UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2329

September Term, 2014

CLARENCE EUGENE JOHNSON, III.

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 9, 2016

Clarence Eugene Johnson, III, was charged with first-degree murder, attempted first-degree murder, and related offenses in the Circuit Court for Anne Arundel County. Mr. Johnson was tried and convicted by a jury of numerous counts, including first-degree felony murder, attempted first-degree murder, and attempted armed robbery. The court (not a jury) sentenced him to life in prison without the possibility of parole for the felony murder, life in prison for attempted first-degree murder, to be served consecutively, plus a concurrent twenty years in prison for the attempted armed robbery.[1] Mr. Johnson contends on appeal that the circuit court erred in denying his motion to be sentenced by a jury, by not merging his first-degree felony murder conviction with the underlying (felony) conviction of attempted armed robbery for sentencing purposes, by admitting hearsay testimony, and by admitting evidence that all of the recovered bullets were fired from the same weapon. The State agrees, and so do we, that the concurrent twenty-year sentence for the attempted armed robbery conviction should have merged into the felony murder sentence. We otherwise affirm Mr. Johnson's convictions and sentences.

[1] The trial court also imposed other sentences not relevant to this appeal.

I. BACKGROUND

On the evening of December 12, 2012, the Annapolis Police Department responded to a call of gunshots fired in the area of the 1400 block of Tyler Avenue in Annapolis. Upon arriving, officers were directed to Jana Jackson's home, where they found Ms. Jackson, shot and wounded, and Joseph Johnson (we'll call him "Joseph" purely for clarity), shot and killed. The police investigation revealed that Mr. Johnson, among others, had been at the residence earlier that evening "shooting dice" with Joseph. Mr. Johnson ultimately was arrested and charged with first-degree murder and other related offenses.

During the trial, Ms. Jackson testified to the following facts: On the evening of December 12, 2012, several people were at her house "partying." Around 7:00 p.m., her friend, Joseph, came over to her house with Mr. Johnson and asked if they could come in and "shoot dice," which she explained was "where they roll the dice for money." As the evening progressed, Joseph appeared to be winning, but was giving money to Mr. Johnson (who apparently was not winning) so that the two of them could continue to play. Mr. Johnson continued to lose, however, and eventually Joseph refused to give Mr. Johnson any more money. Having no money left, Mr. Johnson stated that he was going to leave so that he could get more money and continue to play dice.

When Mr. Johnson came back to Ms. Jackson's house, he put a gun to Joseph's head and told him to "give it up." Joseph refused to give Mr. Johnson any money, so Mr. Johnson shot him in the head. Mr. Johnson then pointed the gun at Ms. Jackson's head and shot her in the chest and arm.

At a motions hearing on May 7, 2014, the circuit court granted Mr. Johnson's motion *in limine* to exclude the findings of the forensic examination of the bullets found in connection with the two shootings, but denied Mr. Johnson's motion for jury sentencing (the State had given notice of its intention to seek a sentence of life imprisonment without the possibility of parole on the first-degree murder charges). A five-day jury trial began on May 7, 2014, and Mr. Johnson was convicted of first-degree felony murder, second-degree murder, and attempted robbery of Joseph; attempted first- and second-degree murder of Ms. Jackson, and other offenses.

On November 10, 2014, the trial court sentenced Mr. Johnson to life without parole for felony murder, life in prison for attempted first-degree murder, to be served consecutively, and twenty years in prison for the attempted armed robbery, to run concurrently with the other sentences. This timely appeal followed.

II. DISCUSSION

Mr. Johnson raises four issues on appeal.[2] *First*, he contends that he was entitled to be sentenced by a jury, rather than the court, after he was found guilty of first-degree

[2] Mr. Johnson phrased the issues as follows in his brief:

1. Did the trial court err in denying Appellant the to right to jury sentencing for first degree murder of Joseph Johnson when he was facing life without the possibility of parole if convicted of that crime?

2. Did the trial court err in not merging the underlying felony of attempted armed robbery into Appellant's conviction of felony murder?

3. Did the trial court err in admitting hearsay into evidence?

(continued…)

murder. *Second*, he argues that the underlying felony of attempted armed robbery should have merged for sentencing purposes with the conviction of felony murder, and the State agrees with him on this point. *Third*, he claims that the court erred in admitting hearsay testimony, and *fourth*, evidence that all the bullets recovered in the case were fired by the same weapon.

