Circuit Court for Prince George's County
Case No. CT161303X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1122

September Term, 2019

OLAYINKA OLABISI KOWOBARI

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Wright, Alexander, Jr.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: April 26, 2021

A jury sitting in the Circuit Court for Prince George's County convicted Olayinka Kowobari, appellant, of manslaughter.[1] The court sentenced her to ten years, all but five years suspended, followed by three years' probation.

Appellant presents three questions for our review, which we have rephrased slightly:[2]

> 1. Did the trial court abuse its discretion by admitting into evidence an in-life photograph of the victim, as well as testimony from the victim's sister about the victim's life and family?
>
> 2. Did the trial court abuse its discretion by restricting defense counsel's closing argument?
>
> 3. Did the trial court commit plain error by submitting portions of a CD to the jury that were not admitted into evidence at trial?

We answer "No" to these questions and shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

[1] A previous trial ended in a mistrial after the jury was unable to reach a unanimous verdict.

[2] Appellant's original questions are as follows:

1. Did the trial court err by allowing an in-life photograph of the decedent and testimony from the decedent's sister about the decedent's life and family?

2. Did the trial court err by precluding defense counsel from highlighting for the jury during closing argument evidence that the State failed to present?

3. Did the trial court err by submitting evidence to the jury that was not admitted into evidence during trial?

In the early morning hours of September 21, 2016, Jodi Henry and the appellant were involved in a physical fight outside of appellant's trailer home. During the fight, appellant stabbed Henry in the left shoulder and the upper back with a kitchen knife, puncturing her pulmonary vein and killing her. At trial, appellant did not dispute that she stabbed Henry, but asserted that she acted in self-defense.

Prior to the incident, appellant lived in a trailer home community in Prince George's County with her two sons, ages 7 and 4. She had broken up with her on-again off-again boyfriend of many years, Christopher "Shane" Humphries, a few months earlier.[3] In the interim, Humphries began dating Henry.

On the morning of September 20, 2016, Humphries broke up with Henry. He spent some of the day with appellant, but then went to his grandmother's house. Shortly before midnight, he called appellant and asked her to pick him up from a liquor store. Appellant agreed. They returned to appellant's home and sat talking while appellant's sons slept.

After midnight, Henry called appellant's cell phone looking for Humphries and, when appellant answered, called her a "(expletive) (expletive)." Appellant told Henry not to disrespect her, acknowledged that Humphries was with her, and hung up the phone. Humphries then used appellant's cell phone to call Henry back. The two argued and Henry said that she was coming over. After unsuccessfully trying to dissuade her,

[3] Humphries is not the father of appellant's children but was close to them.

Humphries told Henry that she could come over if they could sit in her car and talk like adults, but that she could not come and disrespect them. Appellant was concerned because Henry had come to appellant's home a month earlier, wielding a baseball bat, and only left when Humphries forced her to do so.

Henry arrived in her truck a short time later. Humphries and appellant gave different versions of what happened next. According to Humphries, when Henry arrived, he was on the front porch of appellant's trailer and appellant was inside the trailer.[4] Henry got out of her car, yelling and screaming at appellant and Humphries. Henry started up the front porch steps, screaming at appellant, "[y]ou (expletive) (expletive)" and "stupid (expletive)." Humphries tried to push Henry back, but Henry, who was bigger than Humphries, got past him and onto the porch outside appellant's front door.

Henry and appellant got into a physical fight on the porch, throwing punches at each other. Henry grabbed appellant's hair. Humphries tried to get between the two women and managed to pull Henry down the steps and restrain her.

According to Humphries, appellant threw a plastic lawn chair down the steps toward Henry and Humphries. In response, Henry rushed back onto the porch and grabbed a metal ashtray, which she threw onto appellant's car below, smashing the windshield. He testified that Henry started back down the porch stairs when "at some

[4] Appellant's trailer home sat on a raised brick foundation. A wooden staircase led from a driveway adjacent to the trailer to a porch at the level of the front door. The porch and steps were enclosed with a railing.

point in time [appellant] reached over the banister and cut [Henry] on her arm[.]" Up until that point, Humphries had not realized that appellant was armed with a knife. In response to being cut, Henry spun around and rushed back at appellant, "and they kind of clashed into each other and started fighting again." Humphries did not see appellant stab Henry a second time, but he heard Henry yell out, "she stabbed me." Humphries grabbed Henry and pulled her back down the porch stairs while she said, "over and over again, '[s]he stabbed me.'" He put her in the backseat of her truck and drove her to Southern Maryland Hospital.

