Circuit Court for Prince Georges County
Case No.: CT151368X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0178

September Term, 2017

DARIUS PRICE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Berger,
Reed.

JJ.

Opinion by Reed, J.

Filed: December 29, 2017

*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.

On July 25, 2016, Darius Price ("Appellant") was tried in the Circuit Court for Prince George's County for carrying a handgun, firearm possession with a felony conviction, illegal firearm possession, possession of a regulated firearm while being less than thirty years of age at the time of possession after having been adjudicated delinquent by a juvenile court for an act that would be a disqualifying crime if committed by an adult, and possession of ammunition while being prohibited from possessing a regulated firearm. During trial, one of the investigating officers was permitted to testify that Appellant's behavior was indicative of a person who was armed. Following trial, a jury convicted Appellant of wearing or carrying a handgun, possession of a regulated firearm after having been convicted of a crime of violence, possession of a regulated firearm after having been convicted of a disqualifying crime, and possession of ammunition while being prohibited from possessing a regulated firearm. Appellant was subsequently sentenced to three years imprisonment for wearing or carrying a handgun, five years for possession of a regulated firearm, and three years for possession of a regulated firearm after having been convicted of a disqualifying crime. The trial court ordered all to be served concurrently but consecutive to any other sentence being served. Appellant timely appealed and presents the following questions for our review:

> 1. Did the trial court err in permitting Officer Rushlow to testify as a lay witness where expert testimony was required?
>
> 2. Did the trial court err in allowing the State to question Officer Rushlow on redirect about statements he made in his incident report?

3. Are two convictions and sentences based on the possession of a single firearm improper?

For the following reasons, we shall affirm in part and vacate in part.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2015 around 10:00 p.m., several gunshots were heard by Officer Bryan Stevens ("Officer Stevens") while patrolling Martin Luther King Jr. Highway in Prince Georges County. Officer Stevens radioed the dispatcher regarding the gunshots, and Officers Michael Rushlow and Matthew Obordo ("Officer Rushlow" and "Officer Obordo" respectively) responded to the call. When Officer Rushlow approached the area where gunshots were heard, he observed two men, one being Appellant, walking through a parking lot headed towards an alley. While driving up to the two men, he noticed that Appellant "had his hand in his waistband area." During trial, Officer Rushlow stated that this action "raised [his] flags because [he heard] a shots-fired call and immediately [he thought Appellant's] got a gun based on the typical – the characteristics of someone that's armed reaching towards a waistband." Following this observation, he exited his patrol car, told the two men to stop, and to show him their hands. The two men complied.

At some point, Appellant slowly began to put his hands down. Seeing this, Officer Rushlow pulled out his service weapon and told Appellant to put his hands back up and get on the ground. At that time, Appellant kept his hands "at his waistband, turned around and started to run down [the] dark alley." Officer Rushlow began to chase Appellant into the alley and it appeared to him that Appellant was still reaching into his waistband. Officer

Rushlow testified that he believed "…[Appellant] was going to pull out his gun and attempt to shoot me, so I kind of slowed down a little bit, had my gun out." Officer Rushlow further testified that he lost sight of Appellant when he slowed down and Appellant turned towards a fenced-in area. Appellant was apprehended by another officer who found him hiding beneath a truck. Following Appellant's arrest, a gun was found using a canine unit trained to find objects discarded by humans. Based upon the gun found in the alley, Appellant was convicted and sentenced on one count of wearing and carrying and two counts of illegal possession of a firearm.

At trial, the State introduced a joint exhibit in which the State and Appellant showed that Appellant had previously been convicted of a crime that prohibited his possession of a regulated firearm and ammunition. After testimony, the State rested its case and the defense did not present any evidence. Appellant was acquitted of possession of a regulated firearm while being disqualified because of his age and juvenile record, but convicted of wearing or carrying a handgun, possession of a regulated firearm after having been convicted of a crime of violence, possession of a regulated firearm after having been convicted of a disqualifying crime, and possession of ammunition while being prohibited from possessing a regulated firearm. Additional facts will be discussed as necessary in the discussion to follow.

