UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2782

September Term, 2015

DONTAZE BROWN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: July 11, 2017

Tried by a jury in the Circuit Court for Baltimore City, appellant, Dontaze Brown,[1] was convicted of conspiracy to commit murder and wearing/carrying/transporting a handgun. Co-defendant Keefe Spence, who was tried with appellant, was convicted of conspiracy to commit murder and acquitted of first-degree murder, second-degree murder, and wearing/carrying/transporting a handgun.

The trial judge sentenced Brown to a total of 33 years in prison, suspending all but 13 years, after which Brown timely noted this appeal, presenting the following question for our consideration:

> Did the court err by permitting the State to impeach the inconsistency of its witness's testimony in violation of Maryland Rules 5-608 and 5-613?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

On the morning of July 22, 2013, Baltimore City Police were dispatched to the 1700 block of Bond Street in response to a call about a shooting. Upon his arrival at the scene, Baltimore City Police Officer Tyler Pereira observed an unresponsive man, later identified as Dennis Conway, lying face-down in the street, bleeding from the torso. Conway was transported to Johns Hopkins Hospital, where he was later pronounced dead. The Assistant Medical Examiner determined that Conway, who had been shot three times, once in the back of the neck and twice in the back, died from multiple gunshot wounds. The cause of death was determined to be homicide.

[1] Appellant's first name is spelled "Dontayaze" in some documents in the record.

Officers recovered four spent .380 caliber shell casings and one bullet near the intersection of Bond and Lanvale Streets. Another bullet was found on July 26, 2013, in the gutter in front of 1701 North Bond Street.[2]

A canvass of the neighborhood for witnesses yielded information from Carolyn Clanton and Gloria Abraham, sisters who lived a few doors apart on North Bond Street. After returning from her daily walk on the morning of July 22, 2013, Clanton was outside talking to Abraham when she saw three young black men running across Bond Street near Lanvale Street.[3] As they ran, Clanton heard a popping sound; Abraham told her someone was shooting.

Clanton ran to her house and told her sister to get inside. A few minutes after she heard the shots, Clanton observed two slim black men, who may have been two of the three men she had seen before, run up Bond Street toward Lafayette Avenue and turn the corner. The third man she had seen running had been shot and was lying in the street.

Abraham testified similarly, adding that when she initially saw the three men running from Lanvale Street onto Bond Street, it appeared to her that one of the men was trying to grab the man in front of him. Abraham did not know any of the men but reported that the two men chasing the third had been wearing shorts and white undershirts; the man

[2] The police department's firearms examiner determined that all the bullets, including the one recovered from Conway's body, had been fired from the same unknown firearm.

[3] At trial, Clanton stated only that she saw three people running, but in her 2013 recorded statement, she told the police that she believed two of the men had been chasing the third.

with the gun wore glasses.[4] After the shooting, the two men continued running together toward Lafayette Street. Neither Clanton nor Abraham actually witnessed the shooting.

Clanton and Abraham testified that the only other people on the street at the time of the shooting was a young woman with a small child. Neither Clanton nor Abraham recalled seeing any drug dealers sitting outside near the time of the shooting, although Abraham admitted that the neighborhood drug dealers were out on the street nearly every day after 9:00 a.m.

Arrested on drug charges on July 25, 2013, James Mitchell offered information to the police about the Conway shooting in exchange for "any help in the matter that he was dealing with[.]" Mitchell, who was incarcerated at the time of appellant's trial, told the jury that he had lied during his interview with police because he did not want to go to prison. He further claimed to have been coerced and beaten by the police, which caused him to tell the police the story they wanted to hear.

Mitchell testified—extremely reluctantly—that on the morning of July 22, 2013, he was sitting outside on Lanvale Street, as he did every day to sell drugs, when he saw Dennis Conway walking down the street.[5] He then heard someone yell, "Clear the block," which he took to mean "get away." He observed appellant (whom he referred to as "Glasses")

[4] Appellant was later identified as the man wearing glasses.

[5] Mitchell admitted to having "numerous" prior felony drug convictions.

and Keefe Spence (whom he referred to as "Shorty") coming up the street; he knew both men from the neighborhood, and it was Spence, he said, who hollered "clear the block."[6]

When they heard the warning, the few people on the street left the area. As he moved away from Bond Street, Mitchell heard several gunshots, but he did not see the shooter. Shortly after the shooting, Mitchell identified Spence and appellant from photo arrays, but only as people he recognized. He repeatedly denied witnessing the shooting or seeing anything other than appellant and Spence running down the street.

Detective Vernon Parker testified that Mitchell freely offered information to him in exchange for some consideration on his pending drug charges. In fact, according to Parker, Mitchell went so far as to use business cards that he pulled from his pocket to create a makeshift layout of the street on which the shooting took place.

