Circuit Court for Allegany County
Case No. 01-K-16-017346

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 882

September Term, 2017

COREY MALONE

v.

STATE OF MARYLAND

Wright,
Kehoe,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: April 9, 2018

Corey Malone, Appellant, was charged in the Circuit Court for Allegany County with: (1) first and second degree assault on an employee of a State correctional facility; (2) first-degree assault; (3) attempted first-degree assault; (4) second-degree assault; (5) possession of a weapon by a person detained in a place of confinement; and (6) openly carrying a dangerous weapon. He waived a jury trial as to guilt or innocence. Consequently, he was tried in a bench trial on an agreed statement of facts. The judge found him guilty of first-degree assault. Following his bench trial on guilt/innocence, Malone was tried before a jury as to whether he was responsible criminally for the crime for which he was convicted. The jury found him responsible. This appeal ensued.

Appellant poses two questions for our consideration:

1. Was the evidence sufficient to support [his] conviction for first-degree assault?
2. Did the trial court err when it permitted the prosecutor to elicit irrelevant testimony from the State's expert [psychologist] witness during the trial on criminal responsibility?

We shall affirm the judgment of the circuit court, for reasons to be explained.

Relevant Factual Background

As noted, the facts of the guilt/innocence trial were contained in an agreed statement of facts read to the judge by the prosecutor, without critique or addition by defense counsel:

> Specifically, on March 14, 2016, at the North Branch Correctional Institute, at 14100 McMullen Highway, Cumberland, Maryland, in Allegany County, Mr. Corey Malone, who we would identify through witnesses, to include the victim, did use a dangerous weapon, to wit, a razorblade, to assault Correctional Officer Ed Davis. Correctional Officer Edward Davis reported on this date that at approximately 16:58 hours, Inmate Corey S. Malone, who is the Defendant, who he would be able to identify, was

> handcuffed behind his back at the completion of his exercise period. Officer Davis reported the door of the Housing Unit One, Indoor Recreational Area was opened, and he positioned himself at the door to escort the Defendant, who he identified as Corey S. Malone, back into his assigned cell Inmate Corey S. Malone exited the recreational area from around the corner unrestrained, at which time Inmate Malone attacked Correctional Officer Edward Davis with a homemade razorblade weapon, cutting Officer Davis on his neck. Inmate Corey Malone also used a pair of metal handcuffs to assault Officer Davis in his head and face causing lacerations and scarring due to the razorblade cut on his face and neck. Consequently Ed Davis was transported to the Western Maryland Regional Center where he was treated for the laceration on his neck and abrasions on his head and chest. All of these events occurred in Allegany County.

In the trial on criminal responsibility, the parties stipulated to certain facts (which were read to the jury), but, in addition, each side presented an expert witness, both being psychologists. The factual stipulation was as follows:

> That on March 14, 2016 at North Branch Correctional Institution, in Cumberland, Allegany County, that [] Malone did use a dangerous weapon, to wit, a razorblade, to assault Correctional Officer [] Davis. [] Officer [] Davis reported that on March 14, 2016, at approximately 16:58 hours, Inmate Malone, was handcuffed behind his back at the completion of his exercise period. Officer Davis reported the door of the housing unit number one, C/D, indoor/outdoor recreational area was opened, and he positioned himself at the door to escort [] Malone back to his assigned cell. [] Malone exited the recreation area from around the corner unrestrained, at which time Inmate Malone attacked [] Officer Davis with a homemade razorblade weapon, cutting Officer Davis on his neck. Inmate Malone also used a pair of metal handcuffs to assault Officer Davis on his head and face. Subsequently Officer Davis was transported to the western Maryland Regional Medical Center where he was treated for a laceration to his neck and abrasions to his head, face and chest. And all of these events occurred in Allegany County, according to the parties stipulation.

Dr. Beverli Mormile was called by Malone to testify as to her examination of him and opinions formed regarding his ability to be criminally responsible with regard to the

events of 14 March 2016.[1] Dr. Mormile testified that, before her actual examination of Malone, she reviewed his copious medical mental health history, which began in 2002 and ran through his then incarceration. From her review of these records, Dr. Mormile formed the conclusion that Malone had a "documented mental health . . . disorder."