STANDARD OF REVIEW

We review Appellant's question on whether the court erred in allowing Officer Rushlow to testify as an expert, under an abuse of discretion standard. *See Oken v. State*, 327 Md. 628, 659 (1992)("the admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.") *See also, Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 76 (1996)("The trial court's determination is reversible [only] 'if it is founded in an error of law or some serious mistake or if the trial court clearly abused its discretion." Thus, this Court will only reverse "upon a finding that the trial judge's determination was both manifestly wrong and substantially injurious." *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 641(1997). We also review Appellant's second and third questions under the same standard.

Even if there is a finding that the trial court has erred, if the error was not prejudicial to Appellant, this Court will not reverse the judgement of the trial court. *See Harris v. Harris*, 310 Md. 310, 319 (1987)("to justify reversal two things are essential. There must be error and there must be injury; and unless it is perceived that the error causes the injury there can be no reversal merely because there is error.")

DISCUSSION

I. There exists no abuse of discretion where Officer Rushlow testified as to his perception of the events

A. Parties' Contentions

Appellant argues that Officer Rushlow's testimony, regarding the characteristics of someone armed, "required an expert opinion" and "because Officer Rushlow was neither offered by the prosecution nor qualified by the trial court as an expert, his testimony on the subject was inadmissible." Conversely, the State contends "[the testimony] that [Appellant's] behavior was consistent with the characteristic behavior of an armed individual did not require any specialized knowledge to understand, meaning, the average juror would readily appreciate that armed individuals often carry guns in their waistband." Moreover, the State asserts that the testimony was "properly admitted to explain why the officer pointed his service revolver at Price." We agree that the testimony was within the bounds of lay witness testimony as it: (1) explains why Officer Rushlow pointed his service weapon at Appellant; (2) is common knowledge that a person carrying a gun can only conceal it in so many places; and (3) his testimony did not rely on any specialized knowledge, training, expertise, or unique experience.

B. Analysis

Md. Rule 5-701 governs the admissibility of lay witness testimony. It provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony of the determination of a fact in issue.

Thus, lay opinion testimony is testimony that is reasonably based on the perception of the person testifying. Expert testimony is governed by a separate rule, Md. Rule 5-702, which describes factors that the trial court must examine in order to determine expert testimonial admissibility. It provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Unlike lay testimony, expert opinion testimony is based upon specialized knowledge, training, experience, education, or skill. Those declared as experts need not be confined "to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005)

Appellant relies upon *Ragland*, arguing that, like in that case, the trial court abused its discretion by allowing Officer Rushlow to rely, "upon his training and expertise to opine before the jury that Mr. Price was armed." Appellant attempts to offer the same question as the court in *Ragland*: "Where a witness has first-hand knowledge of the events that form the subject of his or her testimony, may the witness offer, as 'lay opinion testimony,' opinions formed about those events based on specialized knowledge, skill, experience, training, or education?" *Id.* at 716.

In *Ragland*, the Court of Appeals of Maryland grappled with whether the testifying officers' statements that "in his opinion" the defendant was engaging in a drug transaction,

was expert testimony. The court stated that the officer had specialized knowledge about drug deals and that his opinion was based on his prior experience in the narcotics unit and his over two-hundred drug arrests. *Id.* at 726. The court ultimately concluded:

> This testimony cannot be described as lay opinion. These witnesses had devoted considerable time to the study of the drug trade…The connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutors questioning. Such testimony should have been admitted only upon a finding that the [expert witness testimony requirements] were satisfied.

Id. Essentially, the court found that because the officers had considerable experience working in narcotics, he used his specialized knowledge when testifying instead of his perception of the events.

In the instant case, Officer Rushlow testified that he thought Appellant had a gun based upon Appellant's actions of putting his hands towards his waistband.

> [OFFICER RUSHLOW]: Yes. While driving up to them, I saw the [Appellant] had his hands in his waistband area as I was walking up – as I was driving up to him and his other companion that he was with.
>
> [STATE]: Okay. And based on that, what, if anything, did you do?
>
> [OFFICER RUSHLOW]: Based off that and how the call came out for shots fired, I immediately came up, myself and another officer, exited my patrol car, told the two individuals, one being the [Appellant], to stop and let me see their hands, because the [Appellant] still had his hand in his waistband. So immediately the [Appellant] and the other suspect or individual put their hands up.

