Circuit Court for Baltimore County
Case No.: 03-K-18-003634

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1329

September Term, 2019

EVERETT WILLIAM JOHNSON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Sharer, J.
Dissenting Opinion by Friedman, J.

Filed: February 5, 2021

Following a jury trial in the Circuit Court for Baltimore County, Everett William Johnson was convicted of first-degree burglary, second-degree assault, use of a firearm in the commission of a crime of violence, and illegal possession of a firearm after being convicted of a disqualifying crime. He was acquitted of first-degree assault arising from the same incident.[1]

In his appeal, Johnson asks us to consider:

1. Whether the trial court abused its discretion in failing to provide a supplemental instruction after the State argued in closing that the jury could rely on either of two distinct incidents to find [him] guilty of crimes that were charged as single counts.

2. Whether the trial court abused its discretion in refusing to ask potential jurors during *voir dire* whether they had strong feelings about firearm laws in this State or country.

The issues raised in this appeal relate only to appellant's convictions of second-degree assault and use of a firearm in the commission of a crime of violence. As we have noted, appellant was acquitted of the charge of first-degree assault and he conceded before the jury that the evidence was sufficient to convict him of first-degree burglary.

For the reasons we discuss, we shall affirm the judgments of the circuit court.

[1] The court sentenced appellant as follows: first-degree burglary, 20 years; second-degree assault, 10 years, consecutive; use of a firearm in the commission of a crime of violence, 20 years consecutive; illegal possession of a firearm after being convicted of a disqualifying crime, 5 years concurrent. The court noted that appellant had 11 prior burglary convictions.

THE CHARGES

The offenses with which Johnson was charged arose from an incident on August 1, 2018, in Catonsville, Baltimore County. On that date, Johnson entered an unlocked, vacant residence. He was not armed at the time of the entry.

While Johnson was in the house, the owner, Jeanne Robin, also entered the house and discovered Johnson in the attic, holding a rifle that belonged to her husband. Seeing that, Robin returned downstairs to her bedroom and retrieved a handgun.[2] Thus armed, she returned to the bottom of the stairs leading to the attic and threatened to shoot Johnson if he came down. Although she attempted to close the door to the attic stairs, Johnson got through and, at some point, dropped the rifle. She and Johnson then struggled for control of the handgun, during which the gun discharged, wounding Robin in the hand. Johnson fled, but was apprehended shortly thereafter while still in the neighborhood.[3]

Requested Supplemental Jury Instruction[4]

In closing, the State argued that the shooting, resulting in injury to Ms. Robin, was a first-degree assault, as was appellant's arming of himself with the rifle, preceding the

[2] Ms. Robin was the legal owner of several firearms, all properly registered.

[3] The summary of the underlying facts, to which the State has not taken exception, is taken from appellant's opening brief. The facts will be discussed in greater detail as we consider appellant's question No. 1.

[4] As to this argument, the State responds in part that "[t]o the extent preserved …." However, the State does not pursue a preservation argument in its brief.

shooting, because he was using the rifle to put her in fear and was likewise using the rifle to commit the burglary.

Hearing that, the defense requested a supplemental instruction to limit the jury's consideration of the assault count to the shooting incident. Defense counsel asserted that the State's argument gave the jury two options to find appellant guilty of assault. That, counsel argued, allowed the State to introduce a "new theory" in its rebuttal closing argument. Appellant argues that, because the State charged a single count but argued that either of two distinct incidents can prove that count, he was entitled to an instruction limiting a finding of guilt to one of the two incidents or requiring unanimity on one or the other incident.

Appellant asserts that "when the State charges a single count but then argues at trial that either of two distinct incidents can prove that count, the defendant is entitled to an instruction that will ensure a unanimous verdict." Such an instruction, appellant continues, "should identify one of the two incidents as the basis for the count, or, in the alternative, should require that the jury unanimously agree as to at least one or the other of the specific incidents." That is so, appellant argues, because, despite charging him with a single assault and a single use of a firearm, at trial, "the State presented evidence of two separate encounters" between appellant and Ms. Robin.

To support his argument, appellant bifurcates his conduct into distinct incidents – the first in taking the long rifle from the attic and displaying it to Ms. Robin and the second in attempting to wrest from Ms. Robin her handgun that she had gotten to defend herself.

In making that argument, appellant concedes that "there is no duplicity or unanimity problem where the multiple incidents are part of a continuing course of conduct or a single transaction." Therefore, there would be no violation of the rule against duplicitous pleading, as proscribed by Md. Rule 4-203.

The State responds that the prosecutor did not introduce a "new" theory of its case by arguing in his closing that either incident (the rifle and the handgun) would distinctly support a guilty finding. The State posits that the prosecutor, throughout, "focused both on the use of the rifle to frighten the victim and the use of the handgun to shoot her." Our reading of the trial transcript supports that assertion. Further, the State argues that "[t]his was all one incident involving two people – occurring in a short period of time in a small area" of the house.

The opinion of the Court of Appeals in *Cooksey v. State*, 359 Md. 1 (2000) is helpful to our analysis. There, as in the matter before us, the Court noted that "[t]he first issue is whether the rule (against duplicitous pleading) has been violated at all." *Id.* at 11. In consideration of that issue, the Court said:

> The question of whether, and under what circumstances, such separate criminal acts may combine to create one separately punishable offense – a kind of *e pluribus unum* approach – has arisen in at least four different contexts, some of which often overlap: (1) when the acts are committed as part of a single incident or transaction; (2) when they are simply descriptive of a single offense; (3) when they are committed at different times but in a continuing course of conduct with a single objective; and (4) when a single offense may be committed in two or more different ways.

Id.