Next, Dr. Mormile examined Malone and administered various tests designed to determine if he was faking symptoms or manufacturing non-recollection of the events. According to Dr. Mormile, Malone remembered "being on the basketball court" and "bits and pieces of what happened" on 14 March 2016. He told Dr. Mormile, "I think the [Correctional Officer] [(]C.O.[)] kept rushing me, like he was i[m]patient. I might have been annoyed." Malone claimed that he did not remember "attacking the correctional officer," but he remembered being placed in a chokehold after the incident.

Dr. Mormile offered the following ultimate conclusion:

> So, based on the records, you know, again, I incorporate all of the information to formulate an opinion, and again, Mr. Malone had a long history of psychiatric issues. He has been diagnosed with numerous psychiatric disorders, one of which was bipolar disorder, which again, has two components, major depressive episode, hypomanic episode.
>
> * * *
>
> He was diagnosed with attention deficit hyperactivity disorder, which as several components; inattention, impulsivity, and hyperactivity, and based on the records that I received from North Branch, that was exactly what this individual was describing. In the last progress note he requested, he was requesting, he was saying mood changes, I have been everywhere, I get restless and depressed, I get angry and hyper. That also fits bipolar disorder. Bipolar disorder is more of a psychiatric (inaudible word). You may not feel both at the same time. The depression may be very depressed, the mania may be very hyper or manic, and umm, and so I formulated an opinion that,

[1] Malone was 19 years old at the time of the incident.

> you know, to a reasonable degree of psychological certainty, he has been diagnosed with a mental disorder since he was six years old, that substantially impaired his mental and emotional functioning, as to make care or treatment necessary or advisable to the welfare of the person or safety of the person, property or another, and as a result of this documented history at the time of the offense, umm, that occurred on March 14, 2016, he lacked substantial capacity to appreciate the criminal nature of his conduct and, and was unable to conform his conduct to the requirements of the law. Now, my understanding of that is that he didn't even have to meet both for me to find him not criminally responsible. The statute actually says or, so he could have been only, met criteria on one prong, which was lacked substantial capacity to appreciate the criminal part and I could have said he could have conformed his behavior, but the statute doesn't require both, but in this case I found that he met the criteria on both.

After the defense rested, the State called Dr. Janet Hendershot. Dr. Hendershot, based on her evaluation of Malone, opined that he was criminally responsible.

Dr. Hendershot examined Malone's records from North Branch Correctional Institution. She talked also with staff at the prison to get their impressions of Malone. A "key factor[]" she used in reaching her conclusion was the police report of the March 14 incident. In addition, she considered information that Malone provided at the time of her in-person evaluation of him.

Some of what Malone told Dr. Hendershot about the incident was the same as what he had told Dr. Mormile. Malone described, however, to Dr. Hendershot also that, "[w]e went outside and played basketball. I did have my razor, I always did. I know how to get handcuffs off four different ways." Dr. Hendershot testified why she found Malone's account significant:

> So in his history we have heard impulse control disorder. When you are impulsive you do things on impulse. We have heard attention deficit disorder and mood disorder. Those would suggest things that, among oppositional defiance disorder, those are conditions that cause people to act out often

> times without thinking and in this case, in Mr. Malone's case, he took the time to make a weapon. He had taken that time to make the weapon long before the incident occurred, so there is not, it is not an impulsive act. It took time the way he described it. The taking off of the handcuffs. He didn't describe it as he impulsively did this, it is just I know how to do it, so I did it, take off the cuffs.

According to Dr. Hendershot, the fact that Malone made a weapon and carried it with him and the fact that he took his handcuffs off suggested "premeditation," which she opined was the opposite of impulsiveness. She said, "I really don't see impulsiveness and in trying to think about what would cause the Defendant to do the behavior, to assault the officer, he didn't provide much in the way of evidence to support any reason why he did it, just that he can't remember and it happened."

