Circuit Court for Baltimore County
Case No. 03-K-19-000232

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1816

September Term, 2019

ELDER ROJAS MENDOZA

v.

STATE OF MARYLAND

Reed,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: February 18, 2021

A grand jury sitting in the Circuit Court for Baltimore County indicted and charged Elder Rojas Mendoza, appellant, with robbery with a dangerous weapon, robbery, second-degree assault, and theft of less than $100. Following a jury trial, appellant was convicted of robbery with a dangerous weapon.[1] The court sentenced appellant to twenty years' imprisonment, with all but ten years suspended. On appeal, appellant presents the following questions for our review, the first of which we have rephrased:

1. Did the trial court err in admitting evidence of appellant's possession of a knife on the day of the robbery?[2]

2. Must [a]ppellant's conviction for robbery be vacated where the jury did not orally return a verdict and was not polled or hearkened as to that offense?

For the reasons set forth below, we shall vacate appellant's conviction for robbery, but otherwise affirm the judgment.

BACKGROUND

At approximately 3:00 p.m. on January 7, 2019, Charles McDevitt was robbed in the parking lot behind the Lansdowne Senior Center in Baltimore County. Mr. McDevitt testified that he was cleaning out the interior of his truck when three men approached him and demanded his money. Mr. McDevitt reported that one of the men revealed what appeared to be the handle of a gun in his waistband. Mr. McDevitt complied and handed his cash to the man with the gun. The shortest of the three men, whom he later identified

[1] At the close of the State's evidence, the State entered a *nolle prosequi* as to the charges of second-degree assault and theft of less than $100.

[2] Appellant phrased the question: "Did the trial court err in admitting irrelevant and overly prejudicial 'other crimes' evidence?"

as appellant, demanded his wallet. Mr. McDevitt gave his wallet to appellant and the men left the parking lot.

Mr. McDevitt called 911 and flagged down a passing police officer. He described the assailants as three "Afro-American Spanish" men wearing dark jackets with hoods drawn over the lower parts of their faces, and dark jeans.

Officer Jordan Grafton responded to a call from the Lansdowne Senior Center at approximately 3:40 p.m. on January 7, 2019. In the vicinity of the Senior Center, he observed three men walking together who matched the description of the suspects in the police broadcast. Officer Grafton activated his body-worn camera and approached the suspects. Officer Grafton observed that appellant had a black face mask around his neck. During a pat down of the suspects, Officer Grafton discovered a kitchen knife in appellant's waistband and a BB gun in the waistband of one of the other suspects. Approximately one hour after the robbery, police contacted Mr. McDevitt and requested that he meet them at a nearby high school to identify three possible suspects. Mr. McDevitt identified the three suspects shown to him by police as his assailants. At trial, Officer Grafton identified State's Exhibit 7 as the knife he discovered in appellant's waistband.

Appellant testified that in January of 2019, he was attending high school and working in the meatpacking industry. Appellant admitted that he was walking in the Lansdowne area on January 7, 2019, but denied speaking with Mr. McDevitt, pointing a weapon at him, or taking his wallet.

DISCUSSION

I.

Appellant contends that the trial court erred in admitting evidence of the knife that was found in his possession on the day of the robbery. The State contends that appellant failed to preserve this issue by failing to object when testimony regarding the knife was first admitted. The State further argues that, even if the issue were preserved, the court properly admitted the evidence, or alternatively, that any error in admitting the evidence was harmless beyond a reasonable doubt.

Officer Grafton testified, without objection, that he discovered a knife in appellant's waistband following the robbery:

[PROSECUTOR]:	When you performed a pat down search of this individual, [appellant], what, if anything, did you find?
OFFICER:	In his waistband, it was, I found a kitchen knife, it was about four to six inches, the blade was about four to six inches.

When the State proceeded to introduce video footage from Officer Grafton's body-worn camera showing his discovery of the knife during the pat down, appellant objected:

[PROSECUTOR]:	Did your body worn camera capture your interaction with these individuals?
OFFICER:	Yes.
[PROSECUTOR]:	If I were to show you a portion of that body worn camera again, do you believe you'd recognize it?
OFFICER:	Yes.

[PROSECUTOR]:	For the record, play for identification purposes just on my screen, State's Exhibit 6.
[DEFENSE COUNSEL]:	**Your Honor, I would object.**
THE COURT:	Overruled.
[PROSECUTOR]:	Your Honor, permission to have the officer step down so he can view my screen?
THE COURT:	Yes, you may step down.
[PROSECUTOR]:	Officer, if you could step down? Officer, I'm playing clip one on State's Exhibit 6. Do you recognize what is depicted on this freeze frame of clip one?
OFFICER:	Yes.
[PROSECUTOR]:	And what is depicted on this freeze frame of clip one?
OFFICER:	That's the, my body camera footage.
[PROSECUTOR]:	It is your body camera footage from that day, January 7th, 2019?
OFFICER:	Yes.
[PROSECUTOR]:	And does it fairly and accurately portray what you saw on that day?
OFFICER:	Yes.
[PROSECUTOR]:	Your Honor, at this time, the State would move to enter State's Exhibit 6 into evidence.
THE COURT:	It's admitted over objection.

