UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1337

September Term, 2013

KENT ERWIN BELL

v.

STATE OF MARYLAND

Eyler, Deborah, S.,
Kehoe,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 6, 2015

Following a January 2011 trial in the Circuit Court for Baltimore City, a jury convicted appellant, Kent Erwin Bell, of second-degree assault. The trial court sentenced appellant to a term of 12 months in prison but he did not note an appeal.

In July 2012, appellant filed a petition for writ of error coram nobis, based on his trial attorney's alleged ineffective assistance in failing to file a timely notice of appeal and the potential collateral consequence of unserved prison time on another conviction. The trial court granted the petition in August 2013, pursuant to a consent order between the parties. Appellant was given the right to note a belated appeal within 30 days of the entry of the court's order. Appellant thereafter filed a timely notice of appeal.

The issues before us involve the trial court's admission of evidence that appellant had previously lived in a treatment center and had been forcibly evicted from the center because he had made violent threats. Appellant asserts that the evidence was irrelevant and therefore was inadmissable as a matter of law. As an alternative contention, appellant argues that the trial court abused its discretion in admitting the evidence because the evidence was unfairly prejudicial. For its part, the State presents preservation and waiver arguments and asserts that, in any event, there was no error or abuse of discretion on the trial court's part.

We are not fully persuaded by the State's preservation and waiver contentions, but agree with the State as to the merits of the appeal.

Background

At approximately 12:30 a.m. on November 7, 2010, Oliver Givens was eating Chinese food at the Golden King Restaurant on the corner of Broadway and Eastern Avenue

in Baltimore City when he noticed appellant, whom he knew, enter the restaurant, order food, and leave the premises. The two men did not speak to one another.

Several minutes later, Givens left the restaurant to walk the two blocks to his car. Hearing footsteps running toward him, Givens turned, and appellant hit him on the back of his head, causing him to fall to the ground. As Givens rose, appellant demanded, "Where's my money? Square up, n—; I'm going to f—you up." Givens understood the reference to "my money" to relate to rent money appellant had paid to live in a treatment center that Givens managed—Givens testified that appellant had paid two weeks' worth of rent, but had been forcibly removed from the home for threats of violence after only one week and he believed he was entitled to a refund.

Givens told appellant that he "didn't have anything to do with that" and pulled out his cell phone to dial 911. Appellant ran from the scene. A police officer responded, but as appellant had left the area, she said there was little she could do, other than to direct Givens to the Commissioner's Office to fill out a report. Givens did so shortly after the incident.

Appellant testified that he knew Givens, as they had been "in a recovery house together" while appellant waited for the lease to begin on an apartment He said he had left the recovery house over disputes with Givens regarding cleaning procedures in the residence and the amount of money Givens collected weekly from the tenants for supplies.

When he saw Givens in the restaurant on the night in question, about four months after he had moved out of the recovery house, appellant asked Givens about the rent money

he had been told would be refunded to him. Appellant admitted to being angry and to shouting various epithets, but he denied touching or punching Givens.

Analysis

Appellant contends that the trial court erred by admitting into evidence Givens' testimony regarding the fact that appellant had lived in a "treatment center" and had been forcibly removed from that center for threats of violence. That testimony, he continues, was irrelevant because it had no logical connection to the existence of a debt allegedly owed by Givens to appellant, or to the alleged assault. Appellant also asserts that the testimony was unfairly prejudicial because it rendered him less sympathetic to the jury by suggesting, he not only was a drug user, but also was "belligerent, perhaps even violent."

The State counters that appellant waived his appellate argument regarding the testimony about his residence in a drug treatment center or recovery house when he testified to that very fact, without objection; in fact, the State continues, defense counsel elicited more information about appellant's residence in the recovery house than did the prosecutor. In addition, the State continues, appellant failed to preserve his argument that the trial court abused its discretion by admitting testimony about his forcible eviction from the recovery house because the argument he makes on appeal differs from the argument made on the issue during his motion for judgment of acquittal before the trial court. Even if not waived, the State concludes, appellant's arguments are without merit, as the admitted testimony was neither irrelevant nor unfairly prejudicial. We will begin with the preservation issue.

