UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2588

September Term, 2015

QUINTON BASS

v.

STATE OF MARYLAND

Krauser, Peter, C.J.,
Wright,
Moylan, Charles E. Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: November 28, 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.

The appellant, Quinton Bass, was convicted in the Circuit Court for Baltimore City by a jury, presided over by Judge Timothy J. Doory, of the first-degree murder and attempted armed robbery of Lawrence Peterson; the first-degree murder and attempted armed robbery of Joseph Ulrich; and the armed robbery of Michael Parker. He was sentenced to two consecutive terms of life imprisonment plus an additional consecutive sentence of 45 years. The appellant here raises the three contentions

> 1. that Judge Doory erroneously permitted the State to introduce a prior out-of-court statement by a prosecuting witness;
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> 2. that Judge Doory erroneously denied the appellant's motion for mistrial; and
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> 3. that Judge Doory erroneously admitted an unduly prejudicial autopsy photograph.

The Factual Background

One of the murder victims, Lawrence Peterson, was a 56-year-old business man who had developed and owned the Empire House Inn, a bed and breakfast establishment at 9 East Chase Street, adjacent to the Belvedere Hotel. Peterson was informally known as the "mayor of the Mt. Vernon neighborhood." The other murder victim, Joseph "Alex" Ulrich, was a 40-year-old photographer who was well known in the neighborhood.

On the early morning of August 10, 2012, at between 3:30 and 4:00 A.M., Mr. Peterson and Mr. Ulrich were sitting and talking on the front stoop of the Inn, where Peterson regularly held court. Michael Parker who had just left a bar on Cathedral Street, saw the two men sitting on the front steps and engaged them in conversation. The subject of interest was the tattoos covering the arms of Ulrich.

That was the scene when, at approximately 4:00 A.M., the threesome was approached by the appellant and an unidentified female companion. The appellant was holding a black "older looking" handgun. The appellant demanded money. None of the three victims had any money on his person. The female reached into Parker's back-pocket and took his key holder, containing his ID, keys, and Social Security card. The two robbers then ran into the alley that runs between the Belvedere Hotel and the Inn. Peterson and Ulrich were getting up and starting to go inside the Inn, when the robbers suddenly returned from the ally and the appellant started shooting. Both Peterson and Ulrich were hit. Parker was not.

Homicide Detective Joshua Ellsworth received a call at 4:14 A.M. and arrived on the scene at 4:25 A.M. Neither shooting victim was able to communicate with him. Parker was taken to police headquarters, where he gave a statement to Detective Robert Burns. Several 9mm shell casings were found at the scene and there were bullet marks on the exterior of the Inn. Ulrich died shortly after arriving at the hospital. Peterson was gravely injured but lingered on, not dying until almost two-years later on May 15, 2014.

The Trial Testimony

The State presented five witnesses. Dr. Pamela E. Southall, the Assistant Medical Examiner, conducted the autopsy on Ulrich. One gunshot wound to the chest would have been "rapidly fatal." The second bullet, to the thigh, broke the femur and perforated the femoral vein. After Peterson was removed from life support two years later, on May 16, 2014, Dr. Southall performed the autopsy on him as well. She determined that the cause of

death was complications from multiple gunshot wounds and that the manner of death was homicide.

James Wagster, of the Baltimore City Police Department's Firearms Examination Unit, testified as an expert. He examined the bullets, bullet fragments, and seven fired cartridge cases recovered from the crime scene. He determined that all seven fired cartridge cases had been fired from the same weapon. Of the bullets and bullet fragments, several could not be identified. Four of the bullets and one jacket portion, however, had all been fired from the same weapon. The bullets were 9mm Luger size. The bullet jacket was included in the .38 caliber class, which includes 9mm bullets, as well as .38, .380, and .357 caliber bullets.

Detective Ellsworth was the lead investigator on the case. The case was a "cold case" for almost a month, from the shootings on August 10, 2012 until September 4, 2012, when Detective Ellsworth received a call from Quantae Garris implicating the appellant. As of September 11, 2012, Detective Ellsworth discovered that the appellant was in custody at the Central Booking and Intake Facility on an unrelated matter. Detective Ellsworth interviewed the appellant. The appellant denied having been involved in the shootings. When asked about his whereabouts on August 10, a full month earlier, the appellant stated that he was either at the homeless shelter on Fallsway or staying with a girl named "Tee Tee." At trial, the appellant elected not to take the stand.

