UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1901

September Term, 2013

JOEL MANUEL MORENO

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,
JJ.

Opinion by Krauser, C.J.

Filed: June 8, 2016

Convicted by a jury, in the Circuit Court for Prince George's County, of robbery, conspiracy to commit robbery, second degree assault, and theft of property with a value of between $1,000 and $10,000,[1] Joel Manuel Moreno, appellant, contends that the trial court erred "in permitting the lead investigator, Detective Scott Ratty, to testify that prior to the incident at issue he had 'spoken to [appellant] numerous times.'" That evidence, he maintains, should have been excluded under Maryland Rule 5-404(b), which prohibits the admission of "other crimes" evidence. But, as the State notes, Moreno did not preserve this issue for appellate review. Moreover, we note that even if he had preserved it, his contention is without merit.

TRIAL BACKGROUND

At trial, the State presented evidence that, on July 1, 2012, eighteen-year-old Joel Moreno and two accomplices robbed and assaulted José Angel Rios. At 4 a.m. on the morning of that day, as he was heading home from work, using public transportation, Rios, a chef, stopped at a convenience store to buy some food. As he was walking home from that store, three young men on bicycles, whom he had seen at the convenience store both that night and on previous occasions, began to follow him.

[1]For the robbery conviction, appellant was sentenced to fifteen years, the first ten without the possibility of parole and the last five suspended. For the conspiracy conviction, appellant was sentenced to a concurrent term of fifteen years, with five years suspended. The court merged the remaining convictions for sentencing purposes and imposed five years of probation.

After Rios crossed the street, the three men surrounded him. Appellant stood directly in front of Rios and commanded him in Spanish, "to give him whatever . . ." he had. When Rios replied, in Spanish, that he did not have anything, appellant revealed a pistol tucked into the waist band of his pants and "said that he was going to kill" Rios. Before Rios could respond further, he was struck in the face by one appellant's accomplices. The blow knocked Rios to the ground and broke his jaw and many of his teeth.

When he regained consciousness, Rios found he was missing his cell phone, his wallet containing $360, three gold bracelets, and three gold neck chains. Subsequently, he identified appellant, as the robber, who had "intimidated" him in Spanish, from a photograph and after that, at trial. Moreover, the owner of the convenience store identified appellant as one of the individuals who was in the store that night.

But, of particular relevance to the issue before us, Hyattsville City Police Detective Scott Ratty, the lead detective on the Rios robbery, testified, at trial, that he had spoken with appellant "numerous times," that he recognized appellant as one of three men in the convenience store video, and that appellant spoke Spanish. The detective subsequently included appellant's photograph in an array shown to Mr. Rios, who identified Moreno as the Spanish-speaking robber.

When appellant was later arrested, pursuant to a warrant, he was wearing a gold necklace and two gold bracelets, which Rios subsequently identified as items that had been

stolen from him during the robbery in question. Moreover, in a videotaped interview with Detective Ratty, appellant admitted being present at the convenience store, the night of the robbery, but denied participating in that robbery. When asked about the stolen jewelry in his possession, appellant stated that, if the items he was wearing when arrested were identified by the victim, then he would "take the fall for it."

DISCUSSION

Appellant contends that the trial court erred in permitting Detective Scott Ratty to testify that he had "spoken with" appellant "numerous times" before the robbery. That testimony was elicited during the following exchange:

> [Prosecutor]: Okay. And were you familiar with the defendant prior to July 1, 2012?
>
> [Det. Ratty]: I was.
>
> **[Prosecutor]: Had you ever spoken to him before?**
>
> **[Defense Counsel]: Objection.**
>
> **The Court: Basis?**
>
> **[Defense Counsel]: Relevance.**
>
> **The Court: Overruled.**
>
> [Det. Ratty]: I have, numerous times.

(Emphasis added.)

