Circuit Court for Baltimore City

Case No. 115195018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2730

September Term, 2016

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DAVON TEMPLE

v.

STATE OF MARYLAND

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Meredith
Friedman,
Wilner, Alan M. (Senior Judge, Specially Assigned)

JJ.

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Opinion by Wilner, J.

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Filed: January 5, 2018

As a result of a shooting – actually a triple shooting – that occurred at approximately 11:48 p.m. on May 22, 2015, appellant was convicted by a jury in the Circuit Court for Baltimore City of second degree murder, use of a firearm in the commission of a crime of violence, and two counts of wearing, carrying, or transporting a deadly weapon, for which he was given an effective sentence of fifty years in prison. He raises five issues in this appeal – whether the court erred in:

(1) failing to ask a question on *voir dire* that he requested the court to ask;
(2) allowing a detective to identify a murky image of a person in a photograph as appellant;
(3) admitting a detective's lay opinion regarding the likelihood of finding fingerprints on a gun;
(4) admitting a detective's lay opinion that an obliterated serial number on a gun indicates that the person using the gun did not want the gun to be traced; and
(5) refusing to grant a motion for new trial.

Finding no error, we shall affirm the Circuit Court's judgment.

## BACKGROUND

At 11:51 p.m. on the evening of May 22, Baltimore City Officer Christopher Smith responded to the 1900 block of Wilhelm Street following the report of a shooting. He found James McCoy lying on the sidewalk outside 1912 Wilhelm Street and Justin Knox inside that house. McCoy had been shot in the back of his head, was unresponsive, and despite some effort on the scene to save him, died from the wound. Knox also had been shot, in the face. He was taken to the Shock Trauma unit and recovered from his wound but said that he did not see the shooter. Approximately four minutes after Officer

Smith's arrival, Officer Tucker Fries, who also was responding to that shooting, was flagged down at the corner of Pratt and Payson Street – about two blocks away – where an individual, later identified as appellant, was lying on the ground bleeding from the neck. There was no immediate association between the two events.

Two days later, in response to a tip from someone who identified himself only as "Marvin," the police searched the back yard of 1930 McHenry Street and recovered a handgun under a dog crate. Marvin told the police that the gun was related to the shooting on Wilhelm Street and that he had placed the crate over the gun. Six casings from fired bullets were removed from the gun. No fingerprints were recovered from the gun, but a single-source DNA profile obtained from a swab of blood on the gun matched appellant's DNA. The State's expert in firearm and tool mark identification testified that the bullet recovered by the Medical Examiner from McCoy's head was fired from that gun. That focused attention on appellant as the murderer. The State's theory was that the wound to appellant's neck was essentially self-inflicted – caused by one of the bullets he fired at McCoy ricocheting and hitting him in the neck.

Some of the issues raised by appellant require a description of the street grid in the immediate neighborhood, which, to some extent, was explained in Detective Kershaw's testimony but which we can take judicial notice of in any event. Wilhelm Street runs in an east/west direction. The next parallel street to the north of Wilhelm Street is McHenry Street, and running parallel one block north of McHenry Street is Pratt Street. Connecting those streets in a north/south direction are, on the western end, Pulaski Street, east of Pulaski Payson Street, east of Payson Street, Goldsmith Alley, and east of

Goldsmith Alley Monroe Street. The State contended that, after shooting McCoy and Knox, appellant ran east along Wilhelm Street to Goldsmith Alley – the next intersecting street – headed north on Goldsmith toward McHenry Street, threw the gun on to the back yard of 1930 McHenry Street, continued north on Goldsmith Alley to Pratt Street, and then ran one block west on Pratt Street until he reached Payson, where he collapsed. Further details will be supplied in the ensuing discussion of the issues.

*Voir Dire*

Among appellant's written *voir dire* requests were:

> "8. Have any of you served previously on a grand jury or petit jury? If so, when and in what court?"
>
> "11. Do any of you have any physical, emotional, or psychological conditions that would prevent you from sitting as a juror or hinder your ability to fairly and accurately evaluate the evidence?" and
>
> "12. Do the facts alleged in this case cause any of you to experience strong feelings to the extent that you would be unable to fairly and impartially decide the case?"

The court rejected No. 8. In its consideration of 11 and 12, this colloquy occurred:

> "THE COURT . . . Eleven I'll give in a different form. Now 12, I understand that you're trying to ask about strong feelings but what – strong feelings about what?
>
> [DEFENSE COUNSEL]: Guns and murder

> [THE COURT]: Okay. So I can't imagine there's a living soul that doesn't have strong feelings about murder. But I can understand your question about guns. So how do you want me to phrase that question? Just do you have strong feelings about handguns that are used in crimes of violence?
>
> [DEFENSE COUNSEL]: Yes.
>
> [THE COURT]: Okay. I'll give that.

