UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1405

September Term, 2015

DARRIN McCAULEY

v.

STATE OF MARYLAND

Berger,
Arthur,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: June 10, 2016

Appellant, Darrin McCauley, was tried and convicted by a jury in the Circuit Court for Prince George's County (Cotton, J.) of possession with intent to distribute heroin, possession of heroin and possession of marijuana. Appellant was sentenced, on July 10, 2015, to a term of twenty years' imprisonment, with all but fifteen years suspended for possession with intent to distribute heroin; the conviction for simple possession was merged and he was sentenced to a concurrent term of one year for possession of marijuana. Appellant filed the instant appeal, in which he raises the following issues for our review:

> 1. Did the trial court err in unduly restricting appellant's Sixth Amendment right to present a defense and/or cross-examine witnesses?
>
> 2. Did the trial court abuse its discretion in refusing to re-open the motion to suppress?

FACTS AND LEGAL PROCEEDINGS

Officer Daniel Bullock of the Prince George's County Police Department testified that, on the morning of August 19, 2014, while on patrol in the Landover area, he observed appellant sitting with others in a parking lot at a shopping center that was known as an "open air drug market." Officer Bullock testified that he observed appellant "toss a black object . . . into a tree that was next to him" and that appellant had an open beer that "he kind of like put down" as Officer Bullock approached. Officer Bullock testified that he issued a citation to appellant for possession of the open alcohol beverage[1] and then walked over to the tree and

[1] Md. Code, Article 2B, §19-301, Possession of Open Container Prohibited (In effect at time of instant proceedings, but repealed by 2016 Md. Laws, Ch. 41 (S.B. 724)).

recovered a small black cloth bag that contained twenty-eight smaller bags, the contents of which field tested positively as twenty-four bags of heroin and four bags of marijuana.

Renju Rajan, who was stipulated as an "expert" in "forensic chemistry and analysis of narcotics," testified that the substances recovered in this case tested positively as marijuana and heroin, respectively. Officer Bullock also testified that he recovered a small amount of cash from appellant's person, an amount which he did not deem factored into the expert opinion of possession with intent to distribute; he did not, however, recover any drug paraphernalia. Based on the foregoing, appellant was consequently arrested.

Corporal Dexter Baxter testified, as an expert in "narcotics," that the substance recovered, which was suspected to be heroin, was packaged in amounts that indicated that the substance was for sale. According to Detective Baxter, heroin is considered a "morning drug" and "you really don't see a user buying more than five baggies at a time or for that morning." The following colloquy occurred during cross-examination:

> [APPELLANT'S COUNSEL]: If someone were to come and buy let's say 20 bags worth, because you packed up 40 bags, right, and left out for your daily drug dealing, they couldn't get it in a big bag like they would at Costco or something, they would literally get 20 bags is all I'm saying, correct?
>
> DET. BAXTER: Yes, you're right, but I never seen that.
>
> [APPELLANT'S COUNSEL]: *So, you've never seen someone buy more than a morning's worth of drugs?*
>
> PROSECUTOR: Objection.
>
> THE COURT: Sustained.

[APPELLANT'S COUNSEL]: Are you speaking of heroin or are you speaking of other drugs?

[DET. BAXTER]: In this case, I'm referring to heroin.

[APPELLANT'S COUNSEL]: *Okay. But, you're not saying that there are persons who buy let's say a few days worth of heroin?*

PROSECUTOR: Objection.

THE COURT: Basis?

PROSECUTOR: —to the form of the question, Judge.

THE COURT: Sustained.

[APPELLANT'S COUNSEL]: That's fine. Nothing further.

(Emphasis supplied).

DISCUSSION

I. Appellant's Sixth Amendment Rights

Appellant contends that trial counsel was "attempting to cross-examine Detective Baxter, consistent with his 'expertise,' regarding the amounts of narcotic in question as it related to personal use." Appellant maintains that it was "a fair and appropriate area of inquiry," because the "question of possession in an amount to indicate an intent to distribute was certainly a relevant part of the inquiry," and essential to his defense. By denying him the right to cross-examine the witness, appellant asserts that his Sixth Amendment right was violated and reversal is required.

The State responds that appellant failed to preserve his claim because he "abandoned" his attempt to question the expert after the trial court sustained the State's objection based on the form of the question. To the extent that the argument is preserved, the State argues, the trial court properly exercised its discretion in sustaining the two objections because the first question was repetitive and the second question was confusing. Furthermore, the State maintains, even if the court abused its discretion, any error is harmless because "[t]he questions posed to Corporal Baxter did not even impeach his expert opinion, much less affect the outcome of the trial."

"The Confrontation Clause of the Sixth Amendment guarantees an accused in a criminal proceeding the right to be confronted with the witnesses against him." *Marshall v. State*, 346 Md. 186, 192 (1997) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986)). "Both the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the right to cross-examine adverse witnesses." *Church v. State*, 408 Md. 650, 663 (2009) (citing *Delaware*, 475 U.S. at 678).

