

Circuit Court for Baltimore City
Case Nos. 116187029 and 116187030

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 710

September Term, 2018

ANTHONY CLARK, JR.

v.

STATE OF MARYLAND

Reed,
Friedman,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 27, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial¹ in the Circuit Court for Baltimore City, Anthony Clark, Jr., was convicted of second-degree murder, attempted second-degree murder, and two firearm offenses relating to a shooting that resulted in the death of a 13-year old boy and serious injury to an adult male.²

Clark presents two questions for our review:

1. Did the trial court err and/or abuse its discretion in permitting a detective to testify that she developed appellant as a “person of interest” after speaking to an absent witness who allegedly knew who the shooter was?
2. Did the trial court abuse its discretion in preventing defense counsel from impeaching the credibility of the non-testifying witness?

We shall reverse the judgments of the circuit court and remand for a new trial.

¹ Clark was originally charged in three separate indictments for charges relating to a June 11, 2016 shooting, all of which were consolidated and tried in November 2017, resulting in a conviction of illegal possession of a firearm from the third indictment and a mistrial on the counts related to the two remaining indictments. This Court affirmed Clark’s illegal possession conviction in a *per curiam* opinion. *See Clark v. State*, No. 2143, Sept. Term, 2017 (filed Nov. 7, 2018), *cert. denied*, 463 Md. 529 (2019). All references to Clark’s jury trial in this opinion refer only to the retrial in February 2018 on the counts relating to the first two indictments.

² Clark was sentenced to 30-years imprisonment for the second-degree murder count and a consecutive 20-years for use of handgun in a crime of violence with the first five years to be served without parole eligibility. On the second indictment, he was sentenced to a consecutive 30-years with all but 20-years suspended to be followed by a period of probation for the attempted second-degree murder count, and a consecutive 20-years for use of handgun in a crime of violence with the first five years to be served without parole eligibility. The sentences were made concurrent with sentences then being served.

BACKGROUND

While the sufficiency of the evidence adduced at trial is not challenged, we provide a summary of the events—consisting of two fights and a shooting—and relevant portions of the proceedings for context in our discussion.

Destiny Fields and DeJhaun Collic³ were together on the evening of June 10, 2016, into the early morning hours of June 11th. At one point, Collic was in a fight with three other men. An acquaintance who had been accompanying Fields and Collic, nicknamed “Puddy,”⁴ fled rather than assisting Collic. Fields ultimately broke up the fight. Afterwards, Collic and Fields solicited the assistance of another friend, identified only as “Mikey,” who knew the three men involved in the fight with Collic, to resolve the conflict. At some point during Mikey’s resolution of the conflict between Collic and the three men, it was learned that Puddy had run away from the altercation, leaving Collic to fight the three men by himself. At which point, Puddy was “jumped” and badly beaten.

After the beating of Puddy, everyone went their separate ways, and Fields and Collic continued their walk home together toward Martin Luther King, Jr. Boulevard and Pennsylvania Avenue. Fields testified that she and Collic shared a home with Mia Harris

³ Throughout the record, his first name is also inconsistently spelled as “De’Jhauna,” “De’Jhaun,” “DaShawn,” and “DeJhaun.”

⁴ The individual’s nickname is also variously spelled throughout the record as “Puddy,” “Poodie,” and “Pootie.”

Carlos⁵ and, occasionally, Carlos' boyfriend. At some point, they were joined by DiAndre Barnes, who accompanied them on their walk home. Fields described the events:

When we approached where I resided, there was a young man dressed in all black, he was standing on the first step, and Mia was standing beside him, and DiAndre began to walk further before us. So the young man had approached me and DeJhuan, and asked who banked his brother, and we both looked at him like he was clueless. And then he asked again, and the second time when he asked he shot a gun.

