expert opinion." *Id.* at 245.

This Court further defined the reach of *Ragland* in *Fullbright v. State*, 168 Md. App. 168 (2006). In that case, Jeffery Fullbright attacked a woman in her home with a knife, which caused the victim to bleed on the knife. *Id.* at 172-73. The bloody knife was later recovered from the scene by the police, and Fullbright was arrested. *Id.* at 173-74. At trial, one of the responding officers, Bradley Bechtel, testified regarding why the knife was not tested for fingerprints. *Id.* at 175. Officer Bechtel, who was not qualified as an expert, explained that based on his "experience and training in the Police Academy in regards to recovering latent prints . . . it's hard to get good prints off of blood." *Id.* at 176.

On appeal, Fullbright argued that, under *Ragland*, the trial court erred in allowing the officer to give lay opinion based on the officer's training and experience. *Id.* at 178. We disagreed, holding that the trial court did not err in admitting the testimony. *Id.* at 185-86. We explained that the facts of that case and the facts of *Ragland* were distinguishable, as Officer Bechtel's testimony "was not opinion evidence, expert or lay, because the State did not offer his testimony for its truth." *Id.* Specifically, we stated:

> Opinion evidence, by definition, is "testimony of a witness, given or offered in the trial of an action that the witness is of the opinion that some fact pertinent to the case exists or does not exist, offered as proof of the existence or nonexistence of that fact." In *Ragland*, the State introduced the officers' opinions that the events they observed constituted a drug transaction in order to prove that those events were *in fact* a drug transaction. By contrast, in the instant case, the State did not elicit Officer Bechtel's opinion to prove that it was *in fact* hard to get good fingerprints off of wet objects. Rather, the State sought his opinion for the sole purpose of explaining to the jury why Officer

> Bechtel, as the investigating officer, did not submit the bloody knife for fingerprint analysis.

Id. at 181-82 (internal citations omitted).

Applying the above principles to the facts of the instant case, we hold that the trial court did not abuse its discretion in allowing Trooper Elwell to testify that he believed the substance in the cigarette pack was heroin. *See Warren v. State*, 164 Md. App. 153, 166 (2005) ("The decision to admit lay opinion testimony is vested within the sound discretion of the trial judge."). Unlike the officers in *Ragland* and *Blackwell,* Trooper Elwell did not rely on any scientific or technical analysis requiring specialized explanation or measurement, nor did he cite to any specific training in the investigation of drug cases when proffering his testimony. Instead, Trooper Elwell stated that he had seen heroin packaged and distributed in a similar manner on prior occasions. *See In re Ondrel M.*, 173 Md. App. at 244 (explaining that the officer's testimony regarding previous exposure to marijuana served as "sufficient foundation for [him] to testify regarding the odor of marijuana[.]"); *see also Paige v. State*, 226 Md. App. 93, 125 (2015) (to testify on a matter, a witness must have personal knowledge, which requires that the witness have "the experience necessary to comprehend his perceptions.") (internal citations and quotations omitted). That Trooper Elwell happened to garner this experience while working as a police officer does not necessarily transform his testimony into expert opinion. *See Warren,* 164 Md. App. at 168 ("The rule of admissibility of lay opinion testimony is no different when . . . the lay opinion is offered by a police officer.").

In fact, we are not wholly convinced that Trooper Elwell rendered an opinion, expert or otherwise. As noted above, opinion evidence is testimony offered as proof of the existence or nonexistence of a relevant fact, such as in *Ragland*, where the officers' opinion that Ragland was distributing narcotics was offered to prove that Ragland was, in fact, distributing narcotics. In contrast, Trooper Elwell's testimony was not offered to prove the truth of his statement – that is, his testimony was not offered to prove that the substance in the cigarette pack was, in fact, heroin. Rather, the testimony was offered to show why Trooper Elwell went to the location to meet appellant, executed the transaction, and sent the bag to the lab for testing.

Nevertheless, even if we were to conclude that Trooper Elwell's testimony was "lay opinion," such testimony was permissible under Maryland Rule 5-701. Trooper Elwell's opinion that the substance was heroin was based on events that rationally support such a conclusion. The trooper had a conversation with appellant, in which he agreed to purchase heroin for $80, and, pursuant to that agreement, he was given a cigarette box that contained a plastic bag with a "corner knot" and an unidentified substance, which he reasonably believed was the heroin he had just purchased. *See Bruce v. State*, 328 Md. 594, 630 (1992) ("[L]ay opinions which are derived from first-hand knowledge, are rationally based, and are helpful to the trier of fact are admissible.").

Moreover, Trooper Elwell's opinion did not require any "specialized" experience or training. As in *In re Ondrel, supra*, where the officer concluded that an unknown substance was marijuana based on its smell, Trooper Elwell's conclusion that the substance was heroin was within the realm of that which a layperson would know as a matter of

course. In other words, after agreeing to purchase $80 worth of heroin, meeting someone to effectuate the transaction, and receiving in return a cigarette box containing nothing but a "clear plastic bag corner knot," a reasonable person would likely conclude that the substance, in the bag, was heroin. *See Warren*, 164 Md. App. at 167 (testimony by police officer that defendant was "drunk" was not expert opinion because "[p]erceiving whether someone is intoxicated does not require specialized knowledge[.]"); *Compare to Randall v. State*, 223 Md. App. 519, 579 (2015) (testimony as to why the Register of Wills "requires the proceeds from the sale of foreign property to be brought into a Maryland estate for the purpose of offsetting expenses exits the realm of layperson testimony . . . and enters the realm of expert testimony based on specialized knowledge of probate law, an area of which the average layperson has no knowledge.").

In sum, the trial court did not abuse its discretion in admitting Trooper Elwell's testimony. *See Raithel v. State*, 280 Md. 291, 301 (1977) ("[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.").

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.