Appellant claims that Detective Ratty's testimony that he had "spoken with" him "numerous times" was "irrelevant, highly inflammatory, and inadmissible other crimes evidence" that should have been excluded under Maryland Rule 5-404(b), which precludes the admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show conformity therewith." In support of that claim, appellant cites out-of-state cases ruling that it is error to admit testimony about prior police interactions with the accused, because such evidence invites jurors to infer that the accused had committed other bad acts or crimes.

The State responds that appellant failed to preserve this issue because he objected only when the prosecutor asked whether the detective had spoken to appellant and only on relevance grounds, without specifying an "other crimes" basis for that objection. The State further asserts that the inquiry was, in any event, "relevant to establish the basis by which Detective Ratty was able to identify Moreno in the video surveillance recording and to provide a foundation for Detective Ratty's testimony that Moreno spoke Spanish, as did one of the robbers."

As the Court of Appeals noted, in *Klauenberg v. State,* "It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State,* 355 Md. 528,541 (1999). And, according to the State, "[t]he facts in

Klauenberg are dispositive of the preservation issue in this case" because "the Court of Appeals specifically held [there] that an objection to testimony limited to relevance did not preserve an appellate argument that the testimony was improper 'bad acts' evidence." In so holding, moreover, the *Klauenberg* Court, as the State point out, cited *Jeffries v. State*, 113 Md. App. 322, 341 (1997), for that precise proposition.

In our view, *Klauenberg* is distinguishable from the instant case. In *Klauenberg*, defense counsel clarified his initial relevance objection and offered an argument expressly demonstrating that he was not asserting a violation of Rule 5-404(b). *See id.* at 540-41. Here, in contrast, defense counsel's relevance objection was made and overruled without any discussion.

We do, however, find *Jeffries*, 113 Md. App. at 341-42, the case relied upon by the *Klauenberg* court, relevant and particularly instructive here. In that case, the issue was whether the trial court erred in admitting testimony by a treating emergency room physician that the accused had previously suffered a gunshot wound. As in this case, defense counsel lodged a relevance objection, but the issue raised on appeal was whether the testimony should have been excluded as unfairly prejudicial "bad acts" evidence under Rule 5-404(b). *Id.* at 341.

In explaining why that Rule 5-404(b) challenge was not preserved for appellate review, this Court stated:

> An objection to the admission of evidence on the general ground of irrelevance is by no means the same thing as an objection to evidence on the ground of unfair prejudice. Indeed, the thrust of an unfair prejudice argument is that the prejudicial effect outweighs the acknowledged relevance. If the evidence were truly totally irrelevant, it would have little, if any, capacity to prejudice. At trial, the appellant objected on the ground of irrelevance but that objection has not been pursued on appeal. On appeal, by contrast, the appellant's argument is exclusively one of prejudice of the "other crimes" evidence variety, but that objection was not preserved for appellate review. The argument that was preserved is not being pursued; the argument that is being pursued was not preserved.
>
> Even if the merits of the prejudice claim were before us, however, we fail to follow the appellant's argument either as a matter of law or as a matter of logic. He cites us no case, and we are aware of none, that holds that a gunshot wound or other scar is evidence of "other crimes." See, moreover, *Oken v. State*, 327 Md. 628, 665-70 (1992). The gunshot wound in the appellant's arm, *per se,* no more implies that he was previously involved in crime than it implies that he is a decorated and valorous hero of the Persian Gulf. Indeed, were [the shooting victim] to be called as a witness in some future case, the eight gunshot scars she would then be carrying would by no means imply that she had a criminal record.

Id. at 342.

Here, as in *Jeffries*, the relevance "argument that was preserved is not being pursued" and the Rule 5-404(b) "argument that is being pursued was not preserved," *id.,* as defense counsel did not object when the prosecutor asked Detective Ratty whether he "was familiar with" appellant, or when the detective answered that question in the affirmative. In fact, it was not until the prosecutor asked whether the detective had "spoken to" appellant that defense counsel objected on relevance grounds. After the trial court overruled that objection

without comment, Detective Ratty answered that he had spoken, with appellant, "numerous times." Defense counsel did not object to that answer or move to strike it.

