

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2461

September Term, 2015

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IN RE: OMAR P.

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Meredith,  
Leahy,  
Beachley,

JJ.

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Opinion by Beachley, J.

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Filed: November 10, 2016

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The Circuit Court for Dorchester County, sitting as a juvenile court, found appellant, Omar, “involved” in the crimes of armed robbery; robbery; wearing, carrying and transporting a concealed dangerous weapon; wearing and carrying a dangerous weapon with the intent to injure; reckless endangerment; and theft of property having a value of less than \$1,000. Omar presents one question for our review which we slightly rephrase as follows: Did the juvenile court err in allowing an investigating officer not qualified as an expert to testify on re-direct examination that another officer “pinged” a cellular phone taken during a robbery, and that the other officer located the stolen phone where Omar lived? We affirm, holding that the trial court did not err in admitting the officer’s testimony; alternatively, even if the trial court erred, we conclude that any error was harmless beyond a reasonable doubt.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Shortly before 8:00 p.m. on September 7, 2015, William and Christine Duncan were walking from a restaurant in Cambridge to their boat, which was moored behind the Harbor Watch Apartments. A black juvenile wearing a gray striped knitted top, dark trousers, and a hat, approached them. The juvenile, later identified as Omar, pulled a gun from his sleeve, pointed it at Mr. Duncan, and demanded money. Mr. Duncan said that he had a cell phone, but no money. At that point, Omar pointed the gun at Mrs. Duncan. Mrs. Duncan said she also did not have any money but had credit cards and a cell phone. She told Omar to “[t]ake whatever you want, but . . . just leave us alone.” Omar told the Duncans to “[g]ive me your cell phones.” Omar took the cell phones and ran away.

Charles Schuyler, who was nearby in his car with his children when these events occurred, observed a white man and woman having a conversation with a black male. As he drove away, his daughter told him, “Dad, he’s got a gun.” Schuyler looked and saw a black male wearing a dark colored baseball cap with a light colored insignia holding a black handgun. Schuyler drove away and called 911.

Officer John Foster of the Cambridge Police Department responded to Mr. Schuyler’s call for a robbery. After meeting with the Duncans, he broadcast a description of the suspect: a black male, five feet, ten inches tall, 165 pounds, no facial hair, wearing a black hat and striped shirt.

Nine days after the robbery, Officer Howard of the criminal investigations division of the Cambridge Police Department met with the Duncans. He showed them a photographic array containing six photographs. Mr. and Mrs. Duncan separately identified a photograph of Omar as the person who robbed them.

The trial court held an adjudicatory hearing on November 6, 2015. At the hearing, Officer Howard testified on cross-examination that the photographic array consisted of previously arrested juveniles. Officer Howard testified, without objection, that he included Omar in the photographic array because of “where cell phone coordinates had pinged.” On redirect, the State sought to clarify the comment, asking, “You testified just now that in developing this array you had developed [Omar] as a suspect because his cell phone pinged?” Omar objected, and the trial court overruled the objection. Officer Howard testified that “Officer Foster during the case of the Duncan’s [sic] incident had traced a cell phone just outside of where [Omar] was staying, which would be 411 Skinners Court and

409 Skinners Court is where the cell phone pinged off of as general coordinates for where that item that had just been taken during the robbery was located.” Omar objected. Officer Howard, over objection, then testified that the phone the police had pinged belonged to one of the Duncans.

Omar testified on his own behalf at the hearing. He stated that at the time of the robbery he lived at 411 Skinners Court—the same address that Officer Howard testified where the cell phone pinged, and had a Mohawk hairstyle. He denied owning a black and gray striped “afghan” type of shirt or a black hat with a white insignia on it. He denied being present in the area of the robbery or taking anything from the Duncans. He stated that he never possessed the Duncans’ cell phones.

The trial court found Omar involved, and committed him to the custody of the Department of Juvenile Services. Omar timely appealed.

### **STANDARD OF REVIEW**

“Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. This Court reviews a trial court’s evidentiary rulings for abuse of discretion.” *Donati v. State*, 215 Md. App. 686, 708 (2014) (internal citations omitted). If the trial court did err in admitting the evidence in question, we then apply the harmless error test:

[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review 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.

*Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

### DISCUSSION

Omar contends that the juvenile court abused its discretion in allowing Officer Howard to testify on redirect examination about Officer Foster’s investigation of the location of one of the stolen cell phones. During his direct examination, Officer Howard testified that, through the course of the investigation, he and another officer “developed [Omar] as a suspect and he was subsequently placed into a photo array to see if [the victims] could possibly identify” him. Defense counsel cross-examined Officer Howard with regard to how the photographs for the array had been selected. The following colloquy took place:

[DEFENSE COUNSEL]: Okay. What was your criteria in, in putting together the photo array?