One of the two key witnesses against the appellant was Michael Parker, the robbery victim. He testified about being engaged for 15 to 20 minutes in conversation with Peterson and Ulrich, as they were sitting on the front steps of 9 East Chase Street. He described how

the threesome were approached by a man and woman who attempted to rob them. He described the man's gun as a "black older looking" gun. The woman went into Parker's back pocket and took his key ring. He testified as to the robbers' walking initially into the adjacent ally but then returning to the front of the Inn immediately and about the appellant firing the shots that hit Peterson and Ulrich. Parker provided the police with a description of both the man and the woman, describing their clothing and their general builds. When Detective Ellsworth presented Parker with a photographic array on September 12, 2012, Parker selected the appellant's photograph from the group and "instantly" identified him as one of the robbers.

The Testimony of Quantae Garris

The other major witness for the State was Quantae Garris. He was, indeed, the key who broke the case open. There were initially no leads to the identities of the two robbers until, on September 4, 2012, Quantae Garris telephoned Detective Ellsworth and informed him that the appellant was the man who shot Peterson and Ulrich. Detective Ellsworth interviewed Garris on September 12, 2012, and took two tape-recorded statements from him. On that day as well, Garris was shown a photographic array and picked out the photograph of the appellant, writing "Ty" on it.

Garris's trial testimony paralleled precisely what was in the taped statements he gave to Detective Ellsworth. Garris had known the appellant since early 2012. He related that the appellant used the nickname "Ty," which was short for "Tyrese Blackman." The appellant stayed at a homeless shelter, known as "Code Blue," located at 620 Fallsway. Garris testified that on August 31, 2012, he and the appellant and a group of others were in

a park near the Washington Monument in Mt. Vernon when police officers approached them. Garris himself was given a citation for drinking in the park.

It was on that day that the appellant told him that he had carried out a robbery and a shooting in that Mt. Vernon area. On that day, the appellant had in his possession a .22 caliber gun, which he referred to as "Baby," and a plastic bag containing bullets. The appellant told him that he had committed the robbery and the shooting with a 9mm gun, but that "when he shot the people he tossed it." In any event, Garris's trial testimony and his taped statements to the police on September 12, 2012, were consistent statements.

Impeachment of Garris's Credibility

On cross-examination of Garris, defense counsel went to great lengths both 1) to impeach the testimonial credibility of Garris and 2) to prove the lack of personal knowledge by Garris of the facts to which he testified. The defense was able to establish 1) that Garris had once acted as an informant for the police; 2) that Garris wanted to ingratiate himself with the police so they would help him resolve both a "parking ticket scam" with which he had been charged and also a pending charge of failure to show proof of payment on an MTA bus or train; and 3) that Garris was seeking a reward for reporting the killer in this particular crime.

The attack on Garris's basis of knowledge consisted of showing him three articles that appeared in the Baltimore Sun describing the crimes and claiming that his testimony was based exclusively on what he had gleaned from reading those articles.

The impeachment of testimonial credibility would have been pursuant to Maryland Rule of Criminal Procedure 5-616(a)(4) and (5), which provide in pertinent part:

> "(a) **Impeachment by Inquiry of the Witness**. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
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> …
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> "(4) Proving that the witness … has a motive to testify falsely;
>
> "(5) Proving lack of personal knowledge[.]"

The State's Response

In an effort to counteract any possible impeachment of Garris's credibility and/or the accuracy of his testimony, the State sought to introduce both tapes and transcripts of the statements Garris made to Detective Ellsworth on September 12, 2012.[1] Over defense objection, Judge Doory allowed the jury to hear the tapes and to receive copies of the transcripts. The appellant's primary contention on this appeal is that Judge Doory committed reversible error in permitting the introduction of Garris's prior consistent statements.

