

Circuit Court for Worcester County
Case No. 23-K-23-000566

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND**

No. 0138

September Term, 2022

MCKINEO MIDDLETON

v.

STATE OF MARYLAND

Albright
Shaw
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: February 17, 2023

* At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant McKineo Middleton was convicted in the Circuit Court for Worcester County of two counts of possession of heroin and one count of distribution of heroin. Appellant presents the following question for our review:

“Did the trial court deny appellant’s right to a fair trial by soliciting critical evidence for the State’s case through questioning of the State’s primary witness after the prosecutor concluded his questioning and in denying defense counsel’s request to strike the exchange?”

We shall hold that the trial court did not deny appellant the right to a fair trial, and we affirm.

I.

In October 2012, appellant was indicted by the Grand Jury for Worcester County of 6 counts of distribution and possession of heroin on two separate days, October 9, 2012, and October 16, 2012. A bench warrant was issued; however, it was not served until appellant was arrested on charges in Wicomico County in November 2020. For each day the State charged distribution within 1000 feet of a school, distribution, and possession. Appellant was then tried on the 2012 indictment in Worcester County.¹ In 2022, a Worcester County jury convicted appellant of possessing heroin on both days and distributing it on October 16, 2012. Appellant was acquitted of distributing heroin on

¹ The prosecution chose not to prosecute appellant for distribution within 1000 feet of a school on either day.

October 9, 2012. For sentencing purposes, the court merged the second possession charge into the distribution charge. On March 4, 2022, appellant was sentenced to term of incarceration of 12 years with all but five years suspended. The term of incarceration is followed by a period of two years of probation.

On October 9th, 2012, while working undercover, Detective Sergeant Jeffrey Johns of the Ocean City Police Department agreed via cell phone to purchase \$160 worth of heroin from appellant. Appellant and Detective Johns met in the parking lot of a Food Lion grocery store. Detective Johns purchased the heroin and subsequently took a picture of the narcotics and submitted it into a police evidence locker. On October 16, 2012, Detective Johns contacted appellant again. He agreed to purchase heroin valued at approximately \$140 at the same Food Lion. This time the exchange took place inside the store. Once again, Detective Johns photographed the narcotics. He again placed the drugs in protective police evidentiary safe. Detective Johns stamped each bag with different words. He recorded the interaction with appellant, which the State introduced into evidence at the trial. The detective and appellant are identified in the recording.

On one purchase Detective Johns acquired 18 blue wax paper bags of heroin, and on the other he acquired 26 bags. When filling out the evidence form for the contents, Detective Johns mistakenly entered the number of bags in the section for weight. On October 11, 2012, forensic chemist Jessica Bullis tested the contents of the 18 blue wax paper bags. On October 31, 2012, she tested the contents of the 26 blue wax paper bags. She reported that her tests showed both substances were heroin.

Although appellant was indicted in 2012 in Worcester, the bench warrant was not served until 2020. In November 2020, appellant was arrested in Wicomico County.² After his arrest he was transferred to Worcester County and the 2012 warrant was served on him.

Appellant proceeded to trial before a jury in the Circuit Court for Worcester County. At trial in December 2021, the State did not produce the drugs. Detective Johns testified that the drugs had been destroyed in 2019. Contrary to general practice and procedure, the drugs were not attached to the State Police Form 67A with the defendant's name. Det. Johns testified that there was a report number for the investigation, that he had placed the drugs in the proper safe, and that the final location for the drugs was the Worcester County Sheriff's Office Property Room. On cross-examination he was asked whether the drugs had left the property room before their destruction. Detective Johns responded, "I don't have the answer to that. I don't have any direct involvement with that."

After cross-examination and redirect the court asked Detective Johns some questions. The court maintained that these questions were just for clarification; however, appellant asserts that these questions were an abuse of discretion.

“THE COURT: Okay. I had one follow-up question. In your testimony to [the prosecutor], you indicated that there was a report number that was assigned to this investigation.

THE WITNESS: Yes, sir.

² In the interim, appellant was residing in Delaware. Although he had 17 convictions in Delaware at the time, the Delaware authorities did not alert Maryland authorities regarding his whereabouts.

THE COURT: And that's specific to your investigation?

THE WITNESS: Yes, sir.

THE COURT: All right. If you're looking at State's 1 and 2, is that report number that you referenced included on either of those exhibits?

THE WITNESS: Yes.

THE COURT: Where does it appear?

THE WITNESS: Top right corner, second entry down, right below Crime Laboratory File Number.

THE COURT: So how is it labeled on that - - that's the M.S.R.P. Form, the 67A, I think is what that's called?

THE WITNESS: Yes, sir.

