UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0485

September Term, 2015

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ANTONIO MAURICE BROWN

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: April 27, 2016

Following a trial in the Circuit Court for Baltimore County, a jury convicted appellant, Antonio Maurice Brown, of attempted first-degree murder, attempted robbery with a dangerous weapon, possession of a regulated firearm after being convicted of a disqualifying crime, and use of a firearm in the commission of a crime of violence. The trial court imposed a life sentence, suspending all but 40 years, after which Brown filed a timely notice of appeal.

Brown asks us to consider the following questions:

1. Did the circuit court abuse its discretion in denying defense counsel's motion for a mistrial?

2. Must the docket entries and the amended commitment record be corrected to accurately reflect the jury's verdict?

Finding no abuse of discretion in the court's denial of the motion for a mistrial, we shall affirm the judgments of the trial court. However, because the docket entries and the amended commitment record do not accurately reflect the crimes of which Brown was convicted, we shall direct that those records be amended.

## FACTUAL AND PROCEDURAL BACKGROUND

On the evening of December 23, 2012, Antonio Anderson visited a friend who lived in an apartment complex in the 6800 block of Townbrook Drive, in the Woodlawn neighborhood of Baltimore County. Walking toward the building, Anderson saw two men inside. When he left his friend's apartment, the same two men were outside. Anderson walked past them toward his car. When he had partially entered his car, the two men, who had been joined by a third man, approached him with guns drawn. One of the men was wearing a mask.

Anderson fought with the men as they tried to force their way into his car. He was able to exit the vehicle, and he fled toward the nearby apartment building. As he ran away, he was shot several times in his legs and buttocks.[1]

When the police responded to the scene, they located eight spent cartridge casings, a hat, and some clothes that had been removed from Anderson by the paramedics: a black knit hat and a ski mask. Because Anderson reported that one of his assailants wore a mask, the Baltimore County Police Department serologist examined the ski mask. From the mask, she recovered saliva, which was subjected to a DNA analysis. The DNA from the mask matched a known sample of Brown's DNA.

The crime scene technicians were able to lift four fingerprints from the passenger side of Anderson's vehicle. The fingerprints belonged to Vincent Whittaker, a known associate of Brown.[2]

Although Brown denied being in the area of the shooting on the night when it occurred, his cell phone "pinged"[3] off three cell phone towers within two miles of the crime scene near the time of the shooting.

[1] There appeared to be no dispute that Brown was not the shooter.

[2] Whittaker was also charged with the attempted murder of Anderson and entered a guilty plea. The State claimed to know of the third assailant's identity, but said that it was unable to charge him.

[3] The verb "to ping" is a neologism that, in this context, refers to the process by which a cell phone communicates with the tower that receives information from the phone and transmits information to it.

Several months after the shooting, the police spoke with Laura Washington, Brown's girlfriend, who lived in the 6700 block of Townbrook Drive, a short distance from the crime (which occurred in the 6800 block of Townbrook Drive). Because Brown appeared to have counseled Washington to remain unavailable to testify at his trial, the court permitted the State to introduce her recorded statement to police, pursuant to Md. Code (1974, 2013 Repl. Vol., 2015 Supp.), § 10-901 of the Courts & Judicial Proceedings Article (permitting introduction of statement otherwise defined as hearsay if statement is "offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement").

In her recorded statement, Washington told the police that she had heard Brown enter her apartment late on the night of the shooting and that she later discovered that Whittaker was with him. She also told the police that Brown was worried that he may have left his DNA in a car when "wrestling with a guy." Her statement contradicted Brown's own recorded statement, in which he denied having been at the Townbrook Drive apartment complex on the night of the shooting.

Brown did not testify or put on any evidence.

## DISCUSSION

### I.

After one of the State's two cell phone experts had concluded his testimony, he told the prosecutor that he had given erroneous testimony about the number of times he had been qualified to testify as an expert witness. When the prosecutor disclosed the

error to court and counsel, Brown moved for a mistrial. The court denied the motion, but offered Brown measures short of a mistrial, which he rejected. We affirm the denial of the motion for a mistrial.

The State called two witnesses to testify about Brown's cell phone records and the location of his cell phone at approximately the time of the shooting: Gary Schaffer, a radio frequency engineer with 23 years' experience working for AT&T, Brown's cell phone carrier; and Baltimore County Police Detective Eric Dunton.

The court accepted Schaffer as an expert in the "area of cell phone technology and the technique of locating and/or plotting the origins of cell phone calls using cell phone records." He had been accepted as an expert on three previous occasions by Maryland circuit courts.