James Nelson, also incarcerated at the time of trial, was with Mitchell at the time of the shooting.[7] Nelson initially testified that he was unfamiliar with either defendant and knew nothing about the case. He added that everything he claimed to have heard or said previously about the case was a "complete lie."

[6] Mitchell changed his testimony several times regarding the identity of the person who yelled, "Clear the block." At first he claimed not to know who said it, then stated that Spence said it, finally returning to a claim that he did not know. The court permitted the State to use Mitchell's prior recorded statement to police to refresh his recollection, and he ultimately settled on Spence because that is what he had told the police shortly after the shooting.

[7] Nelson admitted to "quite a few" prior convictions, including armed robbery, firearm offenses, and assault.

The State was permitted to introduce evidence of Nelson's prior recorded statement that he had given on November 12, 2013, while in a holding cell at a Baltimore City Police station. The videotape of Nelson's interview with the police was played for the jury as impeachment of Nelson's recantation of his eyewitness account of the Conway shooting.

In the videotape, Detective Aaron Cruz, who was investigating the unrelated murder of someone nicknamed "Muppy," asked Nelson if he had "any information that would be helpful." After admitting to having little useful information about Muppy's case, Nelson told Cruz, "I'm going to tell you about another one, a homicide . . . the little guy that got killed right there on Lanvale and Bond" over the summer.[8]

Nelson told Cruz that, earlier that day, when he had left his holding cell to go to the bathroom, he had seen one of the men (who committed the murder at Lanvale and Bond) in holding cell number four.[9] Nelson said that he had seen that man, whom Detective Cruz determined was Keefe Spence, and "another little guy" with glasses take off running onto Bond Street and then kill the victim; he had seen the gun they used and heard the gunshots. It was the man with the glasses, he said, who had the gun.

[8] At the time of Nelson's statement, Detective Cruz knew nothing about the Conway murder and had to consult with other police officers to confirm that it had even occurred.

[9] Detective Cruz verified that, given the physical set-up of the police station, Nelson would have passed holding cell number four on his way to the bathroom.

After being confronted with his videotaped statement at trial, Nelson claimed that he had not been on Bond Street at all on the day of the murder and that everything he had told Cruz was a lie. He further claimed that the tape of his recorded statement was not continuous and that Cruz kept starting and stopping it so that he (Cruz) could instruct Nelson as to what he should say.[10]

Additionally, at trial Nelson maintained that the prosecutor had offered to reduce his sentence in exchange for favorable testimony, but he declined, stating he was "going to tell the truth." He then made clear that he did not want to answer further questions, and he ceased responding to the prosecutor's questions.

After the trial judge threatened to hold Nelson in contempt if he continued to refuse to answer the prosecutor's questions, Nelson acknowledged that he had written on a photo array containing appellant's photo the words: "[H]e's the one that run past me holding the gun and seconds later I heard gunshots." On the array containing Spence's photo, he wrote, "[H]e's the one that said, clear the block and ran past us, seconds later him and another person ran past us again with a gun, and minutes later we heard gunshots." He insisted, however, that the detective had instructed him what to write.

[10] Detective Cruz denied that possibility, explaining that if an officer stops a video recording for any reason, a "whole new set up, a new recording" would be required; there is no "pause" function, and any gaps between separate recordings would be readily apparent. Detective Cruz further denied speaking to Nelson off-camera about any case; he also denied providing Nelson with answers.

As impeachment, the prosecutor showed the jury the videotape of the photo array procedure that contradicted Nelson's statement that the officers told him what to write on the arrays. From the transcription of the tape, it is also clear that Nelson immediately recognized the man who first ran past him as the man who had the gun.

Appellant did not introduce any evidence.

DISCUSSION

Appellant contends that the trial court committed reversible error when it permitted the prosecutor to impeach James Mitchell with his prior inconsistent statements. According to appellant, the questions that impeached Mitchell violated Maryland Rules 5-608 and 5-613. More specifically, appellant argues that the court should not have permitted the prosecutor to impeach Mitchell with testimony that he cooperated with Detective Parker without first confronting Mitchell with his prior words and actions. And, if the State's intent was to have the detective detail Mitchell's cooperation generally, the prosecutor should have asked Detective Parker to give an opinion about Mitchell's truthfulness, rather than provide a specific example of the witness's assistance to the police.

As mentioned in our recitation of the factual background, Mitchell, upon direct examination by the State, recanted the statement he had made to the police—that he knew about the Conway shooting and appellant's and Spence's involvement therein. He also claimed that the only reason he had told the police anything about the case was because officers had beaten and otherwise coerced him into giving information implicating appellant and Spence.

