Circuit Court for Baltimore City
Case No. 120182047

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1447

September Term, 2021

DELVIN FORD

v.

STATE OF MARYLAND

Zic,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 29, 2022

Delvin Ford, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of two firearm offenses: possession of a firearm by a disqualified person and wearing, carrying, or transporting a handgun.[1] Appellant raises one question for our review: Did the trial court err in allowing a State's lay witness to give improper and prejudicial expert testimony? For the reasons that follow, we shall affirm.

FACTS

The State's theory of prosecution was that on the evening of May 15, 2020, appellant was in possession of a handgun in the 400 block of North Glover Street. The State presented testimony from two Baltimore City Police Department detectives, Michael Nolan-Anderson and Richard Whittaker; CCTV footage of events preceding appellant's arrest; and footage from the body cameras worn by Detective Nolan-Anderson and another officer that night. The theory of defense was that the State had failed to prove that appellant was in possession of a handgun beyond a reasonable doubt. The defense presented no testimonial evidence. Viewing the evidence in the light most favorable to the State, the following was established.

Detective Nolan-Anderson was admitted as an expert in identifying the characteristics of an armed person. He testified that around 8:30 p.m., on May 15, 2020, he was in the Southeast Police District stationhouse operating a CCTV camera located on a pole in the 400 block of North Glover Street. While observing the individuals in that

[1] The circuit court subsequently sentenced appellant on the possession conviction to nine years of imprisonment, two years' suspended, the first five years to be served without the possibility of parole, followed by two years of supervised probation upon his release from prison; and a concurrent three-year sentence for the carrying conviction.

area, the detective's attention was drawn to a person, identified as Melvin Ford, because of a bulge in his left pocket of his "skinny" jeans. When the detective zoomed in on the pocket, he believed, based on his training and experience, that the bulge had the imprint of a handgun. When officers arrested a man on an unrelated matter several feet from Melvin, the detective observed Melvin enter a nearby parked car and sit in the front passenger seat. The detective testified the manner in which was Melvin was moving around in the car suggested he was "putting a weapon there." As Melvin exited and walked away from the car, the detective again zoomed in on his left front pant pocket and noticed that the bulge was gone. A few moments later, the detective saw appellant, who he believed was Melvin's brother, enter the car. While sitting in the same place, appellant moved around in the same manner as had his brother. Appellant then exited the car and began walking away. Detective Nolan-Anderson notified the officers in the area about what he had witnessed and advised them to investigate. Video footage from the CCTV camera was admitted into evidence and played for the jury while Detective Nolan-Anderson narrated.

Detective Whittaker testified that on the evening of May 15, 2020, he was in "full uniform" in the 400 block of North Glover Street on an unrelated matter when he learned that an individual was committing "a possible handgun violation[.]" After hearing Detective Nolan-Anderson's observations, Detective Whittaker looked into the window of a car with his flashlight and seeing nothing of importance, ran to catch up to appellant, who was walking away from the car. When the detective yelled out to get appellant's attention, appellant ran and "grabbed his dip area," which the detective described as the waistband area. He alerted fellow officers over the radio of the direction of his pursuit.

Detective Whittaker testified that as he ran after appellant, he saw what he believed was a handgun in appellant's hands. At some point during the pursuit, Detective Lozada, who had joined the foot pursuit from another direction, tackled appellant to the ground and a struggle ensued. During the struggle, Detective Whittaker saw appellant, who was lying on his belly with his hands underneath him, cast a handgun to the sidewalk. Detective Whittaker immediately walked over and stood over the handgun while Detective Lozada and other officers who had convened on the area arrested appellant. Detective Whittaker described the recovered Ruger 380 handgun as "a very small" firearm.

Footage from the body camera Detective Whittaker was wearing on his chest that night was admitted into evidence and played for the jury while Detective Whittaker testified. The footage begins with Detective Whittaker shining his flashlight into the car in which appellant and his brother had been sitting, and the footage stops after the detective testified he observed a handgun in appellant's hand during the foot pursuit. Detective Whittaker explained that he did not know why the camera turned off at that point, but he did not turn it off. He explained that the "old body cameras," which have since been replaced, had slide on/off switches at the top of the camera that could turn off when vibrated or jostled. The State also introduced and played for the jury footage from the body camera Officer Lozada was wearing on his chest that showed appellant's apprehension and arrest.

