Circuit Court for Charles County
Case No. C-08-CR-22-000672

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0144

September Term, 2023

ROBERT LEE MOORE, JR.

v.

STATE OF MARYLAND

Berger,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: January 18, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Robert Lee Moore, Jr., was convicted in the Circuit Court for Charles County of driving a vehicle while impaired by alcohol and failure to control vehicle speed on the highway to avoid collision. Appellant presents the following question for our review:

> "Did the circuit court err or abuse its discretion in restricting defense counsel's cross-examination of Trooper Thomas?"

Finding no error, we shall affirm.

I.

Appellant was charged by citation with driving while under the influence of alcohol (Count 1), negligent driving in a careless and imprudent manner that endangers the property or life of a person (Count 2), driving a vehicle while impaired by alcohol (Count 3), reckless driving of a vehicle in wanton and willful disregard for the safety of persons or property (Count 4) and failure to control vehicle speed on the highway to avoid collision (Count 5). The court entered a judgment of acquittal on Count 4. The jury found appellant guilty of Counts 3 and 5 and not guilty of Counts 1 and 2. The court imposed a term of incarceration of 5 years, all but 9 months suspended, followed by 3 years of probation, on Count 3, and a $500 fine on Count 5.

At around 11:20 p.m. on January 29, 2022, Brock Dotson began to have mechanical trouble while driving on the highway. The battery of the van he was driving failed before he could get it to the side of the road. As a result, he ended up stranded in a stationary vehicle in the fast lane of the highway. He put his hazard lights on and called for assistance. A few minutes later, appellant drove down the same stretch of highway. Mr. Dotson

reported that appellant was "going really fast" in the same lane where Mr. Dotson was stopped. At the last second, appellant attempted to swerve into the right lane, but was unable to do so in time. He hit the back, right side of Dotson's vehicle before coming to a stop fifty feet away.

Trooper Thomas reported to the scene. He had not been present when the collision occurred or seen either car before the collision. He first checked the welfare of both passengers. Mr. Dotson appeared uninjured and said he was fine. Appellant appeared disoriented and the Trooper smelled the strong odor of alcohol on his breath. Appellant spoke with slow, slurred speech and his eyes were glassy and bloodshot. He fumbled with his paperwork and was unable to find his driver's license when the Trooper asked for it. Trooper Thomas inquired about appellant's alcohol consumption, and appellant informed the Trooper that he had had "three or four beers." At that point, the Trooper allowed paramedics to put appellant onto a gurney and take him to an ambulance to assess him. Once appellant was in the ambulance, the Trooper, still smelling a strong odor of alcohol, asked if appellant would be willing to take a field sobriety test. Appellant refused. Similarly, at the hospital, appellant refused a blood test.

At trial, Trooper Thomas testified to his observations at the scene and his interactions with appellant at the hospital. On cross-examination, defense counsel attempted to cross-examine the Trooper on a set of guidelines published by the National Highway Transit and Safety Administration (NHTSA). According to the NHTSA manual, there are three phases in which an officer can investigate for drunk driving: (1) vehicle in

motion, (2) personal contact, and (3) pre-arrest screening. At each stage, the manual lists factors officers can look for to determine whether a driver is impaired.

Key to this appeal are two instances in which appellant's counsel attempted to delve into the specifics of the factors and tests listed in the manual. First, appellant's counsel drew the Trooper's attention to the first phase, "vehicle in motion," and asked the Trooper how many factors there were for that phase. The State objected on the grounds that the testimony was irrelevant and outside the scope of direct examination. The State argued that, because the Trooper was not present prior to the accident, testimony about what an officer hypothetically should have looked for in a situation that did not present itself was not pertinent. The court sustained the objection.

However, the court went on to permit appellant's counsel to thoroughly cross-examine the witness on what signs of intoxication he was unable to check for because he was not present prior to the crash. Immediately after the bench conference, appellant's counsel was permitted to ask "There are a lot of clues for phase one?" After questioning the Trooper about the other phases briefly appellant's counsel returned to phase one and was permitted to ask the following questions:

> [DEFENSE COUNSEL]: Okay, so phase one, vehicle in motion—
>
> TROOPER THOMAS: Yes, ma'am.
>
> [DEFENSE COUNSEL]: —that involves your initial observation of the vehicle in motion?
>
> TROOPER THOMAS: Yes, ma'am.

