UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

Nos. 0177 & 0575

September Term, 2014

COREY SHERROD SAMPSON

v.

STATE OF MARYLAND

Krauser, C.J.,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: November 18, 2015

Convicted, by a jury in the Circuit Court for Dorchester County, of possession of marijuana with the intent to distribute, possession of a firearm in relation to a drug trafficking crime, possession of a firearm following conviction of a disqualifying crime, and related offenses,[1] Corey Sherrod Sampson, appellant, presents the following questions for our review:

> 1. Did the trial court err in qualifying Deputy James McDaniel as an expert witness?
>
> 2. Did the trial court err by allowing Deputy McDaniel to provide testimony tantamount to an opinion as to appellant's guilt?

Finding no error, we affirm.

BACKGROUND

On the night of August 31, 2013, off-duty Cambridge Police Department Detective Antoine Patton observed a vehicle operating in what he believed to be an erratic manner. Believing the driver could be intoxicated, he and other officers, whose assistance he requested, followed the vehicle to a nearby McDonald's restaurant.

When officers approached the vehicle, of which appellant was the driver and sole occupant, they smelled raw marijuana, and one officer observed a firearm in appellant's lap.

[1]Appellant was charged in two separate cases, numbers 09-K-14-015219 and 09-K-13–015122. Although the trial court consolidated the two cases and tried them together, they remained docketed separately. Following appellant's sentencing in both cases on May 19, 2014, his appeal in case 15122 was docketed as case number 177/14, and his appeal in case 15219 was docketed as case number 575/14 in this Court. By order dated November 21, 2014, this Court consolidated the two cases for briefing and argument.

Upon removing the firearm, a loaded .22 caliber Ruger revolver,[2] the officers ordered appellant to get out of the vehicle, whereupon they handcuffed him and placed him under arrest.[3] The police then found, on his person, $1,394 in cash and, in his vehicle, a camouflage bag containing plastic baggies, two of which contained suspected marijuana, .22 caliber bullets, and a digital scale.[4]

At trial, over defense objection, the State called Dorchester County Sheriff's Office Deputy James McDaniel, as an expert witness in the field of narcotics and drug identification, detection, and enforcement, who stated that "[d]rugs and guns run hand in hand." There is often, he explained, an association between the use and possession of firearms and the distribution of controlled dangerous substances as drug dealers often carry firearms to protect themselves from robbery and to collect debts from buyers. Deputy McDaniel further testified that the nature of the items recovered from appellant's vehicle, as well as the absence of any smoking device, was consistent with an intent to distribute the drugs, rather than an intent to put them to personal use.

[2]The gun was later test fired and determined to be operable.

[3]Despite the officers' suspicion of his intoxication, appellant passed field sobriety tests and registered a .00 reading on a breathalyzer test. Because appellant stated that he had taken three Percocets and showed signs of impairment, the responding police officers attempted to obtain the services of a Drug Recognition Expert ("DRE"), who was trained to detect other types of impairment. The officers were unable to reach a DRE.

[4]The suspected marijuana was later confirmed to be 64.8 grams of marijuana. A trace amount of marijuana was found on the scale.

Appellant then testified on his own behalf. He admitted to having had a firearm in his lap when approached by the police officers on the night in question but insisted that he carried the gun for personal protection because a number of his family members had been murdered. Although he admitted that he had been in possession of marijuana, he denied any intent to distribute that substance, claiming, instead, that it was for his own personal use.

DISCUSSION

I.

Appellant contends that the trial court erred in accepting Deputy McDaniel as an expert in the field of narcotics and drug identification, detection, and enforcement because the deputy, having less than eight years of experience as a law enforcement officer and only two years of experience investigating drug cases, lacked the knowledge, skill, experience, training, and/or education required by Maryland Rule 5-702 to offer an expert opinion at trial.

In an effort to qualify Deputy McDaniel as an expert, the State elicited from him testimony that prior to his employment with the Dorchester County Sheriff's Department, he had been employed by the Cambridge Police Department for seven years. The deputy then described, in detail, his 905 hours of training at the Eastern Shore Criminal Justice Academy. That included the identification and detection of controlled dangerous substances ("CDS"). He further testified that he undergoes annual training, along with secondary training in the field of narcotics and CDS through "numerous institutions and agencies."

Moreover, while at the Cambridge Police Department, he had been assigned to the narcotics enforcement team for two years, and he continued to investigate narcotics crimes with the Sheriff's Department.[5] He estimated he had made close to 200 drug arrests since 2007, testified in court close to 1000 times, and had been accepted as an expert witness in the field of narcotics and drug detection, identification, and enforcement on approximately ten previous occasions.

