Circuit Court for Montgomery County
Case No. 135734C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 952

September Term, 2020

ALFRED BROWN

v.

STATE OF MARYLAND

Graeff,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 14, 2021

A jury, in the Circuit Court for Montgomery County, convicted Alfred Brown, appellant, of possession of marijuana and possession of marijuana with the intent to distribute. The Court sentenced appellant to a total term of six months' imprisonment, with all but one day suspended. In this appeal, appellant presents three questions, which we have rephrased for clarity. They are:

1. Did the trial court err in excluding evidence of body-worn camera footage in which a police officer was depicted laughing after another officer had used a racial slur around the time of appellant's arrest?

2. Did the trial court err in refusing to allow the defense's expert witness to testify that the circumstances did not support a finding of possession of marijuana and that the police's investigation of the crime was "sloppy" and "didn't follow best practices?"

3. Was the evidence adduced at trial sufficient to sustain appellant's convictions?

For reasons to follow, we hold that the trial court did not err in excluding the disputed evidence. We also hold that the evidence was sufficient to sustain the convictions. We therefore affirm the judgments of the circuit court.

BACKGROUND

Appellant was arrested and charged after approximately 153 grams of marijuana was found inside a vehicle in which he was a passenger. At trial, Montgomery County Police Officer Erick Mejia testified that, on February 22, 2019, he was in his patrol vehicle when he observed a vehicle that had illegible temporary tags. Officer Mejia initiated a traffic stop of the vehicle and, upon approaching the vehicle, observed two occupants: a driver, later identified as Abel Alston, and a front-seat passenger, later identified as

appellant. Officer Mejia testified that, as soon as he approached the driver's window, he detected a strong smell of fresh marijuana. Upon making contact with appellant, Officer Mejia asked him about the vehicle. Appellant stated that the vehicle belonged to his girlfriend.

After several other officers arrived on the scene to assist, appellant and the driver were removed from the vehicle, and Officer Mejia conducted a search of the vehicle. In the passenger compartment of the vehicle, Officer Mejia discovered a white backpack containing "flakes" of "a green, leafy substance." In an open compartment in the vehicle's center console, Officer Mejia discovered a small digital scale. In the rear of the vehicle, behind the front seats and within arm's reach of both the driver and the passenger, Officer Mejia discovered a black bag. Inside of that bag, Officer Mejia found a package containing two plastic bags of suspected marijuana.

Montgomery County Police Officer Buiung Kang testified that he was one of the officers who assisted Officer Mejia during the traffic stop. Officer Kang testified that, during the stop, he approached the passenger-side window and immediately detected the odor of burnt marijuana. Officer Kang then ordered appellant out of the vehicle and conducted a search of his person. During the search, Officer Kang recovered a cell phone and "two half folds and thick two folds" of currency totaling $283.

Leah King, a forensic chemist with the Montgomery County Police Department, testified that she analyzed the contents of the two plastic bags that were recovered from the

black bag found in the rear of the vehicle. Ms. King testified that the two bags contained a total of approximately 153 grams of marijuana.

Montgomery County Police Detective James Walsh testified as an expert in narcotics investigation. He testified that the marijuana found in the vehicle was possessed with the intent to distribute based on, among other things, the amount of marijuana found, the way the marijuana was packaged, the presence of the scale, and the currency found on appellant's person.

Stanford Franklin, an expert in narcotics investigation, testified for the defense. He opined that the State had failed to present sufficient evidence to prove possession with intent to distribute. He also noted that there were certain investigative tactics that were absent in appellant's case that would have been helpful in forming an opinion as to whether the circumstances suggested possession with intent to distribute. Specifically, Mr. Franklin noted that the police had failed to seize certain items found in the vehicle, had failed to photograph certain pieces of evidence, had failed to thoroughly investigate all the items found in the vehicle, and had failed to conduct certain follow-up investigative techniques, such as obtaining a search warrant for either suspect's home.

Appellant was ultimately convicted. This timely appeal followed. Additional facts will be supplied below.

DISCUSSION

I.

Appellant's first claim of error concerns a motion in limine filed by the State asking the trial court to exclude certain portions of a video taken by one of the officer's body-worn cameras at the time of appellant's arrest. In the video, appellant, who is seated on the side of the road after having been removed from the vehicle prior to the search, becomes agitated when the marijuana is ultimately discovered during the search. Due to appellant's agitation, the police put him in the back of one of the nearby police vehicles. Approximately 14 minutes later, one of the arresting officers, Officer Holiday, an African American female officer, can be heard telling Officer Kang that he "got the n***** fired up." Officer Kang can then be heard laughing. Around the same time, Officer Kang can be heard stating that he had planned to simply give appellant a citation but that he arrested appellant after appellant became agitated.

