Circuit Court for Howard County
Case No. 13-K-17-057621

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 860

September Term, 2018

LIONEL LEE PRINCE

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Reed,

JJ.

Opinion by Kehoe, J.

Filed: June 2, 2020

*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.

After a jury trial in the Circuit Court for Howard County, Lionel Lee Prince, was convicted of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a person previously convicted of a disqualifying offense, as well as various lesser included offenses. The court sentenced Prince to twenty years' imprisonment for robbery with a dangerous weapon and concurrent terms of ten years for conspiracy to commit robbery with a dangerous weapon and five years for illegal firearm possession. Prince then noted this appeal, raising the following issues:

> 1. Whether the trial court erred in failing to declare a mistrial after a detective testified that he had obtained Prince's photograph from a database of "law enforcement photographs"; or after a detective offered inadmissible lay opinion testimony concerning Prince's direction of travel, derived from historical cellular tower data?
>
> 2. Whether Prince should be awarded a new sentencing hearing due to the State's proffer, at sentencing, of unproven allegations of other uncharged criminal conduct?

We will affirm the judgments.

Background

Zegwe Amade worked as a cashier at a BP gas station on Washington Boulevard in the Laurel area of Howard County. At 4:15 a.m. on September 11, 2016, while Amade was working the night shift, two men entered, "pull[ed] out a gun," and "demanded cash." Amade gave the men "the lottery money," but he was unable to open the cash register, which angered one of the assailants, who then "jumped over the counter and start[ed]

kicking the register" and ordered Amade "to get outside." Amade complied with that demand, and the other assailant stood watch over him while the first assailant "tried to break the register." The two assailants then "left together." Video surveillance footage, consistent with Amade's account, was introduced into evidence at Prince's trial.

After the men fled, Amade locked the door and called the police. Officer Patrick Rafferty, of the Howard County Police Department, responded to that call. Officer Rafferty spoke with the victim and "broadcast a description of the subjects." He also "looked around the store" and observed "evidence of a disturbance," such as "candy laying on the ground" and the cash register, which "had been destroyed." Officer Rafferty then took photographs of the interior and exterior of the store at the gas station. Officer Rafferty's supervisor notified detectives, and Detective Christian Kim "came out and assumed the investigation."

Detective Kim watched video surveillance footage, taken at the gas station at the time of the robbery, and determined that neither of the robbers had worn gloves. He therefore ordered an evidence technician to process specific areas for fingerprints, which "the suspects had touched with their bare hands." Ultimately, latent fingerprints were recovered and identified as belonging to a "James Brown."

Detective Kim called Detective Chad Zirk, a Howard County Police Detective assigned to the "ROPE" unit.[1] Because Detective Zirk's duties included physical and

[1] It appears that "ROPE" stands for "repeat offender parole enforcement." *See* https://www.acronymfinder.com/Repeat-Offender-Parole-Enforcement-(police-unit)-(ROPE).html (last visited Jan. 29, 2020). For obvious reasons, this was not disclosed at trial.

electronic surveillance, Detective Kim asked him to "locate and conduct surveillance on the suspects" and "attempt to identify any associates or co-defendants with that robbery." Detective Zirk determined Brown's address, in Baltimore City, and his cell phone number, and he obtained a court order, authorizing him to obtain "cellular device location on a time frame basis" as well as call detail records, which were forwarded to Detective Kim for analysis.

From Brown's call detail records, Detective Kim determined that Brown's cell phone had, "on multiple occasions" and, specifically, near the time of "the armed robbery at the BP gas station," "communicated with" a cell phone belonging to Prince. While conducting physical surveillance of Brown near his residence (and tracking his movements through his cell phone), Detective Zirk observed him walking down a street, accompanied by Prince, whom he identified from "law enforcement photographs."[2]

Police obtained a search warrant for Brown's residence and vehicle. In executing that warrant, they found, among other things, a Chicago Bulls cap and a Green Bay Packers cap, in the trunk of a red Nissan Altima. Detective Zirk previously had determined that Brown occasionally drove that vehicle, which belonged to his girlfriend.

According to Detective Kim, the Chicago Bulls cap matched the cap worn by Brown in the armed robbery, as determined from the surveillance video. The Green Bay Packers

[2] We shall discuss this testimony in greater detail in our discussion of the issues.

cap matched the cap worn by Prince. DNA analysis of those caps, however, was inconclusive, and no match with either suspect was obtained.

