UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0067

September Term, 2015

DARIUS RODMOND KEENAN, JR.

v.

STATE OF MARYLAND

Wright,
Graeff,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 23, 2016

On April 29, 2014, a jury in the Circuit Court for Anne Arundel County convicted Darius Rodmond Keenan, Jr., appellant, of first degree murder (Count 1), use of a handgun in the commission of a felony (Count 2), use of a handgun in the commission of a crime of violence (Count 3), and carrying a handgun (Count 4). On February 20, 2015, the court sentenced appellant to life, all but 60 years suspended, on the murder conviction, and 20 years, concurrent, on the conviction for use of a handgun in the commission of a felony. The court merged the other convictions for sentencing purposes.

On appeal, appellant presents two questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court abuse its discretion in denying appellant's request to replace a sitting juror with an alternate when the juror revealed that he had prior contact with the State's police officer witness and indicated that he might give more weight to the testimony of a police officer just because he or she was a police officer?

2. Did the circuit court abuse its discretion in allowing the State to ask its witness leading questions on direct examination?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Because the issues presented on appeal are procedural in nature, we will provide a limited discussion of the underlying facts. Royce Keenan, Jr. ("Royce"), appellant's uncle, testified that appellant was living with his father, Darius Rodman Keenan, Sr. ("Mr. Keenan, Sr."), at the time of the murder. He stated that appellant and his father generally "got along fine," but "every once in a while they would . . . get off track." Appellant's sister, Cairo Keenan ("Cairo"), who was living with a friend at the time of the

murder, testified that there was "some tension" between appellant and their father, and they had "stupid arguments."

Cairo testified that, a few weeks before the murder, she was sitting with appellant in their father's kitchen. Appellant stated that he hated his father and "would handle his business." Cairo admitted that she told a police detective that, during that conversation in the kitchen, appellant stated: "I hate him so much I will kill him."

On August 11, 2012, appellant and his father got into an argument about food and appellant's purported lack of responsibility. Royce testified that, at the end of the argument, appellant said to his father, "in a threatening manner": "You have to sleep sometimes." Appellant was agitated and irritated. When Royce left his brother's house later that night, he observed appellant "walking back and forth" on Argyle Avenue, a nearby side street.

The next morning, at approximately 9:00 a.m., Royce returned to his brother's home to pick up appellant for help with some painting. He noticed that his brother's car was missing from the driveway, the front door was left open, and loud gospel music was coming from inside the house. Royce entered the house, found Mr. Keenan, Sr. dead on his bed, and called 911. Royce noted that his brother's wallet, keys, and phone were not in their usual place.

At approximately 9:42 a.m., Officer Christopher Cooke, a member of the Anne Arundel County Police Department, responded to Mr. Keenan, Sr.'s home, and he saw Mr. Keenan, Sr.'s body on the bed in his bedroom. One of the paramedics who accompanied him pronounced Mr. Keenan, Sr. "dead on the scene." Officer Cooke then

secured the scene. He did not let anyone into the crime scene except for police, paramedics, fire, and the medical examiner. Officer Cooke subsequently assisted the medical examiner in rolling over Mr. Keenan, Sr.'s body. He also interviewed Royce and began efforts to locate Mr. Keenan, Sr.'s missing cell phone and vehicle.

At approximately 11:00 a.m., Cairo called her father's cell phone. An unknown person answered and said: "I'm out." She tried to call back twice, but nobody answered.

Later that day, a member of the North Carolina State Highway Patrol spotted appellant driving his father's car. Appellant was arrested and the vehicle impounded.

The medical examiner who performed the autopsy testified that Mr. Keenan, Sr. died from a gunshot wound to the head. The crime scene technician who processed the crime scene testified that there was no sign of forced entry into the home. A box of ammunition in various calibers was found in appellant's bedroom, and a single Federal .38 special cartridge was found lying in the road on Argyle Avenue.