Prior to the start of trial, appellant made two motions in limine during the following colloquy (emphasis added):

> [DEFENSE COUNSEL]: Your Honor, there is, in the application for statement of charges which was prepared by the complaining witness in this case, he makes statements that allude to the fact that he met my client when my client was a resident in a halfway house/rehab center, and that the complaining witness was, at the time, the manage[r] of that center.
>
> *This information going to the jury would indicate to the jury that my client has issues with drugs. It could indicate to them many things that are irrelevant to the case.*
>
> *I think it would be unduly inflammatory and lacks any probative value as to the facts of this case, which is a second-degree assault with no indication of any drug use or anything being involved.*
>
> And so I'd make a motion in limine that the complaining witness be admonished by the State that he is not to mention the fact that their relationship took—began in a rehabilitation or halfway house facility.
>
> He can say—obviously, I wouldn't object to him saying I know him from—I've known him for a year or whatever it is. I've known him for two years or whatever it is. But the nature of the origin of the relationship is irrelevant, and I'd make a motion in limine as to that.
>
> THE COURT: I'll hear from the State.
>
> [PROSECUTOR]: Thank you, Your Honor.
>
> Your Honor, the State does not believe that it's an irrelevant point here. The reason for that, Your Honor, is because the State's theory of the case—and I'll be frank with the Court—is that. . .what happened in that halfway house and what—the relationship between the two, the fact that my—the State's victim was the manager, the fact that the testimony would show that the Defendant was asked to leave that house is—that that is the motive for this assault. And, so—
>
> THE COURT: And did the assault happen in the property?

[PROSECUTOR]: It did not, Your Honor.

THE COURT: And how long after the discharge did it occur?

[PROSECUTOR]: I'm not certain. I'm not certain of the length, Your Honor, of time. But what I would say is that we believe that it's extremely relevant and important because this is how these two people knew each other. This is the reason why the State believes that Defendant assaulted the victim, and—

THE COURT: Other than belief, is that the theory of the case?

[PROSECUTOR]: Yes, Your Honor. That's what we're contending. Thank you.

THE COURT: I'll hear from you, sir.

[DEFENSE COUNSEL]: Thank you, Your Honor.

Your Honor, the statement of probable cause is very clear. The complaining witness's theory of the case, by his own hand, is that my client feels that the complaining witness owes my client money, and that the complaining witness believes my client attacked him because he owed him money. Why he owed him money or where they met is irrelevant to that.

I have no objection to the complaining witness saying he thinks I owe him money and he came up and attacked me for that. But anything else is simply inflammatory without—and prejudicial without any probative value.

THE COURT: Well, it's the only rehab center you know of that's based on drugs?

[DEFENSE COUNSEL]: Well, the—he's—that's—in this particular case it is, Your Honor.

THE COURT: Well, I understand that. But I'm saying if someone mentions a rehab center, you think it automatically denotes drugs?

[DEFENSE COUNSEL]: I do not, Your Honor; but in this particular case it does *In fact, in the statement of—or in the application for statement of charges the complaining witness continuously refers to it as a halfway house, which is—which could mean a lot of things; none of them relevant, and all of them potentially inflammatory or, at the very least, confusing to the jurors.*

THE COURT: Madam State's Attorney, very quickly please.

[PROSECUTOR]: Well, very quickly, Your Honor, if the contention is that it would be inflammatory to say why the victim believes that the Defendant believed that he owed him money, then certainly—

THE COURT: I understand your theory. He's saying that the —in actuality what's filled out is in reference to the money. Does the money have anything to do with the—

[PROSECUTOR]: Yes, Your Honor. The money that is alleged to be owed is because he paid rent at this facility and he was evicted.

THE COURT: Thank you. *The motion in limine is denied. I will instruct the State to instruct the witness not to refer to it as a halfway house.*

[PROSECUTOR]: Yes, Your Honor. Thank you.

THE COURT: Anything else from you, sir?

[DEFENSE COUNSEL]: Yes, Your Honor; a motion in limine similar to that point, but not entirely.

There is a statement in the application for statement of charges written by the complaining witness in which he indicates that my client was put out of that facility by the police. Now, that doesn't have anything to do with any money owed, and that is clearly inflammatory for the jury, without any bearing on the case, for the complaining witness to get on the stand and tell the jury—

THE COURT: Madam State's Attorney?

[PROSECUTOR]: *Your Honor, same reason as before: The fact that the victim contends that the Defendant was put out is what spurred this incident because—*

THE COURT: *That isn't what—that isn't the point. The only point that he's raising is that it had to be facilitated by the police. Is that necessary for your case?*

[PROSECUTOR]: As long as–as long as the witness can refer to the fact that he was evicted or put out, or—

THE COURT: He can testify that he was evicted or forcibly removed. I'll grant the motion as to the reference to the police itself**.**

[DEFENSE COUNSEL]: *Thank you, Your Honor. Point of clarification: The word forcibly would—might be—might confuse the jurors—and I don't want to push it while I'm a little bit ahead, Your Honor.*

THE COURT**:** I think you just made the best shot you're going to get, and there's not a four-point play going to happen.

[DEFENSE COUNSEL]: All right, Your Honor. I gave it a shot. Thank you.