[DEFENSE COUNSEL]: And then your observation of how the vehicle stops?

TROOPER THOMAS: Yes, ma'am.

[DEFENSE COUNSEL]: In this case, you never actually saw Mr. Moore driving?

TROOPER THOMAS: I did not, no, ma'am.

[DEFENSE COUNSEL]: Okay, so for instance, one possible clue for vehicle in motion is weaving in the lane?

TROOPER THOMAS: Yes, ma'am.

[DEFENSE COUNSEL]: You have no idea if Mr. Moore was weaving in a lane?

TROOPER THOMAS: I do not, no, ma'am.

Appellant's counsel was able to proceed in this manner, inquiring about the Trooper's inability to observe five different factors and the Trooper knowing that several other factors (e.g., driving the wrong way down the highway) did not apply. Appellant points to no specific factors from the manual that he was not permitted to cross-examine the Trooper about.

Second, appellant's counsel attempted to question the Trooper on the logistics of each of the field sobriety tests which he would have performed had appellant agreed to them. Appellant's counsel confirmed with the Trooper that there were three tests the Trooper would have performed: the horizontal gaze nystagmus, the walk and turn, and the one leg stand. Appellant's counsel confirmed that "each of those requires someone to stay

in a certain position while you are explaining them, right?" Appellant's counsel then attempted to inquire into the heel-to-toe walking method required by the walk and turn test, eliciting an objection from the State. The State argued that the precise methodology of tests not conducted was irrelevant. Appellant's counsel explained that she was attempting to demonstrate that the logistics of the test might make someone who was on a gurney at the time not want to participate in them. The court sustained the objection.

Once again, however, appellant's counsel was able to immediately approach the point with a different set of questions:

> [DEFENSE COUNSEL]: So, we're not going to go into how each one of those tests work?
>
> TROOPER THOMAS: Yes, ma'am, okay.
>
> [DEFENSE COUNSEL]: But each of them do require standing while they are explained?
>
> TROOPER THOMAS: Not the HGN, the HGN you could do lying on a gurney. But yes, the other tests do, yes, ma'am.
>
> [DEFENSE COUNSEL]: So, you are saying that you can do the HGN lying down?
>
> TROOPER THOMAS: Absolutely, yes, ma'am. It is... the science proves that, yes, ma'am.

Pertinent to both of the above inquiries, appellant's counsel was able to sum up her discussion of the NHTSA manual with the following:

[DEFENSE COUNSEL]: Then when all the phases are complete, that is when you make the decision about whether there is sufficient probable cause to arrest someone?

TROOPER THOMAS: Yes, ma'am.

[DEFENSE COUNSEL]: You didn't see phase one?

TROOPER THOMAS: I did not, no, ma'am.

[DEFENSE COUNSEL]: There was no evidence from phase three? No tests were done?

TROOPER THOMAS: No, ma'am, no, ma'am.

[DEFENSE COUNSEL]: And so you made the decision to arrest him based on those observations from phase two that we talked about?

TROOPER THOMAS: With my knowledge, training, and experience, yes, ma'am, I had enough probable cause to arrest him, yes, ma'am.

II.

Appellant argues that both of these sustained objections excluded relevant testimony helpful to his case. Appellant argues that the purpose of cross-examination is to elicit all the facts of a transaction that have not been fully explained. Appellant claims that the first sustained objection prevented him from pointing out indicia of impairment that the Trooper did not observe. This restriction, he claims, prevented him from eliciting the fact that there

were indicia that were absent from this case. Further, appellant notes that there was no apparent prejudice from the line of questioning he sought to engage in which might outweigh the probative value.

Appellant claims that the second sustained objection prevented him from questioning the Trooper about the physical demands of the field sobriety tests. If allowed to pursue the line of questioning as intended, he would better have been able to elicit an alternative reason for his refusal to participate in the field sobriety tests. He claims that the physical demands of the test, in conjunction with the fact that he was, at the moment, lying on a gurney, provided a reason for his actions which is consistent with innocence. The combination of these two objections, appellant claims, denied him his Sixth Amendment right to adequately confront the witnesses against him.

