UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0193

September Term, 2015

JAMES ELIAS BONNETT

VS.

STATE OF MARYLAND

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

JJ.

Opinion by Wright, J.

Filed: June 10, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

In 1972, following a jury trial in the Circuit Court for Prince George's County, James Bonnett, appellant, was convicted of first-degree murder and of the unlawful use of a handgun in the commission of a crime. He received a life sentence plus ten years for the handgun offense.

In February 2014, as a result of *Unger v. State*, 427 Md. 383 (2012),[1] the circuit court vacated Bonnett's conviction and granted him a new trial. On September 4, 2014, the court heard pre-trial motions before Bonnett's new trial. During this hearing, counsel from both sides agreed that there would be no testimony or evidence presented in relation to Bonnett's 1972 trial, the vacated convictions, or his 42-year period of incarceration. The State presented its case-in-chief before the jury on September 9, 10, and 11, 2014. At the end of the State's case, Bonnett moved for a dismissal and/or mistrial, claiming

[1] *Unger v. State* examined Article 23 of the Maryland Declaration of Rights, which reads: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." In 1961, the Court of Appeals promulgated Maryland Rule 756b to implement Article 23, requiring judges "in every case in which instructions are given to the jury, [to] instruct the jury that they are the judges of the law and that the court's instructions are advisory only." A series of cases, *Stevenson v. State,* 289 Md. 167 (1980), *Montgomery v. State,* 292 Md. 84 (1981), and *State v. Adams,* 406 Md. 240 (2008), upheld the "advisory only" jury instruction prompted by Article 23 of the Maryland Declaration of Rights. *State v. Waine*, 444 Md. 692, 695 (2015).

The *Unger* Court overruled "[t]hose portions of the Court's *Stevenson, Montgomery,* and *Adams* opinions, holding that the interpretation of Article 23 in *Stevenson* and *Montgomery* was not a new State constitutional standard." *Unger*, 427 Md. at 417. The Court made those holdings fully retroactive, and "effectively opened the door to postconviction relief for persons tried during the era of the advisory only jury instruction—an opportunity that had been foreclosed by *Stevenson, Montgomery,* and *Adams*." *Waine*, 444 Md. at 696 (citing *Unger*, 427 Md. at 416).

that the State failed to make available certain physical evidence from the 1972 criminal investigation. Although the State claimed that this evidence did not exist, Bonnett testified to having personal knowledge of its existence. Bonnett's motion was denied. On September 11, 2014, Bonnett took the stand in his own defense; no other witnesses were called on behalf of the defense.

The jury returned guilty verdicts on both charges, and Bonnett was sentenced to life imprisonment on the murder charge and ten years to be served consecutively for the handgun charge. Bonnett filed a timely appeal to this Court in March 2015, presenting the following questions for our review:

> 1. Was Bonnett's sixth amendment right to effectively cross-examine a critical State witness improperly infringed upon when the Circuit Court refused to permit the witness to be questioned about Bonnett's first trial in 1972?
>
> 2. Did the Circuit Court abuse its discretion in failing to grant a mistrial as a result of the State's failure to produce exculpatory physical evidence from the 1972 investigation at the new trial in 2014?
>
> 3. Did the Circuit Court abuse its discretion in failing to allow testimony about Bonnett's 42-years of incarceration and in turn err in denying a motion for mistrial based on the same grounds?

For the reasons discussed below, we answer Bonnett's questions in the negative and uphold the judgment of the circuit court.

Facts

Dianna Simpson and Bonnett were married in the summer of 1971, and for a short period of time lived together in Ms. Simpson's parents' house. The young couple had a

tumultuous relationship. About three or four months before Ms. Simpson's death, Bonnett moved out of the house.

On the morning of June 20, 1972, the couple attended a hearing where Ms. Simpson requested a separation and explained she no longer wished to continue with the marriage. The hearing judge ordered the couple to seek counseling and also ordered that Bonnett stay away from Ms. Simpson unless she consented to contact. Later that day, Bonnett called Ms. Simpson to tell her that he wanted to meet with her at her parents' house the next day because "no court was going to keep her away from [him]." That same evening, Bonnett purchased a double barrel sawed-off shotgun and one shell.