At the outset it is clear that the defense cross-examination of Garris attacked his credibility by attempting to show that he had an improper motive to testify. Judge Doory expressly found that "impeachment of the witness, Mr. Garris, has taken place pursuant to the defense cross-examination … of Detective Ellsworth." Judge Doory clearly understood, moreover, that the prior statements being offered by the State were being

[1] The State's response to the charge that Garris had obtained his knowledge of the crimes not from the appellant's words but from the articles in the Baltimore Sun consisted of pointing out that Garris's testimony included details that had never been mentioned in the Baltimore Sun articles. Included were such facts as that the motive for the shootings was robbery, that one of the robbers had been a woman, and that the murder weapon had been a 9mm gun.

"offered to rebut an express or implied charge against the declarant of fabrication or improper influence or motive." In his appellate brief, the appellant acknowledges that he had, indeed, impeached the credibility of Garris's trial testimony by bringing out, on cross-examination, three likely motives for Garris to have fabricated his testimony.

> "As noted above, he was impeached by his admission that he had previously acted as an informant, that he had an open case against him, and by the fact that he expressed an interest in reward money."

Appellant's Br. at 14.

In an effort to rebut that impeachment, the State moved to introduce the two taped statements that Garris had given to Detective Ellsworth on September 12, 2012. At an extended bench conference, defense counsel offered a variety of amorphous objections, arguing that Garris had never actually been impeached, that the prior statements did not rebut impeachment, that the statements went into impermissible details that had not come out in the trial testimony, and finally that the prior statements were inadmissible hearsay. In our judgment, Judge Doory properly ruled that Garris had been impeached and that the prior statements would be relevant to rebut that impeachment. He further ruled that if the prior statements contained any small details not contained in the original testimony, he would give the defense an ample opportunity to make desired redactions from the statements. None of these ruling calls for further analysis. Judge Doory then turned to what was a far more significant and far more nuanced legal issue, although the appellant has failed to address it with any precision.

Two separate Rules of Procedure deal with the question of whether an earlier consistent statement of a witness may be admitted to rehabilitate or bolster the witness's

credibility after the witness's credibility has been impeached. These two rules serve distinct purposes although there are between them obvious procedural similarities. One is Maryland Rule 5-802.1, dealing with "Hearsay Exceptions – Prior Statements by Witnesses." The other is Maryland Rule 5-616, dealing with 'Impeachment and Rehabilitation – Generally."

The similarities and dissimilarities between the two rules have been thoroughly examined by Holmes v. State, 350 Md. 412, 712 A.2d 554 (1998); Thomas v. State, 429 Md. 85, 55 A.3d 10 (2012); Hajireen v. State, 203 Md. App. 537, 551-58, 39 A.3d 105 (2012); McCray v. State, 122 Md. App. 598, 607-13, 716 A.2d 302 (1998).

In the case now before us, counsel for both sides tended to move back and forth between the two rules. Such a conflating of the two rules, however, did no harm. As this Court explained in McCray v. State, 122 Md. App. at 609:

> "The Court [of Appeals in Holmes v. State] went on to hold that the State 'is not required to assert the purpose for which it is seeking admission of a prior consistent statement unless asked by the court,' even though a statement admissible under Md. Rule 5-802.1(b) is admissible as substantive evidence, and a prior inconsistent statement admissible under Md. Rule 5-616(c)(2) is for rehabilitative purposes only and not as substantive evidence.
>
> "Because Holmes does not require the State to articulate whether it is seeking to admit the prior consistent statement for substantive or rehabilitative purposes, it places two burdens on the defendant. First, it is incumbent on the defendant to inquire about the basis upon which the State intends to introduce the prior consistent statement. Second, the defendant must request a jury instruction limiting the use of the prior consistent statement for rehabilitative purposes only."

(Emphasis supplied).

Maryland Rule 5-802.1

Judge Doory ruled that Garris's prior consistent statements were admissible under both Rule 5-802.1 and Rule 5-616. The ruling pursuant to Rule 5-802.1 was the more sweeping of the two. That is because Garris's prior consistent statements were thereby received as substantive evidence. As Rule 5-802.1 provides at its very outset:

> "The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule[.]"

(Emphasis supplied).

Hearsay, of course, is an out-of-court assertion [such as a taped statement made at the police station] offered in court for the truth of the thing asserted. Ordinarily, hearsay evidence is not admissible. If "not excluded by the hearsay rule," however, the statement is fully in evidence, just as weightily as any testimony sworn to in the courtroom. Among those statements "not excluded by the hearsay rule" is, per subsection (b):

> "(b) A statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]"

The prior consistent statements in this case were consistent with Garris's trial testimony and were offered, moreover, "to rebut an express or implied charge against the declarant [Garris] of fabrication or improper influence or motive."