As impeachment of Mitchell's in-court statement about police coercion, the State called Detective Parker, who interviewed Mitchell on July 25, 2013. Parker testified that Mitchell's initial statement regarding Mitchell's location at the time of the shooting was confusing. When the prosecution asked a question about how the confusion was cleared up, Spence's attorney objected to the prosecutor's questions on the ground of hearsay, arguing that the prosecutor was "trying to get this officer to say what Mitchell told . . . [him] about where he was[.]" Appellant's attorney joined the objection on the ground of hearsay and added that the prosecutor "should have asked Mr. Mitchell about that and then asked this detective" and that, in the absence of that line of questioning, the State could not impeach anything Mitchell had said by the use of extrinsic evidence.[11]

The prosecutor disagreed, explaining that her questioning was "more to show how cooperative Mr. Mitchell was being" and that Mitchell, "in an effort to help the detectives clarify where he was, reached into his pocket, pulled out business cards, laid them out in the order of the street and explained to the detectives exactly which street was which and where he was standing." This example of his cooperation, the prosecutor continued, undermined Mitchell's testimony that he had been threatened or coerced into making his statement to Detective Parker.

The court observed that "if the line of questioning is just to prove that [Mitchell] was cooperative, [appellant's counsel's point] doesn't matter . . . [b]ecause it's not offered to prove any truth about where he was. It's just offered to prove that he was being helpful

[11] On appeal, appellant makes no claim that the officer's testimony violated the hearsay rule.

to them." Appellant's attorney agreed that the prosecutor could ask the detective whether Mitchell had cooperated with him in general but argued that she could not introduce a specific example of Mitchell's cooperative behavior.

The court overruled the objections of both defense attorneys and gave the following explanation:

> [T]he information or impeachment, if you will, she—the State is attempted [sic] to impeach his overall premise that he was not voluntarily cooperating. And she is giving examples of that.
>
> Whether or not that is true or whether or. . .not it's different from what he said earlier in terms of the specifics of it, or what he actually said, is not relevant. She's not impeaching his statement. She's impeaching the—the big picture. . . [w]hich I think she has the right to do. Because at this point, whatever she's asking is not offered for the truth.
>
> So the fact that he laid out these cards is not offered to prove that this is really the number of cards was equivalent to the number of the houses he was down. . .it's just offered to prove that he was—he was assisting.

The court then permitted the prosecutor to ask Detective Parker, by the use of leading questions, the following six questions[12]:

> Q. Detective Parker, isn't it true that during your conversation with Mr. James Mitchell, he actually at some point reached into a pocket and pulled out some business cards? Do you remember that?
>
> A. Yes.
>
> Q. Okay. You—isn't it true, though, that—that Mr. Mitchell assisted yourself and Detective Kaczmarek with understanding the layout of the streets that surround the area that you were discussing; Lanvale, Bethel, Bond?
>
> A. Yes.

[12] Defense counsel had earlier stated they had no objection to the use of leading questions.

Q. Okay. Now, in discussing the location that you were talking about; Lanvale, Bethel, Bond, those streets, isn't it true that Mr. Mitchell volunteered to help you figure out the street layout and where all the stores were located?

A. Yes.

Q. At any point, did Mr. Mitchell hesitate when he was talking to you about whether he should—beyond what you've already told us, was [t]here any time where Mr. Mitchell asked to stop the interview?

A. No.

Q. Was there any time where Mr. Mitchell expressed to you that if he felt [that] if he didn't speak with you, he'd be in a lot of trouble?

A. No.

Q. At any point during the interview or during any of the time that you spent with Mr. Mitchell, did he express any concern or fear to you about Detective Green?

A. No.

It is the court's allowance of the above six questions that form the basis for appellant's assertion that the trial judge committed reversible error.

Appellant first claims a violation of Md. Rule 5-613(a), arguing that if the State wished to impeach Mitchell as to whether he actually cooperated in the investigation by using business cards to show the detective the layout of the street on which the shooting occurred, the prosecutor was required to first confront Mitchell, while he was on the witness stand, with his words and actions.

Rule 5-613(a) states:

(a) **Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that

> before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

The unambiguous language of Rule 5-613(a) relates to impeachment by use of a "prior written or oral statement made by the witness[.]" The word "statement" is not defined by Rule 5-613 or in Chapter 600 of Title 5 of the Maryland Rules, nor did our research unearth a Maryland case defining "statement" as used in Rule 5-613. Therefore, we look to the ordinary and popular understanding of the word to determine its meaning. In doing so, we are permitted to consult a dictionary.[13] *See Schreyer v. Chaplain*, 416 Md. 94, 101 (2010) ("The absence of an express definition of a term . . . does not preclude us from construing its plain meaning," and we may "consult the dictionary to elucidate terms that are not defined in the [Rule]."(internal quotation marks and citations omitted)); *Chow v. State*, 393 Md. 431, 445 (2006) ("[I]t is proper to consult a dictionary or dictionaries for a term's ordinary and popular meaning.").