We cannot, on the record before us, conclude that appellant's actions were disparate acts rather than conduct that was committed as part of a single incident. All of appellant's conduct while in the Robin home were in furtherance of the burglary. His confrontation with Ms. Robin occurred within a short span of time and in a somewhat confining space – all essentially on the stairs leading to the second floor and the attic. The initial contact with Ms. Robin – the brandishing of the rifle – and the succeeding events were sequential and occurred within a short time and a small space. The court, in our view, was correct in referring to the disparate aspects of the event as a "continuation of assault."

In reaching our conclusion, we recall the Court of Appeals comment in *Mohler v. State*, 120 Md. 325, 328 (1913), quoted with favor by the Court in *Cooksey*, 359 Md. at 13, that:

> If the acts alleged are of the same nature and so connected that they form one criminal transaction, they may be joined in one count, although separately considered they are distinct offenses. If they can be construed as stages in one transaction and are not inherently repugnant, the count will not be bad for duplicity.

Finally, it is significant to recall that whether to give supplemental instructions is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *Holmes v. State*, 209 Md. App. 427, 449 (2013).

We find no abuse of the trial court's considerable discretion.

Voir dire

Appellant, with reliance on *Pearson v. State*, 437 Md. 350 (2014), requested the trial court to ask of the jury venire the following question: *Does any member of this panel have*

strong feelings about firearms laws in this country or in this [*S*]*tate?* The court, correctly in our view, declined to put that question to the venire.

Appellant posits that the requested question "was likely to uncover biases relating to the State's key witness and the particular crimes at issue."

Cervante Pearson, charged with several drug-related offenses, was tried jointly with a co-defendant in the Circuit Court for Baltimore City. Relevant to the matter before us, the following occurred during *voir dire* in *Pearson*:

> Pearson's co-defendant filed proposed *voir dire* questions, including: "Have you, any member of your family, [a] friend, or [an] acquaintance been the victim of a crime? [] Do you know anyone who is employed in the police department, prosecutor's office[,] or other law-enforcement agency? [] Were you ever a member of a law-enforcement agency, either civilian or military?" … The circuit court declined to ask any of these three proposed *voir dire* questions. Pearson excepted to the circuit court's declining to ask each of the three proposed *voir dire* questions.
>
> During *voir dire*, the circuit court asked: (1) "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?" and (2) "[W]ould any member of the jury panel be inclined to give either more or less weight to the testimony of a police officer that to any other witness in the case, merely the because the witness is a police officer?"

437 Md. at 354-55.

From those options, the Court held that, on request, "a trial court must ask during *voir dire*: 'Do any of you have strong feelings about [the crime with which the defendant is charged]?'" *Id*. at 363.

It is clear to us that "strong feelings" questions on *voir dire* are now the rule rather that the occasional exception. It is equally clear that the Court of Appeals has, where the

question is adapted "to the particular circumstance or facts of the case," sanctioned the use of such questions to prospective jurors with the "ultimate goal" of seating jurors who will be impartial and unbiased. *See Moore v. State*, 412 Md. 635, 645 (2010). Thus, we look to the wording of the proposed *voir dire* question.

Appellant's proposed *voir dire* question was: "Does any member of this panel have strong feelings about firearms laws in this country or in this [S]tate?" In response to Appellant's request, the trial court said:

> I'm not going to ask that. It's not an issue whether [the jurors] have strong feelings about firearms laws. … I think that the case that was authored by Judge Watts, Savante [sic] Pearson, talks about the offense itself, not laws."

The trial court was correct – the question was not framed to elicit responses relating to "the particular circumstance or facts of the case." Rather, it was a blunderbuss inquiry that might have led a prospective juror to respond with strong feelings about any particular aspect of "firearms laws" from the manufacture to the legal ownership of a firearm of any caliber or description. Indeed, a prospective juror who disagreed with the firearms laws of North Dakota might well respond. Of course, had appellant framed his question to comport with the parameters of the *Pearson*, *Moore*, *Shim*, etc., line of cases, the court would have erred in not asking the question.

Finally, we observe that "an appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question. *See Washington v. State*, 425 Md. 306, 314 (2012) ("We review the trial [court's] rulings on the record of the *voir dire* process as a whole for an abuse of discretion[.]"

Applying that standard of review, we find no abuse of discretion by the trial court in declining to put appellant's much too broad question to the jury venire.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.

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As I understand the record, there were allegations of two separate assaults—one at the top of the stairs, one at the bottom of the stairs—in two different modalities, and even involving two separate weapons. If the State had charged both assaults, Johnson might well have been convicted of both. As it is, however, the State only charged one but specifically told the jury it could convict on evidence of either. As a result, in my view, we cannot know of which assault Johnson was convicted. Although it might not seem likely, it is possible that the jury was divided on whether to convict of the assault at the top of the stair and divided on whether to convict of the assault at the bottom of the stairs, but all agreed to convict him of either one assault or the other. Because we don't know, I don't think this conviction complied with our constitutional requirements. *See Cooksey v. State*, 359 Md. 1, 8-9 (2000).[1] I respectfully dissent.

[1] My brothers in the majority use the word, "duplicitous," as *Cooksey* did and as our precedents have always done, to mean "duplicative" or redundant pleading. Slip Op. at 4-5. Although this usage is technically correct, *see, e.g.*, BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 311 (4th ed.), it is old-fashioned and only used in this sense by courts and lawyers. *Id*. ("A nonlawyer might be confused by the following uses of the word [duplicitous]"). To everyone else, the word "duplicitous" means deceitful. *Id*. I suggest that it is high time to end this anachronistic word usage, avoid the likelihood of confusion, and use the word "duplicative" when we mean redundant pleading.