To qualify for admissibility pursuant to Rule 5-802.1 involves more, however, than satisfying the words of the rule itself. As Holmes v. State, 350 Md. at 417, points out, the Maryland Rules of Evidence generally, including Rule 5-802.1, have only been in effect since July 1, 1994. Rule 5-802.1, however, is a counterpart of Federal Rule of Evidence

801(a)(1) and, moreover, embodies a much earlier common law principle. Citing the older Maryland case of City Pass. Ry. Co. v. Knee, 83 Md. 77, 79, 34 A. 252 (1896), Holmes, 350 Md. at 416-17, set out an additional qualification that must be satisfied before a prior consistent statement will be received.

> "As a general rule, prior out-of-court statements made by a witness that are consistent with the witness's trial testimony are not admissible to bolster the credibility of a witness. The general rule has an exception where a witness's credibility is attacked by an implication of fabrication or improper influence or motive; then, the witness's prior consistent statements are admissible if made before the alleged fabrication or improper motive existed."

(Emphasis supplied).

Quoting with approval from 1 MCCORMICK ON EVIDENCE, § 47, at 177 (John W. Strong ed., 4th ed. 1992), Holmes, 350 Md. App. 417, explained the rationale behind this "premotive" requirement.

> "The rationale behind the common-law, 'premotive' rule was that if a witness has been attacked by a charge of 'bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevance to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated."

(Emphasis supplied).

In his case, the "premotive" timing of Garris's prior consistent statements posed no impediment to admissibility. Garris's involvement in legal problems – with a parking ticket scam and with the failure to pay an MTA fare – arose in 2014. His conversation with Detective Ellsworth in which he inquired about reward money also occurred shortly before

trial in 2014. [2] The prior consistent statements in issue, however, were made to the police on September 12, 2012, almost two years before the so-called motives to fabricate.

Of particular interest is the appellant's bald assertion that Garris's history of being a confidential information would be a motive to fabricate false testimony against the appellant. Upon reflection, the charge is absolutely counter-intuitive. Confidential informants are very valuable to the police, especially those at the detective level. The police keep accurate records of a confidential informant's performance level and are periodically called upon to testify with respect to it. Informants are strictly required to give information which checks out to be correct. An unreliable informant who furnishes false information does not last long as an informant. Fabrication is simply not permitted. Even a part-time career as a confidential police informant, therefore, would refute rather than suggest a tendency to fabricate. Impeachment under Rule 5-802.1, it must be carefully noted, is concerned not with a motive to testify but rather with a motive to fabricate, to wit, to testify falsely.

It should also be noted that even a part-time career as a confidential informant may be a motive to give information to the police confidentially, but it is definitely not a motive to testify. Once one is exposed as an informant, as open testimony in court would demonstrably do, one's future as a confidential informant (if not one's life) is gravely compromised. The police go to great lengths to keep the identity of their confidential

[2] Detective Ellsworth explained to the appellant, moreover, that witnesses were never paid reward money. The lure of a reward, therefore, could have provided no motive to testify.

informants confidential. Being a confidential informant is most definitely not a motive to testify at all, let alone a motive to fabricate one's testimony.

We would note that neither in arguing against admissibility before Judge Doory nor in presenting the contention to this Court did the appellant offer any argument with respect to this premotive requirement of Rule 5-802.1. Beyond the first bald assertion, he did not even mention it. We hold that the prior consistent statements were admissible pursuant to Rule 5-802.1.