Bonnett arrived at Ms. Simpson's parents' house the next morning, with the sawed-off shotgun hidden in his pants. Bonnett would later testify that he brought the gun out of fear of his father-in-law and brother-in-law. Ms. Simpson's parents and her brother were not at the house that morning, but her younger sisters, Emmojean and Darlene, were there along with Ms. Simpson's daughter, Lorena, and two of Darlene's friends.

Emmojean, who was 17 years old at the time, was with Lorena in an adjoining bedroom, separated by a bamboo curtain, from Bonnett and Ms. Simpson. Emmojean testified that she overheard some of the conversation but did not step into the other bedroom for about ten minutes. Bonnett called Emmojean to "come here," but Emmojean ignored his command. She testified that through the bamboo curtain, she saw Bonnett pointing, what she believed at the time, an umbrella. Emmojean went into the

room, where the couple was talking, after she noticed a change in Ms. Simpson's tone. At this time, she noticed that Bonnett was "holding a double barreled sawed off shotgun," and he was pointing it at Ms. Simpson. Emmojean testified that Bonnett then grabbed Ms. Simpson by her robe and shot her in the stomach. According to Bonnett, after Emmojean came into the bedroom, there was some "pushing and shoving" and, as a result, the gun "went off" killing Ms. Simpson. After the shooting, Bonnett ran from the home. Bonnett testified that, as he recalled, there was no blood on his clothes. These clothes were not offered into evidence at the 2014 trial.

On the morning of the shooting, Ms. Simpson's youngest sister, Darlene, who was 12 years old at the time, and two friends were asleep in the den, when Darlene woke up to the noise of a "firecracker" and the smell of something burning. Darlene went back to sleep and was awakened minutes later by Emmojean, who told her, "Jimmy shot [Ms. Simpson]." At the 2014 trial, Darlene testified that she spoke to Bonnett by telephone approximately 3 to 4 times in the week prior to the date of the shooting. Darlene testified that Bonnett:

> . . . would ask me if my sister was home. A lot of times she wouldn't be. He would say don't lie to me, is she there? I would say no. I would get a little frustrated and I might hang up. He would call back you know. He would say things like you don't want your sister to die, do you? If I see her or she comes out I'm going to kill her.

During one of these calls, Bonnett told Darlene that he demanded back the "pre-engagement" ring he had given Ms. Simpson. Darlene testified that she was able to return the ring to Bonnett, but admitted that she never mentioned the incident to the

police during the 1972 investigation nor provide testimony at the 1972 trial about the ring.

The mother of Darlene's two friends who spent the night at the Simpsons' residence and were present on the morning of the incident, Ms. Rose Lindsay, was a neighbor of the Simpsons. At the 2014 trial, Ms. Lindsay testified that she was at Big Ben's market about a week before June 21, 1972, and saw Bonnett speaking with an unidentified gentleman to whom Bonnett said, "[I]f I can't have her, nobody going to have her and I'll kill her." On cross-examination, Ms. Lindsay testified that she knew about Ms. Simpson's death and the shooting but she never made a statement because the police never asked her any questions, and "nobody asked [her] any questions" until the State's Attorney called her about a week before the 2014 trial.

At the 2014 trial, Bonnett's attorney expressed to the circuit court:

> I think by calling this witness [Ms. Lindsay] and asking these questions, the State has opened the door to say that this case went to trial once before. Prior to the last trial date this witness never came forward and said anything about what she is now testifying to. That would have been the time to do it. She was never called to testify at that trial. So I can't even impeach her on that because there is no testimony otherwise.

Bonnett's attorney then requested that he be allowed to make reference to the 1972 trial before the jury, to which the circuit court repeatedly responded, "Absolutely not."