The court, in fact, did ask that question:

> "You've heard that this is – the charges in this case are murder, and the murder was accomplished with a handgun. Is there anyone on the jury panel who has strong feelings about handguns that are used in violent – crimes of violence? If your answer is yes to that question, please stand now."

Thirty-five jurors responded, and each was questioned further regarding whether he or she could decide the case fairly based on the evidence. Appellant does not complain in this appeal about the seating or non-seating of those jurors but only about the court's failure to ask question eight and, as part of question twelve, whether any juror had strong feelings about the crime of murder to the extent that he or she would be unable to fairly and impartially decide the case. We shall not consider that issue, because appellant failed to preserve it for appellate review.

Md. Rule 4-323(c) provides that, for purposes of appellate review of a trial court ruling other than on evidence, it suffices if, at the time the ruling or order is made or sought, the party "makes known to the court the action that the party desires the court to take or the objection to the action of the court." In *Smith v. State*, 218 Md. App. 689, 700 (2014), this Court, relying in part on *Marquardt v, State*, 164 Md. App. 95 (2005), confirmed that "an appellant preserves the issue of omitted *voir dire* questions under Rule

4-323 by telling the trial court that he or she objects to his or her proposed questions not being asked." The Court added in *Brice v.* State, 225 Md. App. 666, 679 (2015), quoting in part from *Gilmer v. State*, 161 Md. App. 21, 33 (2005) that "[i]f a defendant does not object to the court's decision to not read a proposed question, he cannot 'complain about the court's refusal to ask the exact question he requested.'" The objection does not have to be specific or state reasons, but it does have to be made. In this case, it was not. Indeed, with respect to Question 12, defense counsel acquiesced in the instruction actually given.[1]

Detective Kershaw's Testimony Regarding State's Exhibit 130

Appellant did not testify at trial. Upon his arrest, he was interrogated by Detective Brian Kershaw. The videotape and transcript of that interrogation were admitted into evidence, and Detective Kershaw testified regarding it. In that statement, appellant said that he had driven his car to the area and parked it on Pratt Street, that he was on Pratt Street at or near Pulaski Street when he got shot, that he did not see the shooter but ran down Pratt Street in an easterly direction toward Payson Street. He never mentioned being on Wilhelm Street, McHenry Street, or Goldsmith Alley. He acknowledged that he

[1] In light of that waiver, we need not address the State's alternative argument that Question 12, as proposed, constituted the kind of compound question declared impermissible in *Dingle v. State*, 361 Md. 1 (2000) and its progeny. *See Pearson v. State*, 437 Md. 350 (2014).

collapsed at Pratt and Payson Streets but said that he did not remember much after being shot until he woke up in the hospital.

As part of his investigation of the murder, Detective Kershaw collected screen shots from videotapes made by surveillance cameras located throughout the area, which were admitted into evidence without objection. One of them (State's Exhibit 124) was taken from a camera on Payson and McHenry Streets. It shows a gold van matching the description of appellant's car turning on to the 1900 block of Wilhelm Street. Exhibit 125, from a camera at Monroe and Wilhelm Streets shows the van heading down the 1900 block of Wilhelm Street and turning south on to Monroe Street. Exhibit 126, from a camera at Pratt and Monroe Streets, shows the van going southbound on Monroe toward Wilhelm Street. Exhibit 128 shows the van parked just seconds before the shooting of McCoy, but, on direct examination, Detective Kershaw did not identify the street where the van was parked. Exhibit 129, taken just as the shooting occurred, shows the shadow or silhouette of McCoy and another individual at the corner of Wilhelm Street and Goldsmith Alley. No objection was made to Detective Kershaw's description of what is shown in those photographs.

The next exhibit was 130. Over a general objection, Detective Kershaw stated that it was taken about a minute after the homicide, that it showed the corner of Goldsmith Alley and Pratt Street, and that one of the two figures in the photograph was that of appellant.[2] The objection was overruled without comment, following which Kershaw

[2] The other figure was riding a bike.

added "this is Mr. Temple here, and in this shot he is walking toward Pulaski – Payson Street on Pratt." That would have him walking in a westerly direction, not easterly toward Pulaski, as appellant said during his interrogation. Exhibit 130 later became the subject of cross-examination of Detective Kershaw, and again, with certainty, he identified the person in the photograph as appellant. When asked to explain that conclusion, he stated:

> "That camera is on a one minute and 40 second rotation. This is 11:48 and 45 seconds. So one minute earlier, one minute and 40 seconds earlier that camera shows this same exact block, and there is no one on Pratt Street. Then moments after the murder, the camera comes back around again and Mr. Temple is observed there. And I say that's Mr. Temple because the next camera shows him continue to the corner where he drops, where the officer responds . . ."

