Circuit Court for Baltimore City
Case No.: 117100013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 488

September Term, 2020

DEON PHILLIPS

v.

STATE OF MARYLAND

Berger,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: September 16, 2021

A jury in the Circuit Court for Baltimore City convicted Deon Phillips, appellant, of theft and possession of a regulated firearm by a disqualified person. The jury acquitted appellant of first-degree assault, second-degree assault, and reckless endangerment. The court sentenced him to sixteen and one-half years, with all but eleven and one-half years suspended (the first five without parole), and five years of probation. On May 11, 2020, the circuit court granted appellant's petition for postconviction relief in the form of a right to file a belated appeal from his convictions.

On appeal, appellant presents two questions for our review, which we have rephrased slightly:

1. Did the circuit court err in denying appellant's motions for a mistrial based on a juror's mid-trial note revealing potential racial bias?

2. Did the circuit court err in denying appellant's motions based on testimony about prior incidents of domestic violence elicited by the prosecutor?

Finding no error or abuse of discretion by the trial court, we will affirm.

BACKGROUND

According to the evidence introduced at trial, Darryenne Ford and appellant had been in a romantic relationship for approximately five years. The couple had one child, C., who was two years old at the time of trial. Ford and appellant lived together in a house they co-owned. On the morning of February 26, 2017, appellant discovered that $1,800 that he had stored inside a shoe box in the home was missing, and he asked Ford if she was stealing. Ford responded that she did not know what appellant was talking about. When Ford realized that appellant was searching for the money in the shoe box, Ford told him that she

had deposited the money in their daughter's savings account at the bank. Appellant instructed Ford to go to the bank with him to get the money, but she refused. Ford disclosed at trial that she had moved the $1,800 from the shoe box to the bathroom closet without appellant's knowledge.

Ford testified that appellant attempted to take her phone and keys from her hand, and that he bit her finger trying to free the items from her grip. An argument ensued. Appellant pushed Ford onto the bed while she was holding C. Ford got up from the bed and told appellant to stop putting his hands on her. She then went to the kitchen and grabbed a knife. She warned appellant that she would stab him if he put his hands on her again. According to Ford, appellant got a gun from his brother, cocked it, and pointed it at her while she was holding C. Appellant then called Ford's mother on the phone and told her to tell Ford to return his money. After speaking with her mother, Ford retrieved the money from the bathroom and threw it at appellant. Appellant picked the money up from the floor and left the house. Later that same day, Ford obtained a peace order and petitioned for custody of C.

The following morning, February 27, 2017, a police officer conducted a wellness check at the parties' home in response to a report of a domestic dispute. As the police officer was leaving the home, a sheriff's deputy arrived to serve appellant with the peace order. Ford informed the police officer of the events of the previous day and consented to a search of the house. In the basement of the house, police found a dirt bike and a gun. Evidence introduced at trial established that the dirt bike had been stolen, and that appellant was disqualified from possessing a firearm.

Appellant testified that Ford took the $1,800 from the shoebox because she was angry following a phone call she had received from a woman reporting that she was pregnant with appellant's child. Appellant admitted that he and Ford argued on February 26, 2017, but denied biting Ford, pushing her down, or pointing a gun at her. Appellant testified that Ford threatened him with a knife when he tried to leave the house. Appellant denied owning the gun or the dirt bike found in the home.

DISCUSSION

I.

Alleged juror bias

Appellant contends that the trial court abused its discretion by refusing to declare a mistrial in response to a juror's note, which he claims showed racial bias.

On the second day of trial, following a short recess, the trial judge informed counsel and appellant that the court had received a note from Juror No. 6, which the judge read aloud:

> Dear Court Clerk, their "T-H-E-I-R" is some very suspicious activity going on in your courtroom. Four gentlemen in your court could possibly be gang members. They are possibly looking at the jury panel and I feel uneasy and threatened.

Defense counsel noted a concern regarding the juror's suggestion that the spectators could be gang members because there had been no allegation that appellant was a gang member and the note "[felt] very racially charged in that verbiage." Appellant informed the court that one of the men was his uncle and he believed the others might be friends of his uncle.

