UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2756

September Term, 2014

BENNY DAVIS

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 6, 2016

After a jury trial in the Circuit Court for Baltimore City, Benny Davis was convicted of the first-degree murder of DeAndre Thomas, use of a firearm in a crime of violence, possession of a regulated firearm, and second-degree assault. On appeal, Mr. Davis argues that the trial court abused its discretion during *voir dire* when it refused to ask a "crime victim" question after asking a "strong feelings question." He also contends that the trial court erred by permitting the State to ask a police officer testifying during its case-in-chief whether the officer believed certain aspects of Mr. Davis's statement to the police. We find no errors and affirm.

I. BACKGROUND

On the morning of March 18, 2013, Benny Davis and his then-girlfriend, Taiwan Gibson, engaged in a heated argument that quickly escalated into a physical altercation. After the fight, Ms. Gibson left the home with their daughter and began to make her way to the home of her friend, Chiquita Hobson. She called ahead to tell Ms. Hobson about the fight and to warn her that Mr. Davis might show up at her house.

After talking with Ms. Gibson, Ms. Hobson left home to go to the store with her cousin, Jacqueline Good. But they never made it to the store. Before they could reach the store, they encountered Mr. Davis, who was wearing a navy blue jacket, jeans, and a black facemask that was not pulled over his face. Ms. Hobson would later testify that he confronted them and said: "Where that bitch at? I'm going to kill that bitch. Not only she can get it; you can get it, too; her mother, her sisters." As the group approached Ms. Hobson's home on Fox Street, Mr. Davis demanded that Ms. Hobson go get Mr. Thomas,

the father of her children. She went inside and returned with Mr. Thomas, who told Mr. Davis that Ms. Gibson was not there. As the argument became heated, the group moved to the alleyway beside the residence.

Mr. Davis eventually left, saying, "I'll be back. Watch; I'll be back." Ms. Hobson left to go meet with Ms. Gibson and go to the store as she had originally planned, while Mr. Thomas and Ms. Good both went back inside. A few minutes later, Mr. Thomas said he had to go outside for a moment because he thought he had lost something. Ms. Good stayed inside and, a few seconds later, heard two gunshots. Mr. Thomas ran back into the home, locked the door, and said, "Benny shot me." He stumbled to the dining room and sat in a chair before collapsing onto the floor. After panicking for a minute or two, Ms. Good called 911. Officer Kenneth Scott, the first officer on the scene after receiving the call, asked Mr. Thomas who shot him, and he replied, "I guess, Benny." Mr. Thomas later died from his wounds.

Mr. Davis was arrested the next day. He agreed to waive his *Miranda*[1] rights and speak to the lead investigator, Detective Robert Ross. During questioning, Mr. Davis admitted to having an altercation with Ms. Gibson at their residence, as well as engaging in a "second altercation" later that morning at Ms. Hobson's home. However, Mr. Davis denied shooting Mr. Thomas and, instead, insisted that he left to go to his aunt's house and "never returned to the Fox Street address." Photographs taken at the time of Mr. Davis's

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

arrest showed him wearing clothes different from the day before, but Mr. Davis told Detective Ross that he had not changed his clothes from the previous day.

The State charged Mr. Davis with first-degree murder and associated firearm charges. Trial began, and during the process of *voir dire*, the trial court declined to ask a question requested by both parties: whether any prospective juror or a family member has ever been the victim of a crime. Both the State and Mr. Davis's counsel approached the bench, and the court substituted a "strong feelings" question for the "crime victim" question, following the then-recent decision in *Pearson v. State*, 437 Md. 350 (2014):

> Right. Under Pearson . . . I didn't ask it; and, relying on Pearson—Judge Watt[s]'s opinion, I did ask the strong feelings question. So, it's noted. I hear what you're saying; but I'm not going to ask the question.