Later, during the State's direct examination of Givens, the witness stated that he saw "Mr. Bell" enter the Chinese restaurant on the night in question. When asked how he was able to call appellant by name, Givens responded:

A. Because I know him. He was a—I'm the manager of a treatment center, and he was one of the residents there.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

BY [PROSECUTOR]:

Q. And, prior to that evening, did you know him?

A. Yes.

Q. And approximately how long would you say you had know him at that point?

A. About three weeks.

Q. So, on that night—and I'm going to direct your attention to that night, November 7th of 2010. At that time, were you the manager of that treatment house?

A. Yes.

Q. And on that particular evening, was he still a resident at the house?

A. No, he was not.

Q. And why is that?

[DEFENSE COUNSEL]: Objection.

THE COURT: Approach.

(Counsel approached the bench where the following ensued:)

THE COURT: Yes, sir?

[DEFENSE COUNSEL]: I understand this was a motion in limine, but I feel I should still preserve the issue for (inaudible) object when it's—

THE COURT: Sure. Anything else?

[DEFENSE COUNSEL]: I think the question. . . is ambiguous, based on the motion in limine and what the Court did with it, and I think that if it was more specific, there would be less likelihood of violating that motion.

THE COURT: All right. Your objection is overruled.

[DEFENSE COUNSEL]: Thank you.

THE COURT: Thank you.

(Counsel returned to trial tables where the following ensued:)

THE COURT: Objection is noted. Overruled. You may answer.

A. Can you repeat the question, please?

BY [PROSECUTOR]:

Q. Why was Mr. Bell no longer a resident at the house?

A. He was forcibly removed from the house because of threats of violence towards—

THE COURT: Next question.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. Let's move along.

* * *

Q. What is it that you understood that he was referring to [when he asked "Where's my money?]

A. Well, when he was forcibly—had to be forcibly removed from the house, he had paid two weeks' rent, and he wasn't—he was there about a week, so he felt as though he was owed money from the rent that he had paid from the recov–from the treatment center.

THE COURT: Next question.

Then, during defense counsel's direct examination of appellant, counsel asked:

Q. Good afternoon, Mr. Bell. Do you–you saw–did you see the testimony of Mr. Oliver Givens just now?

A. Yes.

Q. All right. Do you know that man?

A. Yes.

Q. How do you know that man?

A. We was in a recovery house together.

Q. I'm sorry. You were where?

A. A recovery house?

Q. Recovery house together?

A. Yes, sir.

Q. All right. And what was your—what was your reason for being in the recovery house?

A. I was –I moved in there basically just for my–waiting 'til my other apartment got, you know–well, my lease ran on my other apartment, so I was just –I was there for a week and a half until my other apartment came through.

The State contends that appellant's contention to this court that Givens' testimony that appellant was forcibly removed from the treatment center was irrelevant and prejudicial is not preserved because, at trial, counsel asserted only that the term "forcibly" might be confusing to the jury. However, when we view the exchanges between counsel and the trial court in context, we are persuaded that trial counsel sufficiently communicated to the court what is the essence of his argument to us—that any testimony as to appellant's residency in the treatment program and the circumstances surrounding his departure from that program were irrelevant and unfairly prejudicial. We are also unpersuaded by the State's assertion that appellant waived appellate contentions by testifying about his time in the treatment program. Appellant testified after the trial court had permitted Givens to testify about the treatment program and appellant was entitled to attempt to minimize the damage. *See Hilliard v. State*, 286 Md. 145, 158 (1979).

A. Relevance

Appellant contends that the Givens' testimony relating to the treatment program was irrelevant as a matter of law because:

> the jury needed to know, at most, that Mr. Bell believed that Mr. Givens owed him money for rent from their time living in the same place. This fact was not in dispute, as both men testified to it. Therefore, more specific circumstances that might have formed the basis for Mr. Bell's belief about the debt did not make the existence of the debt or of an assault any more or less likely.

Md. Rule 5-402 provides: "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible." "Relevant evidence" is defined by Md. Rule 5-401 as "evidence having any tendency 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." The determination of whether evidence is relevant is a matter of law, to be reviewed by an appellate court de novo. *DeLeon v. State*, 407 Md. 16, 20 (2008).

We see no error on the part of the trial court in admitting the evidence at issue. The nature and background of the relationship between appellant and Givens, and the fact that the money appellant claimed Givens owed him related to rent paid to the facility from which appellant had been forcibly removed before the end of the rental term, was indeed relevant to the relationship between appellant and Givens. This helped to explain to the jury appellant's motive, intent, or mind set in assaulting Givens. At the very least, then, it was admissible as "largely descriptive in providing a narrative context." *Holmes v. State*, 67 Md. App. 244, 251 (1986). In other words, the manner in which appellant and Givens met, lived

together, and parted ways served to explain and was relevant as to why and whether appellant still may have been angry enough with Givens to assault him four months later.