On the other hand, defense counsel elicited from Deputy McDaniel that he was not a certified DRE, had never functioned as a narcotics investigation instructor, and had not published articles relating to drug investigations in any periodicals.

The court then ruled as follows:

> All right. Well, the rules indicate that the court has to make a decision whether or not the testimony of this particular witness will assist the trier of fact to understand the evidence or to determine a fact at issue. Certainly, the court finds that his training, experience, his skills, his knowledge, his education, including probably most importantly his on-the-job training and field experience, would qualify him to testify as an expert on the use, possession and sale of controlled dangerous substances in the Dorchester County geographic location.

Maryland Rule 5-702 governs the admission of testimony by experts. It states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the

[5]McDaniel's testimony contradicts appellant's claim that the deputy had only two years of experience in investigating drug crimes.

> court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

In other words, a trial court may admit expert testimony if it determines that the expert is qualified to testify by virtue of his education and experience and that the expert's testimony is competent, that is, based on a legally factual foundation. *Oken v. State*, 327 Md. 628, 660 (1992) (quoting *Simmons v. State*, 313 Md. 33, 41-42 (1988)). But a lack of experience or formal credentials does not disqualify an expert witness, "so long as the witness is sufficiently qualified that the witness's testimony would be helpful to the fact finder." *In re Adoption/Guardianship No. CCJ14746*, 360 Md. 634, 647 (2000).

Moreover, the admissibility of expert testimony is a matter largely within the sound discretion of the trial court, and the admission or exclusion of such testimony will rarely constitute a ground for reversal, *Bomas v. State*, 412 Md. 392, 406 (2010) (quoting *Bloodsworth v. State*, 307 Md. 164, 185 (1986)), unless an error of law or clear abuse of discretion is found. *White v. State*, 142 Md. App. 535, 544 (2002). We find neither error nor an abuse of discretion here.

Deputy McDaniel had been a police officer for more than seven years. During that time, he had received extensive education and training—updated annually—in the field of identification and detection of CDS. He had made numerous drug arrests since the start of his career in 2007, testified in court close to 1,000 times, and been accepted as an expert

witness in the field of drug detection, identification, and enforcement on approximately ten previous occasions. The mere fact that he was not a certified DRE, narcotics investigation instructor, or published author on the topic of drug investigations does not necessarily disqualify him as an expert witness. Indeed, Deputy McDaniel's education and experience rendered him sufficiently qualified to testify as an expert in the areas of drug identification, detection, and enforcement.

Furthermore, the deputy's conclusions were based on a legally sufficient factual foundation. His first-hand knowledge gained through his numerous CDS arrests gave him an understanding and a knowledge of the common practices of drug distributors. Finally, because such knowledge is presumably not within an average juror's everyday experience, Deputy McDaniel's testimony assisted the jury in understanding the evidence. *See Shemondy v. State,* 147 Md. App. 602, 612 (2002). Therefore, given that deputy's testimony, was relevant, which is not in dispute, it was admissible under Maryland Rule 5-702. *Walker v. Grow*, 170 Md. App. 255, 275 (2006).

II.

Appellant also claims that the trial court erred in permitting Deputy McDaniel to testify with respect to appellant's intent and state of mind, as well as to render an expert opinion that appellant was guilty of the crime of possession of CDS with the intent to distribute, pointing out that it is up to the jury to determine whether a defendant has a

particular state of mind. The deputy's testimony was thus impermissible and should have been excluded, he maintains.

Subject to a continuing objection by the defense to the opinions of Deputy McDaniel in his capacity as an expert witness, the prosecutor inquired of the deputy the difference between the packaging and volume of marijuana possessed by a personal user versus a distributor, the significance of the presence of numerous plastic baggies found with marijuana, the use of a scale as it pertains to drugs, the likelihood that a drug distributor will have large sums of cash on his person, the association between firearms and drug trafficking, and the significance of the absence of a smoking device when a large sum of drugs is recovered. In summary, the prosecutor asked:

> Q. So let me ask you. What seems to be a larger amount of marijuana than a user might use, is that consistent with the use of repackaging for distribution, scales often seen in distribution, and a relatively large amount of United States currency, no smoking devices and a loaded handgun; are these facts such that you are able to render an expert opinion as to its consistency with someone's intent to distribute a controlled dangerous substance?
>
> A. That's correct. I would consider this definitely possession with intent to distribute as an armed...
>
> Q. Consistent with?
>
> A. Uh-huh.