A crime scene technician processed the vehicle that appellant was driving and recovered, *inter alia*, a revolver, which was loaded with six cartridges, one of which was fired, and a handcuff case containing 28 Federal .38 special cartridges. The revolver was swabbed for DNA, and a partial DNA profile was recovered. Subsequent tests determined that appellant's DNA profile could not be excluded as the source of the DNA. Mr. Keenan, Sr.'s DNA was excluded as the source. The DNA expert testified that there was a 1 in 630 million probability that an unrelated person's DNA would match the partial DNA profile found on the gun.

A firearms expert examined the revolver and ammunition recovered in the case. The expert was unable to directly match the bullet removed from Mr. Keenan, Sr.'s head to the revolver. She testified, however, that the bullet recovered from Mr. Keenan, Sr.'s head exhibited the same "class characteristics" as those that were later test fired from the revolver. She found a rare knurling pattern on both the bullet recovered from Mr. Keenan, Sr.'s head and the bullets that were recovered from the revolver.

Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Juror Issue

Appellant argues that the trial court abused its discretion in denying his "request to replace a juror with an alternate based on the juror's (1) disclosure of contact with [the] State's police officer witness after the witness testified[;] and (2) repeated inclination to believe the testimony of police officers." He asserts that the juror's comments, "when viewed cumulatively, evidence an inability to be fair and impartial and predisposition to credit the testimony of police officers in general, and Officer Cook[e] in particular, over other witnesses."

The State argues that appellant's claims are not preserved for this Court's review. In any event, it contends that appellant "has failed to demonstrate that the trial court abused its discretion or that he was prejudiced."

A.

Proceedings Below

During voir dire, Prospective Juror No. 11, who ultimately was seated for trial as Juror No. 3, responded affirmatively to several questions asked by the circuit court, including: "Is there any member of the jury panel who would give more weight or less weight to the testimony of a police officer merely because that individual is a police officer as opposed to other witnesses in the case?" The juror was called to the bench, and the following colloquy occurred:

> THE COURT: You indicated that you may give more or less weight to the testimony of a police officer just because they are a police officer. Can you explain that?
>
> [THE JUROR]: Yes, sir. From my understanding I believe that the police have a tendency to catch them on the facts, when they see something.
>
> THE COURT: Okay.
>
> [THE JUROR]: So more --- --
>
> THE COURT: Sure.
>
> [THE JUROR]: -- I think a lot of people, including myself, if something happens, I'm more in the flight mode ---
>
> THE COURT: I understand.
>
> [THE JUROR]: -- so I just --- capture this guy ---
>
> THE COURT: All right. If you found the testimony of a police officer not believable could you discredit it?
>
> [THE JUROR]: Absolutely. Yeah.
>
> THE COURT: If you found it believable, then you would consider it believable?

[THE JUROR]: Absolutely.

THE COURT: My question really is would you consider all of the evidence, no matter who gave it, no matter what the person's occupation is, in making a decision?

[THE JUROR]: Yes.[1]

On April 23, 2014, after Officer Cooke testified, Juror No. 3 sent out a note stating that he believed he had met the officer at a Cub Scout event. The court asked if anyone had "any comment about what they would like me to do regarding the note," and defense counsel requested that the court voir dire the juror. The court questioned the juror at the bench. The juror stated that, two years earlier, he went to a police station for a Cub Scout event with his then seven-year-old son. They "went through the tour of the jail cells, things like that," and they had a discussion with "him and one other." The juror stated that the officer did not talk about anything regarding the case on trial, and he did not learn anything about the case outside of the courtroom.

The following colloquy then occurred:

THE COURT: And would the fact that the officer was there at that Boy Scout event affect your ability to be fair or impartial in this case?

THE JUROR: I don't believe so. I mean, it goes back to my point of my original statement, that I believe that they are quicker to gather facts, so -- and more aware of it. So I don't know.

THE COURT: Okay.

THE JUROR: I can't even -- you know, to be fair, it could influence --

[1] As the State notes, appellant did not move to strike the juror for cause, and he stated that the juror was "acceptable" when the jury was being seated. Appellant did not use a peremptory challenge to strike this juror.

THE COURT: How could it influence you?

THE JUROR: Just my, again, my belief of understanding that they take in the facts, that they --

THE COURT: You are not understanding my question.

THE JUROR: Oh, I'm sorry.