Officer Laney Hester, a former Prince George's County police officer who worked as an evidence technician, testified about the crime scene report he created during the 1972 investigation of the shooting. The report indicated that photographs were taken of Ms. Simpson, the point of entry, and the path into the bedroom where the assault took

place. The report also noted that shotgun pellets were found near Ms. Simpson's body and removed from the scene. Officer Hester testified that the medical examiner had taken a paraffin cast of Ms. Simpson's right hand for testing of gun powder residue. None of this evidence was presented in the 2014 trial. Other evidence that was not available to the defense during the 2014 trial included the clothes Bonnett was wearing the day of the shooting. Furthermore, because the shotgun Bonnett used on June 21, 1972, was never found, the State used a replica of the gun during the 2014 trial. Emmojean testified that the replica was substantially similar to the gun.

Discussion

I. The circuit court did not abuse its discretion when it denied Bonnett's request to make references to the 1972 trial.

Prior to the 2014 trial, both Bonnett and the State entered into an agreement by stipulation that there would be no reference to Bonnett's 1972 trial on the same charges or that he had been incarcerated on the charges since 1972. To the extent that witnesses were impeached with their testimony from the 1972 trial, the trial was referred to as a "prior proceeding." On the fourth day of trial, however, Bonnett communicated to the circuit court that he wished to tell the jury that he had been incarcerated on the charges for the previous 42 years, contrary to his counsel's agreement.

On appeal, Bonnett now claims that he suffered prejudice because the jury would wonder what he has been doing between the shooting in 1972 and the 2014 trial, while the State's witnesses produced testimony as to their professions during that time. Bonnett argued that he should be permitted to waive any prejudicial effect the introduction of

incarceration or the previous trial would have on him. At the 2014 trial, his counsel argued that the "blanket prohibition" on Bonnett's incarceration means:

> I can't ask my client what accomplishments have you had in prison in the last 42 years. That door has been closed. The absence of that testimony might detract from him. If we explain to the jury that he has been locked up for 42 years that would account for the fact why he has not worked at jobs for 20 years and is retired. For that reason it is actually potentially relevant. As a lawyer, I would say that would be a basis for the court to reconsider the court's ruling.

The circuit court explained that what Bonnett has been doing since the crime is "irrelevant" as to the issue before the jury, which is what happened on June 21, 1972. The court reiterated that "there will be no testimony regarding a prior conviction, nor the fact that he has been incarcerated for the last 42 years."

i. Withdrawing a stipulation

Parties may make certain stipulations or agreements before trial to save the court's time, to save the parties' expenses, and "for other good reasons." *Bloom v. Graff*, 191 Md. 733, 736 (1949). When a stipulation is made, the parties are bound by the agreement. *Id.* "A stipulation has all the binding force of a contract." *C & K Lord, Inc. v. Carter*, 74 Md. App. 68, 94 (1987). Stipulations made at trial, like contracts, are based on mutual assent and the intent of the parties. *State v. Broberg*, 342 Md. 544, 558 (1996) (citing *Burke v. Burke*, 204 Md. 637, 645 (1954)). Accordingly, a stipulation "will not be set aside absent a showing of good cause such as collusion, fraud, mutual mistake or other grounds that would justify the setting aside of a contract." *C & K Lord, Inc.*, 74 Md. App. at 94; *see also Peddicord v. Franklin*, 270 Md. 164, 175 (1973) (reasoning that

"relief from the effect of a stipulation is given in the trial court upon a proper application for such relief and the showing of good cause for granting such an application . . . . The 'good cause' for granting relief from a stipulation is frequently grounds which would justify the setting aside of a contract such as mutual mistake, fraud, invalidity and the like; but, as we have noted, a court may not be deprived of its ability to give equitable relief by stipulation").

