Circuit Court for Baltimore City
Case No. 116335009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2037

September Term, 2019

DONALD GAFF

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Harrell, J.

Filed: November 6, 2020

Following a bench trial in the Circuit Court for Baltimore City, Officer Donald Gaff, appellant, a patrol officer with the Baltimore City Police Department ("BPD"), was convicted of misconduct in office, but acquitted of second-degree assault.[1] His motion for a new trial was denied. The court sentenced Officer Gaff to a term of one year, suspend all but time served, and to one year of supervised probation. In this appeal, Officer Gaff presents two questions for our review, which we have rephrased:

1. Was the evidence legally sufficient to sustain Officer Gaff's conviction for misconduct in office?

2. Did the trial court err by granting the State's motion *in limine* to preclude Officer Gaff from presenting an expert witness to testify about the reasonable use of force?

For the following reasons, we answer the first question in the affirmative and the second question in the negative and, so, affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

The charges against Officer Gaff arose from an arrest he effectuated in the early morning hours of 11 September 2016, while working the overnight shift in the Brooklyn neighborhood of South Baltimore. At the bench trial, the State presented testimony from the arrestee, Jamal Wilson, and from two other police officers on the scene, Officers Felix Torres and Miguel Rodriguez, both of whom were wearing department issued

[1] This was Officer Gaff's second bench trial. In his first trial, he was convicted of both charges, but moved successfully for a new trial.

body-worn cameras.[2] In his case, Officer Gaff testified and called Officer Nicholas Marks, who also was on the scene that night, but was not wearing a body camera. During trial, the circuit court granted the State's motion *in limine* to exclude Officer Gaff's use of force expert, Professor Maria Haberfeld, Ph.D.

The evidence adduced, viewed in a light most favorable to the State, showed the following. On 11 September 2016, Mr. Wilson was socializing with friends and family. He, his sister, Jamila Wilson ("Jamila"); his adoptive mother, "Mama Jean"; and her young granddaughter had traveled from West Baltimore to the Brooklyn neighborhood to pick up Mr. Wilson's friend, Mike, and some of Mike's friends. They planned to return to West Baltimore together to socialize further at Mr. Wilson's house.

On the way back to Mr. Wilson's house, the group traveled in two cars. Jamila drove a white Nissan Sentra, in which Mr. Wilson was her front seat passenger and Mama Jean and her granddaughter were backseat passengers. Mike drove a black car with at least one passenger. Jamila was following Mike because he knew the area better Before heading home, they made a stop at a bar and package goods store in the 600 block of East Patapsco Avenue. Mike parked at the curb. Jamila initially did the same. While Mr. Wilson was inside the store, Jamila pulled out of her parking space and double-parked near Mike's car, blocking one of the two eastbound lanes of traffic.

[2] Officer Gaff had not yet been issued a body camera and, thus, the events that preceded the arrival of Officers Torres and Rodriguez were not recorded.

It was then, shortly after 1 a.m., that Officer Gaff, who was driving a marked cruiser, pulled up behind Jamila's double-parked vehicle. He yelled twice to her, "Hey, park your car." She gestured to him to go around her. He activated his lights and called for backup over the radio. Officer Gaff approached the driver's side window of the Nissan on foot as Mr. Wilson was returning to the car from the package goods store.

Officer Gaff and Mr. Wilson testified to vastly different versions of what transpired next. According to Officer Gaff, Mr. Wilson approached him yelling, "Get the f—k away from the car" and "F—k you and f—k your mother." He was behaving in a bizarre manner and repeating himself. Officer Gaff was scared and called out his location over his radio, a sign to the dispatcher that he was in danger.

According to Mr. Wilson, he told merely Officer Gaff to "give [them] a few seconds" because they were about the leave. Officer Gaff responded angrily, telling Jamila that he didn't care and to "move that piece of . . . s-h-i-t."

Officers Torres, Rodriguez, and Marks responded to the scene, along with Officer Jose Boscana. When Officer Rodriguez arrived, he saw Officers Gaff and Boscana standing on the passenger side of the Nissan.[3] Officer Rodriguez parked his cruiser "nose- to-nose" with the Nissan. He got out of his vehicle and walked to the driver's side of the Nissan.

At that time, Officer Gaff was directing Jamila and Mr. Wilson to drive away, saying "Go now" and "I'm telling you to leave." Jamila told Officer Rodriguez that she needed to

[3] Officer Boscana also was not wearing a body camera. In any event, he did not testify.

follow the car being driven by Mike, which still was parked at the curb, as confirmed on Officer Rodriguez's body camera video. She said she was following that car back to Baltimore and that he needed to "move out" first. A moment later, Jamila put the Nissan in reverse and Officer Rodriguez exclaimed, "Stop!" and told her to put her car in park.