A. The Trial Court Correctly Denied The Motion For Jury Sentencing.

Mr. Johnson's *first* contention is that the trial court erred in denying his motion for jury sentencing after the State filed a notice to seek a sentence of life imprisonment without the possibility of parole. Mr. Johnson's argument focuses on the "plain language" of Maryland Code (2002, 2012 Rep. Vol., 2015 Supp.) § 2-304 (b) of the Criminal Law Article ("CR"), which he submits unambiguously requires that a life without parole sentence be imposed by a jury.[3] We considered and rejected the identical arguments in our

4. Did the trial court err in allowing the prosecution to admit evidence that all the bullets recovered in this case were fired by the same weapon?

[3] CR § 2-304, as amended, provides in subsection (a) that a court should conduct the sentencing proceeding in life without parole cases, but in subsection (b) provides for jury sentencing:

> *(a) In general.* – If the State gave notice under § 2-203(1) of this title, the court shall conduct a separate sentencing proceeding as soon as practicable after the defendant is found guilty of murder in the first degree to determine whether the defendant shall be sentenced to imprisonment for life without the possibility of parole or to imprisonment for life.

(continued…)

recent decision in *Bellard v. State*, __ Md. App. __ No. 1281, Sept. Term 2014 (filed August 31, 2016), and hold for the same reasons that Mr. Johnson did not have a right to be sentenced by a jury.

In *Bellard*, we acknowledged that the legislation repealing the death penalty inadvertently created some ambiguity in the statute governing sentencing procedures in life without parole cases, but we rejected Mr. Bellard's argument that the current version of § 2-304 provides the right to jury sentencing in such cases. *Id.* slip. op. at 14-17. In so doing, we examined the legislative history and intent behind Senate bill 276, which repealed the death penalty and created the current version of § 2-304, and concluded that the purpose of the legislation was to repeal the death penalty, *not* to alter the sentencing procedures or create a new rights for defendants where the State seeks life without parole:

> But we need not dig deeply into Senate Bill 276 to find its purpose. The bill's Preamble says in so many words that its purpose was "repealing the death penalty," and the Fiscal and Policy Note states that the bill "repeals the death penalty and all provisions relating to it." Fiscal and Policy Note Revised, S.B. 276 Md. at 1. Neither mentions other alterations to the

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> *(b) Findings*. – (1) A determination by a jury to impose a sentence of imprisonment for life without the possibility of parole must be unanimous.
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> (2) If the jury finds that a sentence of imprisonment for life without the possibility of parole shall be imposed, the court shall impose a sentence of imprisonment of life without the possibility of parole.
>
> (3) If, within a reasonable time, the jury is unable to agree to imposition of a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life.

> sentencing authority or procedures for first-degree murder, and the provisions of the bill itself simply removed portions of the Maryland Code relating to the death penalty and replaced references to repealed language. This obviously was a complicated task, and details can—and apparently did—get overlooked. But our two alternatives are to acknowledge that subsection (b) of CR § 2-304 has become purely vestigial, or to interpolate an intention on the part of the General Assembly to create jury sentencing rights that previously didn't exist in non-capital first-degree murder cases. We see nothing in the purpose or language of the legislation itself that suggests any intent to expand jury sentencing to defendants facing life without parole. And although we could have stopped there, we reviewed the legislative history as well, and it too supports a conclusion that the purpose of the legislation was to repeal the death penalty, rather than alter sentencing procedures in non-capital murder cases.

Id. slip. op. at 18. Accordingly, we found in *Bellard*, and reiterate here, that the current version of section 2-304 provides for sentencing by the court, not by jury.

We also reject Mr. Johnson's contention that the rule of lenity requires us to construe any ambiguity in the statute in favor of sentencing by jury. The rule of lenity is an aid for dealing with ambiguity in a criminal statute "when the statute is open to more than one interpretation *and the court is otherwise unable to determine which interpretation was intended by the Legislature*." *Oglesby v. State,* 441 Md. 673, 676 (2015) (emphasis added). It is a "tool of last resort, to be rarely deployed and applied only when all other tools of statutory construction fail to resolve an ambiguity." *Id.* at 681. That tool isn't necessary here, though, because, as we discussed in *Bellard*, the legislative history of the current version of §2-304 reveals that the legislature intended to repeal the death penalty, not to create a new right to jury sentencing for defendants facing life without parole.