Schaffer testified that he had prepared a map, State's Exhibit 63, which indicated the location of the cell phone towers in the area of the shooting. He agreed that his map was "very similar" to State's Exhibit 64, a map prepared for the State by Detective Dunton. In Schaffer's expert opinion, a comparison of the two maps, along with the call records detailing Brown's cell phone activity, showed that Brown's calls near the time of the shooting had "pinged" from the cell phone towers shown on Schaffer's map. The defense did not object to State's Exhibits 63 and 64, and the court admitted them into evidence.

Later, Detective Dunton testified that during his investigation he looked at cell-phone detail records attributed to Brown from near the time of the shooting. Using those records, he plotted the calls onto the map that became State's Exhibit 64. In response to a

question about his "specialized training, or experience, or any kind of knowledge that allows [him] to map cell phone calls . . . onto a map," Detective Dunton stated he had "been to three separate schools for a total of 70 hours in reference to the call analysis through call detail records and the mapping of the cell towers associated with those records," and that he had "hundreds" of hours of on-the-job training doing so. When asked if he had testified as an expert in making maps with respect to cell-phone detail records, Detective Dunton answered affirmatively, stating that he had been qualified as an expert "[t]hree to five times."

Before accepting Detective Dunton as an expert, the court permitted defense counsel to question him about his qualifications. Counsel asked, "[O]ut of those hundreds of cases you have only been qualified three to five times as an expert?" Detective Dunton answered, "To testify as to those, yes." Defense counsel argued that, although the detective said that he had testified only three to five times since completing his schooling in 2008, he could not cite the specific years in which he had been accepted as an expert. Still, the court accepted Detective Dunton as an expert, and he testified about the manner in which he had used Brown's call detail records to plot the calls on the map comprising State's Exhibit 64.

After an overnight recess, the prosecutor advised the court that "a very concerned and earnest [D]etective Eric Dunton" had sought her out to clarify that he had not understood that designation as an expert is a legal term of art. In fact, although he had *testified* on the subject of cell phone mapping on three or four prior occasions, he

explained to the prosecutor that this trial was the first in which he had been officially designated an expert by a court.

In an effort to rectify the error, the State offered to recall Detective Dunton and permit defense counsel to cross-examine him about his qualifications. Alternatively, the State offered to prepare a stipulation that the detective had testified three to five times related to his expertise in map-making and cell phone technology, but that Brown's case was the first in which the State had requested that he be recognized as an expert.

Instead, defense counsel moved for a mistrial on the ground that Detective Dunton's testimony was untrue and that recalling him to admit he had been confused might have some unspecified impact on the jury. The State disagreed that a mistrial was necessary, particularly because the detective's testimony was "redundant of what Gary Schaffer," the other expert, "had already testified to."

The court denied the motion, agreeing with the State that Detective Dunton's testimony was not "essential to the determination by the jury." The court added that Detective Dunton seemed to be "an exceptionally earnest person who . . . misunderstood some questions." The court made it clear that even if it had known this trial was the first in which the detective had been offered as an expert, it would still have accepted him as an expert because of his knowledge, training, skill, and experience about a subject that was beyond the ken of the average lay person. Although the court offered defense counsel another opportunity to question the detective or enter into a stipulation, counsel declined.

Brown now argues that the court abused its discretion in denying his motion for mistrial because, he says, Detective Dunton's inaccurate testimony compromised the jury's ability to judge his credibility. We disagree.

"A mistrial is no ordinary remedy[.]" *Cooley v. State*, 385 Md. 165, 173 (2005). Rather, "'the declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Id.* (quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)); *accord Wagner v. State*, 213 Md. App. 419, 462 (2013); *Molter v. State*, 201 Md. App. 155, 178 (2011). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 595 (1989)). "'[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court,'" *Cooley*, 385 Md. at 173 (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)), and is reviewable on appeal only for abuse of discretion. *Id.*; *accord Nash v. State,* 439 Md. 53, 66-67, *cert. denied*, 135 S. Ct. 284 (2014). The trial court's discretion is very broad, and we generally afford the trial court a "wide berth" in its ruling, rarely reversing a decision on a motion for mistrial. *Nash*, 439 Md. at 68-69 (citing *Alexis v. State*, 437 Md. 457, 478 (2014)).

Although Detective Dunton erroneously asserted that he had been qualified as an expert on three to five prior occasions, we conclude, for several reasons, that the ensuing prejudice came nowhere close to depriving Brown of a fair trial.

