UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1580

September Term, 2013

TREYVON LEMAR CHURCH

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 3, 2015

Treyvon Lemar Church, appellant, was convicted by a jury sitting in the Circuit Court for Somerset County of negligent manslaughter and related crimes arising from a motor vehicle accident in which his passenger died.[1] He presents a single question for our review: did the trial court abuse its discretion in denying his motion for a change of venue? For the reasons that follow, we shall affirm the judgments.

FACTS

Because of the limited nature of the question presented, we provide only a brief recital of the facts for context. On the evening of April 14, 2012, appellant and Michael Somers, appellant's friend and his mother's fiancé, were the occupants in appellant's car when it struck a fence on Polks Road in Princess Anne. The central issue generated by the defense at trial was who was driving, appellant or Somers. Appellant was found trapped and unconscious in the car with his head underneath the dashboard on the passenger side, his torso across the driver's seat, and his feet on the back of the driver's seat. Somers was found dead in a nearby ditch. There was a missing section of the windshield on the passenger's side; the windshield on the driver's side was spider- webbed but intact. An expert in the field of automobile accident reconstruction testifying for the State opined that appellant was

[1] Appellant was convicted of negligent manslaughter; negligent homicide by automobile while under the influence per se; negligent homicide by automobile while impaired; reckless driving; failure to control vehicle speed on a highway to avoid collision; driving or attempting to drive a vehicle while under the influence of alcohol per se; driving or attempting to drive a vehicle while under the influence of alcohol; driving or attempting to drive a vehicle while impaired by alcohol; and negligent driving. He was sentenced on negligent manslaughter to ten years of imprisonment, five years suspended, followed by three years of supervised probation upon his release from prison. The remaining convictions were merged for sentencing purposes.

driving and Somers was a passenger based on the accident scene, the injuries to both men, and damage to the vehicle.

DISCUSSION

Appellant argues that the trial court abused its discretion when it denied his motion for a change of venue because the substantial pretrial publicity could not be cured by *voir dire*. We do not agree.

The right to have a case removed to another county is embodied in Article IV, § 8, of the Maryland Constitution and is implemented by Maryland Rule 4-254(b)(2), which provides:

> When a defendant is not eligible for the death penalty and either party files a suggestion under oath that the party cannot have a fair and impartial trial in the court in which the action is pending, the court shall order that the action be transferred for trial to another court having jurisdiction only if the court is satisfied that the suggestion is true or that there is reasonable ground for it. The Circuit Administrative Judge of the court ordering removal shall designate the county to which the case is to be removed. A party who has obtained one removal may obtain further removal pursuant to this section.

"Whether a case should be removed is a decision that rests within the sound discretion of the trial court." *Pantazes v. State*, 376 Md. 661, 675 (2003) (citation omitted). *See also Smith v. State*, 51 Md. App. 408, 415 (1982). "A party moving for a change of venue carries a heavy burden of satisfying the court that there is so great a prejudice against him that he cannot obtain a fair and impartial trial." *Simms v. State*, 49 Md. App. 515, 518-19 (1981). To sustain his burden, appellant, had to "show[] he has been prejudiced by adverse publicity and that the *voir dire* examination of prospective jurors, available to him, would not be

adequate to assure him a fair and impartial trial." *Dillsworth v. State*, 66 Md. App. 263, 272 (1986), *aff'd on other grounds*, 308 Md. 354 (1987)) (internal quotation marks and citation omitted) (italics added). "*Voir dire* examination is usually a sufficient mechanism to insure that a defendant obtains a fair and impartial trial despite the pretrial publicity." *Simms*, 49 Md. App. at 519 (citing *U.S. v. Jones*, 542 F.2d 186 (4th Cir. 1976)). The goal of a fair and impartial trial

> may be satisfied if each venireman empaneled indicates that he has not formed an opinion of defendant's guilt or innocence as a result of the pretrial publicity or that the pretrial publicity would not in any way derogate from his ability to give the defendant a fair and impartial trial[.]

Id. (internal quotation marks and citations omitted).

Extensive knowledge in the community of the crime does not, by itself, render a trial constitutionally unfair, *see Dobbert v. Florida*, 432 U.S. 282, 303 (1977), and media disclosures are not in themselves necessarily so prejudicial to foreclose a fair and impartial trial. *See Waine v. State*, 37 Md. App. 222, 227 (1977); *McLaughlin v. State*, 3 Md. App. 515, 520-21 (1968). But, situations warranting a change of venue may occur where the publicity is deeply pervasive and comes close in time to the trial. *See Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (where five volumes of Cleveland newspaper clippings were introduced into evidence, many of which demanded a conviction; where all but one juror testified at *voir dire* to having gained prior knowledge of the case from the media; and where every prospective juror had received calls and letters, some anonymously and others from friends, regarding the impending trial, *voir dire* examination insufficient to ensure a fair trial

in the face of such massive and widespread publicity that was clearly prejudicial); *Worthen v. State*, 42 Md. App. 20, 44-46 (1979) (trial court abused its discretion in denying the accused's motion for removal of his child abuse case from St. Mary's County where State also urged removal; where a juror clearly equivocated regarding philosophical opposition to corporal punishment of children; and where eight jurors admitted to exposure to an editorialized report relating appellant's prior offense for assault and battery of the same child). *But see Waine*, 37 Md. App. at 225-28 (where two-thirds of the five panels of prospective jurors stated that they had heard of the case in the news media, but the majority of those stated that their exposure was limited to an article several months earlier; where *voir dire* process excused for cause those jurors who might not be able to render a fair and impartial verdict; and where there was no showing that the jurors read the articles which specified other crimes of which appellant was accused, it was held that the trial court did not abuse its discretion by relying on *voir dire* to ascertain the prejudice). *See also Simms*, 49 Md. App. at 520 n.2 (citing two case facts where pretrial publicity necessitated change of venue before *voir dire* examination: where one-third to one-half of the community population had seen a 20 minute interview of the defendant shortly before trial admitting in detail the crimes of which he was accused, and where, prior to trial, there were numerous attempts to lynch the defendant and plans were made to bring him to trial heavily guarded).