THE COURT: My question is, would the fact that you met the officer at the Boy Scout event affect your ability to judge this case fairly and impartially?

THE JUROR: Oh, fair question. No, I don't believe that would --

THE COURT: Okay. Not your impressions overall of police officer.

THE JUROR: Right, right.

THE COURT: But whatever encounter you had with the officer at that Boy Scout event, would that affect your ability to be fair or impartial?

THE JUROR: To the testimony from that officer --

THE COURT: Yes, judging this case.

THE JUROR: -- yes. Judging from that officer, I believe the information that I would --

THE COURT: Okay. You met him at the Boy Scout incident.

THE JUROR: Correct.

THE COURT: You think he is the one who testified.

THE JUROR: Correct.

THE COURT: Okay. Did you learn anything from him about this case --

THE JUROR: No.

THE COURT: -- at the Boy Scout event?

THE JUROR: No.

THE COURT: All right. Would the fact that you met him at the Boy Scout event and he talked to the Cub Scouts, okay --

THE JUROR: Right.

THE COURT: -- would that affect your ability to consider the evidence in this case and judge this case fairly and impartially?

THE JUROR: I could say no to that.

THE COURT: Okay. That's all I am trying to find out. Okay?

THE JUROR: Okay.

THE COURT: Because if you met him at the Boy Scout event and he told you something --

THE JUROR: Right. No.

THE COURT: That is what I am trying to find out, if there was anything you learned about the case, anything you found out about the case, anything you heard about the case that would affect your ability to judge this case.

THE JUROR: I don't think so. He gave information about his training background, how --

THE COURT: Okay.

THE JUROR: Yeah.

THE COURT: All right. I understand. I am just trying to find out if there was anything said at that point in time that would affect how you judge this case, if you learned anything about this case from what happened then.

THE JUROR: No. No.

THE COURT: All right. That's all I was trying to figure out.

THE JUROR: Fair enough. Okay.

At that point, defense counsel moved to replace Juror No. 3 with Alternate Juror No. 1. The following colloquy then ensued:

> [DEFENSE COUNSEL]: He said on two separate occasions that his -- I just lost the word -- that his decision-making process could be influenced as a result of the contact that he had. And then he reiterated again the fact that he would likely believe the police because of their capture of the facts. So he said on two separate occasions that he would be influenced.
>
> For that reason, we are asking that he be excused and be replaced by alternate number one.
>
> THE COURT: All right. The Court is going to deny your request. The . . . juror indicated that he believes he met the officer at a Boy Scout event where the officer described training and described whatever the police officers do. I really don't see how that has anything to do in this case with whether or not the Defendant killed the victim. You know, the police do what the police do. So the Court disagrees.
>
> [DEFENSE COUNSEL]: I think his answer was particular to this particular officer, not officers in general.
>
> THE COURT: Okay. The Court still overrules. All right?

B.

Preservation

The State argues that appellant's contention, that the court erred in replacing the juror with an alternate, is not preserved for this Court's review, for three reasons. First, with respect to appellant's contention that the court failed to adequately question the juror regarding his potential biases "during voir dire and in response to his note," the State asserts that appellant failed to ask the court to pose any questions to the juror, "nor did counsel alert the court that its questions 'focused on the wrong issue and missed the point,' as he states on appeal." Second, the State contends that appellant's claim below was that the

juror demonstrated bias toward Officer Cooke specifically, but on appeal, appellant is making a different argument, that the juror was "partial toward police officers as a group." Finally, the State argues that appellant "cannot now argue that juror number 3 would give greater weight to police officer testimony based on statements that he did not find objectionable [during jury selection], and after he affirmatively selected juror number 3 to sit on the jury."

We agree with the State that appellant's arguments with respect to the court's questioning of appellant and the juror's purported inclination to believe officers in general were not raised below. Accordingly, they are not preserved for this Court's review.