THE COURT: So what's - - there's a - - is there a title or a caption next to that report number?

THE WITNESS: It says Agency Case Number, and then there's the report number underneath that.

THE COURT: Okay. So that's - - that's the report number that you were referring to, where it says Agency Case Number?

THE WITNESS: Yes, sir.

THE COURT: All right. And what is that number?

THE WITNESS: That is a - - one - -

THE COURT: No, no. What is the actual number?

THE WITNESS: Oh, I'm sorry, sir: 12-0000963.

THE COURT: Okay. Is that - - is that on both of the State's 1 and State's 2?

THE WITNESS: Yes, sir.

THE COURT: In the same spot?

THE WITNESS: Yes, sir.

THE COURT: Does it appear anywhere else on those documents?

THE WITNESS: Yes.

THE COURT: Where else?

THE WITNESS: The Maryland State Police Forensic Science Division Lab Report and then on the last page of Exhibit 1 is the property and evidence voucher.

[DEFENSE COUNSEL]: Your Honor, may we approach?

THE COURT: And that's the - - that's the voucher that you said self-populates?

THE WITNESS: Yes, sir.”

Following this exchange, defense counsel asked to approach the bench and the following exchange occurred:

“[DEFENSE COUNSEL]: With all due respect, I believe that line of questioning was inappropriate. There were questions that [the prosecutor] could have asked and didn't. I would object to them and ask that they be stricken or the jury be - - ask to strike.

THE COURT: All right. Care to be heard?

[THE PROSECUTOR]: No.

THE COURT: All right. Well, I mean, he testified, I wanted some clarification on his testimony, and I don't believe that they were inappropriate questions. I respect your position, and I understand your position, but I still think that that was within the province of the Court to clarify the evidence. The objection is noted and overruled.”

In his motion for judgment of acquittal, defense counsel argued that because the drugs were not produced at trial, the State failed to prove beyond a reasonable doubt the drugs obtained by Detective Johns were the same drugs which had tested positive for heroin. The court denied the motion, relying, *inter alia*, on the information revealed in its questioning of Detective Johns. Appellant’s counsel cites this portion of the court’s denial as indicative of its reliance on its own questioning.

“THE COURT: ...I will note - - and I know [defense counsel] took umbrage with my questions, but the follow-up that I inquired into had to do with the report number that Detective Johns spoke of. I asked him where that was reflected, if it was reflected, and it does show on both State’s Exhibit No.1 as the agency case number, 12-963, and that’s the identifier that Detective Johns attached to this investigation, attached to the CDS, the alleged CDS, that was seized in each of these two cases.”

During jury deliberations the jury asked the following question: “Was it policy in 2012 to have the case/agency number on the photo/video evidence.” Additionally, the jury asked if it had to agree on each charge. The court instructed the jury to consider each charge individually. The jury acquitted appellant of one count of distribution and convicted him of two counts of possession and one count of distribution. The latter possession charge was merged into the distribution charge for sentencing purposes. This timely appeal followed.

II.

Appellant argues that the trial court denied his right to a fair trial by eliciting critical evidence for the State's case through its questioning of the State's primary witness, and subsequently denying defense counsel's request to strike the exchange. Appellant asserts that these questions exceeded pure clarifications and instead filled a critical hole in the State's case. Appellant argues that this conduct violated the court's duty of impartiality and that the case should be remanded for a new trial before a new judge. Specifically, appellant argues that the court violated his right of due process, citing Maryland Rule 18-102.5(a) which requires that judges act without favoritism.

Appellant cites four ways that the court's questions filled the State's evidentiary gap: (1) obtaining the report number, (2) having Johns explain that the number is listed as the "Agency Case Number" on both chemist's analyses (3) having Johns demonstrate where this number appeared to each of the two reports, and (4) asking Johns if the number appeared in any additional locations on the reports resulting in Johns providing two additional locations in addition to the one on the top right corner.

The State argues that appellant's argument is unpreserved because, at trial, defense counsel argued that the court's question was no different than questions the prosecution could have asked, not that there was improper bias. The State asserts that because appellant's objection was on specific grounds, he is limited to those stated grounds in this

appeal. Thus, the allegation of improper bias is unpreserved. In the alternative, if preserved for our review, the State argues that the court acted within its discretion by asking limited clarifying questions. The State argues that it is well-settled that judges may ask clarifying questions if they maintain the line between assisting a jury and influencing the jury.