She testified that the “young man” pointed the gun at Collic and fired once and then she heard four or five more shots as they ran away. Collic was struck in the chest and DiAndre Barnes was struck twice, in the head and upper torso. While on the phone with 911, Fields observed Carlos, the shooter, and an unidentified person, walk past both she and Collic and continue down Martin Luther King, Jr. Boulevard. Collic survived his wounds; DiAndre Barnes was killed. He was 13 years old.

Fields also testified that she was interviewed by police on the morning of the shooting and again five days later, on June 16th. During the first interview, Fields identified Carlos from a photo array as the woman she had resided with at that time and, as she had written on the photo array, the woman who “knows the young man that shot my boyfriend (Collic) in the chest.” During a second interview five days later, Fields was shown another photo array from which she identified the shooter—an identification based on facial hair and complexion even though she did not see his face. Fields testified that

⁵ Throughout the record, she is identified variously as “Harris,” “Harris Carlos,” and “Carlos.” For consistency, we shall refer to her as “Carlos.”

she also recalled observing that one of the shooter's hands had been bandaged and wrapped up.

On cross-examination, Fields admitted that she initially denied knowing who was on the steps next to the shooter, but after being "shouted at" by Detective Sandra Forsythe, she identified Carlos and Carlos' boyfriend as being present. She also agreed that, until that day, she had never mentioned seeing the shooter with a wrapped hand, including during her police interviews or any of her previous sworn testimony relating to this case.

Detective Forsythe confirmed Fields' testimony concerning the sequence of events in relation to her two police interviews and the identifications she made from the two photo arrays. Forsythe also connected Clark as the shooter with the photograph Fields had selected from the second photo array and made an in-court identification of him as being the same person depicted in the photograph selected. Following Fields' identification of Carlos from the photo array as the person next to the shooter during the incident, Forsythe then interviewed Carlos "to find out what did she see at the time of the incident."

Forsythe testified that before interviewing Carlos, and showing her the photo array, no person of interest had been identified, but after speaking with Carlos, she developed Clark as the suspect. She testified that Carlos, on the same day as her police interview, was relocated from her residence in Baltimore City to an undisclosed location in Baltimore County because "[s]he was fearing for her life." Clark was interviewed on the same day as Carlos and on that same day a search warrant was obtained and executed on an apartment on 821 North Fremont Avenue, which yielded a handgun that would later be connected to the shooting by ballistics and a DNA profile mixture of Clark and three other contributors.

Forsythe testified that she observed Clark with a wrap that he placed on his arm while meeting with police.

On cross-examination, Forsythe acknowledged that she had also obtained and executed a search warrant on Carlos' apartment, yielding a BB gun, a plastic gun, purses, wallets, and identification cards. Forsythe agreed that Fields was not initially forthcoming during her interview and had denied knowing who was on the step next to the shooter, but ultimately identified Carlos and her boyfriend as being present. Carlos' boyfriend at the time was also apparently interviewed by police but did not testify at trial.⁶

Carlos did not appear for trial, despite Forsythe's efforts to provide travel arrangements for her, and her whereabouts at the time of trial was unknown. It is the substance of Forsythe's testimony about the Carlos interview that is the focus of this appeal. We shall supplement additional facts, as relevant, in our discussion, *infra*.

DISCUSSION

Preservation

The State presents an initial assertion that Clark has not preserved his hearsay and relevance challenges.

At the time of the shooting Clark was said to be in the company of Fields and Collic's roommate, Mia Harris Carlos. Carlos was interviewed by police and, out of

⁶ Collic also testified at trial but provided limited testimony as to only the sequence of events leading up to and during the shooting, and as to his connection to his "little man," DiAndre Barnes, and to his brief acquaintance with the individual, "Puddy."

concern for her safety, was relocated by police to another residence, but did not appear for trial. Despite the State’s efforts to locate her, her whereabouts were unknown.

The following is the focus of the State’s preservation argument:

[THE STATE]: After speaking to Ms. Harris Carlos, did you develop any persons of interest in this case?