Rule 4-312(e)(2) states: "A party may challenge an individual qualified juror for cause. A challenge for cause shall be made and determined before the jury is sworn, or thereafter for good cause shown." In *Young v. State*, 90 Md. 579, 585 (1900), the Court of Appeals Stated:

> [C]hallenges for cause must be made before the juror is sworn; and that rule is without exception in all cases where the party objecting to the qualifications of the juror had knowledge at that time of the circumstances tending to disqualify, or could have known of them by the exercise of proper diligence in making inquiries or otherwise; and if, with such knowledge, express or implied, he fails to make his challenge before the juror is sworn, it must be deemed to have been waived, no matter how good his cause of challenge may be. To enable the court to entertain an objection to the qualifications of a juror after he has been impaneled and sworn, and the trial has actually been begun by the production of evidence, it at least must be proven that the party making the objection, at the proper time for tendering challenges, did not actually know, and might not have known, the particular circumstances upon which rests the alleged disqualification.

(citations omitted); *see also Larch v. State*, 201 Md. 52, 57 (1952) ("'It is a general rule that if a party knows a cause of challenge, and does not take it at the proper time, that is,

while the jury is being impaneled, he cannot avail himself of the defect afterwards.'") (quoting *Busey v. State*, 85 Md. 115, 118 (1897)).

During voir dire, the circuit court asked the venire whether any person would be impartial toward police officers. At the bench, the juror at issue indicated that he would be inclined to believe the testimony of police officers because they are observant and better able to gather facts quickly than non-police persons who, in similar circumstances, would generally be in "flight mode." The juror subsequently stated, however, that he would be able to discredit an officer's testimony if he did not believe it to be credible. Neither party moved to strike the juror for cause, nor did they use their peremptory strikes to exclude the juror without cause. And appellant did not object when, with this juror remaining, the court announced: "[T]hose will be the twelve jurors who will hear that case." *See Gilliam v. State*, 331 Md. 651, 691 (1993) (party may not complain on appeal about action proposed by trial court where he or she did not object at trial), *cert. denied*, 510 U.S. 1077 (1994). Accordingly, appellant's argument that the court should have replaced the juror because of his purported inclination to believe police officers in general is waived.

Additionally, appellant did not argue at any time below that the court's questioning of the juror was inadequate. Under these circumstances his claim that the circuit court failed to adequately inquire into the juror's potential biases, both with respect to the juror's purported bias toward officers in general and Officer Cooke in particular is not preserved for our review. *See King v. State*, 434 Md. 472, 479 (2013) ("[Maryland courts] will not consider ordinarily any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court . . .' Md. Rule 8-131(a).").

With respect to appellant's contention that the juror demonstrated partiality toward Officer Cooke in particular, however, appellant's motion to replace the juror was based on that ground. Accordingly, we shall address appellant's claim in that regard.

C.

Merits

Maryland Rule 4-312 states, in pertinent part, as follows: "At any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate." A court's ruling on a motion to remove a juror is within the discretion of the trial court and will be reversed only for an abuse of discretion. *State v. Cook*, 338 Md. 598, 612 (1995). *Accord Burdette v. Rockville Crane Rental, Inc.*, 130 Md. App. 193, 207, 745 A.2d 457, 464 (2000)

In *Langley v. State*, 281 Md. 337, 348 (1977), the Court of Appeals explained:

> A juror who states on voir dire that he would give more credit to the testimony of police officers than to other persons has prejudged an issue of credibility in the case. Regardless of his efforts to be impartial, a part of his method for resolving controverted issues will be to give greater weight to the version of the prosecution, largely because of the official status of the witness.

In *Morris v. State*, 153 Md. App. 480, 497 (2003), *cert. denied*, 380 Md. 618 (2004), we addressed whether the circuit court should have struck three jurors for cause because they indicated a "tentative bias against criminals or in favor of police credibility." Each juror, "however, ultimately stated that he or she would be able to render a fair and impartial verdict based on the evidence in the case." *Id.* We noted that,

> [w]ith respect to these three prospective jurors there were, to be sure, potential danger signs, but in the last analysis [the trial judge] had the discretion to go either way. There may have been a potential for bias in the air but there was not, as a matter of law, actual bias on the ground.

Id. at 499. We held that the circuit court did not abuse its discretion in declining to strike the jurors for cause. *Id.* at 501.