Mr. Wilson's side of the conversation is not audible on the body camera footage, but Officer Gaff can be heard saying, "Say another word and you're going to jail." Officer Torrres arrived at this point and approached the driver's side of the Nissan from behind Officers Boscana and Gaff. From his body camera footage, Mama Jean can be seen reaching forward from the backseat to put her hand over Mr. Wilson's mouth. According to Officer Gaff, Mama Jean whispered to Mr. Wilson that he was "in enough trouble, just stop." This caused Officer Gaff to suspect that Mr. Wilson might be on probation or have an open warrant. Officer Gaff began asking Mr. Wilson to show him ID, saying "Give me ID right now. Give me ID. Give me ID or you're going to jail." Jamila, who was crying and visibly upset, began begging Mr. Wilson to get out of the Nissan.

Mr. Wilson opened the passenger side door and got out. Officer Gaff, facing Mr. Wilson, asked him for ID and said, "You're going to jail." Mr. Wilson replied, "I'll go" and placed his hands behind his back. While Mr. Wilson remained facing Officer Gaff with his hands behind his back in a position to be handcuffed, Officer Gaff reached out his left hand and shoved Mr. Wilson's right shoulder, causing him to fall backwards

against the Nissan. As he fell, Mr. Wilson's right hand swatted at Officer Gaff's left arm, making contact.

After he steadied himself against the Nissan, Mr. Wilson's arms were down at his sides. Officer Gaff then lunged toward Mr. Wilson, grabbing and hitting him around the face, yelling repeatedly, "You're going to jail motherf--ker." Officer Torres exclaimed, "Just chill, hey, hey hey!" Officer Boscana placed his right arm between Officer Gaff and Mr. Wilson, blocking Officer Gaff from getting closer to Mr. Wilson. At the same time, Officer Torres grabbed Officer Gaff's left arm and shoulder, attempting to pull him off Mr. Wilson, repeating his admonition, "Hey, hey, hey, chill, chill, chill." Officer Torres testified that he was speaking to Officer Gaff, not Mr. Wilson. During the encounter, Officer Gaff paused for a moment and looked in the direction of Officer Torres, who was urging him to "chill," and then turned back and shoved Mr. Wilson in the face again.

Officer Marks arrived on the scene after Mr. Wilson was out of the vehicle. He testified that as he arrived, he thought he saw Mr. Wilson strike Officer Gaff. He was shown the body camera footage at trial and acknowledged that Mr. Wilson appeared to have his hands behind his back when Officer Gaff shoved him.

Mr. Wilson was arrested and charged with failure to obey a lawful order of a police officer, second-degree assault, and resisting arrest. He was transported to Harbor Hospital, where he was evaluated for abrasions and pain in an eye, and then was transported to Central Booking. Five days later, the State entered a *nolle prosequi* as to each charge.

The State introduced into evidence at trial the BPD's "Use of Force" Policy ("Policy 1115") (published 1 July 2016). As pertinent, Policy 1115 provides that police officers "shall use only the force objectively reasonable, necessary, and proportional to effectively and safely resolve an incident, while protecting the lives of the member or others." An officer "shall de-escalate as soon as possible and appropriate" and "may be justified in using force at one moment, but not justified in using force several seconds later due to the changing dynamics of a situation." Relatedly, an officer must "continually assess the situation and changing circumstances, and modulate their use of force appropriately." This includes "'"slow[ing] down' the situation and re-assess[ing] how [an officer] can achieve the most peaceful outcome."

The "De-Escalation" section of Policy 1115 further explains that de-escalation techniques "include verbal persuasion, warnings and tactical de-escalation techniques, such as slowing down the pace of an incident, waiting out subjects, creating distance (and thus the reactionary gap) between the member and the threat, and requesting additional resources[.]" Creating distance may be achieved by "withdraw[ing] to a position that is tactically advantageous or allows [the officer] greater distance in order to de-escalate a situation[.]" An officer "shall not use tactics designed to intentionally escalate the level of force."

The State also introduced into evidence the BPD Code of Ethics ("Policy 301") and the BPD Rules & Regulations ("Policy 302"). Policy 301 states, in relevant part, that a police officer will "enforce the law courteously and appropriately without fear or favor,

malice or ill will, never employing unnecessary force or violence[.]" Policy 302 provides at Rule 1.1 that police officers "shall be professional, civil and orderly at all times, and shall refrain from coarse, profane, or insolent language." At Rule 1.7, it prohibits the use of "unnecessary force."

The State's theory of the case was that, irrespective of whether the arrest itself was lawful, Officer Gaff's use of force was "unreasonable, unnecessary and excessive" and amounted to an assault. The State maintained that, because Mr. Wilson had his hands behind his back when Officer Gaff initiated contact with him, no force was required to effectuate the arrest and the use of force was an assault. The State maintained that Officer Gaff also committed misconduct in office by his use of unnecessary force in violation of Policies 1115, 301, and 302. It argued that the level of Officer Gaff's anger, which was apparent from the videos, was evidence of his corrupt intent.