Maryland Rule 5-616

Although the rehabilitation of a witness's impeached credibility pursuant to Rule 5-616 seems like little more than a replay of rehabilitation pursuant to Rule 5-802.1, or vice-versa, the legal significance is very different. Rule 5-802.1 is a hearsay issue. As an exception to the Rule Against Hearsay, the rehabilitative prior consistent statement comes in as substantive evidence. The earlier assertion is unapologetically offered for the truth of the matter asserted. Rule 5-616, by contrast, does not deal with hearsay. The rehabilitative prior consistent assertion is offered not for the truth of the thing asserted but only for the fact that it was said. It is classic non-hearsay. Holmes v. State, 350 Md. at 427, explained:

> "Under Md. Rule 5-616(c)(2), a prior consistent statement is admissible to rehabilitate a witness as long as the fact that the witness has made a consistent statement detracts from the impeachment. Prior consistent statements used for rehabilitation of a witness whose credibility is attacked are relevant not for their truth since they are repetitions of a witness's trial testimony. They are relevant because the circumstances under which they are made rebut an attack on the witness's credibility. Thus, such statements by definition are not offered as hearsay and logically do not have to meet the same requirements as hearsay statements falling within an exception to the hearsay rule, e.g., Md. Rule 5-802.1(b)."

(Emphasis supplied).

In Hajireen v. State, 203 Md. App. at 555, this Court explained the rehabilitative process:

> "A review of Rule 5-616(c)(2) indicates that there are three prerequisites to admission of a prior statement as rehabilitation: (1) the witness' credibility must have been attacked; (2) the prior statement is consistent with the trial testimony; and (3) the prior statement detracts from the impeachment."

Rule 5-616(c)(2) provides in pertinent part:

> "(c) **Rehabilitation**. A witness who has been attacked may be rehabilitated by:
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> …
>
> "(2) … [E]vidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]"

(Emphasis supplied).

In this case, the prior statements were clearly consistent with Garris's trial testimony; Garris's credibility had been attacked by the appellant; and the statements, given in full detail almost two years before the trial testimony, reinforced Garris's credibility. The statements were admissible under Rule 5-616.

Had these prior statements been admitted under Rule 5-616 alone, without the benefit of parallel admissibility of the statements pursuant to Rule 5-802.1, the appellant would, upon request, have been entitled to a jury instruction that the statements were not substantive evidence of the appellant's guilt and were to be considered only to support Garris's testimonial credibility. No such instruction was given, for the obvious reason that

no such instruction was ever requested. Holmes v. State, 350 Md. at 429, was very emphatic in that regard.

> "Finally, we note that defense counsel did not request, and the trial court did not give, a limiting instruction with regard to Thompson's consistent statement. Counsel for Petitioner at oral argument contended that the State is required to inform the defense whether the State is seeking admission of a prior consistent statement for substantive or rehabilitative purposes. We disagree. The State is not required to assert the purpose for which it is seeking admission of a prior consistent statement unless asked by the court. Petitioner further posits that a prior consistent statement is admissible as substantive evidence only if it is admissible under Md. Rule 5–802.1(b) and since Thompson's statement was not admissible under that rule Petitioner was entitled to a limiting instruction that Thompson's prior consistent statement was admissible only to rehabilitate her testimony, and not as substantive evidence. We need not reach this issue because Petitioner did not request such an instruction, and "the trial judge ordinarily is not required to give a limiting instruction in the absence of a request."

(Emphasis supplied; citation omitted).

The Motion For a Mistrial

The appellant made a belated motion for a mistrial, claiming that Detective Ellsworth on cross-examination injected into the case that the appellant had been guilty of "other crimes." Aside from the lack of a timely objection, it was clear that such information had been without objection previously referred to, including by defense counsel, and that the door had been widely opened.

It began when during the cross-examination of Detective Ellsworth, defense counsel asked, "And Mr. Garris told you about a driver that participated in the … murder, didn't he?" Detective Ellsworth answered:

> "No, what he stated was that the Defendant had participated in other robberies and that there were drivers associated with those robberies. He was

> referring to a pattern of criminal conduct that preceded the murder, or occurred around the time of the murder."

(Emphasis supplied). Defense counsel significantly made no objection and the trial moved on. At that point, the appellant's "participation in other robberies" and a preceding "pattern of criminal conduct" was undeniably before the jury.

On redirect examination, Detective Ellsworth, again without objection, read from a portion of his recorded interview with Garris.

> "DETECTIVE ELLSWORTH: [ ] How, what makes you think he was a lookout though?
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> "MR. GARRIS: 'Case they both told me everybody they was robbing up in that area. The[y] both look out while Quinton sticks them up with a gun.
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> "DETECTIVE ELLSWORTH: Is that their MO? Is that what they always do?
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> "MR. GARRIS: Yeah, well Geezy is the getaway driver.
>
> "DETECTIVE ELLSWORTH: Geezy is the getaway driver. Quinton does the stickup himself?
>
> "MR. GARRIS: Yes."