According to Detective Kim, cell site location data indicated that, "between 9:00 and 10:00 p.m." on the night before the robbery, both Brown's and Prince's cell phones "operated from a cell tower" in Baltimore City. Then, at "approximately 11:20 p.m." that same evening, both phones operated from the "same cell tower" in Laurel, Maryland. Prince's cell phone "continue[d] to communicate with that same tower up until 12:47 a.m." in the morning of September 11, and Brown's cell phone "communicate[d] with that same tower . . . up until 3:17 a.m." After the time of the robbery, "at approximately 7:30 a.m.," Prince's cell phone communicated with a cell tower in western Baltimore County, and, "between 5:10 and 5:20 a.m.," Brown's cell phone communicated with a cell tower in Ellicott City, in Howard County.

In March 2017, the grand jury returned an eight-count indictment charging Prince with assault in the first degree, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, robbery, use of a firearm in the commission of a crime of violence, possession of a regulated firearm after having previously been convicted of a disqualifying offense, assault in the second degree, and theft of property with a value less than $1,000. Following a two-day jury trial, Prince was convicted of all charges except use of a firearm in the commission of a crime of violence. After sentencing, Prince noted this appeal.

Analysis

1.

Prince contends that the circuit court erred in failing to declare a mistrial, *sua sponte*, after a detective testified that he had obtained Prince's photograph from a database of "law enforcement photographs," or, in any event, after a different detective subsequently offered inadmissible lay opinion testimony concerning Prince's direction of travel, derived from historical cellular tower data. Before addressing this contention, we set forth the factual background.

During Detective Zirk's direct testimony, the following took place:

> [THE STATE]: Can you explain when you conducted your surveillance and what your surveillance entailed?
>
> DETECTIVE ZIRK: Of Mr. Brown?
>
> [THE STATE]: Yes, sir?
>
> DETECTIVE ZIRK: Okay, so the evening hours of September 27th we went to the area where we previously saw him on that Carey Street, his phone was putting in that general area of Carey Street so we had myself along with additional units of the ROPE Section conducting additional surveillance trying to locate Mr. Brown. At that point we were gonna try and locate any associates and co-defendants. At approximately 10:00 p.m. that evening we located Mr. Brown walking down the street in McCullough, he was also walking with a second subject that was later identified and they hung out in [***118**] that area there for probably about 30 minutes together.
>
> [THE STATE]: And were you able to ascertain the identity of that person, the second subject he was with?

DETECTIVE ZIRK: **Yes, the second subject he was with identified him from photographs, law enforcement photographs, to be a Lionel Prince.**

[DEFENSE COUNSEL]: Objection, Your Honor, can we approach, Your Honor?

(Emphasis added.)

A bench conference ensued. Defense counsel moved "to strike Detective Zirk's latter part of the statement where he says that Mr. Prince was identified through law enforcement photographs." The court granted that motion and gave a curative instruction to the jury, informing them that "[s]triking means that you're to treat as though it never occurred, it's not part of the record, when you deliberate you're not permitted to discuss it because it's as though it never occurred." Thereafter, the State moved into evidence a photograph of Prince, obtained from the Motor Vehicle Administration, which Detective Zirk positively identified as depicting Prince.

Then during Detective Kim's direct testimony, the following took place (emphasis added):

[THE STATE]: And with that information that Detective Zirk provided to you what did you do?

DETECTIVE KIM: I decided to review and analyze both cell site data or location that they have for both devices which I was able to obtain through Detective Zirk. And what I noted and I thought to be pretty significant was that on September 10th between 9:00 p.m. to 10:00 p.m. both devices operated from a cell tower that was located within the confines of Baltimore City. And at approximately 11:00 --

THE COURT: I'm sorry, that's between 9:00 and 10:00 p.m. September 10th?

DETECTIVE KIM: Yes, sir.
THE COURT: Alright.

DETECTIVE KIM: And approximately 11:20 p.m. on September 10th both devices operate from a same cell tower located at 3601 Laurel Fort Meade Road in Laurel, Maryland. That tells me that at that same time both devices are communicating with the same tower **which tells me that they're likely within close proximity** --

[DEFENSE COUNSEL]: Objection.