B. Mr. Johnson's Convictions of First-Degree Murder And Attempted Armed Robbery Should Have Been Merged For Sentencing Purposes.

Mr. Johnson was sentenced to life without the possibility of parole for first-degree felony murder and to twenty years for attempted armed robbery, to run concurrently with the life without parole sentence. Mr. Johnson argues that the attempted robbery conviction should have merged for sentencing with the felony murder. He directs us to *Newton v. State*, 280 Md. 260 (1977), in which the Court of Appeals held that felony murder and its underlying felony were deemed the same for double jeopardy purposes and, thus, that no additional penalty can be imposed for the underlying felony. The State agrees with Mr. Johnson. We agree as well: the underlying felony of attempted armed robbery should have merged with the felony murder for sentencing purposes, and we vacate Mr. Johnson's sentence for attempted armed robbery with a dangerous weapon.

C. The Trial Court Properly Admitted Hearsay Testimony.

Third, Mr. Johnson argues that the court erred in admitting hearsay testimony at trial. Officer Tonia Miller testified about her observations at the scene of the incident, and on direct examination, testified that she saw an Oldsmobile parked near Ms. Jackson's house with its engine running. Officer Miller explained that she saw a nervous, confused and jittery man, later identified as Demario Johnson (Mr. Johnson's brother, whom we'll call "Demario"), lying in the reclined front passenger seat of the vehicle. Officer Miller asked Demario what he was doing there, and "[h]e said he was waiting for his brother . . . Clarence Johnson." Defense counsel objected to this answer on the grounds that it was

inadmissible hearsay. The State countered that the statement fell within the present sense impression exception to the hearsay rule. The trial court overruled the objection, reasoning that the statement was not hearsay and, therefore, that there was no need to address whether the statement fell within an exception to the hearsay rule. We find that the statement was hearsay, but falls within the then-existing mental, physical, or emotional condition exception to the hearsay rule.

Whether a statement is hearsay is a question of law we review *de novo*. *Bernadyn v. State*, 390 Md. 1, 7 (2005). According to Maryland Rule 5-801(c), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay must be excluded unless it qualifies as a recognized exception to the hearsay rule. Md. Rule 5-802. When a hearsay objection is raised, the court must determine (1) whether the declaration is a statement; and (2) whether the statement is being offered for the truth of the matter asserted. *Bernadyn*, 390 Md. at 7 (citing *Stoddard v. State,* 389 Md. 681, 689 (2005)).

The first of these criteria is met easily: the declaration "[I'm] waiting for [my] brother . . . Clarence Johnson" is undeniably a statement. If that statement was not offered for the truth of the matter asserted, *i.e*., that the declarant was in fact waiting for his brother, it would have no relevance. But it *was* offered for that purpose: if Mr. Johnson was in the area of the crime scene, he could have committed the crime, and the statement not only sought to establish that possibility, but also to refute defense testimony that Mr. Johnson was not on the scene at the time. We find, therefore, that the statement was hearsay, and

should not have been admitted unless it qualified under one of the exceptions to the hearsay rule. And the State doesn't really challenge this conclusion.

Instead, the State defends the court's decision to admit the statement by arguing that it falls under the present sense impression exception to the hearsay rule, or in the alternative, under the then-existing state of mind exception. The present sense impression exception has been defined as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Booth v. State,* 306 Md. 313, 320 (1986); *see also* Md. Rule 5-803(b)(1). Mr. Johnson disputes that the statement describes or explains any event that Demario was perceiving, and we agree.

We find nevertheless that the statement qualified as a statement about Demario's then-existing mental, physical, or emotional condition, another exception to the hearsay rule. *See* Md. Rule 5-803(b)(3). This exception allows into evidence "[statements] of the declarant's then existing state of mind, emotion, sensations, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action," which tend to prove the declarant's intent. *Edery v. Edery,* 193 Md. App. 215, 234 (2010). The statement here—["I'm] waiting for [my] brother … Clarence Johnson"—was admissible to prove that the declarant was in fact waiting for his brother, Mr. Johnson, because it describes Demario's then-existing mental condition or intent and explains why he was waiting in a running car near Ms. Jackson's home. We discern no error in the court's ultimate decision to admit this testimony.