The parties stipulated that appellant was prohibited from possessing a regulated firearm due to a prior disqualifying conviction.

DISCUSSION

Citing *Ragland v. State*, 385 Md. 706 (2005), appellant argues on appeal that the trial court erred in allowing Detective Whittaker, who was not admitted as an expert, to testify and demonstrate how appellant "was acting like someone who was carrying a gun … based on behavior [the detective] had, in his extensive experience, seen 'hundreds of times.'" Appellant urges reversal of his convictions because Whittaker's testimony was inadmissible expert testimony and extremely prejudicial. The State responds that appellant has not preserved his argument for our review because he did not object to similarly admitted testimony both before and after the alleged inadmissible testimony. The State argues that even if the testimony was admitted in error, the error was harmless.

Preservation

Md. Rule 4-323(a) provides that an "objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." This rule is "well established[.]" *Ware v. State*, 170 Md. App. 1, 19 (2006) (quotation marks and citations omitted), *cert. denied*, 549 U.S. 1342 (2007). *See also* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). "Moreover, an objection must be made when the question is asked or, if the answer is objectionable, then at that time by motion to strike." *Ware*, 170 Md. App. at 19. Additionally, an objection must be made to each and every question or the party must request "a continuing objection to the entire line of questioning"

in order to preserve the issue for review. *Brown v. State*, 90 Md. App. 220, 225, *cert. denied*, 326 Md. 661 (1992).

Detective Whittaker testified that after viewing nothing of interest in the car from which appellant and his brother had exited, the detective ran to catch up to appellant, who was walking away from the car. Appellant directs us to the following testimony by Detective Whittaker, which we will quote at length:

> [STATE:] Okay. And so once you saw this individual walking away from a vehicle, what, if anything, did you do?
>
> [WITNESS:] He was a good distance away from me, and then he turned southbound on another street, so I ran down to the corner to try to catch up to him, at which time he began to walk when I saw him and tried to attempt to stop him.
>
> [STATE:] Okay. And when you say attempt to stop him what does that mean?
>
> [WITNESS:] I began to say hey or something to that effect, and at that time he grabbed his dip area, which is his waistband, and began to run.
>
> [STATE:] Okay. And so once he began to run what, if anything, did you do?
>
> [WITNESS:] I got on the radio, at that time I was quite certain he was armed with a handgun while he was running, got on the radio and alerted everyone over the radio that we were running southbound.
>
> [STATE:] Now, you said you were quite certain that he had a handgun. What had you observed to make you think that he [could] possibly be armed with a handgun?
>
> [WITNESS:] So the investigation that was being conducted led me to, you know, attempt to stop him in the first place, and then as I tried to stop him he grabbed his dip area, which is extremely consistent with people who are armed with handguns, and he began to run.

At this point the State asked the trial court if the detective could rise from his seat, to which the court acceded, and the colloquy continued:

> [STATE:] Detective, would you rise and be able to demonstrate when you say he grabbed his dip area what does that mean?
>
> [WITNESS:] Right here, either side. Most people when they carry a handgun (indiscernible – 10:06:36).
>
> [STATE:] And when you're talking –
>
> [DEFENSE COUNSEL]: Objection. Objection.
>
> THE COURT: Okay. So what's the basis of the objection?
>
> [DEFENSE COUNSEL]: May we approach, Your Honor?
>
> THE COURT: No. What's the basis of the objection? Give me an evidentiary rule.
>
> [DEFENSE COUNSEL]: This officer has not been qualified as an expert, he's about to render an opinion, it is not a lay opinion.
>
> THE COURT: Overruled. Okay, so you can answer the question, but please maybe pull the mic up so people can hear you.
>
> [WITNESS]: So people that are armed with handguns normally without a holster –
>
> THE COURT: Oh, okay, I thought you were talking about the dip area. I didn't hear the testimony. Okay.
>
> [STATE]: That's correct.
>
> THE COURT: Okay.
>
> [STATE]: The State was just asking for him to demonstrate what he meant.
>
> THE COURT: Just show what the dip area is.
>
> [WITNESS]: Right here.
>
> THE COURT: Okay.