[OFFICER HOWARD]: All the photos that are contained in that photo array are of juvenile arrests that we had made prior.

[DEFENSE COUNSEL]: Okay. Well, there are African-American males; correct?

[OFFICER HOWARD]: Yes.

[DEFENSE COUNSEL]: What else is your criteria? Hair?

[OFFICER HOWARD]: Yes. Eyes, facial structure.

[DEFENSE COUNSEL]: Okay. What was your criteria for the hair; if they have it, if they don’t have it?

[OFFICER HOWARD]: We just -- we went on what we had as far as similarities. We didn’t necessarily pick a specific hair style out.

[DEFENSE COUNSEL]: So, so essentially you believed [Omar] was the one who did it, so you went and found five other pictures that you thought were similar to [Omar]?

[OFFICER HOWARD]: No.

[DEFENSE COUNSEL]: Okay. Then describe for me what you did.

[OFFICER HOWARD]: [Omar] was a suspect at the time based on where cell phone coordinate had pinged.

[DEFENSE COUNSEL]: So you got a picture of . . . [Omar]?

[OFFICER HOWARD]: Correct. From a prior arrest.

[DEFENSE COUNSEL]: Okay. And then you went and gathered five other pictures?

[OFFICER HOWARD]: Correct.

[DEFENSE COUNSEL]: Similar, in your opinion similar to the photograph you have of [Omar]?

[OFFICER HOWARD]: Correct.

[DEFENSE COUNSEL]: Okay. No further questions.

On redirect examination, the State questioned Officer Howard further about his testimony concerning the cell phone ping.

[PROSECUTOR]: You testified just now that in developing this array you had developed [Omar] as a suspect because his cell phone had pinged?

[DEFENSE COUNSEL]: I'm going to object.

[THE COURT]: Overruled. You may answer.

[PROSECUTOR]: What's that mean?

[OFFICER HOWARD]: Officer Foster and –

[DEFENSE COUNSEL]: Object.

[THE COURT]: Overruled. You may answer the question.

[OFFICER HOWARD]: Officer Foster during the case of the Duncan's [sic] incident had traced a cell phone just outside of where [Omar] was staying, which would be 411 Skinners Court and 409 Skinners Court is where the cell phone pinged off of as general coordinates for where that item that had just been taken during the robbery was located.

[PROSECUTOR]: And the Duncans –

[DEFENSE COUNSEL]: I object and move to strike. There is no personal knowledge and the cell phone pinging I think is subject to its own analysis.

[THE COURT]: I can -- I understand that. I'm going to overrule that. But I would, I -- you asked about it, he answered about the cell phone ping, and so I think he was just asking about it. *So I'm not going to consider it for anything other than just explanation of the cell phone.*

[DEFENSE COUNSEL]: And respectfully, his response was beyond the scope of any question. He just started talking about a cell phone.

[THE COURT]: I agree. I mean, he just answered -- gave us more information than we needed.

[PROSECUTOR]: Who's [sic] cell phone was that?

[DEFENSE COUNSEL]: Object.

[THE COURT]: Overruled. You may answer.

[OFFICER HOWARD]: It belonged to the Duncans. Which one, I'm not sure, but it belonged to one of them.

(Emphasis added).

Omar contends that the juvenile court abused its discretion in admitting Officer Howard's testimony for several reasons: that he had no personal knowledge of the facts,

that he provided expert testimony despite being a lay witness, and that he testified beyond the scope of redirect examination.

We hold that the trial court did not abuse its discretion in admitting the testimony because the trial court made clear the limited purpose for which it admitted that testimony. In explaining why it overruled defense counsel’s objection, the trial court stated, “he answered about the cell phone ping, and so I think he was just asking about it. So I’m not going to consider it for anything other than just explanation of the cell phone.” Inferentially, the language “I’m not going to consider it for anything other than just explanation of the cell phone” meant that the trial court only intended to consider the testimony for the purpose of understanding how the officers created the photo array—not for the proposition that Omar had one of the Duncans’ phones in his possession and therefore must have committed the crime. Assuming, *arguendo*, that this issue is preserved,<sup>1</sup> we also infer that the trial court permitted Officer Howard to explain that the pinged phone belonged to one of the Duncans because that statement came about in the same line of questioning that explained how the police created the photo array. The trial court indicated that it would not consider that testimony for “anything other than just explanation of the cell phone.” Because the trial court did not consider this testimony as substantive evidence, appellant’s arguments that the officer’s testimony was improper lay witness testimony and lacking in personal knowledge are irrelevant. Further, with regard

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<sup>1</sup> Omar did not object during his cross examination of Officer Howard that Omar was a suspect based on where cell phone coordinates pinged. We need not decide whether Omar preserved the issue for our review.



to the scope of redirect examination, “[t]he trial judge’s discretion in controlling the scope of redirect examination is wide.” *Daniel v. State*, 132 Md. App. 576, 583 (2000). Therefore, the trial court did not abuse its discretion in permitting Officer Howard to testify regarding the cell phone ping.