DETECTIVE KIM: -- to each other --

THE COURT: **Sustained, as to his interpretation, I'll strike that.**

DETECTIVE KIM: -- and at approximately 12:47 a.m. on September 11th Mr. Prince's cell phone device continues to communicate with that same tower up until 12:47 a.m. in the morning.

With respect to Mr. Brown, his cell device communicates with that same tower located at 3601 Laurel Fort Meade Road up until 3:17 a.m. in the morning.

From there at approximately 7:30 a.m. in the morning Mr. Prince's cell device is communicating from a cell tower that's located in Baltimore County around Route 70 and Route 695.

And Mr. Brown's cell device communicates with a cell tower located in Ellicott City, Howard County, Maryland at approximately five, I wanna say between 5:10 and 5:20 a.m. on September the 11th.

So, what that tells me was both devices are communicating with a tower south of Howard County and after there is -- **after the robbery both cell devices are traveling north past Howard County towards the direction of Baltimore City not [too] soon after the armed robbery.**

[DEFENSE COUNSEL]: Objection --

Another bench conference occurred, during which the trial court sustained defense counsel's objection to Detective Kim's lay opinion testimony, interpreting the cell tower location data to infer the subjects' direction of travel.[3] Upon the conclusion of the bench conference, the court gave a curative instruction:

> THE COURT: Alright, ladies and gentlemen, this witness can properly tell you about which tower which phone was pinging off of; and that's what we're talking about is pinging at what time; however **I'm striking any testimony of his interpretation of what direction cars were traveling or individuals were traveling.** You can take that pinging information and do with it what you will in your interpretation as what will guide you absent further evidence to be presented, if any further evidence is presented on that particular [topic]. So, the interpretation as it relates to traveling is stricken but the testimony as to pinging, the dates, the times and the tower locations is not stricken, you can consider that, alright?

(Emphasis added.)

Maryland Rule 4-323(c) provides in part that, "[f]or purposes of review by the trial court or on appeal of any other ruling or order [other than a ruling on admissibility of evidence], it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court." If Prince had moved for a mistrial below, and the circuit court denied that request, then the issue he raises now would be properly before us. But that is

[3] *See State v. Payne*, 440 Md. 680, 697-701 (2014) (holding that a witness must be qualified as an expert to opine about a person's path of travel, based upon cell tower location data).

not what happened. Instead, Prince objected to both instances of inadmissible testimony, and, in each instance, the trial court sustained his objection and struck the improper testimony. At neither time did Prince request a mistrial. Nor does Prince ask us to review his contention under the plain error doctrine.

Prince's contentions do not establish a basis for appellate relief. During the conduct of a trial, a court seldom errs by not doing something that no one asks it to do. If, after sustaining an objection, the trial court grants the relief requested by the objecting party, that party may not claim error on appeal. *Klauenberg v. State*, 355 Md. 529, 545 (1999) (holding that, where the court had sustained the defendant's objection and stricken the inadmissible testimony at issue, and where he had "asked the trial court for no other remedy," he had "no grounds for appeal"); *accord Blandon v. State*, 60 Md. App. 582, 585-86 (1984), *aff'd*, 304 Md. 316 (1985); *Ball v. State*, 57 Md. App. 338, 358-59 (1984), *aff'd in part and rev'd in part on other grounds by Wright v. State*, 307 Md. 552 (1986). (*Wright* was, in turn, abrogated on yet different grounds by *Price v. State*, 405 Md. 10 (2008), which held that inconsistent verdicts would henceforth not be permitted in criminal jury trials.)

In this respect, the present case is very similar factually to *Ball*, where the defendant claimed, on appeal, that he had been "denied a fair trial by the nature of the State's closing argument." *Ball*, 57 Md. App. at 358. Because the trial court had sustained Ball's objections to the State's closing argument, and he had requested "[n]othing more," specifically, requesting neither a curative instruction nor a mistrial, we held that, as Ball had received

"everything he [had] asked for," there was no error. *Id.* at 358-59. Prince's appellate argument is not properly before us.

2.

