Circuit Court for Baltimore City
Case Nos. 113029033 & 113029035

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 394

September Term, 2017

ZEBARY PEARSON

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 31, 2019

Yet again, we take up an appeal flowing from multiple prosecutions following the death of Jermaine Blue on July 28, 2012, as a result of gunshot wounds which, the State charged, were inflicted by appellant, Zebary Pearson, and two others.[1] Pearson was convicted in 2016 by a jury in the Circuit Court for Baltimore City of second-degree murder, use of a handgun in the commission of a felony, and possession of a regulated firearm.[2]

Pearson raises four questions for our review, which we have recast, combining the sufficiency questions for clarity, and which we shall discuss in the order presented in his brief:

1. Did the trial court abuse its discretion when it denied Pearson's motion to dismiss the jury panel?

2. Was the evidence sufficient to convict Pearson of second-degree murder and the weapons charges?

3. Did the trial court abuse its discretion in permitting the testimony of the State's expert witness?

For the reasons that follow, we shall affirm the judgments of the circuit court.

[1] All three defendants were tried jointly in 2013. However, in consolidated direct appeals, this Court reversed the convictions of Pearson and one co-defendant, Edward Ellis, and granted a new trial based on the trial court's failure to sever their trials from the third co-defendant, Antoine Dorsey, whose convictions were affirmed. *See Dorsey v. State*, Nos. 173, 398, and 400 Sept. Term, 2014, 2015 WL 5885155 (filed Oct. 7, 2015). Pearson was re-tried jointly with Ellis, who was also convicted. Ellis's convictions on re-trial were recently affirmed in an unreported opinion by this Court. *See Ellis v. State*, No. 1244, Sept. Term, 2017, 2018 WL 6004560 (filed Nov. 15, 2018). The questions Ellis presented in his appeal do not overlap those from Pearson's appeal.

[2] Pearson was sentenced to 30 years for second-degree murder and concurrent terms of 20 years and ten years for the weapons offenses.

BACKGROUND

We adopt the statement of facts from this Court's unreported opinion in the appeal noted by Ellis, Pearson's co-defendant, from the same re-trial.

> The State's theory of prosecution was that around 2:30 a.m. on July 28, 2012, [Edward Ellis], Antoine Dorsey, and Zebary Pearson shot Jermaine Blue a total of 22 times in front of a residence at 1418 Poplar Grove Street in Baltimore. Testifying for the State, among others, was an eyewitness to the shooting, James King; King's aunt, Shirley Omisore; the medical examiner; a firearms examiner; and several police officers. The theory of defense was mistaken identification. The defense presented no witnesses. The facts presented at trial are as follows.
>
> On July 28, 2012, King and Omisore lived with other family members at 1418 Poplar Grove Street. That evening, several of King's friends gathered at his house, including Blue, [Ellis], Dorsey, and Pearson. King had known Blue for about eight years; [Ellis] and Dorsey for more than ten years, and Pearson was someone he had seen around the neighborhood.
>
> King testified that he mingled with his friends on the front porch of his house until about 2:00 a.m., when he walked to a friend's house, which was across the street and three houses up from his. About half an hour later, as he opened the door to leave his friend's house, he looked toward his house and saw Dorsey hit Blue at the top of the front steps. Blue then ran down the steps to the sidewalk where he was confronted by [Ellis] and Pearson. Dorsey ran after Blue, and all three started hitting Blue on the sidewalk. According to King, when Blue fell to the ground, all three started shooting him and then fled. King called 911 but told the operator that he did not see the shooters. He then left the area because he "was scared."
>
> Omisore testified that about five minutes before the shooting she heard an argument outside the front of her house between Blue and Dorsey over Blue's dog. She told them to quiet down, which they did. After the shooting, she looked outside and saw Blue lying at the bottom of her front stairs. No one else was in sight.
>
> The police responded to the scene. They canvassed the area and spoke with several people who might have seen the shooting but no one wanted to speak to the police. An autopsy was performed and determined that Blue was shot 22 times. He also had lacerations above his lip and abrasions on his arm. The crime lab recovered nine cartridge cases and a bullet fragment from the

> crime scene and 12 bullets from the medical examiner. A firearms examiner testified that based on her examination of the cartridge cases, fragment, and bullets, the projectiles recovered were fired from three different handguns.
>
> About six weeks after the shooting, on September 12, King spoke to the police and made a recorded statement. King's statement mirrored his trial testimony, except that in King's recorded statement he told the police he only saw Dorsey shoot the victim.