In appellant's statement to police, she said that after she and Henry physically fought on her porch, appellant tried to go inside her home. As she did so, Henry swung at appellant and pulled out a piece of her hair. Appellant managed to get inside, where she grabbed a kitchen knife from her counter and put it inside the back waistband of her underwear. She then went back outside because she wanted Henry and Humphries to get off her porch.

According to appellant, Henry threw a lawn chair at her and then threw the large metal ashtray. Henry rushed at appellant, grabbed her hair, and bit her forearm. As appellant was falling onto the ground, she pulled the knife out and stabbed Henry. Appellant could not remember how many times she stabbed Henry.

Appellant told police that Henry continued trying to fight her, but that Humphries pulled Henry away and down the steps. As he did so, Henry said she couldn't breathe.

Humphries then realized that Henry had been stabbed and said to appellant, "Why did you stab her? I told you to go in the house."

After Humphries left with Henry, the police arrived at appellant's home, having been alerted by a 911 call from a man who lived across the street. Appellant was sitting on the front porch crying. A cell phone and an 8-inch bloody knife blade were on the porch steps. The knife handle was located on the porch.

Appellant cooperated with the police. She told them she was in a fight with her boyfriend's ex-girlfriend, that the woman bit her, and that she stabbed her. Appellant showed an officer at the scene a bite mark on her right arm with "indentations of the top and the bottom teeth." The police contacted the emergency departments of local hospitals to determine if any patients with stab wounds had been received and learned of Henry.

The police placed appellant under arrest and took her to the police station, where she gave a recorded statement that was introduced into evidence at trial and played for the jury.

Henry was pronounced dead at the hospital at 2:40 a.m.

We shall include additional facts as necessary to our resolution of the issues.

DISCUSSION

I.

At appellant's first trial, which, as noted, ended in a mistrial, the State indicated its intent to call Henry's older sister, Yuland Henry ("Yuland"), for the purpose of admitting

a photograph of Henry taken while she was alive. Defense counsel objected, arguing that because the parties were stipulating to Henry's identity, the photograph was cumulative. The court ruled that the testimony and the photograph were admissible, reasoning: "I always allow a witness to identify who, in fact, is the deceased and associate a name with a face, but that's all. Not the history of the person or anything of that nature." At the second trial, appellant renewed her objection to the admission of the photograph and to Yuland's testimony. The objection was overruled without explanation.

Yuland testified that Henry, who was 35 years old when she died, was the second oldest of five siblings. Henry had a 12-year old son. Yuland was shown a photograph of Henry taken while she was alive, authenticated it, and it was admitted into evidence over objection. The prosecutor asked Yuland when the last time was she had seen Henry and, over objection, she replied that she saw her the day before she was killed. The prosecutor asked if Yuland's family was "close-knit[.]" Yuland replied that they were "[v]ery, very close-knit, very close-knit."

Appellant contends that the photograph and Yuland's testimony should have been excluded because it was "irrelevant, unduly prejudicial, and cumulative." The State responds that the trial court has broad discretion to admit a photograph as proof of identity and did not abuse that discretion here. It maintains that Yuland's testimony that she had seen her sister the day before she died and that her family was close-knit was relevant to Yuland's credibility regarding her ability to identify her sister.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Bernadyn v. State*, 390 Md. 1, 7 (2005). "Evidence is relevant if it tends to 'make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Walter v. State*, 239 Md. App. 168, 198 (2018) (quoting Md. Rule 5-401). "Having 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018) (quoting *State v. Simms*, 420 Md. 705, 727 (2011)).

Relevant evidence ordinarily is admissible unless "otherwise provided" by law. Md. Rule 5-402. It may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

Yuland's identification of Henry from a photograph of her when she was alive, that was consistent with a photograph introduced of her after her death, was relevant because it tended to make Henry's identity as the victim more likely. *See Broberg v. State*, 342 Md. 544, 565 (1996) (reasoning that a photograph of the crime victim was relevant and admissible even though the parties stipulated to the identity of the victim). That the parties stipulated to her identity did not make the evidence irrelevant, nor did it

deprive the court of discretion to admit it. *Id.* The photograph, a portrait of Henry, was not unduly prejudicial. The trial court did not abuse its broad discretion by admitting it.[5]

Appellant did not preserve any objection to Yuland's testimony that her family was "close-knit" because defense counsel did not object when the prosecutor asked a question framed to elicit that response (or after the answer was given). *See Bruce v. State*, 328 Md. 594, 627–28 (1992) ("'[I]f opposing counsel's question is formed improperly or calls for an inadmissible answer, counsel must object immediately.'" (quoting 5 L. McLain, *Maryland Evidence* § 103.3, at 17 (1987))). We thus decline to consider any argument that this testimony improperly was admitted.