In its case-in-chief, the State sought to discredit Mr. Davis's story that he had never returned to Fox Street, and the defense sought to bolster Mr. Davis's version of the events. The State elicited testimony from Lydia Yoti, Ms. Hobson's neighbor, who witnessed the argument between Mr. Davis and Mr. Thomas from her window that morning. Ms. Yoti noted that Mr. Davis had been wearing "blue jeans and a navy blue windbreaker." After the argument moved into the alleyway, Ms. Yoti could no longer see the individuals, so she "went about [her] morning[.]" Some time later, she heard two gunshots and immediately went to her front door, opened it, and saw Mr. Davis run past her on the sidewalk.

On cross-examination, the defense asked Detective Ross why a search warrant had been conducted only at the home of Mr. Davis's aunt. The Detective responded that there

was no indication that Mr. Davis returned to his own home. When asked whether he believed Mr. Davis had been truthful on this point, the detective answered in the affirmative. On redirect, the State asked Detective Ross whether he believed Mr. Davis's claim that he hadn't changed his clothes since the previous day. The detective answered that question in the negative.

The jury convicted Mr. Davis of first-degree murder, the use of a firearm in a crime of violence, possession of a regulated firearm, and second-degree assault. The court sentenced Mr. Davis to life in prison on the murder conviction, ten consecutive years' incarceration for the use of a firearm conviction, and concurrent time for the remaining convictions.

II. DISCUSSION

Mr. Davis challenges his convictions on two grounds. *First*, he claims that the trial court abused its discretion when it refused to ask a "crime victim" question during *voir dire* after it had already asked a "strong feelings" question. He contends that the Court of Appeals's opinion in *Pearson v. State*, 437 Md. 350 (2014), conflicts with previous cases and has created an "unworkable standard" for eliminating juror bias. *Second*, he contends that the trial court abused its discretion when it allowed the State to ask Detective Ross on re-direct whether he believed part of Mr. Davis's post-arrest statement after the defense made a similar inquiry on cross. The State responds that the trial court interpreted and applied *Pearson* correctly, and that its question to the Detective was permissible after the defense opened the door to it. We agree with the State.

A. The Trial Court Acted Within Its Discretion in Refusing to Ask a "Crime Victim" Question Under *Pearson v. State*.

Mr. Davis argues that the trial court erred in relying on *Pearson* and denying his request for a "crime victim" question during *voir dire*. In Maryland, our "limited *voir dire*" methodology is designed "to ensure a fair and impartial jury by determining the existence of cause for disqualification[.]" *Washington v. State*, 425 Md. 306, 312 (2012) (citations omitted); *see also* U.S. Const. amend. VI; Md. Decl. of Rts. art. 21. The process of *voir dire* is committed to the sound discretion of the trial court, especially with regard to the scope and form of the questions propounded. *Id.* at 313. We review a trial court's decision not to propound a particular *voir dire* question for abuse of discretion. *Id.* at 314.

In considering whether the court should have asked a particular question, "the standard is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present" and whether the matter has been fairly covered by other questions. *Id.* at 313-14 (citations omitted). "On request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification[.]'" *Pearson*, 437 Md. at 357 (alterations in original) (quoting *Moore v. State*, 412 Md. 635, 663 (2010)). In *Pearson*, the Court of Appeals held that a trial court need not ask whether any prospective juror has been the victim of crime, but *must* ask, on request, whether any prospective juror has any strong feelings about the crime with which the defendant is charged. *Id.*

Mr. Davis offers two arguments why, in his view, the trial court abused its discretion when, citing *Pearson*, it declined to ask a "crime victim" question. *First*, Mr. Davis

characterizes the Court of Appeals's statements in *Pearson* regarding the "strong feelings" and "crime victim" questions as *dicta*, and therefore they don't bind the trial court. But dicta is a "collateral statement" upon which the ultimate decision "was not dependent," *State v. Baby*, 404 Md. 220, 246 (2008), and the second sentence of the *Pearson* opinion states that "[w]e hold that: (I) a trial court need not ask during *voir dire* whether any prospective juror has ever been the victim of a crime . . . ." 437 Md. at 354. The entire first Roman-numeraled section of *Pearson* analyzes, then decides, whether a trial court must ask a "crime victim" question if it has already asked the "strong feelings" question. *Id.* at 356-64. The opinion specifically considered whether a potential juror's experience as a crime victim provides "'a *demonstrably strong correlation* [with] a mental state that gives rise to [specific] cause for disqualification'" and found that it didn't. *Id*. at 359 (quoting *Curtin v. State*, 393 Md. 593, 607 (2006)) (alteration in original) (emphasis in original). So the issue here—whether or not a trial court must ask the "crime victim" question on request—lay at the substantive heart of *Pearson*, and we disagree that its holding can be parsed so finely as to ignore it in favor of other cases (even if the earlier cases compelled the result Mr. Davis seeks, and we will see below that they don't).