[FORSYTHE]: Yes.

[DEFENSE]: Objection.

* * *

[DEFENSE]: This line of questioning is --

THE COURT: I’m sorry, your basis?

[DEFENSE]: -- this line of questioning is abrogating my client’s right to confront witnesses. We’re going to have Ms. Mia Harris, inferentially known as witness number two, who says the suspect is my client; that’s where this is going. He’s trying to bolster Ms. Destiny Fields --

* * *

[DEFENSE]: -- by saying this is the first -- this is -- Mia Harris is the first one we would get to talk to, and after that we have the suspect. So -- I mean, I can’t cross-examine Ms. Mia Harris Carlos, who’s not here and has taken off and she’s on the run.

The State argues that “[i]n making this specific objection, defense counsel did not raise two of the three claims [he] makes on appeal – that it was inadmissible hearsay, and that it was not relevant.”

While the State’s assertion is accurate, we note that, shortly after the court’s ruling on the confrontation clause issue, the colloquy continued:

[THE STATE]: Detective Forsythe, my question is after speaking to Ms. Harris Carlos, did you develop a person of interest in the case?

[FORSYTHE]: Yes.

[THE STATE]: Who was that person of interest?

[DEFENSE]: Objection.

THE COURT: The objection is overruled.

* * *

[FORSYTHE]: His -- Anthony Clark.

At that point, as Clark asserts in his reply brief, he preserved all grounds under the general objection relating to the identification of the person of interest developed following the interview with Carlos. *See Graves v. State*, 334 Md. 30, 37 (1994) (finding that with the general objection made during hearsay testimony, prior to the introduction of particular evidence, “all grounds were preserved as to that testimony”). We agree and reject the State’s preservation argument.

1. Admission of Evidence Relating to an Absent Witness

This Court has explained:

The admissibility of evidence is left to the sound discretion of the trial court. We will not disturb a trial court’s evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion. An abuse of discretion occurs when a decision is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

Mines v. State, 208 Md. App. 280, 291–92 (2012) (internal quotations and citations omitted). However, ““a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility[,]”” and thus, ““[w]hether evidence is hearsay is

an issue of law reviewed *de novo*.” *Parker v. State*, 408 Md. 428, 436 (2009) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)).

Hearsay

Clark first asserts that “[t]he trial court erred in admitting inadmissible hearsay.” He bases that argument on “Detective [Sandra] Forsythe’s testimony that she developed [him] as a ‘person of interest in the case’ after speaking to Ms. Carlos implicitly contained the hearsay statement that Ms. Carlos had implicated [him].” (Internal citation omitted). Clark avers that Forsythe’s testimony “was the functional equivalent of stating that Ms. Carlos told [Forsythe] [he] was involved.”

Therefore, Clark asserts that “[b]y permitting the State to introduce an out-of-court identification of [him] by a non-testifying declarant, the trial court erroneously admitted hearsay.” He argues that this testimony is hearsay because “the evidence was plainly introduced for its truth: Ms. Carlos’ information implicated [him] as the ‘person of interest’ in the shootings, and the probative value of this information ‘rest[ed] on [her] sincerity and accuracy’ as an eyewitness.” (Quoting *Fair v. State*, 198 Md. App. 1, 13 (2011)).

Clark relies on *Zemo v. State*, 101 Md. App. 303 (1994). In *Zemo*, investigators originally had no suspects, but received information leading them to Zemo and a few others who became suspects. 101 Md. App. at 312. Because of the detective’s testimony of the sequence of events, we found that “[t]he only rational conclusion that one can draw from the testimony is that the unnamed source passed on to the detective knowledge that [Zemo] was implicated in the [crime].” *Id.* at 312–13.