Dr. Hendershot found it significant also that mental and other health services, including medications, had been made available to Malone while he was incarcerated at North Branch Correctional Facility, but he "has not complied and has not followed through." She believed that that supported her conclusion that Malone was criminally responsible because "[i]t is a choice that he is making [to be the way he is]."

Regarding Dr. Mormile's written report, Dr. Hendershot characterized it as "a very thorough report about Mr. Malone's history," however, she disagreed with the conclusion reached in the report because there was not enough attention given in its analysis to Malone's actual behavior at the time of the offense.

In rebuttal, the defense recalled Dr. Mormile. Dr. Mormile disagreed with Dr. Hendershot's testimony in two respects. First, she pointed-out that the two had "a difference of opinion as to the elements that you review or that you look at to determine

criminal responsibility. It is not just what that person was doing. I mean in order to establish a mental disorder, there has to be a history of mental disorder." Second, she disagreed with Dr. Hendershot's interpretation of the police report. She explained:

> [I]t did not state that he made that weapon to attack that officer. He made it clear that he carried it all the time. It was paranoia. Very consistent with what had been reported to me. He was paranoid. He reported it to them. He was paranoid. He carried a weapon all the time. That wasn't premeditation. That weapon was made to protect him from whatever he was paranoid about.
>
> * * *
>
> An impulsive act is taking off handcuffs if you know how to do it very quickly, I mean I also worked at Patuxent Institution, I also worked a maximum security prisons, so I understand, just like Dr. Hendershot, what and how and how things can happen. It had to have happened very quickly and very impulsively in a moment for that officer to be attacked as quickly as it states in that report. Getting out of handcuffs does not take a lot of time for inmates who have mastered that art. But there was no premeditation.

As noted earlier, the jury found Malone criminally responsible for his actions on 14 March 2016.

ANALYSIS

I.

A.

Initially, Malone argues that the agreed statement of facts was insufficient to support his conviction of first-degree assault for slashing a correctional officer in the neck and face using a "homemade razorblade weapon." Specifically, Malone contends that the statement of facts left to mere speculation whether the "intent . . . to cause serious physical injury" element of the crime was satisfied.

The parties agree on the standards of appellate review we must apply to this sufficiency of the evidence contention. The standard is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' *Derr v. State*, 434 Md. 88, 129 (2013) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in *Jackson*), *cert. denied*, 134 S. Ct. 2723 (2014). This standard is "precisely the same" regardless of whether the case is tried to a jury or a judge. *Chisum v. State*, 227 Md. App. 118, 127 (2016).[2]

Because the relevant "statute prohibits not only causing, but attempting to cause, a serious physical injury to another," *id.* at 403, it is not necessary for conviction that the victim actually suffer a serious physical injury. Rather, what the statute requires is "the specific intent to cause, or attempt to cause, serious physical injury." *Dixon v. State*, 364 Md. 209, 239 (2001); *accord Chilcoat v. State*, 155 Md. App. 397, 403 (2004) ("[T]he State must prove that an individual had a specific intent to cause a serious physical injury[.]"). A fact finder "may infer the necessary intent from an individual's conduct and the surrounding circumstances, whether [] . . . the victim suffers such an injury," and "may 'infer that one intends the natural and probable consequences of his act."' *Chilcoat*, 155 Md. App. at 403 (internal citations and some quotation marks omitted). "In determining whether an injury creates a substantial risk of death, the focus is on the injury, not how

[2] When a judge, rather than a jury, is the fact finder, it is not necessary for the defense to move for judgment of acquittal in order to preserve the issue of evidentiary sufficiency for appellate review. *Chisum*, 227 Md. App. at 125-26, 129.

well the victim responded to medical treatment . . . . The fortuity of prompt medical treatment and speedy recovery by the victim is not a primary consideration.'" *Chilcoat*, 155 Md. App. at 402-03 (internal citation omitted).