On further cross-examination, Kershaw repeated almost verbatim what he had said on direct – that the camera showed appellant coming out of Goldsmith Alley, turning on to Pratt Street, and proceeding to Payson Street, where he collapsed and was found by Officer Fries.

Exhibit 130 is in evidence, and appellant's description of it as a "grainy, dimly lit image" is accurate. It would have been next to impossible for the jury, looking just at that exhibit, to determine the identity of the figure shown in it. The argument made on appeal, which was not specified below but is preserved in light of the general objection, is that Detective Kershaw's conclusion that appellant was the person shown walking in the photograph was one that could be made only by a qualified expert and not by a lay witness, and that Detective Kershaw was never qualified as an expert. He notes that Md. Rule 5-701, governing opinions offered by lay witnesses, limits testimony in the form of

opinions or inferences to those "which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Those requisites, he claims, were not met in this case, as Detective Kershaw had no firsthand knowledge of the events, and, in appellant's view, his opinion was not helpful to a clear understanding of his testimony or the determination of a fact in issue. He relies largely on this Court's decisions in *Moreland v. State*, 207 Md. App. 563 (2012) and *Paige v. State*, 226 Md. App. 93 (2015). We disagree.

The proper line of demarcation between Rule 5-701, dealing with opinions offered by lay witnesses, and Md. Rule 5-702, dealing with opinions offered by qualified experts, was considered in *Ragland v. State*, 385 Md. 706 (2005), principally in the context of whether a lay witness should be allowed to express an opinion that was based on the witness's specialized knowledge, skill, training, or experience. The Court held that an opinion of that kind was permissible only by a qualified expert. That is no longer in dispute. The issue here is whether Detective Kershaw's identification of appellant in Exhibit 130 was in any way based on some specialized knowledge, skill, training, or experience of the officer, and, if not, whether it was rationally based on his own perceptions and would be helpful to the jury's determination of whether appellant was present in the 1900 block of Wilhelm Street at the time of the homicide and was, in fact, the person who shot McCoy and Knox.

The standard is clear; how it applies depends on the circumstances. *Moreland* involved a bank robbery that was captured on the bank's surveillance camera. The witness whose testimony was at issue was not present at the scene but had known the

defendant for many years and was allowed to identify him from the video recording because of his substantial familiarity with him. Similarly, in *Paige*, a shoplifting case, the witness, a loss prevention officer, had observed the defendant's every movement from the time he and his cohorts entered the store. The Court's principal holding was that, because similar testimony was admitted without objection, Paige's objection was waived and not preserved for appellate review. As an alternative holding, the Court concluded that her testimony explained the facts on the video and that any opinions she offered were rationally based on her perceptions and were helpful for the jury to understand the facts.

Appellant, of course, stresses the distinction; Detective Kershaw had never seen appellant before this episode and did not observe what was happening in real time. He simply interpreted Exhibit 130, which the jury theoretically could do for itself. There obviously is a distinction between the situations in *Moreland* and *Paige* and the one before us, but that does not require a different result.

Merely showing Exhibit 130 to the jury would have been of little or no help to them. The significance of the exhibit came from (1) Detective Kershaw's having watched the videotapes made by the several surveillance cameras in the area, from which Exhibit 130 and the other screen shots were taken, most of which the jury never saw, (2) his identification of various structures that better defined the area based on his having walked it –where an awning and a pawn shop was located, (3) his knowledge of the times when and the locations from which the various photographs were taken, (4) his knowledge of the cycles on which the cameras operated and the relevance of that, (5) the relevance of what was depicted in the other photographs, to which no objection was

raised, and (6) the relevance of the one pedestrian shown walking down the middle of Pratt Street toward Payson Street within a minute or so after the shooting and immediately before appellant was found collapsed at that corner. None of this was a matter of special expertise but simply of a good police investigation that connected discernible dots and gave the jury useful information that they could accept or reject based on their perception of the detective's credibility and what they, themselves, might glean from the exhibit in light of the detective's testimony.