First, as the trial court explained, Detective Dunton's misstatement stemmed from an honest mistake about a matter of legal terminology – a subject in which only lawyers and judges are expert. Based on the detective's training and experience – 70 hours of course work on mapping cell phone data and hundreds of hours of work experience – the court would still have accepted him as an expert had he correctly stated he had not previously been qualified.

Second, the prosecutor pointed out, and the court agreed, that Detective Dunton's testimony was, in large part, cumulative of that of Schaffer, whose status as an expert was unchallenged by Brown. Schaffer agreed, without objection, that the map he created, showing the cell towers in the location of the shooting, was substantially similar to the map created by Dunton. In addition, Schaffer, not Dunton, advised the jury that a comparison of the two maps and the call records showed that Brown's cell phone calls pinged off the towers shown on the maps. *Klauenberg v. State*, 355 Md. 528, 555-56 (1999) (holding that circuit court did not abuse its discretion in denying motion for mistrial where it was "doubtful" that the objectionable testimony prejudiced the defendant, because court had properly admitted similar testimony from other witnesses); *Webster v. State*, 151 Md. App. 527, 555-57 (2003) (holding that circuit court did not abuse its discretion in denying motion for mistrial where jury heard statements to same effect from another witness, and the cumulative nature of objectionable testimony mitigated any potential prejudice).

Third and finally, the trial court offered Brown the reasonable remedy of either recalling Detective Dunton as a witness to expose his error or entering a stipulation detailing the error. Brown chose neither option, opting instead for the maximalist approach of requesting a mistrial. In our view, that remedy was not warranted by the facts, and the trial court did not abuse its discretion in denying Brown's motion for mistrial.

**II.**

Brown contends that the docket entries and his amended commitment record[4] erroneously state that he was convicted of crimes of which the jury did not find him guilty. He is correct.

The court submitted six charges to the jury: first-degree murder (Count 1), first-degree assault (Count 2), use of a firearm in the commission of a crime of violence (Count 3), possession of a regulated firearm after being convicted of a disqualifying crime (Count 5), attempted robbery with a dangerous weapon (Count 9), and attempted robbery (Count 10).[5]

[4] Brown's April 9, 2015, commitment record was amended on June 25, 2015, to reflect a corrected start date of the sentence – February 7, 2014, rather than January 27, 2015.

[5] The verdict sheet referred to "possession of a regulated firearm after being convicted of a disqualifying crime," which is a violation of Md. Code (2003, 2011 Repl. Vol., 2015 Supp.), § 5-133(b) of the Public Safety Article ("PS"). However, the record reflects that Brown was convicted of the charge set forth in Count 5 of the indictment, a violation of PS § 5-133(c)(1), which prohibits possession of a regulated firearm by a person who has previously been convicted of a crime of violence. In addition, the parties stipulated that Brown "has previously been convicted of a crime that (continued…)

The verdict sheet instructed the jury not to return a verdict on the lesser-included offense of first-degree assault (Count 2) if it convicted Brown of attempted first-degree murder (Count 1). The verdict sheet also instructed the jury not to return a verdict on the lesser-included offense of attempted robbery (Count 10) if it convicted Brown of attempted robbery with a dangerous weapon (Count 9).

The jury found Brown guilty of attempted first-degree murder (Count 1), use of a firearm in the commission of a crime of violence (Count 3), possession of a regulated firearm after being convicted of a disqualifying crime (Count 5), and attempted robbery with a dangerous weapon (Count 9). Having found Brown guilty on Count 1 (attempted first-degree murder) and Count 9 (attempted robbery with a dangerous weapon), the jury complied with the instruction in the verdict sheet and returned no verdict on the lesser-included offenses in Count 2 (first-degree assault) and Count 10 (attempted robbery).

At Brown's disposition hearing, the court imposed the following sentence:

> The sentence as to Count 1, the attempted first degree murder, is life, suspend all but 40 years.
>
> As to . . . *Count 2* [*, first-degree assault,*] *that sentence would, the sentence would merge*.
>
> As to Count 3, use of a firearm in the commission of a felony or a crime of violence the sentence is ten years to be served concurrently.
>
> As to Count 5, possession of a firearm by a prohibited person, this sentence is five years concurrent.
>
> And as to *Count 9, an armed robbery charge*, the sentence is 20 years concurrent.

prohibits him from possessing a regulated firearm in the State of Maryland under Public Safety Article 5-133(c)."