Even assuming the trial court did abuse its discretion in admitting Officer Howard’s testimony for an improper evidentiary purpose, we hold this error harmless beyond a reasonable doubt. “In Maryland, an error is harmless if ‘a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.’” *Fields v. State*, 395 Md. 758, 764 (2006) (citations omitted). We can state beyond a reasonable doubt that Officer Howard’s testimony did not influence the verdict because the trial court did not rely on the cell phone ping as a justification for finding Omar involved.

In *In re Owen F.*, we considered a similar situation where a juvenile court admitted evidence that it did not rely on when finding a juvenile involved. 70 Md. App. 678 (1987). There, police officers took Owen into custody after a police chase. *Id.* at 684. Once in custody, the officers failed to inform him of his *Miranda* rights. *Id.* at 685. At his juvenile delinquency hearing, the trial court, over objection, permitted an officer to testify as to a gesture Owen made. *Id.* In holding that error harmless beyond a reasonable doubt, we held,

Fingerprints were taken and indicated that Owen had indeed been inside the burglarized [sic] houses. The stationhouse admission and fingerprints were introduced at the hearing and were relied upon by the court in its finding. This evidence supports the court’s delinquency determination and is not

related to the tainted gesture. Therefore, the admission of Owen’s gesture, though error, was harmless beyond a reasonable doubt.

*Id.* at 686.

The Court of Appeals has previously noted that in a non-jury setting, even if a trial court improperly admits inadmissible evidence, the harm is greatly diminished.

We are fortified in this belief by the fact that this was a non-jury case. The assumed proposition that judges are men [and women] of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence, lies at the very core of our judicial system. Such an assumption would be completely unwarranted with regard to a jury of laymen and the impact which evidence may have upon their deliberative powers. And, if this case had been tried before a jury, our conclusion may well have been different than that presently reached. We take sustenance from the opinion of the Court of Special Appeals in *Gunther v. State*, 4 Md. App. 181, 241 A.2d 907 (1968), wherein the Court states:

‘The fear of admitting details of convictions for prior crimes stems from its potential influence over a jury. However, this fear is not justified in a non-jury trial where the court, by its wisdom and experience, is expected to be beyond the influence of such evidence. We are unable to conclude that the admission of appellant’s prior conviction for malicious destruction of property was such an abuse of discretion and so clearly irrelevant as to constitute reversible error.’ 4 Md. App. at 184, 241 A.2d at 908.

*State v. Babb*, 258 Md. 547, 550-51 (1970).

Here, the trial court explained its ruling as follows,

Well, I observed the demeanor of the witnesses. I found the testimony of Mr. and Mrs. Duncan to be completely credible. In addition, when I look at the time of day that this happened, it was dusk. There was some light. Both of them credibly testified that they could see. They were both test -- credible and it was, it was, it was not an impermissible photo array and their testimony is they quickly picked out the individual and clearly identified the individual.

I find their identifications to be reliable and credible. I do not find the testimony of the Respondent to be credible.

So I find him involved.

Nowhere does the trial court refer to the cell phone ping in its decision, and the fact that the trial court itself sat as finder of fact bolsters the notion that the error, if any, was harmless beyond a reasonable doubt.

Like in *Owen*, unrelated, but persuasive evidence permitted the trial court to find Omar involved. The trial court found the Duncans credible, that they accurately identified Omar from the photo array, and that they were able to see his face the night of the robbery. On those bases, and not on that of a cell phone ping, the trial court found Omar involved.

### **Conclusion**

In the case at hand, the juvenile court clearly did not accept Officer Howard's testimony as substantive evidence, but considered it only as far as it explained how the police developed Omar as a suspect to include him in the photographic array. In finding Omar involved, the trial court relied exclusively on the Duncans' testimony as well as Omar's lack of credibility. Therefore, even if the trial court abused its discretion in admitting Officer Howard's testimony, we hold any error harmless beyond a reasonable doubt.

**JUDGMENT OF THE CIRCUIT COURT FOR  
DORCHESTER COUNTY, SITTING AS A  
JUVENILE COURT, AFFIRMED; COSTS TO  
BE PAID BY APPELLANT.**