A reviewing court must "'defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence.'" *Hobby v. State*, 436 Md. 526, 538 (2014) (citation omitted); *Bible v. State*, 411 Md. 138, 156 (2009). It is not material "'whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether [this Court] would have drawn different inferences from the evidence." *Id.* Although a conviction may rest on circumstantial evidence alone, *Taylor v. State*, 346 Md. 452, 458 (1997), "[i]f upon all of the evidence the defendant's guilt is left to conjecture or surmise, and has no solid factual foundation, there can be no conviction." *Taylor*, 346 Md. at 458.

B.

The Criminal Law Article of the Maryland Code proscribes, at § 3-202, first-degree assault, which it defines as "[a] person may not intentionally cause or attempt to cause serious physical injury to another. Section 3-201 of that Article defines "serious physical injury" as personal injury that "(1) creates a substantial risk of death; or (2) causes permanent or protracted serious (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ."

Malone concedes that he attacked Officer Davis with a "homemade razorblade weapon," inflicting a laceration on the officer's neck, which required treatment. Beyond that, Malone seizes upon what he perceives as the lack of specificity in the agreed statement

of facts regarding the depth or length of the laceration, the exact location of the laceration on Officer Davis' neck, and the type of treatment rendered. Malone speculates that perhaps the laceration was only a scratch on the neck that was treated with an over-the-counter medication. As to the scarring on Officer Davis' neck, the statement of facts, Malone contends, left also to speculation whether it was permanent or transient, and whether it was small or large. Hence, as this argument goes, the injury was not proven to have "create[d] a substantial risk of death" or a "permanent or protracted serious disfigurement," within the meaning of the statute.

Malone seems also to quarrel with whether the agreed statement of facts reflects adequately his intent to cause serious physical injury. Finally, he imagines that the modality of the assault was not proven adequately because the "homemade razorblade weapon" could just as likely have been a "piece of plastic molded in the shape of a razor blade," with an "extremely dull" edge.

We like, the trial judge, find no purchase for Malone in his favorable conjectures about a lack of specificity in the agreed statement of facts. The fact that he slashed Officer Davis' face and neck with a razor blade-edged, home-made shank sufficed to permit the trier-of-fact to infer Malone's intent to cause serious physical injury. The statement of facts frames repeatedly the working-end of the weapon as a razor blade. Officer Davis was treated for his wound at a hospital. Scarring occurred as a result. Even if there was room for competing, more benign reasonable inferences to be drawn from the agreed statement of facts, a reviewing appellate court does not "second guess the [fact finder's] determination" upon which of them to draw. *Smith v. State*, 415 Md. 174, 183 (2010); *Ross*

v. State, 323 Md. App. 72, 88 (2017). Clearly, the trial judge did not draw any of the inferences argued by Malone on appeal.

Resolving all reasonable inferences from the agreed statement of facts in favor of the State, the evidence was sufficient to conclude that Malone intended to inflict serious physical injury on Officer Davis, and thus to convict him of first-degree assault.

II.

A.

Malone perceives as prejudicially irrelevant a relatively brief passage in Dr. Hendershot's direct examination testimony during the criminal responsibility trial, to which he objected in part, but the trial judge overruled the objection. The pertinent exchange was as follows:

> PROSECUTOR: And in the last, in the last year, how many times have you found somebody not criminally responsible or referred them on for further investigation to Perkins, the mental hospital, the state mental hospital?
>
> DEFENSE COUNSEL: Objection.
>
> COURT: Overruled. You can answer that, ma'am.
>
> DR. HENDERSHOT: Oh, thank you. In, even in just the past month or two, I have actually referred two people to go, to be evaluated at Perkin's or the local hospital. Out of approximately, let me see how many I have done in the last month or two.
>
> PROSECUTOR: Okay.
>
> DR. HENDERSHOT: And some of them were for competency, not criminally (sic) responsibility. In the case of competency, if someone is dangerous, they need to be in the hospital, so if there is any question about competency and it is believed that (sic) may also be dangerous, it is ultimately up to the judge to make that decision, but there have been cases where I felt that the Defendant needed to be in the hospital, and there have

> been cases where I felt that the Defendant was not dangerous and could be in the community.