An accepted definition of "statement" is "1. something stated. 2. a communication or declaration in speech or writing, setting forth facts, particulars, etc." *Random House Webster's College Dictionary*, 1260 (1997). Conduct not intended to be an assertion is not

[13] "Statement" is defined in Rule 5-801(a) as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 5-801, however, specifically details that its definitions "apply under this Chapter[.]" As such, its definition of "statement" is not applicable to Rule 5-613, which does not appear in Chapter 8 of the Rules. Notwithstanding the inapplicability of Rule 5-801's definition of "statement" to Rule 5-613, however, were we to apply it to appellant's argument relating to a violation of Rule 5-613, our ultimate conclusion would not change.

included in the definition. *See* Lynn McLain, *Maryland Evidence: State and Federal* § 613:1, at 628 (2001, May 2017 Update)(footnotes omitted) (Under Rule 5-613(a), "a witness may be impeached by examination to show that the witness previously made a statement in a way inconsistent with his trial testimony. By its terms, Md. Rule 5-613 applies only to written or oral 'statements,' and not to conduct inconsistent with one's testimony.").

In answering the six questions here at issue, Detective Parker did not rely on any declaration, either in speech or writing, made by Mitchell. Given the prosecutor's proffer to the trial court, during a bench conference, that Mitchell had used business cards to show "the order of the street and explained to the detectives exactly which street was which and where he was standing," defense counsel worried that the prosecutor would try "to get this officer to say what Mitchell told. . .[him] about where he was" at the time of the shooting. Counsel's fear was not realized, however, because the prosecutor did not ask Parker what Mitchell told the police. Instead, in the questions at issue, inquiry was made as to Mitchell's actions not his words. As mentioned, in response to the prosecutor's carefully phrased leading questions, Parker detailed only that Mitchell voluntarily—with no apparent hesitation or fear of retribution if he did not help the police, as Mitchell claimed at trial—pulled some business cards out of his pocket in an attempt to assist Detective Parker with understanding the layout of the streets surrounding the area of the Conway shooting. Because the prosecutor did not ask Parker about a prior "statement" made by Mitchell—and the detective volunteered none—we perceive no violation of Rule 5-613

when the court permitted the detective to answer the six questions at issue, without first confronting Mitchell with his prior actions.

Appellant also contends that the trial court violated Md. Rule 5-608 when it permitted the State to impeach Mitchell with his prior inconsistent statements by use of a specific example of his cooperation with police.

Rule 5-608 states, in pertinent part:

> **(a) Impeachment and rehabilitation by character witnesses.**
> 1) Impeachment by a character witness. In order to attack the credibility of a witness, a character witness may testify (A) that the witness has a reputation for untruthfulness, or (B) that, in the character witness's opinion, the witness is an untruthful person.
> (2) Rehabilitation by a character witness. After the character for truthfulness of a witness has been attacked, a character witness may testify (A) that the witness has a good reputation for truthfulness or (B) that, in the character witness's opinion, the witness is a truthful person.
> (3) Limitations on character witness's testimony. (A) A character witness may not testify to an opinion as to whether a witness testified truthfully in the action.
> (B) On direct examination, a character witness may give a reasonable basis for testimony as to reputation or an opinion as to the character of the witness for truthfulness or untruthfulness, but may not testify to specific instances of truthfulness or untruthfulness by the witness.
> (4) Impeachment of a character witness. The court may permit a character witness to be cross-examined about specific instances in which a witness has been truthful or untruthful or about prior convictions of the witness as permitted by Rule 5-609. Upon objection, however, the court may permit the inquiry only if (A) the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the prior instances occurred or that the convictions exist, and (B) the prior instances or convictions are relevant to the witness's reputation or to the character witness's opinion, as appropriate.

Rule 5-608 applies to impeachment and rehabilitation of a witness by "a character witness." In this case no character witnesses were called. The State did not call Detective Parker to impeach or attack Mitchell's character. Nor did the prosecutor ask Parker

whether Mitchell had a reputation for truthfulness or untruthfulness or was a truthful or untruthful person. Because the State made no attempt to impeach Mitchell's character, through the testimony of Parker, Rule 5-608(a) was not violated when the court allowed Detective Parker to answer the six questions at issue.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ASSESSED TO APPELLANT.