Here, Forsythe testified that the police had no persons of interest until speaking with Carlos. The State continued to solicit from Forsythe the identification of the person of interest who was developed during the interview with Carlos when Carlos was shown a photo array. Thus, the State effectively produced for the jury an inference that Forsythe received valuable information about the identity of the shooter from Carlos, an eyewitness who was not produced by the State and was not subject to cross-examination. We are persuaded that the testimony was clearly offered for the truth of the matter asserted, that Carlos, whom the State knew was not available to testify, implicated Clark as the shooter.

Relevance

Alternatively, Clark posits that “[a]ssuming, *arguendo*, that this testimony was admissible for a non-hearsay purpose, the trial court abused its discretion in permitting it.” He contends that “[e]ven if [Forsythe’s] testimony was admissible for the non-hearsay purpose of showing why [he] became a suspect, it had minimal probative value[,]” and there was “*no need* to introduce this evidence.” (Emphasis in original).

Judge Moylan, writing for this Court, explained in *Zemo*:

The State’s theory that the course of an investigation somehow must be shown, pertinent or not, assumes that a criminal trial should unfold upon the stage of the courtroom with the unbroken linear quality of a silent movie. Modern audiences, however, both in the jury box and out, are capable of “leaping o’er time and space” as relevance and admissibility dictate.

101 Md. App. at 310–11.

Finding immaterial most of the testimony relating the information provided by the informant and the steps that led the detective to Zemo as a suspect, we recognized that “[w]here the event itself is immaterial, the reason for the event is doubly immaterial.” *Id.*

at 309. In agreeing with that rationale, the Court of Appeals in *Morris v. State*, 418 Md. 194, 226 (2011), acknowledged “that extrajudicial statements which explain police conduct, but nonetheless directly implicate the defendants, are excluded typically as overly prejudicial.”

A similar factual scenario is present in the case before us. We reach the same conclusion as did Judge Moylan—that the State exceeded the necessary scope of questioning, delving into matters involving the process of the investigation that were irrelevant, namely, relating to how Clark became a person of interest.

Confrontation Clause Violation

In a separate argument, Clark also contends that “[t]he trial court violated [his] confrontation rights[,]” afforded by the U.S. Constitution and the Maryland Declaration of Rights, and explained in *Crawford v. Washington*, 541 U.S. 36 (2004). Clark posits:

First, here, as in *Crawford*, the statement [by Carlos] was made during a recorded police interview. Second, the circumstances objectively indicate[d] that there [was no] ongoing emergency, and that the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution. Ms. Carlos was interviewed by police the day after the shooting, and the primary investigator, Detective Forsythe, spoke with her to find out what [she saw].... Finally, Ms. Carlos’s statement was solicited under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, given that it was a recorded police interview regarding a murder investigation....

(Internal quotations and citations omitted).

We recall that Fields and Collic were together in the early morning of June 11, 2016 when they were joined by DiAndre Barnes on their walk home. Fields then described the events when they had arrived at their residence: “[T]here was a young man dressed in all

black[] ... standing on the first step, and [Carlos] was standing beside him[.] ... [T]he young man had approached me and DeJhuan, and asked who banked his brother[.] ... [T]he second time when he asked he shot a gun.” She went on to explain that the “young man” shot at Collic, striking him in the chest, and, as they ran away, she heard additional shots, two of which struck and killed DiAndre Barnes. Fields testified that she took the shooter’s question, asking about who had “banked” his brother, to mean that “he was referring to who had jumped ... Puddy[.]”

Forsythe initially interviewed Fields within hours of the shooting. At the time, Fields resided with Carlos and Collic. At that stage of the investigation, there were no persons of interest. As a result of Fields’ identification of Carlos as an eyewitness, Forsythe met with Carlos for an interview, which was video and audio recorded. Additionally, the State elicited testimony that Carlos was shown a photo array. Forsyth also testified that she assisted Carlos in relocating her residence because “[s]he was fearing for her life.” Moreover, Forsythe was asked whom, after the Carlos interview, she considered the person of interest. In response, she named and identified Clark. We find a parallel in Judge Moylan’s observation in *Zemo*, “[t]he only possible import of such testimony was to convey the message that the [non-testifying witness] 1) knew who committed the crime, 2) was credible, and 3) implicated the appellant.” 101 Md. App. at 306.