. . . [I]t's to be followed by five years of probation as to Count 1.

(Emphasis added.)

In other words, even though the jury had complied with the instruction not to return a verdict on Count 2, the court imposed a sentence on that count (albeit one that merged with the sentence on Count 1). In addition, the court mistakenly stated that the jury had convicted Brown of "armed robbery" rather than attempted robbery with a dangerous weapon. The court did not mention Count 10.

The docket entries and amended commitment record reflect a conviction for "armed robbery" rather than for attempted robbery with a dangerous weapon. The docket entries and amended commitment record also reflect convictions on both Count 2 (which the court mentioned at sentencing) and Count 10 (which the court did not) even though the jury had returned no verdict on either of those lesser-included offenses. In addition, the amended commitment record states that count 10 (attempted robbery) merged into the "armed robbery" charge.

Citing *Caldwell v. State*, 164 Md. App. 612 (2005), Brown argues that the docket entries and, by extension, the amended commitment record must be corrected to reflect that he was convicted of attempted robbery with a dangerous weapon, not of armed robbery, and that he was not convicted of either first-degree assault (Count 2) or attempted robbery (Count 10). The State agrees that the docket entries and commitment record should be amended to reflect that Brown was found guilty of and sentenced for attempted robbery with a dangerous weapon, not for armed robbery. The State, however,

disagrees that the docket entries and commitment record should be amended to reflect that Brown was not convicted of first-degree assault (Count 2) or of attempted robbery (Count 10).

In support of its position, the State correctly observes that a conviction of a greater offense constitutes a finding of guilt on all lesser-included offenses. *Smith v. State*, 412 Md. 150, 165 (2009). Consequently, Brown's conviction of the greater offense of attempted first-degree murder (Count 1) constitutes a finding of guilt on the lesser-included offense of first-degree assault (Count 2) notwithstanding the jury's compliance with the instruction not to return a verdict on Count 2 after finding him guilty on Count 1. Similarly, Brown's conviction of the greater offense of attempted robbery with a dangerous weapon (Count 9) constitutes a finding of guilt on the lesser-included offense of attempted robbery (Count 10), again notwithstanding that the jury's compliance not to return a verdict on Count 10 after finding him guilty on Count 9. On that basis, the State concludes that the docket entries and commitment record need not be amended to address the convictions for first-degree assault and attempted robbery.

The difficulty with the State's argument is that the jury complied with the instruction not to return a verdict on Counts 2 and 10. While the jurors could have convicted Brown on Counts 2 and 10, the fact of the matter is that they did not. Because it is inappropriate for the docket entries and commitment record to state that Brown was convicted of offenses on which the jury did not return a verdict, we direct that the docket entries and commitment record be amended to state, accurately, that Brown was not

convicted of or sentenced on the charge of first-degree assault or on the charge of attempted robbery.[6]

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO AMEND THE DOCKET ENTRIES AND COMMITMENT RECORD TO REFLECT THAT APPELLANT WAS CONVICTED OF ATTEMPTED ROBBERY WITH A DANGEROUS WEAPON (COUNT 9), BUT THAT HE WAS NOT CONVICTED OF FIRST-DEGREE ASSAULT (COUNT 2) OR OF ATTEMPTED ROBBERY (COUNT 10). JUDGMENTS OF THE CIRCUIT COURT AFFIRMED IN ALL OTHER RESPECTS. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY BALTIMORE COUNTY**.

[6] In an argument unaddressed by Brown, the State asserts that, on Count 5, on which the jury convicted Brown of possession of a firearm by a prohibited person in violation of PS § 5-133(c)(1), the statute dictates that first five years be served without suspension or the possibility of parole. The circuit court, however, sentenced Brown to five years in prison, to be served concurrently with his 40-year sentence for attempted first-degree murder, for the violation of PS § 5-133(c)(1). The docket sheet and amended commitment record reflect the sentence that the court imposed. The State had the right to appellate review when the circuit court "[f]ailed to impose the sentence specifically mandated by the Code" (Md. Code (1974, 2013 Repl. Vol.), § 12-302 of the Courts and Judicial Proceedings Article), but it did not file a timely cross-appeal in this case. "Consequently, we will address only those issues that were presented by appellant." *Prahinski v. Prahinski*, 75 Md. App. 113, 120 (1988) (citing *Joseph H. Munson Co. v. Sec'y of State*, 294 Md. 160, 168 (1982), *aff'd*, 467 U.S. 947 (1984)).