II.

The court instructed the jurors on self-defense as a complete defense to the sole charge of involuntary manslaughter. They were advised that the State had the burden of

[5] We reject appellant's suggestion that the trial judge abused her discretion by failing to exercise it based upon her remark during the first trial that she "always" allowed the State to present a witness to identify the victim of a crime and "associate a name with a face." As this Court has explained in the context of a discussion of an exercise of sentencing discretion,

> [t]hat a veteran and experienced judge develops over the years a consistently applied and deeply ingrained . . . philosophy does not mean that that judge has thereby failed to exercise discretion. That an experienced and veteran judge may fall into predictable and identifiable . . . habits and patterns does not mean that that judge has thereby failed to exercise discretion.

Holland v. State, 122 Md. App. 532, 547 (1998). Here, likewise, the veteran trial judge's routine practice of permitting identification of the victim by a family member or friend was not the failure to exercise discretion, but a reasonable and consistent exercise of it.

proving beyond a reasonable doubt that at least one of the four factors necessary to show self-defense was not satisfied: 1) that appellant "was not the aggressor" or, if she was the aggressor, that she was not the person who escalated "the fight to the deadly force level;" 2) that appellant "actually believed that she was in immediate or imminent danger of bodily harm;" 3) that appellant's "belief was reasonable;" and 4) that she "used no more force than was reasonably necessary to defend herself in light of the threatened or actual harm." The court further instructed the jurors that if they found that appellant used deadly force, they must decide if the use of that force was reasonable, *i.e.*, whether appellant reasonably believed that Henry's actions "posed an immediate or imminent threat of death or serious bodily harm." Further, "before using deadly force [appellant was] required to make a reasonable effort to retreat" unless she was "in . . . her home or if . . . retreat was unsafe."

During the prosecutor's closing argument, she conceded that the first three factors were satisfied: 1) that Henry was the first aggressor, 2) that appellant believed that she was in imminent danger, and 3) that that belief was reasonable. The State disputed that the fourth factor was satisfied, however, arguing both that appellant used more force than was reasonably necessary to defend herself *and* that she had an opportunity to retreat,

specifically, that she could have stayed inside her home, locked the door, and called 911, rather than arming herself and reengaging with Henry.[6]

Defense counsel addressed the latter contention in his closing, arguing that the State had not adduced any evidence that appellant had a safe avenue of retreat:

> [DEFENSE COUNSEL]: Well, the State said that my client should have retreated in the home. The State argued that. The State said, oh, should have retreated in the home. What evidence is there that the home was secure? None.
>
> [PROSECUTOR]: Objection, Your Honor, calls for speculation.
>
> THE COURT: I am going to sustain that one.

At a bench conference that followed, the court questioned defense counsel about what he meant by whether the house was "secured[.]" Defense counsel replied, "[w]e don't know that there were locks on the door." The court noted that there was no evidence that there were not locks on the door and reaffirmed its earlier ruling, telling defense counsel that he was not permitted to argue that there was no evidence concerning the locks.

[6] In a footnote, appellant points out that the jury was properly instructed on the "castle doctrine," which holds that a defendant does not have a duty to retreat if they are in their home. The jury was not instructed, however, on whether a porch or deck is considered part of a home. Appellant notes that a comment to the Maryland Criminal Pattern Jury Instruction on self-defense suggests that the castle doctrine applies within the curtilage and that the porch is considered curtilage such that no duty to retreat existed. *See Comment* to MPJI-Cr 5:07 (citing *Gainer v. State*, 40 Md. App. 382 (1978)). She concedes, however, that she did not request a jury instruction to this effect or make this argument before the trial court. Accordingly, this issue is not before us on appeal.

When defense counsel resumed his closing argument, he emphasized that the court would not allow him to argue facts not in evidence, but that did not mean that the jurors could hold it against appellant if it they believed that there were deficiencies in the evidence. He then returned to his earlier argument, stating: "[n]ow, the State argued that the door should have been locked. What evidence is there [that] there were locks on the door?" The prosecutor objected, and the court ruled that the objection was "sustained, again" and directed defense counsel to "move on."