In *Geiger v. State*, 235 Md. App. 102 (2017), we explained that *Zemo* compelled reversal because it “consisted not simply of the introduction of two items of significantly prejudicial evidence against the defendant, but in the *deliberate and protracted fashion in which it was done.*” *Id.* at 130 (emphasis added).

The questions to Forsythe eliciting information about the photo array shown to Carlos, and testimony concerning her fear and need to be relocated, can be read as an effort by the State to circumvent the confrontation issue following Carlos' disappearance and failure to appear for trial. The questions went directly to implicate Clark as the shooter, about which he had no opportunity to cross-examine Carlos.

Admission was not harmless error

Lastly, Clark avers that admitting such evidence “was not harmless beyond a reasonable doubt.”

First, this was a close case: the jury sent out a note indicating that it had “completed [its] second poll [and] [seem[ed] [sic] to be at an impasse,” and the first trial ended in a mistrial after the jury failed to reach a verdict. Second, this evidence was plainly significant to the State's case: Ms. Carlos's implicit identification of the shooter was relied on extensively by the prosecutor in closing argument. Third, Ms. Fields, who was the only testifying witness that implicated [him], admitted that she did “not really” have the opportunity to observe his face, and acknowledged that her identification was based on “facial hair.” Finally, although there was DNA evidence linking Mr. Clark to the suspected murder weapon, there were *three other contributors* to the DNA profile found on that weapon....

(Internal citations omitted).

“In cases of established error, that error will be deemed harmless if a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.” *Wilder v. State*, 191 Md. App. 319, 369 (2010). *See also Dorsey v. State*, 276 Md. 638, 659 (1976).

The import of the court's admission of Forsythe's hearsay testimony about Carlos and her statements to police, was to clearly implicate Clark as the shooter. Their admission was not harmless error.

Fields’ testimony provided the jury with the identity of Carlos, her roommate at the time of the shooting, as the person who knew who fired the shots and who was with the shooter when Fields, Collic, and Barnes approached. She also testified about being shown a photo array a few days later during her second interview with police and picking the photograph that most resembled the shooter, although she was not asked to identify Clark in court as the shooter from the photograph.⁷ Fields clarified, however, that she had not seen the shooter’s face, she had “just seen facial hair and his (the shooter’s) complexion,” and based her identification of the shooter in the photo array on the facial hair. It was not until Forsythe testified on the second day of trial that there was an in-court identification of Clark as the person of interest, connecting him to the photograph Fields had selected in the photo array.

In sum, the rational inference from the evidence presented to the jury through Forsythe’s testimony about her interview with Carlos was that: before speaking with Carlos, the police had no persons of interest; during the interview Carlos was shown a photo array; thereafter police developed Clark as the person of interest; Clark was identified in court by Forsythe as the person of interest; a search warrant was then obtained

⁷ The State did, however, attempt to elicit from Fields that Clark did not have “long facial hair,” without ever asking her to identify Clark as the shooter or connecting him to the man in the photograph that Fields had selected from the photo-array as resembling the shooter. Although the court sustained the objection and struck her answer to the State’s first attempt at asking the question, on the second attempt, the State directed Fields’ attention, as well as the jury’s, to Clark as he sat at trial table and again asked, without establishing a connection of him to the photograph, “... does he have the same facial hair today?” The objection to the second question drew counsel to the bench, following which, the court sustained the objection.

and executed on apartment 1 of 821 North Fremont, which yielded a handgun that was later determined to be the one involved in the shooting; and “fearing for her life,” the police relocated Carlos on the same day as her interview. Forsythe’s testimony relating to the Carlos interview gave the jury a known but absent eyewitness, who knew the shooter and saw the shooting, who was shown a photo array, who feared for her life and had to be relocated, and whose information developed Clark as the only person of interest.