Testimony of Detective Jones Regarding Serial Number and Fingerprints

Kelly Figueroa, a police crime lab technician, testified as a fact witness, not as an expert. As relevant here, she described the process for lifting fingerprints. She made clear that she is not a fingerprint analyst but was responsible merely for lifting fingerprints from various objects that would then be examined by others. She said that she had attempted to lift fingerprints from the handgun that the State established was the murder weapon but had not recovered any possible latent prints from it or from the casings. Following up on a question from the prosecutor, the court asked her what surfaces are more likely to cause a print to be left, to which she replied that "[y]ou can find a print on anything depending on what you're using to process it with." She added that smooth non-porous surfaces, like the barrel of a gun, are the best because it is not going to absorb the moisture one leaves behind. She also acknowledged that prints could be wiped away.

Ms. Figueroa was followed as a witness by Detective Jonathan Jones, who had been with the police department for 16 years, with the homicide unit for over nine years, and who had been the primary homicide investigator on approximately 40 cases. He took the call from the person another officer had identified as "Marvin" (but who Detective Jones referred to as "Melvin"), which led to the discovery of the murder weapon.

Detective Jones met Ms. Figueroa at the scene and rendered the gun safe. He confirmed that there was no serial number on the gun and stated that, when no serial number is found, they refer to the number as having been "obliterated." No objection was made to that testimony. He then was asked, "And in your experience what is an obliterated serial number indicative of," to which appellant objected on the ground of relevance. The court, assuming that the answer was going to be that the gun was used in a crime, asked how that would not be relevant, to which counsel replied "I think it speaks for itself. It's been already linked to a shooting, it's just piling on at this point." Unconvinced, the court overruled the objection, following which the prosecutor repeated the question:

> "Q Detective, when a serial has been obliterated from a weapon what is that indicative of based on your experience?
>
> A That the person using it didn't want this serial number to be – didn't want the gun to be traced."

Shortly after that colloquy, Detective Jones was asked whether any latent prints had been recovered, and he replied in the negative. He then was asked whether it was common or uncommon to have latent prints on a handgun, to which, over a general

objection that was overruled, he replied "uncommon." Asked if he had an understanding why it was uncommon, he explained, without further objection:

> "One, is, as I've learned from being in the Homicide Unit, fingerprints are very delicate. And by that I mean it can – once a fingerprint is on an object or on something it can be smeared off, moved away. Handling of a gun is one of those – one of those situations where your hand is constantly moving.
>
> Also, when a gun is fired it gets extremely hot and fingerprints are oil and dirt, the oil and dirt can in such a way get burned off or singed off from a gun during the process of it actually being fired. I cannot recall a time when I've recovered a fingerprint from a handgun."

Appellant claims foul with respect to both segments of Detective Jones's testimony – that his statement regarding the inference to be drawn from obliterating a serial number was both irrelevant and prejudicial under Md. Rule 5-403 and that his statement regarding the unlikelihood of finding a fingerprint on a handgun was in the nature of expert testimony by a lay witness. Neither complaint has merit.

With respect to his testimony regarding the obliterated serial number, his complaint regarding prejudice under Rule 5-403 is unpreserved. He made a specific objection on the sole ground of relevance, and that is all that is before us. *Klauenberg v. State*, 355 Md. 528, 541 (1999). With exceptions not at issue here, Md. Rule 5-402 declares all relevant evidence to be admissible. Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Court of Appeals has made clear that trial courts have "wide

discretion" in determining the relevance of evidence. *State v. Sims*, 420 Md. 705, 724-25 (2011).

At issue in the case was whether appellant used that gun to murder Mr. McCoy and wound Mr. Knox and, if so, whether the shootings were premeditated and with malice, and not in self-defense or accidental. The DNA evidence connected appellant to a gun from which the serial number had been obliterated and that had been discarded following the shooting. Discarding the gun itself lends an inference that the shooter did not want it to be connected to him, and the obliteration of the serial number supports that inference. The secondary inference drawn from that fact, relevant to whether the shooting of Mr. McCoy constituted murder, was that the shooting was not in self-defense or accidental, but deliberate – that this was not just a gun that he happened to be carrying for a lawful purpose that he would not mind being traceable to him but was, instead, one he intended to use in the commission of a crime. Detective Jones's statement thus had a tendency to make the existence of that fact, which was of consequence, more probable than it would have been without that statement.

With respect to the testimony regarding the likelihood of finding latent prints on a handgun, Detective Jones was not testifying as an expert but simply from his experience as a homicide detective. The question objected to was whether it was common or uncommon to find prints on a gun and he replied that, in his experience it was uncommon. He could not recall a single time that he recovered a print from a handgun. What appellant is complaining about in this appeal was his subsequent explanation of

why that may have been the case, which may have bordered on an expert opinion, but there was no objection to that testimony.