While we have found no Maryland case law specifically addressing the applicable standard of review for a circuit court's mid-trial denial of a party's request to withdraw a pre-trial stipulation, we find guidance in *Brooks v. United States*, 993 A.2d 1090 (D.C. 2010), a case from the appellate court of our sister jurisdiction, the District of Columbia Court of Appeals. The *Brooks* Court explained that the denial of mid-trial requests to withdraw stipulations should be reviewed like mid-trial requests to withdraw guilty pleas or withdraw rights to a jury trial, which conforms with Maryland law; we review such decisions under an abuse of discretion standard. *Brooks*, 993 A.2d at 1093; *see also Dawson v. State*, 172 Md. App. 633, 639 (2007) ("Ordinarily, the abuse of discretion standard is applicable to appellate review of the denial of a Motion to Vacate Guilty Plea[.]").

A party that has entered into a stipulation "may waive the provisions of a stipulation for his benefit by taking a step or position in conflict with the terms of the stipulation." *Peddicord*, 270 Md. at 176 (citing *Hughes v. Jackson*, 12 Md. 450, 462-63 (1858)). A circuit court may find that a party "waived any benefits under the stipulation

or, indeed, that the stipulation had been abandoned by the acts of both parties[.]" *Id.* at 176-77. Nevertheless, "trial courts do have discretion to relieve a party from a stipulation where such action is intended to prevent manifest injustice." *Brooks*, 993 A.2d at 1095 (citing *Byrd v. United States,* 485 A.2d 947, 950 (D.C. 1984). As stated by the District of Columbia Court of Appeals, "[w]hen deciding whether to grant a request to withdraw a stipulation or waiver concerning the testimony of a government witness, a judge may take into account various factors, including the stage of the proceedings, the importance of the testimony, inconvenience to the court, and prejudice to the government." *Id.*

We agree with Bonnett with the concept that he had the right to waive an agreement made for his benefit, just like he would be able to waive any right, constitutional or otherwise. *See Logan v. State*, 289 Md. 460, 470-71 (1981) (noting that "it would be a strange holding indeed were we to conclude that though the defendant can knowingly waive a constitutional right, he cannot knowingly waive a court rule . . . adopted to bolster and implement that constitutional right").

We are, however, not dealing with a clean slate, with no prior agreement or stipulation. What we are addressing is Bonnett's right to waive any "prejudicial effect that the introduction of [the 1972 trial] evidence would have by allowing him to withdraw his stipulation on the fourth day of trial." It is clear from the record that at this time, the State had already presented its evidence, witnesses, and argument within the confines of the stipulation. Waiving the stipulation that was initially entered into for Bonnett's benefit *after* the State had presented the majority of its evidence would greatly prejudice

the State. *See Brooks*, 993 A.2d at 1095. If the circuit court were to grant Bonnett's request, the trial would have to be reset to the beginning and be entirely retried. This would have been virtually impossible with the same jury.[2]

Bonnett does not attempt to set aside the stipulation because of mutual mistake, fraud, or invalidity but to enjoy some perceived post stipulation benefit. The stipulation between Bonnett and the State being otherwise binding, the circuit court had to weigh, reflectively, "the stage of the proceedings, the importance of the testimony, inconvenience to the court, and prejudice to the government," *Brooks*, 993 A.2d at 1095, and was within its discretion to deny Bonnett's request to set it aside. *Davis v. State*, 344 Md. 331, 339 (1996) (Judges are presumed to know and properly have applied the law.) The factors as outlined in *Brooks* weighed heavy in favor of denying Bonnett's request to set aside the stipulation.

ii. Failing to proffer evidence

The State points out that Bonnett failed to preserve this issue for our review because he did not proffer a record of his accomplishments. "A party must clearly proffer his theory to the trial court in order to challenge on appeal the sustaining of objections to those questions." *Bruce v. State*, 328 Md. 594, 626 (1992) (citation omitted). In order to preserve the issue for appeal, "[a] proffer as to the substance and importance of the expected answers was required." *Conyers v. State*, 354 Md. 132, 164 (1999).

[2] It should be noted that Bonnett did not make a request for a mistrial.