Here, when the circuit court questioned the juror about any prior interaction he had with Officer Cooke, the juror stated that he had met him once before at a Cub Scout field trip to a local police station, but he did not obtain any information about the case being tried. When asked whether his interaction with Officer Cooke would "affect [his] ability to consider the evidence in this case and judge this case fairly and impartially," the juror responded: "I could say no to that." Under these circumstances, there was a reasonable basis for the court to conclude that the juror's prior contact with Officer Cooke would not affect the juror's ability to judge the case fairly and impartially, and the court did not abuse its discretion in declining to replace the juror.

II.

Leading Questions on Direct Examination

Appellant next argues that the circuit court abused its discretion when it permitted the prosecutor to ask Cairo a leading question on direct examination "regarding a threat she previously stated to a detective had been made by her brother." He acknowledges that "allowance of leading questions is generally viewed as a matter within the trial court's discretion," but he asserts that an appellate court may reverse a conviction where the leading question was not justified. Appellant argues that the leading question posed by the

prosecutor here did not fall under any of the "exceptions to the general rule forbidding leading questions on direct examination."

The State disagrees. It contends that, "[a]mong the exceptions to the general prohibition against leading questions during direct examination are their use to refresh a witness's recollection." It asserts that refreshing the recollection of its witness "is precisely what the prosecutor was doing in this case." We agree.

A.

Proceedings Below

During the prosecutor's direct examination of Cairo, she testified that, approximately two weeks before her father was killed, she talked to her brother in her father's home. The following ensued:

> [PROSECUTOR:] Tell us what your brother said to you about your dad.
>
> [CAIRO]: He was describing how he hates him and he doesn't understand why he does what he does to us. But I wasn't sure what he meant by that. And at the end of the conversation he said he would handle his business. But I didn't ask any questions. He just walked out at that point.
>
> [PROSECUTOR:] Do you recall your brother saying anything else at that point that you perceived to be a threat?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> * * *
>
> [PROSECUTOR:] At any time did you hear anyone threaten your father?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

[CAIRO:] No.

* * *

[PROSECUTOR:] Cairo, do you recall having a conversation with Detective Davis of the Anne Arundel County Police?

[CAIRO:] Yes.

[PROSECUTOR:] And do you recall saying to Detective Davis --

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: I am sorry, Detective Brechtel [phonetic] --

THE COURT: Overruled.

[PROSECUTOR:] Do you recall saying to Detective Brechtel of the Anne Arundel County Police that the Defendant had said in a conversation regarding your father, "I hate him so much I will kill him"?

[CAIRO]: Yes.

[PROSECUTOR:] And Cairo, was that in that same conversation that you just described for us at the kitchen table?

[CAIRO:] Yes.

The court then overruled defense counsel's objection that the prosecutor's questioning was improper based on the use of a leading question.

B.

Merits

Maryland Rule 5-611(c) addresses leading questions and states, in pertinent part: "The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as

may be necessary to develop the witness's testimony." As the State notes, the rule permits leading questions to "develop the witness's testimony," which includes situations where "'an omission in [] testimony is evidently caused by want of recollection, which a suggestion may assist.'" *Lee v. Tinges*, 7 Md. 215, 234 (1854) (citations omitted). *Accord Roberson v. United States*, 249 F.2d 737, 742 (5th Cir. 1957) ("The trial court may in its discretion, permit leading questions to refresh the recollection of a witness. The manner of exercise of this discretion will not be ground for reversal unless the discretion be abused."), *cert. denied*, 356 U.S. 919 (1958); 2 WHARTON'S CRIMINAL EVIDENCE § 8:15 (15th ed.) ("Leading questions on direct examination are permissible, however, when the witness is deficient in memory.").

Here, the prosecutor attempted to elicit from Cairo testimony regarding a threatening statement that appellant made during a conversation they had at their father's kitchen table, which Cairo had conveyed to a police officer. Cairo initially stated that she did not remember anyone threatening their father during that conversation. The prosecutor then used her prior statement to the police, in the form of a leading question, to refresh her recollection, at which time Cairo confirmed that she remembered telling police that appellant made the threatening statement on that occasion. Under these circumstances, it was not an abuse of discretion for the trial court to permit the leading question to refresh Cairo's recollection.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.