Circuit Court for Baltimore City
Case No. 117095001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 256

September Term, 2018

JAMAL A. GIBSON

v.

STATE OF MARYLAND

Graeff,
Beachley,
Salmon, James A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 21, 2019

On February 17, 2017, Derrick McCargo was shot while fleeing from an attempted robbery. A jury in the Circuit Court for Baltimore City convicted Jamal A. Gibson, appellant, on charges of first-degree assault; carrying a handgun; and unlawful discharge of a firearm in Baltimore City.[1] Appellant, who was sentenced to twenty-two years for the assault, plus a consecutive three years for carrying a handgun, presents the following issue for appellate review:

> Did the circuit court err or abuse its discretion in admitting irrelevant and unfairly prejudicial evidence?

For the reasons that follow, we conclude that the trial court did not err or abuse its discretion in overruling a defense objection to the State's inquiry to the victim about why the incident remained "vivid as if it was yesterday[.]"

BACKGROUND

Around 9:30 p.m. on February 17, 2017, Derrick McCargo parked in the 600 block of Lexington Street, near a night club, then waited with his engine running for a friend who planned to meet him there. Mr. McCargo had "drifted off" when he was "startled" by a loud knock on the car window. A light-skinned man with a slender build and facial hair was standing next to his car displaying a gun.

When the gunman demanded that Mr. McCargo get out of his car, Mr. McCargo put the car in reverse. As the gunman said, "Stop. Don't do it. Don't even think about it[,]" Mr. McCargo proceeded to drive away. The gunman fired a shot through the car window,

[1] Appellant was acquitted on charges of attempted first-degree murder, conspiracy to commit first-degree murder, attempted second-degree murder, conspiracy to commit murder, conspiracy to commit second-degree assault, and conspiracy to carry a handgun.

striking Mr. McCargo in his arm. Mr. McCargo drove himself to a hospital, where he was treated before being transferred to Shock Trauma. The bullet "remains in [McCargo's] sternum."

Baltimore City Police Detective Durel Hairston investigated the shooting. In addition to "a .40 caliber casing," a bullet fragment, and broken glass found at the scene of the shooting, he recovered surveillance video from both CitiWatch and University of Maryland cameras. From that footage, Detective Hairston captured a still image of two men walking in the area at the time of the shooting, then circulated that image within the department.

Detective Avraham Tasher recognized one of the two men based on their prior interactions. After looking through a database, Detective Tasher identified appellant by name.

Detective Hairston then created a "double-blind photo array" that included appellant's photograph. On March 3, 2017, a different detective with no knowledge of the investigation showed Mr. McCargo the photo array. Mr. McCargo selected appellant's photo as the person who shot him.

After appellant was arrested, a search warrant executed at his residence yielded "college air max" tennis shoes that police matched to one of the men appearing on the surveillance video.

At trial, Mr. McCargo again identified appellant as his assailant. Appellant, testifying in his defense, denied that he was the person in the surveillance footage and denied shooting Mr. McCargo. He also claimed that the seized shoes belonged to his

brother and did not match the shoes worn by the suspect in the surveillance video.

DISCUSSION

Appellant contends that the trial court erred or abused its discretion in overruling defense counsel's objection to the victim's testimony explaining why he recalled the attack as "vivid as if it was yesterday[.]" This claim of error arises from the highlighted portion of the following colloquy, which took place during the State's direct examination of Mr. McCargo:

> [PROSECUTOR]: Can you take a moment and review State's Exhibit 15. And then once you're done reviewing it can you tell us that you've completed your review.
>
> [MR. MCCARGO]: I have completed the review.
>
> [PROSECUTOR]: All right. And do you recognize what State's Exhibit 15 is?
>
> [MR. MCCARGO]: Yes. They -- it's a photo array of the -- a photo array.
>
> [PROSECUTOR]: And were you shown this photo array on March 3rd of 2017?
>
> [MR. MCCARGO]: Yes, I was.
>
> [PROSECUTOR]: And you were asked if you were able to recognize anyone. Is that correct?
>
> [MR. MCCARGO]: That's correct.
>
> [PROSECUTOR]: Okay. And did you in fact indicate that you recognized somebody?
>
> [MR. MCCARGO]: Yes.
>
> [PROSECUTOR]: Which number did you recognize?
>
> [MR. MCCARGO]: Number 4.

[PROSECUTOR]: Okay. And who did you recognize number 4 to be?