Second, Mr. Davis argues that *Pearson* creates an "unworkable standard" for asking the "strong feelings" and "crime victim" questions. He highlights what he sees as an incongruity between *Pearson* and previous cases, beginning with *Dingle v. State*, 361 Md. 1 (2000). In *Dingle*, the Court of Appeals addressed whether the "crime victim" question could be asked in a compound format. *Id.* at 4. The *voir dire* question at issue required

prospective jurors to stand if they had ever been the victim of a crime *and* believed that this experience would cause them to be biased. *Id.* at 4-5. The Court found that asking the question in that form "shifts from the trial judge to the venire responsibility to decide juror bias[,]" which in turn distorts and frustrates the purpose of *voir dire*. *Id.* at 21.

From there, Mr. Davis points to *State v. Thomas*, 369 Md. 202 (2002), *abrogated by Pearson*, 437 Md. 350, in which the Court of Appeals held two years later that a trial court abused its discretion when it declined to give a compound version of the "strong feelings" question in the context of a narcotics crime. The defendant asked whether "any member of the jury panel ha[d] such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged[.]" *Id.* at 204. The Court held that the trial court abused its discretion by not asking this question because it was "aimed at uncovering a venire person's bias[,]" in relation to the particular issue of the case. *Id.* at 214. In *State v. Shim*, 418 Md. 37, 54 (2011), *abrogated by Pearson*, 437 Md. 350, the Court expanded *Thomas*'s holding to reach beyond just narcotics crimes.

Unfortunately for Mr. Davis's argument, the Court of Appeals abrogated *Thomas* in *Pearson*. A co-defendant had asked the trial court to ask separate questions about whether members of the panel or their families had been crime victims, worked in law enforcement, or served in the military. The court declined to give these questions, but asked instead, among other things, whether they held "such strong feelings regarding [the charges against the defendant] that it would be difficult . . . to fairly and impartially weigh the facts of [the]

trial[.]" *Pearson*, 437 Md. at 355. The Court reiterated the "essential holding" underlying *Shim*, *i.e*., that a court must ask the "strong feelings" question on request, but found that that the compound phrasing shifted to the prospective juror the responsibility to identify and evaluate his personal bias. *Id.* at 360-63. As a result, the court amended its holding in *Shim*, *i.e.*, that courts must, on request, ask jurors whether they have strong feelings about the crimes with which the defendant is charged, *id.* at 363-64, but may not ask the question in a way that puts it on the juror to decide whether those strong feelings compromise his impartiality.

Mr. Davis reads all of these cases still, somehow, to require trial courts to ask a "crime victims" question in a non-compound form on request, even if the "strong feelings" question has separately been asked. But even if we were to agree that the Court of Appeals hasn't confronted that precise choice, *Pearson* still resolves the question before us here, *i.e.*, whether this trial court abused its discretion by refusing to ask a generalized crime victim question. *Pearson* doesn't prohibit such a question, nor does any other case, and it may be that some courts under some circumstances may find it warranted. But the issue here is whether the circuit court abused its discretion by reading *Pearson* (a) to favor a "strong feelings" question over a "crime victims" question and (b) as not compelling the court to ask both questions. We find that the court got the law and the questions right.

B. The Court Did Not Abuse Its Discretion By Permitting the State to Ask A Witness Whether He Believed Part Of Mr. Davis's Post-Arrest Statement.