At the hearing on its motion, the State argued that Officer Holiday's use of a racial slur, Officer Kang's reaction, and Officer Kang's statement regarding the citation should be excluded as irrelevant and unfairly prejudicial. Defense counsel argued that the statements were relevant to show "bias" on the part of Officer Kang against appellant. Defense counsel also argued that the statements showed that the police's investigation was "sloppy," and that Officer Kang's statement regarding the citation may have influenced the decision to arrest and charge appellant for the marijuana possession.

Ultimately, the trial court granted the State's motion, finding that the evidence was not relevant because "Officer Kang didn't say it" and because "it happened 14 minutes

after the drugs were found in the backseat." The court also noted that the State, and not the police, "decides who to charge."

Appellant now claims that the trial court erred in granting the State's motion. He asserts that evidence of Officer Kang's laughter following Officer Holiday's use of a racial slur should have been admitted pursuant to Md. Rule 5-616 as proof that Officer Kang was racially biased. Appellant further claims that evidence of Officer Kang's statement regarding giving appellant a citation was "highly probative of bias and the quality of the police work in this case which was a critical part of [the] defense."

The State asserts that evidence of Officer Kang's laughter did not establish that he was racially biased and, even if it did, such bias was not relevant to any material issue at trial. The State also argues that, to the extent that the evidence was somehow relevant, any probative value was substantially outweighed by the danger of unfair prejudice. As to Officer Kang's statement regarding the citation, the State maintains that the evidence did not establish bias and was irrelevant.

Maryland Rule 5-616 provides, in relevant part, that "[t]he credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at . . . [p]roving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely." Md. Rule 5-616(a)(4). The Rule also states that "[e]xtrinsic evidence of bias, prejudice, interest, or other motive to testify falsely may be admitted[.]" Md. Rule 5-616(b)(3). "Proof of bias may be used to attack a witness' veracity or the reliability of his or her testimony." *Pantazes v. State*, 376 Md. 661, 693

(2003). "It is well-established that the bias, hostility, or motives of a witness are relevant and proper subjects for impeachment." *Id.* at 692.

Nevertheless, "'trial courts retain wide latitude in determining what evidence is material and relevant, and to that end, may limit, in their discretion, the extent to which a witness may be cross-examined for the purpose of showing bias.'" *Parker v. State*, 185 Md. App. 399, 426 (2009) (quoting *Merzbacher v. State*, 346 Md. 391, 413 (1997)). In addition, Md. Rule 5-611 bestows upon the trial court the duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]" Md. Rule 5-611(a). In accordance with that duty, "a trial court may exercise its discretion to 'impose reasonable limits on cross-examination when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant.'" *Stanley v. State*, 248 Md. App. 539, 551-52 (2020) (quoting *Martinez v. State*, 416 Md. 418, 428 (2010)). "We review for an abuse of discretion the exclusion of evidence on the ground of irrelevancy." *Smith v. State*, 423 Md. 573, 592 (2011).

We hold that the trial court did not err in excluding evidence of Officer Kang's laughter following Officer Holiday's use of a racial slur or in excluding evidence of Officer Kang's statement regarding giving appellant a citation. As to the first comment, although it is conceivable that Officer Kang's reaction to Officer Holiday's statement could be construed as being indicative of racial bias on the part of Officer Kang, we fail to see how such bias was relevant in appellant's case. In testifying at trial, Officer Kang merely recited

his role in the traffic stop, which was limited to a search of appellant's person and the recovery of two "folds" of currency. Given that appellant does not dispute that the currency was in fact found on his person, evidence that Officer Kang may have been racially biased would have had essentially no effect on the evidence supporting appellant's conviction. On the other hand, given the inflammatory nature of Officer Holiday's use of the n-word and the relatively inconsequential nature of Officer Kang's testimony, evidence of Officer Kang's laughter following the racial slur would have almost certainly caused prejudice and led to a confusion of the issues.