On cross-examination, the deputy clarified:

> In this case the gun in conjunction with the marijuana, all the packaging material, the electric scale which is used to weigh the suspected marijuana, and

> you can see the residue on it and the amount of U.S. currency, all of those items together. . . are consistent in my training, knowledge and experience to be with a possession with intent to distribute. If you take one of these items separate, it may not be consistent with a possession to distribute. . . . But if you took this marijuana with all these packaging materials, the scale, the money and the gun and add all those things together . . . that is consistent with possession of intent to distribute.

When, on cross-examination, defense counsel repeatedly attempted to refute the State's claims that appellant possessed the marijuana at issue with the intent to distribute rather than for personal use, Deputy McDaniel remained steadfast in his opinion that the totality of the circumstances established an intent to distribute:

> No. It's everything, like I said. If it wasn't in close proximity—all those items here besides the gun and the U.S. currency were found together in one bag. This—there's not a doubt in my mind that all that these [sic] plastic sandwich baggies here and all these miniature gram baggies we consider them for, the marijuana and the scale weren't all together just at random. They were intended to be used together to take the marijuana . . . put it on the scale, put it in a bag for distribution.
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> At that point, defense counsel objected during a bench conference:
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> [DEFENSE COUNSEL]: My concern is that he continues to say—it's stuff that's just over the line.
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> THE COURT: He continues to say it because you continue to ask it.
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> [DEFENSE COUNSEL]: Well, I'm not—I haven't been asking whether or not—
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> THE COURT: You're asking for responses and you're getting responses. If you don't like what the responses are, then too bad. Don't ask them. Do you understand what I'm saying?

[DEFENSE COUNSEL]: Your Honor, the expert notes he's known before day, he continues to know he's not permitted to opine that this is for purposes of distribution. He is permitted to opine—

THE COURT: He has, he's said, he's used the words "consistent with."

[DEFENSE COUNSEL]: And this expert continues to overstep that clearly restrictive—

THE COURT: How? How?

[DEFENSE COUNSEL]: By saying that there's no doubt in his mind that he was distributing.

[PROSECUTOR]: Because you're pushing him into suggesting that he was wrong.

THE COURT: You're pushing him into that. He used the word consistent multiple times. It's the same way we asked questions of your drug expert you did not have to ask; didn't help your case at all, helped the State's case, because you just want to engage in the exercise. You need to think about what you're asking. You keep asking him and opening the door and you're going to get the answers you don't like and you're going to be stuck with them. He has testified consistently that it's consistent with the use and the more you try to confuse him, if you get something that comes out, too bad. . . So if you're, if you're having fun playing this game, I'm not. So if you don't like where he's going, then you need to lead him there, ask the good questions and things such as that. You can lead. You've got a cross—you're on cross-examination. But don't come whining to me if he's giving you answers that you're not wanting. He's trying to stay within the parameters. He has done it previously when he's qualified. He's done it today. But you can't keep badgering him and expect it's going to turn out in your favor. So that's where we are.

The issue raised by appellant implicates Maryland Rule 5-704(b), which states:

(b) **Opinion on mental state or condition**. An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental

> state or condition constituting an element of the crime charged. That issue is for the trier of fact alone. This exception does not apply to an ultimate issue of criminal responsibility.

This rule created "'a line that expert witnesses may not cross.'" *Gauvin v. State*, 411 Md. 698, 704 (2009) (quoting *U.S. v. Mitchell*, 996 F.2d 419, 422 (D.C. Cir. 1993)). Whether the trial court violated Rule 5-704(b), by permitting a police expert to testify impermissibly as to a defendant's state of mind in a CDS distribution case or to state an opinion as to whether a defendant possessed CDS with an intent to distribute, was an issue addressed in a pair of Maryland cases: *Gauvin, supra,* and *Barkley v. State*, 219 Md. App. 137 (2014).

In *Gauvin*, the prosecutor asked the police expert witness if he had formed an opinion "as to whether or not the PCP that was seized from Ms. Gauvin on December 15th, 2006 was for her personal consumption or for distribution?" 411 Md. at 701-02. In rendering that opinion, the officer stated: "That the amount would indicate to me that it was possessed with intent to distribute. I would base that on different factors." *Id.* at 702. He went on to list those factors as the large amount of the drug seized from the defendant, the amount and denominations of the money recovered from her person, and the presence of rubber gloves, which dealers often use to keep the PCP from being absorbed into their skin. *Id.*

The Court of Appeals found that the prosecutor's question relating specifically to the defendant, sought an opinion prohibited by Rule 5-704(b), and the trial court should have sustained the defendant's objection to the question, on the ground that an expert is not

entitled to express the opinion that the defendant possessed a CDS with the intent to distribute it. *Id.* at 710-11. But it then held that the officer, in his *answer* to the question, did not cross the line established by the rule, because he never unequivocally testified about Gauvin's mental state or stated directly that she had the intent to distribute. *Id.* at 711. Instead, the officer's opinion was based upon his knowledge of common practices in the drug trade, rather than on some familiarity with what appellant thought. *Id.* The Court therefore concluded that the officer's testimony was admissible. *Id.* at 713.