[MR. MCCARGO]: The person that shot me on September -- on February 17th.

[PROSECUTOR]: And did you indicate anywhere on photograph number 4 how you recognized the person?

[MR. MCCARGO]: Yes.

[PROSECUTOR]: What is it that you wrote?

[MR. MCCARGO]: I wrote, "This is the person that shot through my window."

[PROSECUTOR]: You didn't have to read it. You remember?

[MR. MCCARGO]: Yes.

[PROSECUTOR]: Why?

[MR. MCCARGO]: Because it's vivid as if it was yesterday, as it just happened.

[PROSECUTOR]: The incident?

[MR. MCCARGO]: Yes.

[PROSECUTOR]: And the photo array?

[MR. MCCARGO]: Yes.

[PROSECUTOR]: Why is this incident so vivid to you?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

Go ahead, sir.

[MR. MCCARGO]: Because it was a life-changing experience. It was -- it was so unreal. It's like this isn't -- it's me as my [sic] facing life and death at this time, at the hands of someone else, someone I don't even know, someone I've never even -- I had no relation with, no reason, no rhyme or reason to be in this situation.

> [PROSECUTOR]: And, Your Honor, at this time the State would move State's Exhibit 15 into evidence.
>
> [DEFENSE COUNSEL]: No objection.
>
> THE COURT: All right. It's admitted.

(Emphasis added.)

In appellant's view, Mr. McCargo's reasons for characterizing "the offense and his viewing of the photo array as 'vivid'" were "inadmissible . . . because these remarks were not relevant to his identification of [appellant]." Alternatively, appellant contends that even if the challenged testimony were "somewhat relevant," its probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Md. Rule 5-403. The State responds that appellant's claim of error is waived because defense counsel "both objected too early and too late[,]" and in any event, "his argument has no merit." We consider each contention in turn.

Waiver

The State contends that defense counsel's objection to the question, "Why is this incident so vivid to you?" came too early "if there was something inadmissible in the witness's answer." Alternatively, if the "objection to the question were to be treated as an objection to the answer," nevertheless it was too late, because by that time "[t]he evidence [appellant] now claims was inadmissible had already come in," when Mr. McCargo previously "testified, without objection, that his recollection of the shooting incident was 'vivid as if it was yesterday, as [if] it just happened."

We are not persuaded that appellant waived his right to challenge the ruling on the

grounds asserted here. "[A]n objection must be made when the question is asked or, if the answer is objectionable, then at that time by motion to strike[.]" *Ware v. State*, 170 Md. App. 1, 19 (2006) (citing *Bruce v. State*, 328 Md. 594, 627-30 (1992)). Defense counsel objected, not to the description of the incident as vivid, but to the prosecutor's invitation to expound upon what made the incident remain vivid. Because a general objection preserves all appellate grounds for challenging the admission of evidence, appellant did not waive his right to challenge the State's question on the ground that it elicited irrelevant or unduly prejudicial evidence. *See generally Boyd v. State*, 399 Md. 457, 476 (2007) (stating that, under Md. Rule 4-323, "a contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence"). Consequently, we shall address those challenges.

Relevance

Under Maryland Rule 5-401, evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Evidence that is not relevant is not admissible." Md. Rule 5-402. Because "[r]elevance is a relational concept[,]" we consider whether challenged evidence "is related logically to a matter at issue in the case[.]" *Snyder v. State*, 361 Md. 580, 591 (2000) (citations omitted). This Court reviews *de novo* a trial court's determination of relevance. *See State v. Simms*, 420 Md. 705, 725 (2011).

Here, the challenged testimony was relevant because it related to Mr. McCargo's identification of appellant as the person who shot him. Evidence of a victim-witness's

level of certainty about his identification of the defendant as his assailant may be a "highly relevant" factor in evaluating credibility and weighing evidence. *See Hopkins v. State*, 352 Md. 146, 163 (1998) (observing that a witness's "testimony as to the identity of the assailant . . . was material to the outcome and, as such, highly relevant"). Indeed, the trial court directed the jury, in accordance with the judicially-approved pattern jury instruction on identification of a defendant, that in evaluating evidence that a witness identified the defendant, "[y]ou should also consider the witness's certainty or lack of certainty[.]" *See* Maryland State Bar Ass'n, Maryland Criminal Pattern Jury Instructions 3:30 (2d ed. 2018). This reflects the "fundamental principle . . . that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Conyers v. State*, 354 Md. 132, 153 (1999) (quoting *Bohnert v. State*, 312 Md. 266, 277 (1988)); *see also Hopkins*, 352 Md. at 166 ("once identification testimony has passed the threshold of relevance and reliability, issues affecting credibility . . . go to its weight, not its admissibility"); *State v. Hailes*, 217 Md. App. 212, 265 (2014) ("Any residual question as to the reliability of the identification is a matter to be fought out by examination and cross-examination and is ultimately to be resolved by the jury. It is quintessentially an issue of fact and not an issue of law."), *aff'd on other grounds*, 442 Md. 488 (2015).