Moreover, as the court correctly noted, the marijuana that led to the charges against appellant already had been discovered when Officer Kang laughed at Officer Holiday's statement. Appellant presents no argument to suggest that Officer Kang's "bias" contributed in any way to the discovery of the marijuana or the circumstances indicating appellant's possession of the marijuana. Although appellant does claim that the officer who found the marijuana was "receiving advice and guidance" from Officer Kang "throughout the stop and search," there is no evidence in the record to support that claim.

As to Officer Kang's second comment – that he would have simply issued appellant a citation but for appellant's behavior following his arrest – we likewise fail to see how that comment was relevant. Appellant has presented no argument to show how that comment was "highly probative of bias." Appellant also has failed to explain how such "bias" affected Officer Kang's testimony or the evidence against him. Although appellant suggests that Officer Kang's statement was probative of "the quality of the police work,"

appellant does not offer any argument explaining how the quality of the police work was relevant to any material issue. And, as was the case with Officer Kang's laughter, the marijuana already had been found when Officer Kang made the statement regarding giving appellant a citation. As such, the trial court did not err in excluding either statement.

Assuming, *arguendo*, that the trial court erred in excluding the statements, any error was harmless. For the reasons previously discussed, we are convinced that the court's exclusion of the evidence was unimportant to the jury's determination of guilt and in no way prejudiced appellant. *See* Md. Rule 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling[.]"); *see also Vigna v. State*, 470 Md. 418, 453 (2020) ("The exclusion of evidence is harmless if it is unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.") (citations and quotations omitted).

II.

Appellant's next claim of error concerns the trial court's exclusion of certain testimony by the defense's expert witness, Stanford Franklin. During trial, before the testimony of the narcotics investigation expert, Mr. Franklin, the State informed the court that it was objecting to certain subject areas to which Mr. Franklin had planned on testifying. Specifically, the State sought to prevent Mr. Franklin from testifying that "the police investigation in this case was sloppy," and that the police "did not follow best practices with respect to securing, documenting, [and] preserving physical evidence." The State also asked that Mr. Franklin be prevented from opining that the facts and

circumstances of the case did not adequately show who possessed the marijuana found in the vehicle. In response, defense counsel argued that he had a constitutional right to present a defense, which included the right to present the disputed evidence.

In the end, the trial court granted the State's motion and found as follows:

> Well, as to the facts and circumstances that show who possessed [the marijuana], whether there's enough evidence to determine who possessed it, not enough evidence to show who possessed it, well, the jury knows that there was marijuana found in the car, in the backseat area of the car, right?
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> * * *
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> Was it in the trunk that was unable to be opened by the passenger? Was it accessible to the passenger? I mean this is all common sense. It was, clearly, one, or the other, or both of the people in the car possessed the marijuana in the car. We have a notion of joint and several possession, right? You have joint or possession by more than one person. You can have . . . constructive possession or actual possession. These are all just normal concepts in the law, right?
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> So, under the facts and circumstances, it's certainly not appropriate for an expert to say it couldn't happen, or we don't know enough, because all we had to do was have one person know. In other words, if one, or the other, or both know, they know, so to me this just, clearly, is not appropriate.
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> As to the other one, under the circumstances of this case, I don't find that it's appropriate. Maybe in some extreme case maybe, but this is just kind of a normal case where the police might have done something better, they might have had more evidence seized. I mean you see lots of evidence where the police seize lots of things, sometimes they don't seize everything, sometimes they do fingerprints, sometimes they don't do fingerprints, sometimes they do DNA, sometimes they don't do DNA.

> So, I think under the facts and circumstances of this case, it's not appropriate to have an expert testify that the investigation was sloppy or didn't follow best practices. So, I'm going to grant the State's motion in limine.

Appellant now claims that the trial court erred in granting the State's motion. Citing Md. Rule 5-702 and his constitutional right to present a defense, appellant asserts that his expert should have been permitted to testify as to the quality of the police's investigation and the issue of possession. Appellant argues that expert testimony regarding the police's "investigative deficiencies" was appropriate "because it was not within the ken of the average juror and would be helpful to an assessment of whether appellant's defense that the investigation was sloppy had merit." That defense, according to appellant, was relevant because it "made it more probable that the jury would accept that the State had not proven the case beyond a reasonable doubt." Appellant argues that his expert should have also been permitted to testify as to whether the evidence supported a finding of possession because that opinion "was rationally based and would be helpful to the fact-finder." While conceding that, under the relevant caselaw, his expert could not have testified that he did not possess the marijuana, appellant asserts that the expert "could have testified that the circumstances were inconsistent with a finding of possession based on his experience given the lack of evidentiary nexus between appellant, a front-seat passenger, and the marijuana located in the backseat, and other factors."