During cross-examination, defense counsel asked Detective Ross whether he believed that Mr. Davis's post-arrest statements were credible. When asked why no search warrant had been issued for Mr. Davis's residence, Detective Ross responded that "[t]here was no indication that Mr. Davis had gone back to that residence." The inquiry could have and perhaps should have stopped there. Instead, defense counsel continued:

> [DEFENSE COUNSEL]: Well, the indication was he's told you he didn't go back to that residence. *So, are you saying that you believe Mr. Davis?*
>
> [DETECTIVE ROSS]: Yes.

(Emphasis added.)

Mr. Davis now argues that the trial court abused its discretion when it allowed the State on re-direct, over numerous objections, to ask Detective Ross whether he believed Mr. Davis when he claimed to be wearing the same clothes he had worn the day Mr. Thomas was murdered. Relying on *Bohnert v. State*, 312 Md. 266 (1988), Mr. Davis contends that the State's question regarding the truthfulness of part of his statement infringes the jury's duty to assess credibility.

The State responds with three arguments. *First*, it states that *Bohnert* does not apply in this case because Mr. Davis did not testify. *Second*, even if *Bohnert* applies, Mr. Davis's inquiry on cross "opened the door" to follow-up questions from the State on re-direct. *Third*, the State claims that any error by the trial court was harmless because the evidence

strongly supports the conclusion that Mr. Davis had not been truthful.[2] "The trial judge's discretion in permitting inquiry on redirect examination is wide[.]" *Bailey v. State*, 16 Md. App. 83, 110 (1972). This discretion is "particularly wide 'where the inquiry is directed toward developing facts made relevant during cross-examination or explaining away discrediting facts.'" *Daniel v. State*, 132 Md. App. 576, 583 (quoting *Bailey*, 16 Md. App. at 110-11).

Mr. Davis relies on *Bohnert* for the proposition that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth." 312 Md. at 278. But the *Bohnert* rule only applies to prevent a witness from testifying to the credibility of another testifying witness, and although Detective Ross did testify about whether he believed Mr. Davis's statement, Mr. Davis never testified. Mr. Davis argues nevertheless that *Bohnert* applies because the statement was submitted and accepted as substantive evidence. We rejected this theory in *Colkley v. State*: when confronted with the same issue that we now face, we described *Bohnert* as "completely unavailing" because "*Bohnert* concerns improper comment on the credibility of a witness. Colkley was never a witness. He did not take the stand in his own defense. *Bohnert*, therefore, has nothing to do with this case." 204 Md. App. 593, 641 (2012), *rev'd on other grounds sub nom. Fields v. State*, 432 Md. 650 (2013).

[2] The State contends that its inquiry did very little to bolster its argument because several witnesses had testified that Mr. Davis was wearing different clothes the day before his arrest.

Mr. Davis correctly points out that, in general, "the investigating officers' opinions on the truthfulness of an accused's statement are inadmissible under Maryland Rule 5–401." *Casey v. State*, 124 Md. App. 331, 339 (1999). But that general principle gives way when a party opens the door to an otherwise impermissible line of inquiry. "The 'opened door' doctrine is based on principles of fairness and permits a party to introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel." *Mitchell v. State*, 408 Md. 368, 388 (2009) (citing *Conyers v. State*, 345 Md. 525, 545 (1997)). "'[O]pening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" *Clark v. State*, 332 Md. 77, 85 (1993).

The defense asked Detective Ross, in so many words, whether he believed Mr. Davis's statement to him. To be sure, counsel only asked about one particular statement, but the Detective's response could well have been interpreted to suggest broader agreement. Even if it were interpreted as Detective Ross believing that Mr. Davis had not returned home that day, such an opinion would be impermissible under Maryland Rule 5-401. *Casey*, 124 Md. App. at 339. But at the very least, the defense's question opened the door for the State to challenge the scope of the Detective's belief because there were other statements, such as Mr. Davis's denial that he had changed his clothes, that the Detective had not believed. We see no abuse of discretion in the court's decision to allow this limited

questioning on re-direct in response to the defense's credibility-bolstering questions on cross.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.