D. The Trial Court Did Not Abuse Its Discretion By Admitting Evidence That All Of The Bullets Recovered Were Fired By The Same Weapon.

Finally, Mr. Johnson contends that the trial court abused its discretion by allowing evidence that all of the bullets recovered in the case were fired from the same weapon.[4] Normally, of course, ballistics evidence should be admissible with the proper foundation. But in this case, the court had granted a defense motion *in limine* to suppress the findings of forensic testing of the bullets, cartridges, and other ballistic evidence contained in a lab report as a discovery sanction after finding that the report was provided to the defense too late and that admitting it would be "patently unfair" to Mr. Johnson. The court precluded the State from introducing the contents of the report either in writing or by oral testimony, but expressly reserved the right to rule on whether it might be admitted if the defense "open[ed] the door" by suggesting that there was more than one gun. "Generally, 'opening the door' is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue." *Clark v. State,* 332 Md. 77, 85 (1993). We review the court's decision to admit evidence through an "opened door" for abuse of discretion. *Fullbright v. State,* 168 Md. App. 168, 184-85 (2006).

[4] The State argues that Mr. Johnson did not preserve this issue for appeal because he did not object to the stipulation at the time it was read into evidence. That's true, but the defense did challenge on a timely basis the trial court's decision that the defense had opened the door to the challenged testimony, so we will address the argument on its merits.

During the cross-examination of Officer Davis, defense counsel asked if the Officer had bagged Joseph's hands. When the Officer acknowledged that he had, counsel asked why he had bagged them. The Officer responded that the bags preserved fingernail clippings and DNA and prevented cross-contamination. The defense then asked whether one could "get gunshot residue off of his hands," and the Officer answered affirmatively.

After Officer Davis was excused as a witness, the prosecution argued that the defense "opened the door" to the previously excluded lab report when it asked the Officer about bagging Joseph's hands and whether the police could get gun residue from his hands. The State contended that this testimony tended to suggest that *Joseph* may have had a gun, that no other evidence had been offered to support the theory that there was more than one gun, and that once the defense asked about bagging Joseph's hands, it would be unfair not to allow evidence that all of the shots came from one gun. The defense countered that it did not open the door because it never questioned Officer Davis about whether Joseph's hands had been tested for gunshot residue, only whether that was one of the reasons for bagging someone's hands.

The trial court agreed with the State. It ruled that the defense's questions opened the door to the ballistics report because the defense's questions to the Officer implied that the State had failed to present gunshot residue evidence excluding Mr. Johnson as the shooter (and thus implied that Joseph might have been a shooter) The court did not rule that the lab report was admissible in its entirety, but left it to the parties to see whether they could stipulate that there was only one gun and that all of the bullets or projectiles were

fired from that one gun. The parties reached such an agreement, and a stipulation was read into evidence.

Mr. Johnson disputes that the door actually opened. He argues that the defense's questioning did not generate any evidence that more than one weapon was used or that Joseph had fired a weapon, and that the Officer's testimony was not competent evidence. But again, the trial court found that defense counsel's questioning implied that the State had failed to present gunshot residue evidence to exclude Mr. Johnson as having fired a gun, and the limited evidence of the ballistic reports the court allowed completed the picture the defense had started painting (and the rest came in by stipulation). Moreover, the court initially excluded the contents of the ballistics report as a discovery violation, not because it was incompetent. We see no abuse of discretion in the court's decision that the defense opened the door or the remedy. *See Merzbacher v. State,* 346 Md. 391, 404 (1997). Even if we were to assume that the court erred, Mr. Johnson has the burden to demonstrate prejudice, *Crane v. Dunn,* 382 Md. 83, 91 (2004) ("It is not the possibility, but the probability of prejudice which is the object of the appellate inquiry.") (internal quotations and citations omitted), and he has offered no argument in that regard other than to reiterate his view that the court misconstrued the purpose of the questions that opened the door in the first place.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED WITH REGARD TO THE SENTENCE FOR ATTEMPTED ARMED ROBBERY, AFFIRMED IN ALL OTHER RESPECTS. COSTS TO BE PAID THREE-FOURTHS BY APPELLANT, ONE-FOURTH BY ANNE ARUNDEL COUNTY.