(Emphasis added). When the State also sought to introduce the knife that Officer Grafton recovered from appellant, defense counsel objected:

[DEFENSE COUNSEL]: Your Honor, I'd just object to the introduction of this particular knife. It's just incendiary and prejudicial to [appellant]. It wasn't a weapon that was used during the course of the alleged crime. The [victim] never identified this particular knife, it was just something that was found on him and the jury is going to, I guess, use this against [appellant] when, in fact, it wasn't used in this crime. That's what the victim said and that's what all the police officers are going to say. The only reason it's being introduced is for incendiary purposes. I would ask that it be struck and I would ask that the [c]ourt instruct the jury not to consider it.

THE COURT: Okay.

* * *

[PROSECUTOR]: Your Honor, this is an accomplice liability case. We're establishing a connection between these individuals. The fact that a knife, the fact that has already been introduced into evidence, was recovered from this [d]efendant, when the other [c]o-[d]efendant also had a weapon, . . . it shows concert of purpose, the fact that there is a weapon, (inaudible) armed robbery.

THE COURT: Okay. Objection is overruled.

Maryland Rule 4-323(a) provides, in pertinent part, that "[a]n 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." *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[.]").

Here, Officer Grafton's body camera video had been marked for identification, but it had not been admitted into evidence, when the State questioned him about his encounter with appellant and his discovery of the knife. Although appellant did not object to the video footage when it was marked for identification, he objected to the video footage before it was admitted into evidence. Appellant also objected to the introduction of the knife before it was admitted into evidence. Although appellant failed to object to Officer Grafton's *testimony*, we view the video footage and the knife itself as quantitatively distinct from that testimony. Accordingly, appellant's objections to the admission of the video and the knife were sufficient to preserve the issue for our review.

Appellant argues that the trial court erred in admitting evidence of his possession of the knife as "other crimes" evidence because the knife bore no connection to the crimes at issue and the admission of the knife served as improper propensity evidence, resulting in significant prejudice to him. The State counters that appellant's possession of the knife was relevant to the robbery charges to show his intent and efforts to commit the robbery. The State further claims that the knife was not "other crimes" evidence, but rather intrinsic evidence related to the robbery itself. Finally, the State adds that, even if the evidence was erroneously admitted, the error was harmless.

"We review a circuit court's decision to admit or exclude evidence applying an abuse of discretion standard." *Norwood v. State*, 222 Md. App. 620, 642 (2015) (citing *Kelly v. State*, 392 Md. 511, 530 (2006)). First, we must consider whether evidence is legally relevant, and, if relevant, we determine whether the evidence is inadmissible

because its probative value is outweighed by the danger of unfair prejudice. *State v. Simms*, 420 Md. 705, 725 (2011). Issues of relevance are reviewed *de novo*. *State v. Robertson*, 463 Md. 342, 353 (2019).

Maryland Rule 5-404(b) provides that, "[e]vidence of other crimes, wrongs or other acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith." The rule "restricts the admissibility of evidence of 'other crimes, wrongs, or acts,' unless that evidence has special relevance to the case." *Odum v. State*, 412 Md. 593, 609 (2010) (citing *Ayers v. State*, 335 Md. 602, 630-31 (1994), *abrogated on other grounds by State v. Jones*, 466 Md. 142 (2019)). Thus, "evidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial." *State v. Faulkner*, 314 Md. 630, 633 (1989) (quoting *Straughn v. State*, 297 Md. 329, 333 (1983)); *see also Terry v. State*, 332 Md. 329, 334 (1993) (stating that other crimes evidence "is excluded because it may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant"). Evidence of other crimes or bad acts is admissible, however, in limited situations where "the evidence is 'specially relevant' to a contested issue" other than propensity, "such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Burris v. State*, 435 Md. 370, 386 (2013) (quoting Rule 5-404(b)).

The Court of Appeals has explained that "the strictures of 'other crimes' evidence law, now embodied in Rule 5-404(b), do not apply to evidence of crimes (or other bad acts

or wrongs) that arise during the same transaction and are intrinsic to the charged crime or crimes." *Odum*, 412 Md. at 611. "Intrinsic" evidence is evidence of crimes "so connected or blended in point of time or circumstances with the crime or crimes charged that they form a single transaction, and the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes." *Id*. (holding that evidence of crimes leading up to and following the kidnapping for which defendant was on trial, were so "connected or blended in point of time or circumstances" that they "arose out of the same criminal episode" and "formed a single transaction"), *see also Silver v. State* 420 Md. 415, 436 (2011) (stating that evidence that was "intertwined and part of the same criminal episode" did not "engage the gears of 'other crimes' evidence law" even where it may show "some possible crime in addition to the one literally charged" (quoting *Odum*, 412 Md. at 611)). "Acts that are part of the alleged crime itself such as acts in furtherance of an alleged conspiracy or put in its immediate context, are not 'other acts' and thus do not have to comply with Md. Rule 5-404(b)." *Odum*, 412 Md. at 611 (quoting Lynn McLain, *Maryland Evidence, State and Federal* § 404.5 (2009 Supp.)). The *Odum* Court explained why evidence of uncharged crimes that occur at the crime scene "does not necessarily engage the gears of 'other crimes' evidence law":

> The ultimate end to be served by the ban on "other crimes" evidence is that the State should not be permitted to bring in "out of left field" the fact that on some other occasion the defendant committed a crime. The danger being guarded against is that such past behavior will be offered to show and will be used by a jury to conclude that the defendant has a propensity to commit crime. The fear is that the jury may convict him in the case on trial because of something other than what he did in that case, to wit, because of his criminal propensity.