We do not overlook the forensic evidence that linked Clark’s DNA, as one of four possible contributors, to the handgun found at 821 North Fremont. Even in the face of that evidence, we cannot say that Forsythe’s hearsay statements were harmless beyond a reasonable doubt.

2. Impeaching a Non-Testifying Declarant⁸

Finally, Clark contends that “[d]efense counsel should have been permitted to ask Detective Forsythe whether items found in Ms. Carlos’s apartment were from ‘street robberies.’” He asserts that, “[i]n a close case, the trial court’s decision to prevent defense counsel from impeaching [Ms. Carlos’s] credibility was a significant advantage to the State, limiting the defense’s ability to challenge the veracity of a critical witness.” This, he claims, is because “Ms. Carlos’s credibility was integral to the State’s case: she implicitly identified Mr. Clark as the shooter and, unlike Ms. Fields, there was no suggestion that she had trouble identifying the shooter.”

⁸ In view of our reversal, we need not consider Clark’s second assertion of error, but we do so briefly for the benefit of the circuit court in the event of a retrial.

The Maryland rules expressly provide that “[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked[.]” Rule 5-806(a). The limitations on that impeachment evidence are that it be “by any evidence which would be admissible for those purposes if the declarant had testified as a witness.” Rule 5-806(a). “[M]ere accusations of crime or misconduct may not be used to impeach.” *Taylor v. State*, 407 Md. 137, 155 (2009). In *Taylor*, the Court of Appeals explained:

[C]ross-examination to impeach, diminish, or impair the credit of a witness is not confined to matters brought out on direct examination; it may include collateral matters not embraced in the direct examination to test credibility and veracity, it being proper to allow any question which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or which tends to test his accuracy, memory, veracity, character, or credibility.

407 Md. at 157 (quoting *State v. Cox*, 298 Md. 173, 184 (1983)).

Here, Clark attempts to connect the BB gun, purses, wallets, and identification cards found in the search to an inference that Carlos was in the business of “street robberies,” thus challenging her credibility and the information she gave to investigators.

Clark’s counsel engaged in the following colloquy:

[DEFENSE]: Detective Forsythe, you also obtained a search warrant for Mia Carlos’ apartment; isn’t that right?

[FORSYTHE]: Yes.

[DEFENSE]: And in that apartment you found a BB gun?

[FORSYTHE]: Yes.

[DEFENSE]: And another plastic gun?

[FORSYTHE]: Yes.

[DEFENSE]: And you also found in there purses, wallets, identification cards of other persons not connected with this case?

[FORSYTHE]: Yes.

[DEFENSE]: And was your opinion that those were from street robberies; isn't that right?

[THE STATE]: Objection....

Following a bench conference, the court ruled that:

The observations one makes is admissible because of the observations from the incident. However, it is improper impeachment. It is improper to attempt to impeach a witness through their prior criminal record when the witness themselves are not here.

Furthermore, if the witness were here, that would be an improper way to ask the witness about their --

* * *

-- that's the only thing the detective could testify about is what it -- actually took after action taken, action taken, not words spoken. The objection is [sustained].

We are persuaded by *Taylor* that a mere accusation of criminal conduct is insufficient to offer impeachment evidence pursuant to Rule 5-806(a). There was no evidence of Carlos ever having been arrested, charged, or convicted of any role in a street robbery scheme. Nor does the evidence reveal that Forsythe had personal knowledge of Carlos' asserted criminal conduct. We find no error in the trial court's ruling.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY VACATED;
CASE REMANDED TO THAT COURT
FOR A NEW TRIAL. COSTS ASSESSED
TO THE MAYOR AND CITY COUNCIL OF
BALTIMORE.**