The State argues that the trial court properly exercised its discretion in limiting the testimony of the defense's expert witness. The State maintains that testimony regarding the "sloppiness" of the police's investigation would not have been helpful to the jury in

determining a fact in issue. The State further maintains that expert testimony as to the issue of possession was inappropriate because "lay persons do not require the assistance of an expert to determine whether someone possesses a substance."

The right to present a defense, and the right to present evidence in support of that defense, is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and by Article 21 of the Maryland Declaration of Rights. *Taneja v. State*, 231 Md. App. 1, 10 (2016). That right is circumscribed, however, by "two paramount rules of evidence, embodied both in case law and in [Md.] Rules 5-402 and 5-403." *Smith v. State*, 371 Md. 496, 504 (2002). The first rule is "that evidence that is not relevant to a material issue is inadmissible." *Id.*; *see also* Md. Rule 5-402. The second rule is that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.*; *see also* Md. Rule 5-403. We review the trial court's decisions under an abuse of discretion standard. *Muhammad v. State*, 177 Md. App. 188, 273-74 (2007).

The right to present a defense also is circumscribed by Md. Rule 5-702. *See Taneja*, 231 Md. App. at 10 (noting that a defendant "does not have an unfettered right to offer testimony that is . . . otherwise inadmissible under standard rules of evidence"). Under that rule, expert testimony may be admitted "if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Md. Rule 5-702. "To determine the appropriateness of expert testimony on a particular subject, a court should ask 'whether the trier of fact will receive appreciable help from the expert

testimony in order to understand the evidence or to determine a fact in issue.'" *Walter v. State*, 239 Md. App. 168, 195 (2018) (citing *Sippio v. State*, 350 Md. 633, 649 (1998)). Moreover, "expert testimony is required only when the subject of the inference is so particularly related to some science or profession that is beyond the ken of the average layman; it is not required on matters of which the jurors would be aware by virtue of common knowledge." *Johnson v. State*, 457 Md. 513, 530 (2018) (citations and quotations omitted) (cleaned up). "The decision whether to admit or exclude expert testimony is a matter within the discretion of the trial court, and the court's decision in this regard will seldom constitute a ground for reversal." *Easter v. State*, 223 Md. App. 65, 79 (2015) (citations and quotations omitted).

We hold that the trial court did not err in limiting appellant's expert witness. As to the testimony regarding the police's investigation, the court found that any testimony that the investigation was "sloppy" or that the police "didn't follow best practices" was inappropriate given that the adequacy of the police's investigation was not at issue in appellant's case. We see no abuse of discretion there. Whether the police conducted a "sloppy" investigation or failed to follow "best practices" was not at issue in appellant's case. *Cf. Sewell v. State*, 239 Md. App. 571, 626-28 (2018) (holding that the trial court erred in excluding expert testimony regarding police officer's best practices, where the defendant, a former police chief on trial for misconduct in office, proffered the testimony to rebut the element of "corrupt intent"). In appellant's case, such testimony would likely have confused the issues and mislead the jury.

Moreover, the trial court did allow appellant's expert to provide extensive testimony regarding the adequacy of the police's investigation. Thus, while the court did not allow the specific testimony at issue, the court did allow appellant to pursue, by way of expert testimony, his defense that the police's investigation was inadequate. Given those circumstances, we cannot say that the court abused its discretion.

We likewise hold that the court did not abuse its discretion in preventing appellant's expert from testifying that the evidence did not support a finding that appellant possessed the marijuana found in the vehicle. As the court explained, expert testimony was unnecessary to that determination. That is, the jury did not require the assistance of an expert to determine whether appellant possessed the marijuana, as the factors that affect that determination all fall within the purview of a lay person's "common knowledge."

Appellant argues that his expert should have at least been able to testify that the circumstances were generally inconsistent with a finding of possession based on the expert's experience. That argument, however, was not raised below and thus is not preserved for our review. Md. Rule 8-131(a).

III.

Appellant next claims that the evidence adduced at trial was insufficient to sustain his convictions. He argues that the State failed to show that he possessed the marijuana found in the black bag in the backseat of the vehicle in which he was a passenger. The State argues that such an inference was reasonable and that, as a result, the evidence was sufficient.