Ellis v. State, No. 1244, Sept. Term, 2017, 2018 WL 004560, at *1–2 (filed Nov. 15, 2018).

DISCUSSION

1. Motion to Dismiss the Jury

Pearson complains that he was brought into the courtroom through a different door than that used by court personnel, counsel, the public, the trial judge – that is, in the words of co-defendant's counsel, "[e]veryone at liberty" walked past the jury panel in order to enter the courtroom. Pearson, on the other hand, did not pass by the jurors to enter; rather, he was escorted through a separate door. That, counsel argued[3] in support of the motion to dismiss the jury, indicated to the jurors that Pearson was in custody and dangerous and, as a result, "created a substantial taint and will be with [him] as [he goes] forward" at trial. After hearing argument, the court denied the motion.

Thereafter, *voir dire* was concluded, a panel of jurors was seated, and the courtroom clerk asked: "Is the jury panel acceptable to the Defense …?" After briefly requesting the court's indulgence, Pearson's counsel responded: "Acceptable." That response, the State

[3] Counsel for Pearson's co-defendant, Ellis, made the motion and argued it on behalf of Ellis, in which Pearson's counsel later joined without additional argument.

posits, constitutes non-preservation of Pearson's claim. We agree. *See State v. Stringfellow*, 425 Md. 461, 470 (2012) (explaining that "[o]bjections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, 'is directly inconsistent with [the] earlier complaint [about the jury],' which 'the party is clearly waiving or abandoning.'" (quoting *Gilchrist v. State*, 340 Md. 606, 618 (1995))).

It is settled that a claim of error in the seating of a juror "is ordinarily abandoned when the defendant or his counsel indicates satisfaction with the jury at the conclusion of the jury selection process." *Gilchrist*, 340 Md. at 617 (internal quotations and citations omitted). In *Mills v. State*, 310 Md. 33 (1987), *vacated sub nom on other grounds*, *Mills v. Maryland*, 486 U.S. 367 (1988), the issue was whether the trial court should have struck two prospective jurors, however, the Court of Appeals determined Mills had not exhausted his allotted peremptory strikes. *Id*. at 39-40. Proceeding *arguendo*, the Court briefly addressed the merits of Mills's argument, reiterating that claims of error in the inclusion or exclusion of a juror are ordinarily abandoned when the objecting party indicates the acceptability of the final jury panel. *Id*. at 40. Such was apparent in *Mills*, when, after checking the identity of one prospective juror, defense counsel stated, "Your Honor, the Jury as impaneled is acceptable to the Defense." *Id*. In *Thomas v. State*, 301 Md. 294 (1984), Thomas's claim of error was also waived where he "unequivocally indicated that the jury was acceptable to him." 301 Md. at 310 (citing *White v. State*, 300 Md. 719, 758 (1984)). This Court, as well, has held that claims of error were waived by an indication of satisfaction with the jury panel as seated. *See, e.g.*, *Adams v. State*, 183 Md. App. 188, 201

(2008) (finding any objection abandoned when "after the jury was selected counsel agreed, saying '[w]e're satisfied, your Honor.'"), *rev'd on other grounds*, 415 Md. 585 (2010).

Nonetheless, we shall consider Pearson's novel argument, which is founded in cases involving assertions of prejudice because a defendant appeared before prospective jurors in prison garb or in arm and/or leg restraints. We can find no applicability in that area of potential undue prejudice to the argument that he now raises. Pearson relies on *Wiggins v. State*, 315 Md. 232 (1989), which reversed the trial court's denial of a motion to dismiss the jury venire on motion of the defendant who asserted that, because correctional officers transporting Wiggins were wearing rubber gloves, there existed an assumption that Wiggins was a carrier of the AIDS virus. 315 Md. at 253. The Court of Appeals reversed, not because the guards were wearing gloves, *per se*, but because the trial court had not made an adequate inquiry into the reasons for the gloves. *Id*. at 244-45. *Wiggins* is not persuasive.