B. Unfair Prejudice

Appellant also contends that the trial court abused its discretion because the evidence was unfairly prejudicial:

> At every level it made Mr. Bell less sympathetic to the jury. The jury heard that he lived in a treatment center. . . . .As defense counsel argued, all of the inferences to be drawn from this information were at least potentially inflammatory for the jury.

Md. Rule 5-403 states that "[a]lthough 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evidence may be unfairly prejudicial to a criminal defendant "'if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he is being charged.'" *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Lynn McLain, MARYLAND EVIDENCE STATE AND FEDERAL §403:1(b) (2009 Supp.)). However, the prejudice to a party caused by the fact that the evidence weakens the party's case is not the sort of "unfair prejudice" to which Rule 5-403 refers. *Id*. (citing McLain, §403:1(b) (2nd ed. 2001).

If the evidence is relevant, a reviewing court "grants wide latitude to trial judges' decisions on its admissibility." *Id*. at 21. If the trial judge has made a finding of relevancy, we are loath to reverse the trial court, unless the evidence is plainly inadmissible or there is

a clear showing of an abuse of discretion. *Id*. (citing *Merzbacher v. State*, 346 Md. 391, 404-05 (1997)).

Recently, we analyzed how the concept of abuse of discretion applies in cases such as the one before us:

> "This final balancing between probative value and unfair prejudice is something that is entrusted to the wide discretion of the trial judge. The appellate standard of review, therefore, is the highly deferential abuse-of-discretion standard. The fact that we might have struck the balance otherwise is beside the point . . . . Reversal should be reserved for those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so."

Cousar v. State, 198 Md. App. 486, 517-18 (2011) (quoting *Oesby v. State*, 142 Md. App. 144, 167–68 (2002)).

In our view, the trial court did not abuse its discretion when it admitted evidence that appellant lived with Givens in a recovery house and was forcibly removed from it. These facts were related to the assault as contextual background. The jury was entitled to know that appellant and Givens had a past history, that their relationship had been acrimonious, and the basis for appellant's belief that Givens owed him money. In his brief, appellant argues that the phrase "half-way house" suggested that appellant had a drug problem. Assuming this to be correct, we do not believe that such information in this day and age is so likely to "influence the jury to disregard the evidence or lack of evidence regarding the particular crime," *Odum*, 412 Md. at 615, so as to render the trial court's ruling on appellant's object an abuse of discretion.

Even assuming, arguendo, that appellant's objections were well taken, and that the complained-of evidence was erroneously admitted, such error would be harmless. Appellant moved in limine to exclude testimony that he had lived in a drug treatment "halfway house," or similar residence, and that he had been removed forcibly from that house by police for making threats of violence. And, to preserve the issue for appellate review, appellant objected, during the State's direct examination of Givens, when Givens testified that he was "the manager of a treatment center, and [appellant] was one of the residents there." He also objected when the State questioned Givens as to why appellant ceased residing in that treatment center and to Givens' response that appellant had been forcibly removed from the house.

However, later during Givens' direct examination, the prosecutor asked what Givens understood appellant to mean when he asked Givens, "Where's my money?" on the night of the assault; Givens responded, "Well, when he was forcibly–had to be forcibly removed from the house, he had paid two weeks' rent. . .and he felt as though he was owed money from the rent that he had paid from the recov–treatment center." Appellant interposed no objection, and the testimony was properly received into evidence. Then, during appellant's own direct examination by his attorney, he said he knew Givens because "[w]e was in a recovery house together," a statement defense counsel even had him repeat.

These later, unobjected-to questions and responses placed before the jury the same information about appellant's residence in a treatment center and his forcible removal from

that residence as did the earlier questions to which appellant objected. "This Court and the Court of Appeals have found the erroneous admission of evidence to be harmless if evidence to the same effect was introduced, without objection, at another time during the trial." *Yates v. State*, 202 Md. App. 700, 709 (2011), aff'd, 429 Md. 112 (2012). *See also Robeson v. State*, 285 Md. 498, 507 (1979)("The law in this State is settled that where a witness later gives testimony, without objection, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless."); *Wilson v. State*, 87 Md. App. 659, 670 (1991)("The introduction of later testimony, without objection, to the same effect as the earlier objected to testimony, renders any error in the earlier ruling harmless.). As such, even were we to find error in the trial court's admission of the complained-of evidence, appellant would not prevail on appeal, as the error was harmless.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.