"The test of appellate review of evidentiary sufficiency 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)). That standard applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witnesses accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Darling v. State*, 232 Md. App. 430, 465 (2017) (citations and quotations omitted) (emphasis in original). In making that determination, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). Further, '[w]e defer to the fact-finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal*, 191 Md. App. at 314 (citations omitted).

"[I]n order to support a conviction for a possessory offense, the 'evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited [item.]" *Jefferson v. State*, 194 Md. App. 190, 214 (2010) (citations omitted). "'Control' is defined as 'the exercise of a restraining or

directing influence over the thing allegedly possessed.'" *Williams v. State*, 231 Md. App. 156, 200 (2016) (citations omitted). In addition, "[b]ecause a person 'ordinarily would not be deemed to exercise dominion or control over an object about which he is unaware,' knowledge of its presence 'is normally a prerequisite to exercising dominion and control' and, hence, possession." *Mills v. State*, 239 Md. App. 258, 275 (2018) (quoting *Dawkins v. State*, 313 Md. 638, 649 (1988)). Thus, to prove possession, the State must also establish "that the accused knew 'of both the presence and the general character or illicit nature of the substance.'" *Handy v. State*, 175 Md. App. 538, 563 (2007) (citations omitted).

That said, "[c]ontraband need not be on a defendant's person to establish possession." *Id.* "Rather, a person may have actual or constructive possession of the [contraband], and the possession may be either exclusive or joint in nature." *Moye v. State*, 369 Md. 2, 14 (2002). When considering whether the evidence is sufficient to establish joint and/or constructive possession, we generally look at the following factors: 1) the proximity between the defendant and the contraband; 2) whether the contraband was within the view or knowledge of the defendant; 3) whether the defendant had ownership of or some possessory right in where the contraband was found; and 4) whether a reasonable inference can be drawn that the defendant was participating in the mutual use and enjoyment of the contraband. *Cerrato-Molina v. State*, 223 Md. App. 329, 335 (2015) (citing *Folk v. State*, 11 Md. App. 508, 518 (1971)). We also consider the nature of the premises where the contraband is found and whether there are circumstances indicating a common criminal enterprise. *Nicholson v. State*, 239 Md. App. 228, 253 (2018).

Nevertheless, possession is not determined by any one factor or set of factors but rather "by examining the facts and circumstances of each case." *Smith v. State*, 415 Md. 174, 198 (2010).

We hold that the evidence adduced at trial was sufficient to show that appellant possessed the marijuana. The marijuana was found in a moving vehicle in which appellant was the sole passenger. *See Maryland v. Pringle*, 540 U.S. 366, 373 (2003) ("[A] car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.") (citations and quotations omitted). The bag in which the marijuana was found was located within arm's reach of where appellant was sitting, and the vehicle, according to Officer Mejia, had a strong smell of fresh marijuana. *See Pyon v. State*, 222 Md. App. 412, 439-42 (2015) (holding that the evidence was sufficient to establish possession of marijuana found in a vehicle's closed glovebox, where the defendant was a front-seat passenger in the vehicle and the arresting officer detected the odor of marijuana prior to the discovery of the drugs). A digital scale was found in plain view between the driver's seat and the passenger's seat, and a bag containing a "green, leafy substance" was found in the passenger compartment where appellant was sitting. *See Johnson v. State*, 142 Md. App. 172, 197-201 (2002) (holding that the evidence was sufficient to establish possession of marijuana found in a vehicle in which the defendant was a front-seat passenger, where the marijuana was within the defendant's reach, the arresting officer detected the smell of burnt marijuana coming from the vehicle, and a marijuana bud was seen in plain view on the gearshift cover).

Finally, appellant admitted that he and his girlfriend had recently purchased the vehicle, and $283 in cash was found on appellant's person.

From that, a reasonable inference could be drawn that appellant knew about the marijuana in the black bag and that he exercised some dominion or control over it. No speculation was required for the factfinder to reach that conclusion. *Cf. Taylor v. State*, 346 Md. 452, 459, 463 (1997) (finding evidence of marijuana possession insufficient where the defendant was merely present in a hotel room in which marijuana had been smoked and where the marijuana had been secreted in someone else's personal carrying bags, which were not shown to be within the defendant's control); *Moye*, 369 Md. at 17-20 (finding evidence of drug possession insufficient where the drugs were found in a home in which the defendant had been temporarily staying and where no evidence was presented establishing either the defendant's proximity to the drugs or his presence in the area of the home where the drugs were found). Accordingly, the evidence was sufficient to sustain appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.