This Court considered a similar issue in *Barkley*. In that case, the expert police witness testified that the 53 baggies of heroin, taken from the defendant, were packaged in the manner in which heroin is normally sold on the street. He added that the $10 and $20 bills recovered from the defendant were the amounts street dealers generally charge for a baggie of heroin and that typical heroin users do not generally carry more than one or two bags of the drug on their person. 219 Md. App. at 142.

The prosecutor then posed the following question:

> And combining all of this evidence, the fact that we don't have any needles or any way of using the heroin, the money in the pocket, the denominations, the number of bags, are you able to form an expert opinion as to whether an individual with this set of facts was engaged or possessing the heroin with the purpose of distributing it?

Id. at 143.

The officer answered:

> What I've heard today based on the amounts that were located, the manner of the bands, the lack of any type of device to utilize the heroin, it's pretty evident to me just based on my training and experience here in Wicomico County in recent weeks that it was destined to be distributed to persons here in Wicomico County.

Id.

When defense counsel objected, the prosecutor pointed out the "critical distinction" he had made between "an individual whose intent was to distribute heroin" and "the Defendant's particular mindset." *Id.* at 144.

There, we held that the prosecutor's question to the expert witness relating to "[a]n individual with this set of facts" could relate to anyone and was therefore "appropriately generic." *Id.* at 151. We explained that "[e]ven though the circumstances may implicate the defendant, an opinion based on the circumstances themselves rather than on some special knowledge about the defendant's mind does not offend Rule 5-704(b)." *Id.* at 155. We further observed that the prosecutor's question summed up the physical circumstances of the defendant's arrest and asked whether any "individual with this set of facts" would intend to distribute. Consequently, we concluded that the officer's expert opinion did not offend Rule 5-704(b); the defendant's state of mind could be inferred from the circumstances themselves. *Id.*

We reach a similar conclusion here. After enumerating the physical circumstances of the recovery of CDS from appellant, *i.e.*, the 64.8 grams of marijuana, the baggies often

used for packaging, the scale, the gun, the large amount of cash found on appellant, and the absence of a personal smoking device, the prosecutor carefully asked Deputy McDaniel, "[A]re these facts such that you are able to render an expert opinion as to *its consistency with someone's intent to distribute a controlled dangerous substance?*" (Emphasis added.) Thus, the prosecutor's question, which could relate to anyone, was proper.

The deputy's answer, "That's correct. I would consider this definitely possession with intent to distribute . . . ," approached the line of impropriety by almost suggesting that appellant's specific actions indicated an intent to distribute but was saved by the prosecutor's reminder, "Consistent with?" Then, on cross-examination, the deputy was very careful to reiterate that the physical circumstances of the case were "consistent with" possession of marijuana with the intent to distribute; indeed, he used the phrase three times in one answer to defense counsel's questioning.

Later, when defense counsel repeatedly tried to shake the witness from his opinion, the deputy stated: "This—there's not a doubt in my mind that all that these [sic] plastic sandwich baggies here and all these miniature gram baggies we consider them for, the marijuana and the scale weren't all together just at random. They were intended to be used together to take the marijuana . . . put it on the scale, put it in a bag for distribution." At that point, defense counsel objected that the deputy had overstepped the boundaries of Rule 5-704(b).

Although the trial court appeared to couch its ruling, at least in part, in terms of defense counsel's opening the door to an improper response, in our view, there was no impropriety in the deputy's response because, as in *Gauvin* and *Barkley*, he never unequivocally testified about appellant's mental state or stated directly that appellant intended to distribute the marijuana. Instead, in stating that the baggies and scale were "intended to be used together to take the marijuana . . . put it on the scale, put it in a bag for distribution," he based his opinion on his knowledge, training, and experience relating to common practices in the drug trade, rather than on some familiarity with what appellant thought. *See Pringle v. State*, 141 Md. App. 292, 300 (2001), *rev'd on other grounds*, 370 Md. 525 (2002), *rev'd on other grounds*, 540 U.S. 366 (2003)("The witness never opined as to appellant's state of mind or his credibility. The witness opined that 'the drugs were going to be distributed' with no reference to appellant's intent or credibility.") Indeed, the deputy acknowledged that he was not present on the night appellant was arrested, nor involved in the investigation of appellant's crimes.

We conclude that Deputy McDaniel's opinion, which was based on the physical circumstances of the case, and not on appellant's mindset, did not offend Rule 5-704(b) and was properly admitted.

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