On April 14, 2012, more than five months after the accident, appellant filed a motion to remove his case from Somerset County to another county because of prejudicial pretrial

publicity. In appellant's motion, he relied on a television station post; a *Crisfield- Somerset County Times* article; and an "unscientific survey." The television post, issued the day after the accident, briefly related the accident and stated that the driver/appellant was black and the victim/passenger was white. The newspaper article, posted less than three months after the accident, described appellant as the driver and the victim as the passenger. The survey conducted by defense counsel consisted of people he apparently randomly met "on the streets of Somerset County" on September 25, 2012. Of the 15 people surveyed, nine (60%) believed appellant was guilty.

On November 5, 2012, the court held a hearing on the motion. At the hearing, the State noted that the newspaper article would be at least five months old if trial began that day and that Somerset County has a higher percentage of African Americans than the Maryland average – 42 percent versus 30 percent. The court denied the motion finding that the pretrial publicity had not been substantial and that *voir dire* would suffice to eliminate any prejudice.

Appellant's first trial ended in a mistrial based on a discovery violation. On March 29, 2013, appellant renewed the motion for a change of venue. Appellant incorporated his previous motion and attached a March 6, 2013 *Crisfield-Somerset County Times* article about the mistrial. That article related, among other things, that the previous trial had centered on who was driving the car and summarized some of the witnesses' testimony. Appellant argued that the newspaper article was evidence of "new circumstances involving negative publicity[.]"

A hearing was held on appellant's removal motion on April 9, 2013. At that hearing, defense counsel informed the court that he was also aware of a blog that suggested that the Somerset County's State's Attorney was pursuing this case because he was being pressured to "put these black guys in jail." After the parties' arguments, the court ruled:

> I don't think there has been any massive or widespread publicity in this case. I know you attached a clipping from the *Crisfield Times*. And Mr. Krumbacker wrote – he's one of the few reporters who comes in this courtroom anymore. That's only a weekly newspaper at the southern end of the County. I'm not sure how many people read it. I don't remember if there was anything in the Daily Times or the Somerset Herald. Does anybody remember seeing anything?
>
> [THE STATE]: There wasn't that I recall.
>
> THE COURT: I don't think any of the local television stations covered the matter?
>
> [THE STATE]: No, Your Honor.
>
> THE COURT: So I'm not persuaded that the community has been saturated to the extent *voir dire* would be meaningless in this case.

After denying the motion, the court then asked the parties if, in addition to asking the panel whether they had read or heard anything about the case, they wanted any particular *voir dire* questions asked because of any publicity. Both attorneys responded in the negative.

At the start of trial two weeks later, the trial court asked the *voir dire* panel, among other things: "Do you know anything about this case either through your own personal knowledge or by discussions with anyone else? Have you read or heard about this case in any of the news media?" Of the six members of the panel that responded, only three

mentioned media coverage. One of those told the court that the victim was a student of hers "so I was following it in the papers." One stated that appellant was his neighbor, that he knows the "whole family," and that he had "read what was in the paper." The third, when she approached the bench and was asked what she knew about the case, responded, "Nothing. I've just glanced at it in the paper." When asked if she remembered anything about the case, she replied that she did not, and further stated that she could be fair and impartial. Only the third person was empaneled on the jury. The trial court also asked the panel whether anybody had "read anything about this case or heard about this case through some connection with a blog?"[2] No one responded to that question.

Appellant does not argue that any of the jurors who heard his case were not capable of rendering a fair and impartial verdict. He argues instead, relying on the news articles and his attorney's informal poll, that he could not receive a fair trial because the pretrial publicity assumed he was driving and mentioned his race and the victim's race. He argues that Somerset County is a small, historically racially-biased county where a "significant" number had preconceived notions about his guilt.

[2] The trial court also asked the panel, among other things: whether they had any bias or prejudice either for or against the defendant; whether they had any bias or prejudice that would stop them from rendering a fair and impartial verdict based on race, noting that the defendant was African American and the victim was Caucasian; and whether there was any other reason why they could not render a fair and impartial verdict. No one responded to those questions.

We recognize initially the appellant did establish that there was some pretrial publicity concerning his case, some months and several weeks, before trial. But, the test is not whether a potential juror has been exposed to pretrial publicity; it is whether he or she can still be impartial.

> It is not required, however, that the jurors be totally ignorant of the facts and issued involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Simms, 49 Md. App. at 520 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961)).

Here, the pretrial publicity was hardly persuasive, and moreover, the *voir dire* process revealed that a fair jury could be and was seated. Certainly, his attorney's unscientific survey of 15 people seven months prior to his trial, nine of whom thought appellant was guilty, did not sustain his burden of showing prejudice by the jurors due to pretrial publicity. It was too small a sample, was too informal, and failed to indicate whether those polled had read any article or seen any television story about the case. Additionally, this is not a case like *Marshall v. United States*, 360 U.S. 310, 312-13 (1959), which appellant cites for support, where the United States Supreme Court reversed a conviction because the jurors were exposed to news accounts that contained information not admitted at trial.

In sum, the trial court was not persuaded by the evidence that the community had been so saturated by the pretrial publicity that *voir dire* would be meaningless in this case and that

conclusion was amply supported by the evidence presented. Therefore, the trial court did not abuse its discretion in denying the motion for change of venue.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.