Motion for New Trial

On *voir dire*, the court asked the members of the jury panel to stand if they or any member of their immediate family "ever worked for or volunteered with any law enforcement agency such as any police department, any sheriff's office, any prosecutor's office, the Office of the Public Defender, the FBI, correctional officer, or neighborhood watch." One of the jurors, Ms. Carey, did not respond, and she ultimately was selected to serve on the jury.

On November 27, 2016 – ten days after the jury's verdicts were rendered – the State's Attorney's Office filed a "Supplemental Post-Trial Disclosure" in which it stated that one of the jurors (Ms. Carey) "was an embedded Social Worker from the Department of Social Services assigned to provide reports to the State's Attorney's Office." The disclosure added that [Ms. Carey] "has an office located within the State's Attorney's Office but is neither compensated nor supervised by the State's Attorney's Office." It asserted the State's belief that the juror's failure to inform the parties of her association with the Office was "an inadvertent mistake" and that the jury's verdict should not be disturbed.

That disclosure provoked a motion for new trial in which appellant asserted that Ms. Carey's lack of response to the court's question raised a presumption of bias and may not be viewed as an inadvertent mistake. At a hearing on the motion, Ms. Carey testified

that she was a social worker with the Baltimore City Department of Social Services but was "out-stationed" at the State's Attorney's Office Special Victim's Unit. She said that she supplies that unit with child welfare information that DSS has collected, that she does not investigate cases for the State's Attorney's Office, that she played no role with respect to this case, that she is not compensated by that Office, and that there was nothing about her work that played any role in her decision in the case. Notwithstanding that the *voir dire* question mentioned a prosecutor's office, Ms. Carey said that she had focused on police agencies, which is why she did not respond.

With this evidence and after listening to argument, including defense counsel's statement that, had Ms. Carey revealed her connection to the State's Attorney's Office, he would have challenged her for cause and, if necessary, excused her through a peremptory challenge, the court announced that it was "satisfied that the juror's failure to respond was wholly inadvertent," that she did not, in fact, work for the State's Attorney's Office in any capacity but merely provided them with social service records in child abuse cases, and that she indicated that she could be a fair and impartial juror. On those findings, the court denied the motion.

Citing *Williams v. State*, 394 Md. 98 (2006) and *Hunt v. State*, 345 Md. 122 (1997), appellant points out that, when a juror fails to respond accurately to a *voir dire* question, a defendant's Constitutional right to an impartial jury is denied. He argues that the court's conclusion that Ms. Carey's failure to respond was inadvertent is untenable and defies innocent explanation.

The problem in *Williams* was that the juror failed to disclose, in response to a nearly identical question, that her sister was employed as a secretary in the State's Attorney's Office and, when that was later revealed, the court, without ever questioning the juror, simply declared the connection to be too remote. Citing this Court's Opinion in *Burkett v. State*, 21 Md. App. 438 (1974), the *Williams* Court accepted the view that, in the absence of a showing of actual prejudice or evidence that gives rise to a reasonable belief that prejudice or bias by the juror was likely, the grant of a new trial is discretionary but made clear that some investigation by the court is required. The Court stated (394 Md. at 113):

> "We endeavor to be clear on this point. Where the juror is available for further voir dire and is further voir dired, a trial court may exercise the discretion *Burkett* requires it to exercise. But the trial court's sound discretion can only be exercised *on the basis of the information that the voir dire reveals and the findings the trial court makes as a result*."

(Emphasis in original).

Contrariwise, the Court held that "where there is a non-disclosure by a juror of information that a voir dire question seeks and the record does *not* reveal whether the non-disclosure was intentional or inadvertent, the defendant is entitled to a new trial." (Emphasis added).

Here, of course, unlike the situation in *Williams*, there was a further examination of the juror and specific findings were made by the trial court. The relevant question posed on *voir dire* was not whether Ms. Carey was associated or connected in any way with a prosecutor's office but whether she ever "worked for or volunteered with" a

prosecutor's office, and the uncontradicted evidence was that she did neither. She worked for DSS. Her silence was an accurate response to the question posed.

Beyond that, as to whether her explanation that she focused on police agencies rather than a prosecutor's office could reasonably support a conclusion that her non-response was inadvertent was to some extent a matter of her credibility, which the court had the ability to assess. The question lumped the prosecutor's office in with police departments, sheriff's offices, and the FBI, and it is impossible from a cold record to determine with what speed or inflections the question was asked. Some courts propound those kinds of questions in writing to the prospective jurors so they have the ability to read and think about them. In this case, we do not agree with appellant that the court's finding of inadvertence is untenable.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.