Before the jury returned to the courtroom, the judge admonished the audience that "not a single member of this gallery shall make so much as one glance toward that jury box when the jury is in the jury box." The judge further stressed that should anyone "glance at the jury box," that person would be removed from the courtroom.

In response to defense counsel's concerns that Juror No. 6 might associate appellant with a gang, the court excused the jury and conducted *voir dire* of Juror No. 6:

> THE COURT: Now, of course your note set off a touch tone of emotion when you used the word "gang members," and there is no evidence of any gang affiliation in this case. And -- and, you know, defense counsel accurately pointed out that, you know, that raised defense counsel's concern that there was some racially charged feeling here where indeed there was no evidence of that; correct?
>
> [DEFENSE COUNSEL]: That's right.
>
> THE COURT: All right. Now, you and your other eleven fellow jurors, as a I may have intimated or told you at the beginning of the case when I made my preliminary remarks, were that you are the judges of the facts and I'm the judge of the law.
>
> Your job is to wait until you've heard all of the evidence, and then, once you've heard all the evidence and been instructed on the law applicable to this case by the Court, which I will do today, because we will reach that point today, --
>
> [JUROR NO. 6]: Okay.
>
> THE COURT: - and then you've heard closing arguments by the lawyers after I instruct the jury, and which you will hear today, you will then, along with your fellow jurors, for the first time at that point be told by me to go to the jury room where all of the evidence will be taken to you, meaning documentary or demonstrative evidence beyond the testimony that you've heard, and then, and only then for the first time indeed start talking about the case and deliberating toward reaching a verdict, and that you'll do that fairly and impartially. Okay?
>
> [JUROR NO. 6]: Okay.

THE COURT: And you'll do that reaching a decision not based on sympathy, prejudice, public opinion, or fear; correct? Will you be able to do that?

[JUROR NO. 6]: Yes, I will.

THE COURT: Do you have any concerns about your ability to do that?

[JUROR NO. 6]: I have no concerns.

THE COURT: Any questions by the State?

[PROSECUTOR]: No, thank you.

THE COURT: Any questions by the defense?

[DEFENSE COUNSEL]: No, Your Honor.

After returning to counsel table and consulting with appellant, defense counsel asked to approach the bench. At the bench, defense counsel expressed reservations regarding Juror No. 6, but opted to proceed "for now."

Later that afternoon, defense counsel again raised concerns regarding Juror No. 6 and requested a mistrial. The judge questioned Juror No. 6 a second time:

THE COURT: And it's really in an abundance of caution, and just so I can be clear on things. Since we last spoke --

[JUROR NO. 6]: Uh-huh.

THE COURT: -- and I asked you some questions that I think alleviated a concern that you had, --

[JUROR NO. 6]: Right.

THE COURT: -- has anything happened in the meantime that would keep you from being able to decide this case fairly and impartially, meaning, sir, without impartial – without partiality to the State or the defense, --

[JUROR NO. 6]: Right.

> THE COURT: -- and deciding the case based solely on the evidence and nothing else?
>
> [JUROR NO. 6]: Solely on the evidence. That's it.
>
> THE COURT: All right.
>
> [JUROR NO. 6]: I give you my word. You know, I'm looking at the defense, looking at the State's entire [case]. I'm going to give you all my fair judgment honestly, clear-cut. That's it.
>
> THE COURT: All right. And thank you for that answer. And then my next question is is it accurate to say that you have not spoken or communicated about this case with anyone, even your fellow jurors?
>
> [JUROR NO. 6]: No one.
>
> ***
>
> THE COURT: All right.
> Any questions by the State?
>
> [PROSECUTOR]: Nothing.
>
> THE COURT: By the defense?
>
> [DEFENSE COUNSEL]: No, Your Honor.

Defense counsel moved for a mistrial, which the court denied, finding that the fairness of the proceedings had not been compromised.