The State argues that appellant was able to cross-examine on the indicia of impairment which the Trooper did not observe and that this meets the threshold level of inquiry that is required by the Sixth Amendment. The State argues that the precise question the State first objected to, "How many indicators are there for that phase one, vehicle in motion, possible indicators?" was, at best, collaterally relevant. As to the second line of questioning, the State notes that appellant questioned the witness about the physical requirements of the tests (i.e., they are performed standing up). The State argues that the precise instructions for the tests were, once again, at best, minimally probative to a collateral issue.

In the alternative, the State argues that, if there was any error, that error was harmless beyond a reasonable doubt. Appellant cross-examined the witnesses on the key

points underlying both arguments that he sought to advance through this testimony and was able to argue both points in closing arguments. The State claims that, in light of the overwhelming evidence in this case—including Moore's physical symptoms, the odor of alcohol, and his admission that he had drunk three or four beers—any minor probative value lost was harmless.

III.

The Sixth Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights protect a defendant's right to cross-examine witnesses. *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018). That right is not, however, unrestricted. *Stanley v. State*, 248 Md. App. 539, 551 (2020). Cross-examination is not permitted on matters that are irrelevant or immaterial to the trial issues. *Rowe v. State*, 62 Md. App. 486, 495 (1985). The question of whether a matter is sufficiently probative is left to the sound judgment of the trial court. *Id.* We, therefore, review the circuit court's decision to preclude the two lines of questioning for an abuse of discretion. *Id.* at 496.

As a preliminary matter, appellant's argument that he was prevented from questioning the witness about indicia of impairment that were not observed misrepresents the record. Appellant was granted the opportunity to question the witness about the phase one indicia of impairment listed in the NHTSA manual for four transcript pages. Indeed, appellant does not point to a single indicum of impairment that he was not permitted to cross-examine the witness about. He was permitted to elicit testimony that there were "a lot" of indicia that the Trooper could have looked for in phase one, but that the Trooper

was unable to do so because he was not present. Thus, the question before the court is not whether it was error to prevent appellant from inquiring into indicia of impairment that the Trooper did not see. It is whether it was error to prevent appellant from inquiring specifically into how many indicia are listed under phase one of the manual.

If the Trooper had been present to observe appellant driving, an enumeration of the various indicia he could have observed as compared to the number he did observe would be relevant. The fact that he was unable to observe appellant during the accident was relevant. The connection is tenuous, at best, between the number of indicia of impairment that a Trooper could have seen had he been present at a time when it is undisputed that he was not, and the material fact at issue, i.e, whether appellant was impaired. The more attenuated the connection between the evidence and the proposition it is offered to prove, the less the probative value of the evidence. *Grandison v. State*, 341 Md. 175, 206 (1995). We do not find abuse of discretion in the trial court's decision to exclude that single question.

Similarly, appellant was not precluded from inquiring into the physical requirements of the field sobriety tests. He was permitted to ask questions about the physical requirements he today cites as a reason why he might not have wanted to perfom the tests: they require standing up. He was prevented from inquiring about the specific instructions for each individual test. As above, once appellant established the physical demands of the tests through alternative questions, the connection between the precise instructions for each of the tests, and the material facts at issue, is tenuous at best. The trial court did not abuse its discretion in excluding that line of questioning.

Even assuming, *arguendo*, that the questions appellant sought to ask were relevant the error, if any, was harmless. When, as the reviewing court we are able to declare a belief, beyond a reasonable doubt, that the error in no way affected the verdict, we do not reverse. *Dorsey v. State*, 276 Md. 638, 659 (1976). Here, appellant's only argument that the State's first objection prejudiced him in any way is that "he had a right to point out the indicia, or clues, or impairment that were not observed." Appellant's only argument that he was prejudiced by the State's second objection is that the evidence "would have established an innocent reason for Mr. Moore to decline the tests, a reason that was not evidence of consciousness of guilt." The State's objection did not prevent appellant from doing either of these things. He questioned the witness on the full litany of indicia of impairment that the Trooper might have observed had he been present prior to the crash and established that the Trooper had seen none of them. He established that the field sobriety tests would have required him to stand and that, at the time, he was lying on a gurney. He was able to ask sum-up questions about the lack of information the Trooper was able to obtain from two out of the three phases of an investigation. Appellant was not prejudiced by either of these sustained objections.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.