In *Jones v. State*, 4 Md. App. 616 (1968), the defendant complained, *inter alia*, that someone painted a swastika on a courthouse pillar and a racial slur on the courthouse steps which prevented him from being afforded a fair trial based on his concern that those markings might "charge the atmosphere with racially impacted prejudices and create an atmosphere of hostility…." 4 Md. App. at 622. He moved, pretrial, that the jury panel be stricken and, later, for a change of venue. *Id*. At the hearing, the trial court examined each juror on the issue during *voir dire* and received testimony from the sheriff about the markings, noting a lack of publicity about the date of Jones's trial and the lack of

connection between the markings and his case. *Id*. at 622-23. On appeal, affirming the trial court's judgment, this Court noted that:

> Both motions are matters of discretion in the trial judge and the burden is upon the moving party to show facts which will give rise to the actual prejudice. The trial court was satisfied that the jurors could render a fair verdict and we cannot say, on this record, that he abused his discretion.

Jones, 4 Md. App. at 623 (internal citations omitted).

The Court of Appeals has said that "'if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.'" *Bruce v. State*, 318 Md. 706, 721 (1990) (quoting *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986)). We are satisfied on this record that the trial judge gave adequate consideration to Pearson's motion, explained the logistics of the courtroom ingress and egress, and engaged in an appropriate weighing of potential prejudice.

Finally, Pearson presents us with no authority to support his claims of potential prejudice predicated on the use separate courtroom entrances for defendants *vis-à-vis* others. The State has cited us to *Marbley v. State*, 461 N.E.2d 1102 (Ind. 1984). Marbley asserted prejudice because he was required to enter the courtroom through a door, unavailable to the public and others, that led directly to an adjacent lockup. The Court reasoned: "Control of the proceedings is within the trial court's discretion and a reversal will be required only when there is shown a manifest abuse of discretion and the denial of a fair trial to the complaining party." 461 N.E.2d at 1108 (citing *Lawson v. State*, 412 N.E.2d 759, 768 (Ind. 1980)).

Pearson's broad assertion of prejudice falls far short of showing actual prejudice. Indeed, he concedes that "there was no other indication that jurors knew [he] was incarcerated." Basically, he claims prejudice, not as a result of having been inappropriately viewed by potential jurors, but for not having been seen at all.[4] We find no error in the trial court's ruling.

2. Sufficiency of the Evidence

Pearson challenges the sufficiency of the evidence to support the jury's guilty verdicts of both second-degree murder and the weapons charges. His primary challenge is directed at the State's witness, James King, whose testimony Pearson contends was contradictory and unreliable. That King's testimony was contradictory does not, *per se*, equal unreliability or inadmissibility.

We preview our sufficiency discussion with a brief recounting of the facts, recited in detail, *supra*, particularly as related to King's testimony.

On the evening July 28, 2012, on Poplar Grove Street in Baltimore City, following an argument about a dog, a fracas broke out, ending in the beating and fatal shooting of Jermain Blue. At the time, those present were Blue, "Stacia and her girlfriend," "[a] guy named Waters," "Duke," "Eddie, Stink, and Antwon," according to the testimony of King's aunt, Shirley Omisore, who resided at that address with him. "Duke" was Jermaine Blue; "Eddie" was Edward Ellis (Pearson's co-defendant) and "Stink" was identified as Pearson. Ms. Omisore later identified, from police photographs, "Antwon," Ellis, and Pearson as

[4] We also observe that a reasonable juror could reasonably infer that a defendant, charged with a homicide offense, would be in pre-trial detention.

those who were arguing with Blue. From her location inside the house, she did not witness the shooting of Blue but, hearing gunshots, she returned to the front of the house and saw Blue lying on the ground.

Sufficiency – Second-degree Murder

An essential, albeit unwilling, State's witness was James King, who lived nearby on Poplar Grove Street.[5] King testified that he observed Blue run down the porch steps as he was struck by Dorsey and then by Pearson and Ellis. After Blue fell to the ground, King testified, all three – Dorsey, Pearson, and Ellis – starting shooting Blue. As to that phase of the incident, King initially told police that it was Dorsey that he saw shooting Blue. It was King who placed a 911 call to report the event.