Prince contends that, at sentencing, the circuit court relied upon an impermissible consideration, namely, his alleged involvement in an uncharged offense, a holdup that had taken place in Anne Arundel County later "the same evening" as the Howard County holdup. He asserts that he is entitled to a new sentencing hearing. This contention is not persuasive.

In Maryland, only "three grounds for appellate review of sentences are recognized": (1) whether "the sentence constitutes cruel and unusual punishment or violates other constitutional requirements"; (2) whether "the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations"; and (3) whether the sentence exceeds the maximum allowed by law.[4] *Jackson v. State*, 364 Md. 192, 200 (2001) (quoting *Gary v. State*, 341 Md. 513, 516 (1996)).

A "sentencing judge in a criminal proceeding is 'vested with virtually boundless discretion.'" *State v. Dopkowski*, 325 Md. 671, 679 (1992) (quoting *Logan v. State*, 289

[4] The *Jackson* Court used the expression, "whether the sentence is within statutory limits." *Id.* at 200. Subsequently, the Court of Appeals has slightly broadened this category, holding that a sentence exceeding the maximum allowed in a binding plea agreement is an illegal sentence to be treated exactly like a sentence exceeding statutory limits. *See Matthews v. State*, 424 Md. 503, 514 (2012) (observing that the Court of Appeals has "deemed sentences inherently 'illegal' pursuant to Rule 4-345(a) when the sentences exceeded the limits imposed by law, be it statute or rule") (citations omitted).

Md. 460, 480 (1981)). "In considering what is proper punishment, it is now well-settled in this State that a judge is not limited to reviewing past conduct whose occurrence has been judicially established, but may view 'reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried.'" *Logan*, 289 Md. at 481 (quoting *Henry v. State*, 273 Md. 131, 147-48 (1974)).

In addressing a claim that a circuit court relied upon an impermissible consideration in imposing sentence, we examine "the context of the entire sentencing proceeding," *Abdul-Maleek v. State*, 426 Md. 59, 73 (2012), and determine whether the judge's "comments might lead a reasonable person to infer that he might have been motivated by" an impermissible consideration. *Jackson*, 364 Md. at 207.

Even if we were to assume that the uncharged Anne Arundel County holdup was an impermissible consideration, it is mere speculation to conclude, as Prince would have it, that the circuit court relied upon his alleged involvement in that uncharged offense. In imposing sentence, the court pointed out that Prince had "a more violent background and record than most" of the defendants of which it was aware and that Prince had "at least six prior convictions," including first-degree burglary, first-degree assault, illegal possession of a regulated firearm, and possession of a concealed deadly weapon while he was incarcerated in a different case. Moreover, the court noted, Prince committed the crimes at issue in this case less than five months after he had been released from incarceration. Given

Prince's record, the court was properly concerned that he was a danger to the community, stating:

> It's not the worst armed robbery [that is, the crime of conviction, not the uncharged offense] in that there was no significant injuries or things of that nature, but it was a significant armed robbery committed by a person who had fairly recently been released from prison for serving time for a violent offense. I think that public safety is the primary driver of this sentencing proceeding.

The court then sentenced Prince to a top-of-the-guidelines sentence of 20 years' active incarceration, without suspending any part of that sentence.

Although the State proffered that Prince had been involved in the Anne Arundel County holdup and referred expressly to a video recording that had been provided to the defense in discovery, as well as inferentially to police reports and a statement of charges, the court made no mention of that incident whatsoever, either at the time of the State's proffer or thereafter. In stating the reasons for imposing the sentence that it did, the circuit court relied only upon unquestionably permissible considerations, specifically, Prince's prior convictions, the nature of the offense, and the brief time period between his release from imprisonment and his re-offending. We hold that a reasonable person would not infer, in "the context of the entire sentencing proceeding," *Abdul-Maleek*, 426 Md. at 73, that the court relied in any way upon the purported impermissible consideration in imposing sentence. *See Sharp v. State*, 446 Md. 669, 691-92 (2016) (rejecting a claim that sentence had been imposed because the circuit court had impermissibly considered the defendant's decision not to plead guilty, where the circuit court had, in response to the defendant's

argument, mentioned that the defendant had rejected a plea offer and elected to stand trial, but subsequently, in imposing sentence, identified only "entirely permissible reasons for its sentence").

THE JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY ARE AFFIRMED. COSTS ASSESSED TO APPELLANT.