Because he wished to waive the stipulation for the purpose of presenting to the jury his accomplishments while in prison, Bonnett must therefore have established before the circuit court what was excluded. Specifically, he should have produced the achievements he wished to introduce.

iii. Withdrawing stipulation during Ms. Lindsay's cross-examination

Bonnett's failed attempt to waive his stipulation mid-trial because of prejudice to the State also forecloses his request to specifically discuss the 1972 trial when cross-examining Ms. Lindsay. Not only was he barred from directly questioning her about the 1972 trial for the reasons outlined above, but his justifications for wishing to do so also fall short. Ms. Lindsay's testimony did not "open the door," as Bonnett maintains. The "opened door" doctrine allows for previously irrelevant competent evidence to be made relevant, and thus admissible, "through the opponent's admission of other evidence on the same issue." *Grier v. State*, 351 Md. 241, 260 (1998); *see also Mitchell v. State*, 408 Md. 368, 388 (2009). It is a way of saying, "[m]y opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue." *Clark v. State*, 332 Md. 77, 85 (1993).

Here, the State putting Ms. Lindsay on the stand did not require a reference to the prior trial. Bonnett's concerns about Ms. Lindsay's testimony, specifically why Ms. Lindsay did not approach law enforcement sooner with the information she had on Bonnett, were considered during Bonnett's opportunity to cross-examine Ms. Lindsay. His counsel asked Ms. Lindsay whether she had reported hearing the statements allegedly

made by Bonnett in 1972, to which she admitted that she never told the police about what she heard because "the police didn't ask me any questions. Nobody asked me any questions . . . . . I knew about the shooting." Ms. Lindsay explained that the first time she was contacted by an official authority was the State's Attorney's office a week before the trial. This testimony did not "open the door" for a discussion of the 1972 trial and it did not present a new issue in the case that required inadmissible evidence to balance justice for Bonnett. Bonnett had the opportunity to cross-examine Ms. Lindsay on why she never came forward. Accordingly, the circuit court did not violate Bonnett's Sixth Amendment right to effectively cross-examine a State's witness.

II. Bonnett was not denied a fair trial because of alleged missing physical evidence.

On the morning of the fourth day of trial, Bonnett told the circuit court that he had personal knowledge of the existence physical evidence from the 1972 investigation that was not provided during discovery:

> THE DEFENDANT: Thank you, Your Honor, for the court's indulgence. Through a course of time in preparation of my post-conviction procedure and hearing there was a search for transcripts and old records and things to clarify certain positions that we had taken, my attorney from the University of Maryland law school. I began a correspondence with the Maryland Archives and research. There was no transcript of the trial. All transcripts are now available or given to the court and given to the attorneys as the record has shown.
>
> Throughout the course of time – now my position before the court right now is this. The State has completely removed this evidence, and I can make that accusation, removed this evidence in preparation for this trial. The evidence has all disappeared.
>
> The last valuable communication that I had with people that were completely disturbed that the State would come forth and say there are no

photographs, no clothing, there is nothing. Then label the case a cold case and come in and try to clarify that with the court . . . .

THE COURT: Let me interrupt you. I just wanted to hear the issue with the evidence. [Defense Counsel], you are counsel, I will hear from you.

[DEFENSE COUNSEL]: This is what my client believes that while he was incarcerated he was provided with information that would suggest these items existed. Maybe I should ask my client, did an attorney tell you or did someone tell you that these items existed? How did you learn that these – how did you come to the belief that these items existed? If you could be more specific maybe.

THE DEFENDANT: I consider those issues confidential right now during the course of this trial, confidential.

THE COURT: Okay.

THE DEFENDANT: I will make them available to the court. I will do that . . . .

* * *

THE COURT: Let's deal with the motion to dismiss. Anything further on that?

[DEFENSE COUNSEL]: The motion to dismiss would be based on my client's contention that the State did not furnish physical evidence that was required to be produced. In fact, he is right, he is right in that the State is required under Maryland rules of procedure, discovery rules, to make available all the evidence. I did in fact at one of our status hearings or conference, ask permission, ask the State to see if before the trial. *At that time they indicated they did not have any.*

* * *

The lynchpin is does it really exist or not. It is the belief of my client that it does. It is the belief of the State, they have represented clearly it doesn't. They have called a witness to that effect. *It is a question of fact that we can't resolve at this time.*

THE COURT: Thank you. *I can.* The motion is denied.