Appellant now argues that Detective Ratty's testimony that he had "spoken with" appellant "numerous times" unfairly prejudicial to appellant, as it suggested that appellant had "several prior criminal encounters" with the police. But, the only issue preserved by defense counsel is whether the trial court erred in overruling the relevance objection to the prosecutor's question about whether the detective had "spoken to" appellant. Counsel did not separately object to or move to strike the witness's answer that he had done so "numerous times," much less complain that such testimony constituted "other crimes" evidence. When an answer to a question includes objectionable evidence, counsel must object or promptly move to strike the response in order to preserve the admission of that evidence as an issue on appeal. *See Bruce v. State*, 328 Md. 594, 628-29 (1992). Having failed to do so, appellant did not preserve this issue for our review. In fact, as in *Jeffries*, the only issue preserved for appellate review is one that is not being pursued on appeal and that is whether the trial court erred in overruling the relevance objection to the prosecutor's question asking if the witness had "spoken to" the accused.

We nonetheless shall briefly address Moreno's unpreserved claim. We begin by noting that Moreno cites no Maryland appellate decision holding that evidence of conversations between the accused and a police officer constitutes inadmissible "bad acts"

or "other crimes." Instead, he relies on decisions of other state appellate courts, which, he claims stand for the proposition that the "references to a defendant's prior contacts with police" should have been excluded as unduly prejudicial "bad acts" or "other crimes" evidence "because they suggest prior trouble with law enforcement." *See Minnesota v. Strommen*, 648 N.W.2d 681, 687 (Minn. 2002); *New Jersey v. Tilghman*, 786 A.2d 128, 133 (NJ. Super. Ct. App. Div. 2001); *Willis v. Florida*, 669 So. 2d 1090, 1093 (Fla. Dist. Ct. App. 1996); *Hardie v. Florida*, 513 So. 2d 791, 793-94 (Fla. Dist. Ct. App. 1987); *Illinois v. Bryant*, 499 N.E.2d 413, 421 (Ill. 1986) (observing that officer's testimony that he called defendant "by name" was "better avoided" because it implied a criminal history).

We are not persuaded that these decisions would warrant reversal here, as none of the cited cases involved testimony that an individual police officer was familiar with the accused because he had "spoken" with him on previous occasions, they are factually distinguishable and thus irrelevant.[2] In fact, the challenged testimony in *Strommen*, *Willis*, and *Hardie*,

[2] *Illinois v. Bryant,* 113 Ill. 2d 497, 514 (Ill. 1986), was also cited by Moreno. In that case, the Illinois Supreme Court, after affirming a reversal based on a jury instruction issue, briefly addressed a claim "that improper suggestions of a prior criminal record came out in testimony" by the arresting officer, namely, "that he called to the defendant by name when he saw the defendant running from the" crime scene. The Illinois appellate court stated that, although "[t]he record does not explain how the officer happened to know the defendant[,]" and "the prosecutor did not argue that the officer's prior acquaintance with the defendant was evidence of a criminal history, that implication may be conveyed by testimony of this nature, and for that reason, it is better avoided, unless somehow relevant." *Id.* In that case, the officer's acquaintance with the accused "did not appear to have any relevance[.]" *Id.* Here, the officer's testimony that he spoke with Moreno provided a foundation for his (continued...)

among other things, referred to prior police department "contacts," "incidents," and "investigations" involving the accused. Such "loaded" terms differ significantly from the relatively innocuous reference by Detective Ratty to prior conversations he had had with appellant. They far more strongly suggested that the accused had committed prior crimes, and their view does not provide persuasive support for a broad rule precluding all references to prior conversations between an accused and an individual police officer.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2](...continued)
identification of him on the surveillance video and a basis for his testimony that Moreno speaks Spanish.