> [A] cross-examiner must be given wide latitude in attempting to establish a witness' bias or motivation to testify falsely . . . . As the decision to limit cross-examination ordinarily falls within the sound discretion of the trial court, our sole function on appellate review is to determine whether the trial judge-imposed limitations upon cross-examination that inhibited the ability of the defendant to receive a fair trial.

Merzbacher v. State, 346 Md. 391, 413 (1997) (citations omitted). Significantly, "[a] trial judge always acts within his or her discretion by prohibiting the introduction of relevant but otherwise cumulative evidence." *Id.* at 414–15 (citing MD. RULE 5–403).

In the case *sub judice*, we first address the question of preservation. The State, citing *Watkins v. State*, 328 Md. 95, 99–100 (1992), *overruled by Calloway v. State*, 414 Md. 616 (2010), argues that, where a party acquiesces to a court's ruling, there is no basis for appeal from that ruling. In *Watkins*, however, defense counsel was seeking leave of the court, at a bench conference, to question a witness about a pending theft charge. Counsel acquiesced, accepting "the prosecutor's statement that, no 'deal' had been made with the witness . . . [a]ccordingly, there is no basis for appeal from this ruling." *Id*. at 100. The instant case is a different situation. Here, there was an objection, on the record, that the court sustained. Maryland Rule 8–131(a) provides that an issue may be decided by the appellate court if it "plainly appears by the record to have been raised in or decided by the trial court," as the issue was in the instant case. Therefore, we conclude that the issue is preserved for our review.

We next address whether the trial court abused its discretion in sustaining the State's objection during cross-examination of Detective Baxter. The trial court's ruling sustaining the State's objection on grounds of "form of question," was not an abuse of discretion. Although it is disingenuous to posit that the issue that appellant's counsel sought to address was unclear to the Court and the prosecutor, *i.e.*, that the evidence concerning the quantity of drugs recovered could just as easily have been obtained for appellant's personal use, there is no indication that appellant's right to a fair trial was violated. Nor is there any indication that appellant's trial counsel was seeking to impeach the witness or that the purpose of his

cross-examination was to reveal bias or self-interest. Appellant's trial counsel was free to reformulate the question and continue cross-examination of the hostile witness. The fact that cross-examination concluded voluntarily by counsel, after the second objection was sustained, does not weigh against the trial court's ruling in a determination of the abuse, *vel non*, of its discretion.

Furthermore, although we are unpersuaded by the State's argument that the questions were confusing, we conclude that the questions, as formed, elicited repetitive responses from the witness. A trial court always has discretion to limit relevant, but unnecessarily cumulative evidence. MD. RULE 5–403; *Merzbacher*, 346 Md. at 414–15. We reiterate that, instead of concluding cross-examination, appellant's trial counsel was free to formulate questions that would not elicit repetitive responses from the witness or explain to the court the reasoning for a particular line of questioning. Therefore, we hold that the trial court did not abuse its discretion.

II. Motion to Suppress

Next, appellant contends that the trial court abused its discretion in refusing to re-open his motion to suppress after Officer Bullock "dramatically changed" his testimony at trial. Essentially, appellant challenges the lawfulness of his detention in light of Officer Bullock's trial testimony; thus, he contends that the search incident to his detention violated his constitutional rights.

The State responds that "Officer Bullock's testimony at trial and at the suppression hearing was not inconsistent, much less material[ly] inconsistent." Furthermore, the State asserts, Officer Bullock never communicated to appellant that he was, in fact, detained. Finally, the State maintains that appellant's detention, after the issuance of the citation, was based on "ample reasonable suspicion" to support the continued investigation to determine what appellant had thrown into the shrubbery.

A transcription of the colloquy concerning Officer Bullock's trial testimony is excerpted below:

> [APPELLANT'S COUNSEL]: All right. Officer, for a citation offense such as this one that you gave [appellant], once you're satisfied with that person's identification information and you have them sign the citation, they are free to go at that point, correct?
>
> PROSECUTOR: Objection.
>
> THE COURT: Overruled.
>
> [APPELLANT'S COUNSEL]: It's okay if you don't know.
>
> [OFFICER BULLOCK]: At this point, no, because *I was actually still doing my investigation.*
>
> [APPELLANT'S COUNSEL]: So, after you received [appellant's] identification information and were satisfied with it, had him sign the payable citation, he was still then detained?
>
> [OFFICER BULLOCK]: Yes.
>
> [APPELLANT'S COUNSEL]: He was not free to leave?
>
> [OFFICER BULLOCK]: No, he was not, sir.

[APPELLANT'S COUNSEL]: Can we approach?