The State argues that the court only clarified a minor point regarding testimony and evidence that had been admitted. Moreover, the questions did not establish a missing element of the crime. Additionally, the State asks this court to focus on the questions asked, not the answers given. The State argues that if the detective was mistaken about the report numbers, the questioning could have favored the defense instead of the State and that the court's questioning adhered to the guidelines established by the Supreme Court of Maryland³ in *Diggs v. State*, 409 Md. 260, 264-69 (2009), and this court in *Smith v. State*, 182 Md. App. 444 (2008). Lastly, the State argues that if there was any error, it was a harmless error.

III.

We address first the State's preservation argument. The State has argued that appellant's argument is waived because he did not specifically argue improper bias to the

³ On December 14th, 2022, Maryland's highest court was renamed The Supreme Court of Maryland from the Maryland Court of Appeals. For our purposes we refer to it by its current name.

trial court. Maryland Rule 8-131, which governs the scope of appellate review, dictates that the “appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.” The Supreme Court of Maryland has interpreted that to mean that “the appellate courts will only address issues that are properly preserved for review, and issues that are not preserved are deemed to be waived.” *Bryant v. State*, 436 Md. 653, 659 (2014). A general objection preserves all issues for appellate review; a specific objection preserves for appellate review only “the ground explicitly raised in the trial court.” *DeLeon v. State*, 407 Md. 16, 25 (2008).

We hold that the issue is preserved for our review. Appellant’s counsel objected below, and we interpret his objection to include bias as a basis for the objection. We will not apply a hyper technical analysis to an obvious objection, aggressively asserted by counsel in the “heat of battle.”

It is well settled that a judge has the right to ask questions during a trial, *Johnson v. State*, 38 Md. App. 100, 107 (1977), cert. denied, 282 Md. 734 (1978), if that judge maintains “the line of impartiality over which [he or she] must not step.” *Nestor v. State*, 243 Md. 438, 446 (1966); *see also, McMillian v. State*, 65 Md. App. 21, 27 (1985). Here, the court’s questions were to clarify testimony and bring out the full facts. *Jefferies v. State*, 5 Md. App. 630, 632-33 (1969). The questions appellant objects to do not denote such unfairness, partiality or impropriety as to mandate reversal.

There is “a fine line between assisting the jury by bringing out facts and sharpening issues, which is permissible, and influencing the jury’s assessment of facts or of a witness’s

credibility by indicating his [or her] own opinions, which is not.” *Smith v. State*, 182 Md. App. 444, 489 (2008) (internal quotations omitted). The main justification for judicial questioning is to clarify issues in the case. *Madison v. State*, 200 Md. 1 (1952). This questioning can be proper even if it questions the defendant’s credibility. *King v. State*, 14 Md. App. 385 (1972). Judges must use this ability sparingly to avoid questions regarding impartiality. *Kelly v. State*, 392 Md. 511 (2006). Accordingly, this Court has distilled the following principles to adjudicate judicial intervention during the examination of a witness:

“From the foregoing, we distill the following principles regarding judicial intervention in the examination of witnesses. (1) The primary purpose of judicial interrogation of witnesses is to clarify matters elicited on direct or cross-examination. (2) Judicial interference in the examination of witnesses should be limited and it is preferable for the trial judge to err on the side of abstention from intervention in the case. (3) Although the number of questions posed by the trial judge exceeds those normally asked by a trial judge, the sheer number, standing alone, is not determinative of whether reversal is warranted. (4) It is preferable for the presiding judge to afford counsel the opportunity to elicit relevant and material testimony prior to interceding. (5) Continued inquisitorial participation in the questioning of witnesses runs afoul of the court's role as impartial arbiter, whether such questions are proper or improper, when they tend to influence the jury regarding the court's view of the testimony and evidence. (6) The most egregious manner of intervention is the trial court's personal injection of its views and/or attitude toward witnesses or parties or their theory of the case through intimidation, threatening, sarcasm, derision or expressions of disbelief, irrespective of the frequency or the point in time during or at the conclusion of direct or cross-examination of counsel. (7) If the direct and cross-examination of counsel is woefully inadequate, requiring extensive supplementation thereof, the preferred procedure is for the court to summons both counsel to the bench or in chambers and suggest how it wishes to proceed. (8) Greater latitude is granted to a trial judge based on the complexity of a case.”

Smith v. State, 182 Md. App. 444, at 486-87 (2008).

The trial court *sub judice* adhered to generally accepted principles in questioning the witness. First, the court waited until after both the defense and prosecution examined the witness. The court addressed the system of categorization for evidence that was collected and admitted. The court did not interject personal views or bias. The questioning was not persistent or pervasive and was limited to one pertinent issue that had come up during the examination. We agree with the State that the questioning was not improper. Because we find no error on the part of the trial court, we hold that the trial court did not abuse its discretion in denying the motion to strike the colloquy.

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