(Emphasis supplied). Detective Ellsworth went on, again without objection, to explain that he and Garris, in that part of the interview, had been discussing "a history of what normally happens" rather than the special circumstances of this crime itself.

Adding to the confusion was the fact that the defense and the State were working from two different transcripts of the earlier statements made by Garris. As defense counsel sought to pin Detective Ellsworth down to a particular page of the transcript, the State's transcript that Detective Ellsworth had earlier reviewed did not reflect what defense

counsel was seeking to pinpoint. The motion for a mistrial reflected defense counsel's frustration at the differences between the two transcripts.

> "[DEFENSE COUNSEL]: There's no problem, Your Honor, and I'm, I try not to be difficult in your courtroom out of courtesy. But what happened here is completely improper. I went and showed this particular line right here to him to try to get him to testify on something. The State's Attorney then showed him this line, which is completely different from that line and –
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> "THE COURT: It's on different page in a different discussion. But it's a question about what does the man mean while he's discussing it and that will be included in the actual statement that I'm going to admit into the evidence."

(Emphasis supplied).

In denying the defense motion for a mistrial based on "other crimes" evidence, Judge Doory referred to the fact that the testimony about Geezy, the getaway driver on other occasions, was obviously prominently before the jury without objection and that a mistrial was not going to be granted on the basis of avoidable confusion about the transcripts of the police interview.

> "THE COURT: Now, unfortunately, it's a door that you opened. Now the Detective may have been confused about which part of the transcript, which part of the interview you were talking about but you have to control your witness when you ask those questions. Once you asked the questions and the detective said to you no, he didn't' say he was the driver that night, he said he was the driver in their series of robberies, well, the specifics of that may be followed up by anyone. But you have brought that, by your questioning, directly in to the case.
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> "I can't give you the benefit of a mistrial for an area that you have gone into and it is obviously an area that is blossoming with each series of questions. But I can only decide based upon objections that are made as to whether or not the parties can go into it further. But those areas that you have specifically cross-examined the Detective about, and [the prosecutor] has specifically examined him about, will be area that are included in the tape that is going to be admitted into evidence because they've already been

> stated. Were they not stated, I would have granted your motion to redact them. But I can't redact them now, once they have become part of the argument back and forth.
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> ***
>
> "But now we've gone back and forth in a situation where people are using their own transcripts because they haven't shared transcripts. I don't know whether that's because people have no confidence in the other side's ability to transcribe but there, for the purpose of appellate record, the transcripts will be there, they will not be there for the purpose of the jury's examination. That's not going to happen. The jury is going to get the disk and they're going to be able to listen to it and they'll be able to hear what they hear and when you argue to the jury you can say ladies and gentlemen, listen to the disk and see if you don't hear Mr. Garris say X. That's the way trials happen.
>
> "But whether this should be in this trial, no. [W]e have gone far afield but we have gone far afield one step at a time by each party asking questions that were not objected to and the answers are what you're stuck with. Your motion for mistrial is denied."

(Emphasis supplied).

We hold that Judge Doory did not abuse his discretion in not granting a mistrial.

An Autopsy Photograph

The appellant's final contention will not detain us long. He claims that Judge Doory abused his discretion in admitting one particular photograph from the post-mortem examination of the murder victim Joseph Ulrich.

We have looked at the photograph and find it to be very run-of-the-mill as autopsy photographs go. It is a full-length photograph of Mr. Ulrich lying on his back and nude. Victims, however, are routinely nude when they are subject to a post-mortem examination.

In terms of relevance, Mr. Ulrich was a murder victim. The photograph in issue showed a bullet wound to the groin and a second bullet wound to the chest. The appellant

complains that the photograph was unnecessary because only the appellant's criminal agency was the only contested issue in this case. That may well be true, but the cause of death must nonetheless be proved, as the appellant would be sure to point out had the State failed to do so.

When the appellant objected that this particular photograph was inflammatory, Judge Doory ruled:

> "Well this is not inflammatory, it's just embarrassing to someone who might die of embarrassment if he hadn't already died being pictured this way. So your objection is going to be denied as to that one."

We see no abuse of discretion in that ruling.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.