On cross-examination, King conceded (1) that he had told the 911 operator that he had not seen the shooting but that he was lying, and (2) that he avoided police efforts to interview him. King testified that, when finally interviewed by police, he had identified Pearson (known as "Stink") in a photo array and had written on Pearson's photo: "This is the person Stink I saw hitting Duke (Blue) after shooting him."

Portions of King's testimony on direct are relevant:

Q. Who were the two people [Blue] was confronted with?

A. Stink and Eddie (Ellis).

Q. … how was he confronted?

A. They started hitting him, like fighting him.

[5] At trial, King acknowledged that he did not want to be in court, but was taken there by police.

Q. And what happened next?

A. They started shooting him after he got on the ground.

Q. … who started shooting him?

A. Like all of them. After, like after, after Duke ran down the steps and he was confronted by the two --

Q. When you say the two, I need you to identify the two.

A. Stink and Eddie.

Later, in response to the prosecutor's question, King said:

> After, after Antwon struck Duke, Duke ran down the steps, and then he was confronted by Stink and Eddie. Stink and Eddie started fighting Duke too. Antwon came down the steps. And then they all started fighting on Duke. And then they winded up shooting him.

When asked, "Did you see Stink shooting Duke?", King answered, "Yes." He testified that "they all had guns." King, referring several times to the actions of Antwon (Dorsey), Stink (Pearson), and Eddie (Ellis), testified that they were "all aiming down" at Blue as he lay on the ground. At the State's request, King then demonstrated what he observed Pearson's body doing during the incident, explaining, "Punching again, kicking, like they was all in a group, and posing, aiming down, loud shots."

Our standard of review of a sufficiency challenge has been often stated: whether, viewing the evidence in the light most favorable to the State, "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Suddith*, 379 Md. 425, 429 (2004) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). In our review, we give due deference to the jury's findings of fact, resolution of conflicting

evidence and assessment of witness credibility. *Burlas v. State*, 185 Md. App. 559, 568-69 (2009). This is so even in cases where "generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Smith*, 374 Md. at 534.[6] *See also Burlas*, 185 Md. App. at 569 (recognizing that "there is no distinction to be given to the weight of circumstantial, as opposed to direct, evidence. A conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.").

Although King's testimony, including his pre-trial statements to police, was contradictory and consisted of circumstantial as well as direct evidence, it was for the jury to resolve the sufficiency of that evidence to support the charge of second degree murder. It was likewise for the jury to determine questions of King's credibility. Finally, we note that a conviction may rest on the testimony of a single witness. *Branch v. State*, 305 Md. 177, 183-84 (1986).

We defer to the jury's resolution of those questions.

Sufficiency – Firearms Charges

Pearson also argues that "there was no evidence that [he] had a regulated firearm or a handgun for purposes of possession of a regulated firearm or wear, carry, or transport a handgun firearm." No firearms were recovered in the investigation of Blue's murder.

[6] In denying Pearson's motion for acquittal, the trial court observed: "[t]here is no doubt in my mind that this case is a credibility case. There's no doubt in my mind that the observations made by Mr. King are somewhat circumstantial in nature…."

Pearson was charged with possession of a regulated firearm pursuant to section 5-133(b) of the Public Safety Article (PS), which includes handguns, defined as "a firearm with a barrel less than 16 inches in length." PS § 5-101(n)(1). He was also charged with use of a firearm in commission of violent crime pursuant to Maryland Code (2002, 2012 Repl. Vol.) Criminal Law (CL) § 4-204, which includes handguns and rifles as firearms, and with wearing, carrying, or transporting a handgun pursuant to CL § 4-203, which includes, *inter alia*, pistols, revolvers, and short-barreled rifles. CL § 4-201(c).

Detective Martin Young from the Baltimore City Homicide unit testified that "12 projectiles," later identified as bullets, were recovered from Blue's body during the autopsy. The State's firearm expert testified that the various bullets and shell casings recovered were fired from three separate firearms: "So the first firearm is the 9 millimeter. The second firearm are the 32 S&W, which stand for Smith and Wesson long fired from a Colt, and the third are also 32 S&W long bullets from either an FIE or an H&R type revolver."