> [STATE]: Okay.
>
> THE COURT: All right.
>
> [STATE:] And so when you – he's running away from you, so are you able to see his hands? What of his body were you able to see that made you believe he was grabbing his dip area?
>
> [WITNESS:] Initially when he began to run I could not see his hands, I could just see him go to his dip area, like I said, which I've been – I've seen hundreds of times. At that time I just began to pursue him on foot.

Detective Whittaker was asked to return to his seat, which he did. The State then asked the detective what happened next, and he testified: "Once we got to Orleans Street I saw what – it was a dark figure which – in his hand, which I believed was a handgun. At that time we continued through the alley running."

Appellant argues on appeal that the trial court erred in allowing Detective Whittaker, who was not admitted as an expert, to opine, based on his experience, that appellant was acting like someone who was carrying a gun and to demonstrate to the jury what he meant by the "dip area." Appellant has several preservation problems.

Before appellant lodged his only objection, the State had elicited from Detective Whittaker that "I was quite certain [appellant] was armed with a handgun while he was running" and "as I tried to stop him he grabbed his dip area, which is extremely consistent with people who are armed with handguns, and he began to run." Because appellant did not object to this testimony or request a continuing objection, he has not preserved for our review his argument as to that testimony. Appellant's only objection came when the State asked the detective to show the jury what he meant by the "dip area." When the detective began to answer that question by explaining why a person carrying a weapon would grab

his waistband, the trial court stopped the detective and re-directed the detective to answer the question posed, *i.e.*, what he meant by the "dip area." The detective subsequently pointed to his waistband area. Appellant did not object when the detective then went on to testify that based on his experience he believed that appellant had a gun because he was running and grabbing his dip area.

Because appellant never objected to the earlier or later admitted testimony about why the detective believed appellant had a handgun, nor did appellant move to strike that testimony, nor did he argue why it would have been futile to object to the admission of that testimony, he has failed to preserve for our review his argument that the detective improperly testified that appellant was acting like someone who was carrying a gun based on behavior the detective had, in his experience, seen "hundreds of times." *See Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 763-64 (2007) ("[A]bsent a continuing objection, an appellant waive[s] its objection to [the] admission [of testimony] by permitting subsequent testimony to the same effect to come in without objection.") (quotation marks and citation omitted) (brackets in *Pulte*), *aff'd*, 403 Md. 367 (2008). The only argument appellant has preserved for our review is that the trial court erred in overruling his objection to Detective Whittaker demonstrating the dip area for the jury. As will be shown below, however, that argument has no merit.

Expert opinion testimony

In *Ragland v. State*, *supra*, the Court of Appeals clarified the distinction between lay opinion and expert opinion testimony. Two Maryland Rules govern opinion testimony. Md. Rule 5-701, titled "**Opinion Testimony by Lay Witnesses**" provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Md. Rule 5-702, titled, "**Testimony by Experts**" provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The Court stated in *Ragland* that "[l]ay opinion testimony is testimony that is rationally based on the perception of the witness[,]" while expert opinion testimony is testimony "based on specialized knowledge, skill, experience, training, or education." 385 Md. at 717. The Court held that the Md. Rules on opinion testimony "prohibit the admission as 'lay opinion[,'] testimony based upon specialized knowledge, skill, experience, training or education." *Id*. at 725.

As to the detective's demonstration of what he meant by the dip area, which was the only issue regarding his testimony preserved for our review, we hold that was lay opinion testimony and not expert opinion testimony because it was based on the detective's personal observation and did not rely on any specialized experience. Therefore, the trial court did not err in admitting that demonstrative testimony.

Having clarified what was properly preserved for our review did not constitute error, we further hold that had appellant preserved for our review his argument that the trial court erred in admitting Detective Whittaker's testimony that based on his experience he

believed appellant had a handgun when he ran while grabbing his waistband, any error was harmless under *Dorsey v. State*, 276 Md. 638, 659 (1976).

Harmless error analysis

In Maryland, harmless error is governed by the standard first adopted by the Court of Appeals in *Dorsey v. State*, *supra*.