Trial courts are vested with wide discretion in ruling on a motion for mistrial because "a mistrial is an extreme remedy not to be ordered lightly." *Nash v. State*, 439 Md. 53, 69 (2014). Mistrial is appropriate when "'such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice.'" *Id*. at 69 (quoting *Burks v. State*, 96 Md. App. 173, 187 (1993)). "Generally, appellate courts review the denial of a motion for a mistrial under the abuse of discretion standard, because the 'trial judge is in

the best position to evaluate whether or not a defendant's right to an impartial jury has been compromised.'" *Dillard v. State*, 415 Md. 445, 454 (2010) (quoting *Allen v. State*, 89 Md. App. 25, 42-43 (1991)). To constitute an abuse of discretion, the trial court's decision must be "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Nash*, 439 Md. at 67 (citations and internal quotation marks omitted).

"A criminal defendant's right to have an impartial jury trial is one of the most fundamental rights under both the United States Constitution and the Maryland Declaration of Rights." *Jenkins v. State*, 375 Md. 284, 299 (2003). The right to an impartial jury is grounded in "the paramount notions of justice and fair process during criminal proceedings." *Id*.

Once a party raises the issue of jury misconduct creating a presumption of prejudice, the trial judge has an affirmative duty to *voir dire* the jury as to their ability to render an impartial verdict. *Dillard*, 415 Md. at 461. The sole purpose of *voir dire* in Maryland "'is to ensure a fair and impartial jury by determining the existence of specific cause for disqualification.'" *Collins v. State*, 463 Md. 372, 376 (2019) (quoting *Pearson v. State*, 437 Md. 350, 356 (2014). Upon request, the trial court is required to conduct *voir dire* aimed at discovering the precise reason for disqualification. *Id*. Upon examination of the jurors, "'the trial court should exercise its "power to assure itself that the … jurors could continue fair and impartial deliberations.'" *Dillard* at 461 (quoting *Jenkins*, 375 Md. at 308).

Here, the trial court questioned Juror No. 6 on two occasions to determine whether the juror could be an impartial fact finder. Following each round of questioning, Juror No. 6 expressed an ability to decide the case fairly and impartially, ultimately assuring the court that the juror would consider both the State's case and the defense's case and give a "fair judgment." Following the second round of questioning, the court determined that it was satisfied with Juror No. 6's responses and ability to decide the case fairly and impartially based on the evidence presented.

Appellant's citations to a number of out-of-state cases addressing issues involving jurors who expressed racist views are inapposite. In this case, the juror's concerns were not clearly prejudicial, nor did they evidence obvious racial bias. Although we recognize that a perceived feeling of intimidation could prejudice a juror, we see no evidence of prejudice in Juror No. 6's responses to *voir dire* or in the jury's deliberations. We conclude that the trial court did not abuse its discretion in denying appellant's motion for a mistrial after questioning Juror No. 6 and ascertaining the juror's commitment to remaining fair and impartial throughout the proceedings.

II.

Admission of evidence of prior abuse

Appellant contends that the circuit court erred in permitting the State to elicit testimony from Ford regarding alleged prior incidents of domestic violence and threats. The State responds that the court properly exercised its discretion in allowing testimony regarding an altercation between appellant and Ford in 2017 and striking testimony regarding incidents that occurred in 2014.

During the defense's cross-examination of Ford, the prosecutor alerted the court that she intended to question Ford on redirect examination regarding a prior incident of domestic violence. Defense counsel objected. The court responded that "prior acts of domestic violence in a domestic violence context are very relevant."

On redirect examination, over defense counsel's objection, Ford testified that she and appellant had argued on two occasions in 2014, and on one of those occasions, appellant threatened her with a gun "for the first time." The court determined that the evidence was inadmissible and gave the defense the option to have the testimony stricken or to cross-examine Ford about the incidents. Defense counsel requested that the testimony be stricken and moved "prophylactically" for a mistrial. The court instructed the jury as follows:

> So, Members of the Jury, I want to let you know that the Court has sustained the defense objection. And again, as I told you in the preliminary instructions, you should not concern yourself with either party's objections or the Court's ruling.
>
> And that having been said, I am going to instruct you that having granted a motion to strike, that you shall please disregard testimony with regard to, for the record, using quotes, "an October 14th, incident," or - - and, I should say "and," for the record using quotes, "the first time" understanding that the State is going to move to, if you will, questioning with regard to a different event.