(Counsel approached the bench, and the following ensued:)

* * *

[APPELLANT'S COUNSEL]: I will admit, even through the suppression hearing that we had, this is the first we're learning, and I think the State also, that, at that point [appellant] was not free to leave. In fact, the testimony was not that at the suppression hearing. The testimony at the suppression hearing was that he was free to leave. If he was not free to leave at that point, the case law is clear that, once someone has the citation, at that point, they have to be free to leave. The only way that a person can be detained, placed under arrest, is if the officer is not satisfied with their identification information. If the person either doesn't have identification, they give their name, date of birth, and somehow they don't match up or, for whatever reason, they're not satisfied. But basically, the suppression was denied at the hearing because he was free to leave. The evidence was not suppressed because he was free to leave at that point, that is, was basically he happened to just stay there. That's why we've been going down this whole road with the defense. That's why I've been asking these questions, because the testimony then was that he went back to his chair on his own, not that he was being detained as is now being testified to. Based on that, I can't even say that denying the motion to suppress was improper because that was all the evidence that was presented to the Court at the time. But, based on this—

THE COURT: I don't understand. What are you asking of me? You've said all of this. You must be asking something. What are you asking for?

[APPELLANT'S COUNSEL]: I would ask that the evidence that was obtained after [appellant] was detained unlawfully be suppressed.

THE COURT: You mean the evidence that the officer said he saw him throw away? That request would be denied. The testimony thus far is that it is not something he took from him, but something that he had thrown away and discarded and he went and retrieved it.

[APPELLANT'S COUNSEL]: Agreed. What was taken from him, however, [was] the money which has already been testified to and is in evidence.

THE COURT: Anything you wish to add?

> PROSECUTOR: Judge, this court has already made a decision in regards to the suppression of the evidence. That motion was denied. With regards to the drugs, Your Honor, I don't want to reopen that issue because it has already been decided. I would ask the Court to deny the defendant's motion. It sounds that he wants to have the drugs and money suppressed.
>
> [APPELLANT'S COUNSEL]: I would agree with the Court with regard to the drugs, which were already discarded. But, the money which is detained, physically, it was in his right pocket, based on what's been said that would have to be suppressed.
>
> THE COURT: Based on the testimony thus far, your request is denied.

(Emphasis supplied).

Because, according to appellant, Officer Bullock's testimony at the suppression hearing is relevant to his contention that the court abused its discretion in refusing to reopen his motion to suppress, which was before a different trial judge, the relevant portions of the proceeding are excerpted below:

> [APPELLANT'S COUNSEL]: What did you do with Mr. McCauley after you issued the payable citation?
>
> [OFFICER] BULLOCK: Well, from there I, like I said, from there went over to investigat[e] what was over there that he tossed which was in the—a tree.
>
> [APPELLANT'S COUNSEL]: Keep going.
>
> [OFFICER] BULLOCK: Yeah, from there, you know, I issued a citation, and then went to go investigate what was tossed.
>
> [APPELLANT'S COUNSEL]: And what was Officer Powers doing at this time?

* * *

> [OFFICER] BULLOCK: Officer—what I was doing, I guess he was, too, I was focusing on that, but at the same time I don't know exactly what Officer Powers was doing but he was right there on the scene with me the whole time.
>
> [APPELLANT'S COUNSEL]: He searched the tree area with you?
>
> [OFFICER] BULLOCK: No, I searched the tree area. He was actually standing next to McCauley.
>
> [APPELLANT'S COUNSEL]: Was standing with Mr. McCauley?
>
> [OFFICER] BULLOCK: There you go, yes. In between McCauley and the tree.

"Rule 4–252 . . . explicitly allows the circuit court to reconsider its denial of a motion to suppress evidence if either party requests such a reconsideration." *Long v. State*, 343 Md. 662, 664–65 (1996).

In the instant case, in arguing that his motion to suppress should have been "re-opened" at trial, appellant proffers that his detention became unlawful when he was not free to leave after the issuance of the citation for possession of an open container of alcohol. Although appellant is correct that a lawful detention requires a reasonable suspicion supported by articulable facts that an accused is engaged in criminal activity, *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see also Stokes v. State*, 362 Md. 407, 415–16 (2001), appellant fails to acknowledge the entirety of the factual backdrop surrounding his detention. After the issuance of the citation, Office Bullock possessed a reasonable and articulable suspicion that appellant was engaged in *additional* criminal activity because, when he initially approached appellant, he witnessed appellant cast off a "black object" into a "tree." Because appellant

discarded this "black object" in an area known for illicit drug transactions, Officer Bullock had further reason to be suspicious. Although Officer Bullock's investigation of the *open container* had concluded, the officer's investigation of appellant's *other* suspected criminal activity, as it pertained to drug possession, was ongoing. It would be illogical, and potentially dangerous, for Officer Bullock, who encountered appellant engaged in two or more suspected criminal acts, to conclude the investigation with the issuance of a citation, advise appellant that he is free to leave, only to, immediately thereafter, again, take appellant into custody to complete the investigation of suspected additional criminal acts.

Finally, we agree with the State that Officer Bullock's hearing testimony does not "dramatically" differ, particularly in substance, from his trial testimony. Accordingly, we hold that the trial court did not abuse its discretion by not re-visiting appellant's pretrial motion to suppress at trial.

CONCLUSION

For the foregoing reasons, we hold that the trial court did not abuse its discretion by sustaining the State's objection to appellant's form of question during cross-examination and we further hold that the trial court did not abuse its discretion by not re-opening appellant's pretrial motion to suppress at trial.

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