We find *Mines v. State*, 208 Md. App. 280 (2012), instructive here. In that case, a victim-witness testified that he "was a hundred percent sure" that Mines "was the man who tried to rob him." *Id*. at 302. Mines argued this testimony was inadmissible because it was "not relevant and was unfairly prejudicial." *Id.* Although Mines did not preserve those objections, this Court concluded that the testimony was admissible because "[a] witness's

degree of certainty is a proper consideration when evaluating his likelihood of misidentification." *Id*. (citing *Neil v. Biggers*, 409 U.S. 188, 200 (1972)).

Here, as in *Mines*, the victim-witness's level of certainty was relevant because it was probative of the primary disputed fact in the case – whether Mr. McCargo accurately identified appellant as the person who shot him. Mr. McCargo's explanation of why the encounter remained "as vivid as if . . . it just happened" was relevant information for the jury to consider in weighing the credibility of his identifications. Accordingly, the trial court did not err in overruling the defense objection to the inquiry.

Undue Prejudice

Even when proffered evidence is relevant, it may be excluded under Maryland Rule 5-403, which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In this context, prejudice is narrowly defined to mean that the evidence unfairly "tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission[.]" *Hannah v. State*, 420 Md. 339, 347 (2011). Accordingly,

> [e]vidence is never excluded merely because it is "prejudicial." If prejudice were the test, no evidence would ever be admitted. Parties . . . have a right to introduce prejudicial evidence. Probative value is outweighed by the danger of "unfair" prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.

Moore v. State, 84 Md. App. 165, 172 (1990) (quoting J. Murphy, *Maryland Evidence*

Handbook § 509, at 160 (1989)). This Court reviews a ruling that the probative value of challenged evidence was not substantially outweighed by the danger of unfair prejudice for abuse of discretion. *See Simms*, 420 Md. at 725.

"Probative value relates to the strength of the connection between the evidence and the issue, to the tendency of the evidence to establish the proposition that it is offered to prove." *Smith v. State*, 218 Md. App. 689, 704 (2014) (quoting *Weiner v. State*, 55 Md. App. 548, 555 (1983)). In this context, evidence is generally excluded only when it has "an undue tendency to persuade the jury to decide the case on an improper basis, usually an emotional one." *See Parker v. State*, 185 Md. App. 399, 439 (2009) (quoting *Weiner*, 55 Md. App. at 555). "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith*, 218 Md. App. at 705. "The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial." *Odum v. State*, 412 Md. 593, 615 (2010).

Appellant maintains that Mr. McCargo's testimony was unduly prejudicial because it "was more akin to evidence of how the crime had affected him and was well-suited to a victim impact statement to be presented at a sentencing." We disagree. As discussed above, an eyewitness's certainty is "highly relevant" in evaluating that witness's credibility. *Hopkins*, 352 Md. at 163. The fact that Mr. McCargo was confident in identifying appellant had strong probative value. Additionally, Mr. McCargo's confidence in identifying appellant was not unfairly prejudicial. Nothing about Mr. McCargo's certainty in identifying appellant as the assailant would create an emotional response in a

juror such that his or her logic would be overcome by sympathy. *Moore*, 84 Md. App. at 172.

Appellant's defense was articulated in defense counsel's opening statement to the jury that "[p]eople are fallible" and that appellant should not be "prosecuted . . . solely based on the observation of a man who was in a panic situation for mere seconds." The defense's focus on the circumstances of this nighttime street encounter between strangers elevated the probative value of Mr. McCargo's contrary claim that the life-threatening nature of the assault made it as "vivid as if it . . . just happened." Balancing such strong probative value against the unlikelihood that such testimony would be so emotionally distressing that jurors would be unable to perform their fact-finding and deliberative duties, the trial court did not abuse its discretion in overruling the defense objection.

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