On appeal, appellant contends the trial court erred by so restricting her counsel's closing argument given that her duty to retreat was central to the case. We conclude that the trial court did not abuse its broad discretion in ruling that this line of argument was not supported by any facts in evidence and, in any event, any error was harmless beyond a reasonable doubt.

A photograph in evidence depicting appellant's trailer home reflected that it had a traditional front door and a storm door. There was no reason to believe that appellant's front door would not be equipped with a locking mechanism. The court reasonably concluded that it would invite the jury to speculate about facts not in evidence to allow defense counsel to argue that the State failed to prove that appellant's front door could be locked. Even if this was an appropriate line of argument, which we conclude it was not, defense counsel twice made this argument and the State did not move to strike either remark. Thus, the jurors were aware of defense counsel's position that there was no evidence that appellant's front door could be locked. For this reason, any error by the

court in sustaining the prosecutor's objections was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 658–59 (1976).

III.

The State introduced into evidence and played for the jury a 911 call placed on September 21, 2016 by a man who lived across the street from appellant. The caller stated that there were three people on the porch of the trailer home across the street fighting with knives. He hung up when the dispatcher asked for more information.

The recording of the 911 call was the second track on a CD disc containing seven tracks. The first track identified the contents of the CD. Tracks three through six were communications between the 911 dispatcher and emergency personnel. The last track stated that the recording was ended.

As pertinent, Track 6 consisted of an unidentified speaker asking the dispatcher whether there had been any prior 911 calls related to appellant's address. The dispatcher responded, "[a] 911 hang up and a CDS complaint." The unidentified speaker asked for the dates on the calls and the dispatcher relayed that the "CDS complaint" was on July 13, 2016, which was just over two months before the instant altercation. The 911 hang up was on July 19, 2016.

At trial, the State moved "Exhibit 4 into evidence, Track 2 of State's Exhibit 4." Over a previously made objection unrelated to the issue on appeal, the exhibit was so admitted. Track 2 was then played for the jury.

When the jury retired to deliberate, State's Exhibit 4 was sent back to the jury room with the jurors. The court also arranged to have a computer placed in the jury room to allow the jurors to view any electronic exhibits.[7]

On appeal, appellant contends the court committed plain error by permitting an unredacted State's Exhibit 4, which contained six tracks that were not admitted into evidence, to be included in evidence. We decline to exercise plain error review here.

Plain error review is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Robinson v. State*, 410 Md. 91, 111 (2009) (citation, alteration, and internal quotation marks omitted). It is available, at the discretion of an appellate court, if four elements are satisfied: (1) "'there must be an error or defect — some sort of deviation from a legal rule — that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant;'" (2) "'the legal error must be clear or obvious, rather than subject to reasonable dispute;'" (3) "'the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings;'" and (4) the error must "'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings.'" *State v. Rich*, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)) (additional citations, quotation marks, and alteration omitted).

[7] In addition to State's Exhibit 4, the other electronic exhibit was appellant's recorded statement to the police.

Here, we shall assume without deciding that the first two prongs of the plain error test are met in that evidence not admitted at trial was submitted to the jury and appellant never affirmatively waived her rights with respect to this error. *See Merritt v. State*, 367 Md. 17, 33 (2001) ("[E]xhibits which have not been admitted into evidence obviously should not be submitted to the jury[.]"). We conclude, however, that appellant failed to satisfy the second two prongs of the test. First, there is no evidence that the jurors ever listened to Track 6 of Exhibit 4 during their deliberations, which lasted just over 2 hours. If the jurors had listened to Track 6, they would have learned only that a "CDS complaint" had been registered by someone relative to appellant's home. It was not clear from the recording whether the complaint was registered by someone at appellant's home or about appellant's home. The dispatcher advised that that complaint was resolved as "all quiet," suggesting that no CDS activity was discovered. Even if the jurors believed that the complaint was made about appellant and involved the use of illegal drugs, we cannot see how that information would have influenced their verdict. *See id*. (noting that "prejudice is not presumed when unadmitted exhibits are submitted to the jury"). There was no allegation that appellant was under the influence of drugs or alcohol on September 20–21, 2016, or that that impacted her behavior. The inadvertent oversight by the court and the parties in allowing an unredacted version of the CD to be submitted in evidence also was not the type of error that would cause a reasonable person to doubt the "fairness, integrity or public reputation of judicial proceedings." *Rich*, 415 Md. at 578

(quoting *Puckett*, 556 U.S. at 135). For all these reasons, plain error review is not warranted here.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.