The defense did not object to the instruction given by the court.

The prosecutor proceeded to question Ford regarding an incident that occurred on February 17, 2017. Defense counsel objected and moved for a mistrial. The court denied the motion for a mistrial. Over defense counsel's objection, the court permitted the State to question Ford regarding the incident on February 17, 2017. Ford testified that, on

February 17, 2017, she and appellant had argued because appellant had failed to meet her and C. for C.'s first visit to the aquarium. Ford testified that appellant had called her obscenities, spit on her, and scattered her belongings throughout the house. Ford recalled that she might have slapped appellant. She recounted that appellant had pulled her hair, pinned her down on the bed, and threatened to kill her. Before Ford left the house, appellant put a knife to her neck and threatened her.

Rule 5-404(b) provides that, "[e]vidence of other crimes, wrongs or other acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith." Other crimes evidence is generally excluded because it "may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner*, 314 Md. 630, 633 (1989). But there are exceptions to that general rule, including the admission of evidence having "special relevance to the case," *i.e.*, evidence that is "substantially relevant to some contested issue in the case and is not offered simply to prove criminal character." *Odum v. State*, 412 Md. 593, 609 (2010); *Hurst v. State*, 400 Md. 397, 407-08 (2007). Specifically, evidence of other crimes or bad acts is admissible to demonstrate "proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Burris v. State*, 435 Md. 370, 386 (2013) (quoting Rule 5-404(b)).

Other crimes evidence must satisfy a three-part test to be admissible: (1) the evidence must have special relevance other than to show propensity; (2) the proponent must establish by clear and convincing evidence that the prior act occurred; and (3) the probative value of the prior act must substantially outweigh the danger of unfair prejudice.

Faulkner, 314 Md. at 634-35; *Wilder v. State*, 191 Md. App. 319, 343-44 (2010). We review a decision to deny a mistrial stemming from the admission of other crimes evidence for abuse of discretion. *Nash*, *supra*, 439 Md. at 66-67. We consider "whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmos v. State*, 316 Md. 587, 594-95 (1989)). In making that determination, we recognize that

> the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able … to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial.

Simmons v. State, 436 Md. 202, 212 (2013) (quotation marks and internal citations omitted).

A.

Admissibility of evidence of February 17, 2017 incident

Appellant contends that Ford's testimony regarding the incident that occurred on February 17, 2017 was inadmissible because it was not "substantially relevant" to an issue in the case and danger of unfair prejudice outweighed the probative value of the evidence. Appellant asserts that *Jackson v. State*, 230 Md. App. 450 (2016), the case relied on by the prosecutor at trial, does not control the outcome of this case because it was incorrectly decided. He argues that *Jackson* improperly permitted the introduction of propensity evidence under the guise of motive. Appellant argues that the "existence of a common motive for abuse (the desire for control) does not make evidence of the former incident

admissible in a trial of the latter, because admissibility under the motive exception requires some showing that the first incident of abuse supplied the motive for the second."

In *Jackson*, the defendant was on trial for assault of his girlfriend. We held that evidence of the defendant's prior history of domestic abuse of his girlfriend was "clearly probative" of his motive for assault, which was to "exert[] control over the victim through the perpetration of a cycle of violence." *Id*. at 461. In *Jackson*, we applied prior decisions establishing that evidence of prior incidents of violence is admissible to prove motive. *See Snyder v. State*, 361 Md. 580, 605 (2000) (recognizing that "[e]vidence of previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive"); *Jones v. State*, 182 Md. 653, 657 (1944) (holding that evidence of defendant's previous violent acts against his wife which showed "a long course of ill treatment" and "almost a continuous state of hostility" were evidence of the defendant's intent and motive in his trial for his wife's murder); *Stevenson v. State*, 222 Md. App. 118, 150 (2015) (holding that evidence of the defendant's physical abuse of his partner was admissible to show motive, as the evidence "was probative of a continuing hostility and animosity" toward her, and therefore "of a motive to murder"). We recently applied *Jackson* and *Snyder* in *Vaise v. State*, 246 Md. App. 188, 211-12 (2020), in determining that evidence of a "recent altercation between father and son, involving animosity boiling over into verbal and physical assault," had special relevance in establishing the son's motive, intent and identity at the trial for his father's murder.