> I remember the [Appellant] slowly put his hands back down like this in a slow motion (indicating). That raised my flags because I'm hearing a shots-fired call and immediately I think he's got a gun based on the typical – the characteristics of someone that's armed reaching towards a waistband.

Appellant believes when Officer Rushlow testified that "I think he's got a gun based on…the characteristics of someone that's armed reaching towards a handgun," it was expert testimony. We disagree. Officer Rushlow testified to information that was reasonably within his perception of the events. As stated in his testimony, he received a call that gun shots were heard, he approached Appellant, and observed him reaching towards his waistband. At that point, Officer Rushlow reasonably thought that Appellant had a weapon located in his waistband chiefly because Appellant was directed by Officers Rushlow and Obordo to keep his hands up and Appellant began to put them down. In fact, Officer Rushlow would later testify that he feared that Appellant was going to shoot him because he continued to reach towards his waistband area. Therefore, we find no abuse of discretion. Assuming there was an error in admitting the testimony, that error was not injurious to Appellant's case. Thus, we find no abuse in discretion in admitting the testimony as lay opinion testimony.

II. There exists no abuse of discretion in allowing the State to redirect Officer Rushlow

A. Parties' Contentions

Appellant asserts that during cross-examination, Officer Rushlow was impeached because of an omission in the police report he authored. Appellant claims that on direct

examination, Officer Rushlow testified that once he began to chase Appellant, he was afraid that he would be shot because Appellant continually reached for his waistband. On cross, Appellant impeached this portion of Officer Rushlow's testimony by demonstrating that Officer Rushlow never mentioned that Appellant reached towards his waistband during the chase in his incident report. Following cross-examination, the State re-directed Officer Rushlow, and Appellant believes this re-direct was outside of the scope of the cross, and thus the court erred. The State contends that it was allowed to re-direct to rehabilitate Officer Rushlow. We agree.

B. Analysis

Since we review this issue as an abuse of discretion, we give deference to the trial court. We refuse to supplant our judgment for that of the trial judge because the trial judge has the opportunity to "closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record…" *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 59 (1992).

Simply, Appellant was allowed to re-cross Officer Rushlow after he was re-directed. In that re-cross, Appellant asked:

> [DEFENSE]: None of those four times in that report, just to clear up, do you refer to the period we've been speaking of when you were running and you observed Mr. Price looking back at you while reaching for his waistband and fearing that you'd be shot?
>
> [OFFICER RUSHLOW]: No.

Appellant had not been prejudiced because the point was made; Officer Rushlow never mentions in his incident report that he feared he would be shot when he began to chase Appellant. Thus, we find no abuse of discretion.

III. Convictions and sentence based on the possession of a single firearm is improper

A. Parties' Contentions

Both Appellant and the State agree that one of the convictions for illegal possession of the handgun found in the alley should be vacated. We agree and will vacate one of the convictions.

B. Analysis

Appellant was convicted and sentenced on two counts of MD. CODE. ANN. PUB. SAFETY, §5-133.3 ("§5-133.3") for illegal possession of a regulated firearm; once under §5-133(b)(1) and again under, §5-133(c)(1). In the instant case, both convictions are based upon the possession of the same handgun. §5-133.3(b)(1) provides: "…a person may not possess a regulated firearm if the person has been convicted of a disqualifying crime," while §5-133(c)(1) states: "a person may not possess a regulated firearm if the person was previously convicted of: (i) a crime of violence…" We will follow this Court's decision in *Wimbish v. State,* 201 Md. App. 239 (2011), and affirm the conviction for the offense with the greater penalty, that is, possession by a person previously convicted of a crime of violence. Accordingly, we reverse the conviction for the offense with the lesser penalty,

which is possession of a regulated firearm if the person has been convicted of a qualifying crime.

CONVICTION AND SENTENCE FOR POSSESSION OF A REGULATED FIREARM BY A PERSON WHO HAS BEEN CONVICTED OF A DISQUALIFYING CRIME VACATED. ALL OTHER JUDGMENTS AFFIRMED. COSTS TO BE PAID ONE-HALF BY HOWARD COUNTY, ONE-HALF BY APPELLANT.