* * *

> Although the direct evidence of what happens at a crime scene may sometimes show some possible crime in addition to the one literally charged, that coincidental possibility does not necessarily engage the gears of "other crimes" evidence law.

Id. (alteration in original) (quoting *Dixon v. State*, 133 Md. App. 325, 330-31 (2000), *rev'd on other grounds*, 364 Md. 209 (2001)).

The evidence of the knife concealed in appellant's waistband and discovered within an hour of the robbery, was so "connected or blended in point of time" that it was part of the same criminal episode as the robbery. Appellant's possession of the knife in his waistband, if believed by the jury, was relevant to show appellant's intent to participate in the armed robbery in concert with two cohorts. *See Wagner v. State*, 213 Md. App. 419, 457-60 (2013) (finding that defendant's use of the robbery proceeds to buy drugs was intrinsic to the robbery and probative of the defendant's motive and participation in the robbery). In our view, the knife was relevant to show a common scheme by appellant and the other perpetrators to carry weapons while they committed the robbery. The evidence was not brought "out of left field" to show that appellant, on some other occasion, committed a crime, nor was it used to show appellant's propensity to commit a crime. *Odum*, 412 Md. at 611. Although the knife was prejudicial to appellant, that prejudice did not outweigh the probative value of the knife and its connection to appellant's involvement in the robbery. *Id.* at 615 ("The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial.").

Even if the knife was improperly admitted, any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (stating that an error is harmless when a reviewing court is "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" (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))). Here, Officer Grafton testified, without objection, to his discovery of the knife in appellant's waistband during his pat down of appellant. Moreover, the court properly overruled appellant's objection and admitted the body camera footage as relevant evidence showing the officer approaching three individuals who matched the description of the perpetrators within an hour of the crime. This evidence allowed the jury to assess for themselves whether the three suspects fit the description provided by the victim. Moreover, body camera footage included the pat down of one of the other suspects that revealed the presence of a BB gun in his waistband, which was consistent with the victim's statement. In our view, the admission of the knife itself was not only cumulative to Officer Grafton's un-objected-to testimony, but also cumulative to the relevant body camera footage that the trial court properly admitted. Accordingly, we perceive no error. *See McClurkin v. State*, 222 Md. App. 461, 484-85 (2015) (holding that erroneous admission of evidence was harmless where the evidence was cumulative of other evidence in the case); *Tu v. State*, 336 Md. 406, 428 (1994) (stating that erroneous admission of cumulative evidence is harmless).

II.

Appellant next contends that his conviction for robbery must be vacated because that verdict was not announced in open court, nor was the jury hearkened or polled as to that offense. The State agrees that appellant's conviction for robbery must be vacated.

At the conclusion of the evidence, the charges of robbery with a dangerous weapon (Count 1) and robbery (Count 2) were submitted to the jury. After deliberations, the jury returned a verdict sheet indicating that the jury had found appellant guilty of robbery with a dangerous weapon (Count 1) and robbery (Count 2).[3] The clerk asked the jury foreperson for the verdict on Count 1, robbery with a dangerous weapon, and the foreperson responded that the jury had found appellant guilty of that charge. The clerk did not inquire as to the jury's verdict on Count 2, robbery. The court then instructed the clerk to hearken the verdict. The clerk proceeded to hearken the guilty verdict as to the robbery with a dangerous weapon charge, but did not hearken the verdict as to the robbery charge. The jury was not polled as to either verdict before the court discharged the jury.

Although we shall accede to the State's concession to vacate the robbery conviction, we note that in certain circumstances, an appellate court may direct a judgment of conviction for a lesser-included offense even where the jury never returned a verdict on that charge. *See Brooks v. State*, 314 Md. 585, 600-01 (1989) (vacating conviction for greater-included offense, but directing judgment of conviction for lesser included offense

[3] As to Count 2, robbery, the verdict sheet stated, "If count #1 is not guilty, move to count #2. If count #1 is guilty, stop."

where the jury did not render a verdict for that charge). Nevertheless, the State has not raised any objection to appellant's request to vacate the robbery conviction, presumably because there is no practical difference in this case between vacation of the conviction and merger of robbery into the greater offense. We shall therefore vacate the robbery conviction in accordance with the State's concession.

CASE REMANDED WITH INSTRUCTIONS TO VACATE THE CONVICTION FOR ROBBERY AND CORRECT THE DOCKET AND COMMITMENT RECORD. JUDGMENT OTHERWISE AFFIRMED. APPELLANT TO PAY 75 PERCENT AND BALTIMORE COUNTY TO PAY 25 PERCENT OF COSTS.