As Malone views this testimony on appeal, because the contest in the criminal responsibility trial was over whether Malone had a mental disorder at the time he attacked Officer Davis, such that he was unable to appreciate the criminality of his action or conform his conduct to the law, Dr. Hendershot's experiences in other cases or contexts recommending that other persons be committed for treatment to mental health facilities had no bearing on the central issue of Malone's trial.

The State ripostes that Dr. Hendershot's pertinent testimony was relevant because it provided the jury with context in aid of weighing her overall testimony. Her prior experience in such evaluations and whether she was a "hired gun" or biased for the State were pertinent, for much the same reasons as the defense's efforts in its earlier similar examination of Dr. Mormile, to the point of establishing her independence from the Office of the Public Defender and her experience in evaluating "at least forty defendants" in criminal responsibility contexts.

Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Md. Rule 5-401. The Court of Appeals discussed Rule 5-401 and the concept of relevancy in *Snyder v. State*, 361 Md. 580 (2000):

> Relevance is a relational concept. Accordingly, an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, i.e., one that is properly provable in the case. *See* Md. Rule 5-401. In order to find that such a relationship exists, the trial court must be satisfied that the proffered item of evidence is, on its

> face or otherwise, what the proponent claims that item to be, and, if so, that its admission increases or decreases the probability of the existence of a material fact. Moreover, the relevancy determination is not made in isolation. Instead, the test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable.

Id. at 591-92 (internal citations and parentheticals omitted). A trial court "does not have discretion to admit irrelevant evidence," and an appellate court considers de novo whether evidence was relevant, i.e., whether "the evidence is or is not 'of consequence to the determination of the action."' *State v. Simms*, 420 Md. 705, 724-25 (2011) (citations and some internal quotation marks omitted). Although relevance is a legal requirement, it is "generally a low bar." *Id.* at 727. Generally, in its review of a ruling whether to exclude evidence on relevance grounds, an appellate court looks for an abuse of discretion. *See Brooks v. State*, 439 Md. 689, 708-09 (2014).

In making a determination of admissibility, a trial court considers ordinarily "first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, 420 Md. at 725.

We agree with the State's position. In cases where dueling expert witnesses are put into play on the litigation chess board, it is quite ordinary for each party to seek to build-up or tear down (respective to each party's cause) each expert's prior experience in the relevant field and objectivity versus bias for the side for which he or she is called to testify. In the present case, both parties employed this technique, in an effort to persuade the fact-

finder that the opinions of his or her expert should be given greater weight. Malone boasted that his expert, Dr. Mormile, was not an employee of the Office of the Public Defender (and hence a dis-interested and neutral witness) and had substantial experience evaluating defendants as to their ability to be criminally responsible. The State, in an effort to tip the scale in similar regards as to its expert, Dr. Hendershot, crowed that she was an independent contractor who did not work as an employee of the local State's Attorney's Office and whose prior opinions in evaluating defendants for criminal responsibility purposes did not adopt always the view that a defendant was criminally responsible.

The "'opinion of an expert witness, the grounds upon which it has been formed, and the weight to be accorded to it are all matters for the consideration of the jury.'" *Rollins v. State*, 392 Md. 455, 509 (citation omitted), *cert denied*, 549 U.S. 959 (2006), *overruled in part on other grounds by Derr v. State*, 422 Md. 211, 234-36 (2011).[3] "'[E]vidence tending to show that an expert witness has frequently testified or otherwise been involved in litigation for one party directly relates to the weight a jury may give the testimony[.]'" *Wrobleski v. de Lara*, 353 Md. 509, 519 (1999) (quoting *Scott v. State*, 310 Md. 277, 294 (1987)).

The relevance of an expert witness's prior experience and outcomes in the germane field of inquiry is relevant, as is an asserted lack of bias. There was no error here.

[3] The Maryland Criminal Pattern Jury Instructions (2017), at §3:14, encourage trial judges to advise jurors, in evaluating what weight to give expert testimony, that an "expert's knowledge, skill, experience, training or education, as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion."

B.

Because the State's position as to error prevails here, there is no need for us to consider its harmless error argument.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED; APPELLANT TO PAY THE COSTS.