> "We conclude that when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent view of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded — may have contributed to the rendition of the guilty verdict."

State v. Hart, 449 Md. 246, 262-63 (2016) (quoting *Dorsey*, 276 Md. at 659). *See Gross v. State*, __ Md. __, No. 32, Sept. Term, 2021 (filed August 26, 2022) (affirming the standard for harmless error review under *Dorsey*). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332 (2008) (quotation marks and citation omitted). Maryland appellate courts have "steadfastly maintained" that the State has the burden to prove harmlessness. *State v. Yancey*, 442 Md. 616, 628 (2015). "The harmless error standard is highly favorable to the defendant[.]" *Perez v. State*, 420 Md. 57, 66 (2011).

In *Ragland*, two police officers, who had not been identified as expert witnesses, testified that based on their experience and training they had witnessed a drug deal between Paul Herring and Jeffrey Ragland, who was the front seat passenger of a car. The officers,

however, were unable to see the nature of the items exchanged, and when the car in which Ragland was a passenger was stopped shortly thereafter, no drugs or paraphernalia were found in the car or on Ragland. 385 Md. at 709-10. Rather, the officers found only a folding knife and $35 and $24 in cash in each of Ragland's front pockets. *Id*. at 710. The Court held that the testimony by the two police officers that they had witnessed a drug deal was not lay witness testimony but expert testimony that was improperly admitted because the officers had not been identified as experts in discovery. *Id.* at 716.

The Court then proceeded to a harmless error analysis. Ultimately, the Court held that the admission of the officers' testimony was not harmless and it reversed Ragland's conviction for distribution of a controlled dangerous substance. The Court reasoned as follows:

> The primary witness against Ragland was Paul Herring, an impeached witness, a participant in the alleged crime, and a witness testifying pursuant to a plea agreement with a promised benefit from the State. The remaining evidence was circumstantial, and depended upon an inference that Herring had obtained his piece of crack cocaine from Ragland. To support this inference, the State relied in large part on the police officers' opinion testimony that the events on Northwest Drive had constituted a drug transaction. Under these circumstances, we cannot say beyond a reasonable doubt that this testimony did not contribute to the verdict.

Id. at 726-27.

Here, Detective Nolan-Anderson, who was admitted as an expert in the identification of characteristics of a person armed with a firearm, testified that he believed that Melvin had placed a firearm in the car based on the bulge in Melvin's pants, which was in the shape of a firearm, his movements while sitting in a parked car, and the lack of the bulge upon his leaving the car, which appellant subsequently entered and made similar

movements. More importantly, Detective Whittaker testified that he saw a handgun in appellant's hands during the ensuing foot chase, and Detective Whittaker testified that as appellant was being apprehended, he saw appellant throw a handgun to the sidewalk. The handgun was recovered and introduced into evidence at appellant's trial.

Detective Whittaker's eye-witness account distinguishes this case from *Ragland*. In *Ragland*, the two officers' expert opinions that Ragland was engaged in dealing narcotics was a significant piece of evidence put forth by the State to establish a prima facie case that Ragland was involved in that crime. However, the officers did not see the nature of what was being exchanged, and they recovered no drugs or paraphernalia from Ragland or the car in which he was a passenger. In contrast, the unimpeached testimony of Detective Whittaker was that he saw appellant running with a handgun and he saw appellant tossing a handgun to the sidewalk upon his apprehension. *Cf. Branch v. State*, 305 Md. 177, 183-84 (1986) (eye-witness identification is sufficient to sustain a conviction and needs no corroboration). Detective Whittaker's testimony about why he believed appellant had a handgun as he was chasing him was harmless because it was cumulative of other properly admitted trial evidence. *See Brown v. State*, 364 Md. 37, 42 (2001) (erroneously admitted evidence harmless beyond a reasonable doubt where cumulative of properly admitted evidence); *Snyder v. State*, 104 Md. App. 533, 564 (erroneous admission of testimony that echoes that of another witness harmless because merely cumulative), *cert. denied*, 340 Md. 216 (1995). Accordingly, any error was harmless beyond a reasonable doubt.

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