(Emphasis added).

Bonnett now asserts a violation under *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* provides that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[3] 373 U.S. at 87. Bonnett maintains that because he "testified that he had personal knowledge" as to the existence of potentially exculpatory physical evidence, the circuit court was required to "ma[ke] an effort to determine whether the State had improperly withheld this exculpatory physical evidence." However, Bonnett's allegations are not supported by the record.

At the conclusion of the motion to dismiss, the circuit court resolved the factual dispute as to whether any evidence from the 1972 investigation existed in favor of the State. We will not disturb any of the court's findings of fact unless such findings are clearly erroneous. *Goff v. State*, 387 Md. 327, 338 (2005). If any competent evidence exists to support the circuit court's factual findings, "those findings cannot be held to be clearly erroneous. *Id.* (citation omitted); *see also Brooks v. State*, 148 Md. App. 374, 399-400 (2002) (explaining that findings of fact are not clearly erroneous where there is "some evidentiary basis that legally permits [the court] to consider the existence of a fact").

[3] Under *Brady*, a defendant must show that the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; that the evidence was suppressed by the State, either willfully or inadvertently; and prejudice to the accused must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Here, the only evidence presented supports the State's position. The State provided the testimony of Detective Bernard Nelson from the Prince George's County Police Department's Cold Case Unit. Detective Nelson testified that he was asked to "locate anything that [the department] may have in reference" to the case before the 2014 trial. In response to the request, Detective Nelson's search included a hand-search of the property warehouse, a search of the warehouse databases, and a hand-search of boxes and microfilmed records.[4] No physical evidence from the case was found. This included no photographs of Ms. Simpson's home, no shotgun pellets, no shotgun wadding, or any clothing from anyone. Detective Nelson explained that the Prince George's County Police Department's policy prior to 2006 required that the department retain evidence in a murder case for a period of 25 years.[5]

Bonnett challenges the State's witness with firsthand knowledge of the absence of the evidence with a bald allegation that unidentified "people" were "completely disturbed" that the State claimed the physical evidence did not exist. He supports his assertion that there must be physical evidence because, at one time, the transcripts of the 1972 trial were missing and had since been produced. When asked by his own counsel to

[4] Detective Nelson testified that he was able to discover some records on microfilm during the search, including an autopsy report and pictures, that was copied and forwarded to the State's Attorney's Office. Bonnett, however, is not alleging that he did not receive these particular records.

[5] Detective Nelson testified that the current policy, in place since 2006, requires the Prince George's County Police Department to retain physical evidence in a murder case for a period of 75 years.

"be more specific" as to how he came to know of the missing evidence, Bonnett asserted that he "consider[ed] those issues confidential" and never disclosed to the court the source of his information.

"[T]his [C]ourt cannot assume a bald unsupported allegation in the petition to be true." *McCoy v. Warden, Md. Penitentiary*, 1 Md. App. 108, 115 (1967) (citing *Hornes v. Warden*, 235 Md. 673 (1964); *Brown v. Warden*, 221 Md. 582 (1959)). Unsupported, bald assertions are not a sufficient ground for post conviction relief. *Id.* Bald allegations do not make Bonnett's statements fact. There is nothing in the record suggesting that such evidence exists or that the State knew or should have known of the existence of such evidence. In fact, Detective Nelson's testimony indicates that such evidence no longer exists, and even if it does, it cannot be located. Bonnett's general conclusory allegation that the State violated *Brady* and, thereby, his due process rights, does not provide him with grounds for relief. *See, e.g.*, *Husk v. Warden, Md. Penitentiary*, 240 Md. 353, 356 (1965) ("A general conclusional allegation of a denial of constitutional rights without supporting facts is not a ground for relief . . . .") (Citing Md. Code (2001, 2008 Repl. Vol.), Criminal Procedure § 7-102). The circuit court, therefore, did not err in denying Bonnett's motion to dismiss.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.