The State's expert testified that both sets of the 32 S&W long bullets were "most common to a revolver," but not the same type. With respect to the 9 millimeter cartridge casings, the expert stated that, "It's a 9 millimeter, semi-auto or automatic pistol[,]" but "it could be a 9 millimeter rifle." Because, Pearson argues, King could not specifically identify the weapons possessed by the shooters as handguns, as opposed to rifles, the evidence was insufficient to support a conviction of the firearms charges.

The State responds that King's testimony was more consistent with the shooters having used handguns as opposed to a rifle, in that a long gun would have been more

apparent to him. Moreover, the State posits, King referred to the shooters's actions as "aiming down."

Again, we defer to the jury's consideration of the evidence before it and find that a reasonable juror could infer from the description of the scene and the shootings that Pearson and the others used handguns rather than rifles. *See also Wilder v. State*, 191 Md. App. 319, 338 (2010) (emphasizing that "'tangible evidence in the form of the weapon is not necessary to sustain a conviction; the weapon's identity as a handgun can be established by testimony or by inference'" (quoting *Brown v. State*, 182 Md. App. 138, 166 (2008))).

3. Expert's use of photographs

Before calling its firearms examiner to the stand, the State advised the court that she – the examiner – would make use of demonstratives, including two fake guns, fake bullets, and photographs of guns being fired, one in the daytime and the other in the nighttime. Pearson's counsel asked the court to advise the jury that the demonstrations were not evidence. The court did so, advising the jury that the demonstratives were not evidence, but were "offered only to assist you in understanding [the] testimony" of the examiner. Counsel also, at that juncture, objected to admission of the photographs and requested that the examiner's testimony be confined to responsive answers rather than a lecture. In ruling on the objection, the court said:

> In addition, the photographs that she may have of the firing of a weapon and any muzzle flash that may exist in both daytime and nighttime, I believe, is probative and it is relevant and has been properly generated already as cross examination during the testimony of Mr. King as to what Mr. King may or may not have seen during the course of the shooting. Particularly, reference was made by [counsel] about what Mr. King may have seen and testified to in a prior proceeding … and then I believe [co-

> defendant's counsel] asked him questions about whether he could see the gun in the hand of Mr. Pearson or Mr. Ellis during the actual firing.
>
> To the extent that there is inconsistent evidence or inconsistent testimony, both from the first trial[7] and this trial or during this trial, the observation of a sole eyewitness is a critical component of this particular case and as such, this Court's going to direct the jury to examine the testimony of that witness with great care, and as such, this jury needs to know what an expert has to say about what if anything could be seen with regard to a gun in the hands of the defendants at the time that the shooting and, therefore, any questions in that regarding with clarifying, explaining the operation, the process in which weapons of this nature are fired, is relevant, is probative and any prejudicial effect does not outweigh the probative value.
>
> I'll say it again. Any prejudicial effect does not outweigh the probative value and I will allow it….

Pearson argues that the court erred in its ruling. He asserts that: "There was simply no probative value to pictures of a firing handgun. Instead of actually going to the issues of the case, the pictures were simply confusing and potentially misleading."

The admissibility of demonstratives "'rests within the sound discretion of the trial court.'" *Andrews v. State*, 372 Md. 1, 20 (2002) (quoting *Ware v. State*, 348 Md. 19, 65 (1997)). Likewise, the initial determination of evidentiary relevance is made by the trial court. *Merzbacher v. State*, 346 Md. 391, 404–05 (1997) (citations omitted). *See, e.g.*, *Best v. State*, 79 Md. App. 241, 259 (1989) (a ruling of relevance is "quintessentially" within the trial court's wide discretion). Finally, the admissibility of evidence generally is left to the sound discretion of the trial court. *Donati v. State*, 215 Md. App. 686, 708 (2014) (citing *Hajireen v. State*, 203 Md. App. 537, 552 (2012)).

[7] The convictions which were reversed on direct appeal, as noted, *supra*.

We are satisfied that the trial court properly exercised its discretion and engaged in an appropriate balancing of probative value as opposed to potential undue prejudice.[8]

We find neither error nor abuse of discretion in the trial court's rulings.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ASSESSED TO APPELLANT.

[8] The State raised a preservation issue as to one of the photographs, asserting that while Pearson's co-defendant objected to both photographs, his own counsel objected to only one. We are satisfied that the issue was brought to the attention of the trial court, enabling a ruling, and therefore has been adequately preserved.