In this case, evidence that appellant had abused Ford prior to the February 26 incident showed the acrimonious nature of their relationship, which provided a motive for

his assault. The February 17 incident was also probative of appellant's motive as it had occurred only two weeks prior to the February 26 incident. The February 17 incident was "so closely connected to the offense charged as to be evidence of the intent and motive of the accused[.]" *Snyder*, at 606 (citing *Jones*, 182 Md. at 657). Here, the trial court did not abuse its discretion in finding that the probative value of the February 17 assault was not substantially outweighed by its potential for unfair prejudice.

B.

Admissibility of evidence of 2014 incidents

Appellant contends that the trial court erred in refusing to grant his motion for a mistrial based on Ford's testimony regarding two prior incidents of abuse in 2014. Appellant argues that even though the testimony concerning two incidents of abuse in 2014 was stricken, the court's curative instruction to the jury was unlikely to "unring the bell" and cure the prejudice resulting from the inadmissible testimony.

The Court of Appeals has set forth the following factors to be considered in determining whether the prejudice resulting from inadmissible testimony is "substantial enough" to warrant a mistrial:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). We are mindful that in analyzing these factors "no single factor is determinative

in any case, nor are the factors themselves the test. . . . Rather, the factors merely help to evaluate whether the defendant was prejudiced." *McIntyre v. State*, 168 Md. App. 504, 524 (2006) (internal citations omitted).

In *McIntyre*, the defendant was convicted of possession and distribution of child pornography. The investigating officer testified that he had asked the defendant during an interview about a prior incident of the defendant getting into trouble for downloading child pornography. *Id.* at 522-23. Defense counsel objected and requested a mistrial. *Id*. at 523. The trial judge denied defendant's motion for a mistrial and gave a curative instruction, advising the jury that the question had been stricken and the jury should disregard the question and avoid speculating as to the officer's potential response. *Id*. at 523-24.

Applying the *Rainville* factors, this Court determined that the officer's statement was a single, isolated incident, unsolicited by the prosecutor, and the curative instruction given by the trial judge was timely and accurate. *Id*. at 525. We concluded that the defendant was not substantially prejudiced by the police officer's statement because at the time the defense requested a mistrial, the jury had already heard that the defendant had previously sent and received emails containing images of child pornography. *Id*. at 526.

Here, the trial court sustained the defense's objection and granted the defense's request that the testimony be stricken. The court then instructed the jury to disregard any reference to "an October 14th, incident." In cases where the trial judge advised the jury to disregard inadmissible testimony, "it has been … consistently held that the trial court has not abused its discretion in refusing to grant a motion for a mistrial." *Wilson v. State*, 261 Md. 551, 568-69 (1971) (citations omitted). Cautionary instructions are deemed to cure

most errors and jurors are presumed to follow the court's instructions. *Carter v. State*, 366 Md. 574, 592 (2001) (citing *Veney v. State*, 251 Md. 182 (1968)); *Spain v. State*, 386 Md. 145, 160 (2005) ("Maryland courts have long subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary.").

We conclude in this case that the trial judge did not abuse his discretion by denying appellant's motion for mistrial. Though Ford was the principal witness, her reference to the 2014 incidents was not directly responsive to the prosecutor's question asking about "the most recent" incident that appellant had threatened her with a gun. Ford's reference to two incidents in 2014 was brief and no further details about the incidents were provided by Ford. Here, as in *McIntyre*, Ford's reference to the 2014 incidents was not particularly prejudicial because, at the time defense counsel requested a mistrial, Ford had already testified that there had been another incident with appellant in 2017 on "the Friday before this incident." The trial court's decision to give a prompt curative instruction following Ford's references to prior abuse in 2014 was not an abuse of discretion.

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