Defense counsel argued that Officer Gaff was permitted to use force to effectuate the arrest of Mr. Wilson and the amount of force used was objectively reasonable given that Mr. Wilson had been behaving belligerently and erratically throughout the encounter and had ignored Officer Gaff's orders to produce identification. With respect to the misconduct in office charge, the defense argued that because the only specific act of misconduct identified by the State was the alleged assault, if Officer Gaff was found not guilty of assault he must be found necessarily not guilty of misconduct.

The court found that the witnesses at trial had "credibility issues galore" and that no one had "testified . . . consistent with what the video[s] show." The court found Officer Gaff not guilty of second-degree assault, but guilty of misconduct in office.

The trial judge asked Officer Gaff if he understood the verdict. His counsel replied, "My understand[ing] from the State was that they were –their theory of prosecution –" The trial judge interjected, "[t]he State's theory of the case can be whatever it wants to be. The facts are the facts." In response to defense counsel's remonstration that the State still had to "allege a specific act of misconduct[,]" the court elaborated as follows:

> The act of misconduct was the escalating of the – okay? The fight – let's say it was a fight of mutual affray. If the – assuming that Mr. Wilson struck him first, and then he struck him again, the Court's concern is he was inappropriate and he did not exercise good judgment or common sense in pursuing this matter. Even when the other officers were trying to stop him he was still smacking him and cussing at him. It was done then. That was the not exercising good judgment. That was his specific intent to impede administration of justice.
>
> If these officers had not been there he'd still be beating this guy. It was over. It was done. He did not exercise good judgment. The way this whole thing was handled was horrific. All right.
>
> Now, I was just about – well, as I said, the fear and frighten-ness dissipated the more officers who showed up on the scene. And the cursing, the belligerent-ness, the escalation by this officer never de-escalating, it was constantly escalating. Constantly escalating. He never took a step back when the other two had control of the situation. He never just said, "Fine, you all deal with it," and walked away, which he could.
>
> His temper, his voice, the tone, his words, his actions were all – all of them, were in direct violation of the Code of Ethics in 301 and 302. And it was not like he did not have a choice, he did. He did have a choice.
>
> Now, when I say excessive force I'm not saying that he shot him when he could have just hit him. What I'm saying is the continuous, he never tried to de-escalate, he never exercised good judgment or common sense in handling this situation. Even after – if he – if Mr. Wilson assaulted him, even after the initial maybe it's a reflex, which police officers don't have the luxury of having, the reflex, "oh, somebody hit me" let me hit

> them right back, even if you take that, I'll give him that reflex, but even after that reflex of just a human nature he continued.
>
> He continued to actually – he wasn't trying to arrest the – Mr. Wilson at that point. It was, "Oh, you want to fight." And that's all fine and dandy now, when you have two other uniforms in blue holding him, to go ahead and fight him. And that's the misconduct or malfeasance in office. That's where he violated his oath as a police officer.
>
> Now I don't care what the State's theory is, I'm going on what the facts presented to the Court. If you want to go just based on assault, I – like I said, I'm not convinced beyond a reasonable doubt that there was justification – that there was no legal justification. Okay. But let's not go by a preponderance okay.
>
> And I – that's where it is. That's where I am. And I don't believe the officer continued in good faith. And the incident didn't stop there, it went on. And it is from that point on that's really the big problem for the misconduct in office for this fact finder.

This timely appeal followed. We will include additional facts, as relevant, in our discussion of the questions presented.

DISCUSSION

I.

Sufficiency of the Evidence

a.

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence [and] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, . . . giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). A finding of fact is not "clearly erroneous" "if there is competent or material evidence in the record to support the court's conclusion." *Brown v. State*, 234 Md. App. 145, 152 (2017) (citation omitted).

As this Court has explained, "the ultimate appellate review of the sufficiency of the evidence, if triggered, is precisely the same in a jury trial and in a bench trial alike." *Chisum v. State*, 227 Md. App. 118, 129 (2016). We ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in *Jackson*)). We "view[ ] not just the facts, but 'all rational inferences that arise from the evidence,' in the light most favorable to the prevailing party[,]" *Smith v. State*, 232 Md. App. 583, 594 (2017) (quotation omitted), giving "due regard to the fact finder's findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Potts v. State*, 231 Md. App. 398, 415 (2016) (cleaned up).

b.

"In Maryland, misconduct in office is a common law misdemeanor." *Duncan v. State*, 282 Md. 385, 387 (1978) (footnote omitted). The Court of Appeals has defined it to mean "corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office." *Id*. (citing *Perkins on Criminal Law* 485 (2d ed. 1969)). "Corrupt behavior" may fall within three categories: malfeasance, misfeasance, or nonfeasance. *Id*. Malfeasance is "the doing of an act which is wrongful in itself," misfeasance is "the doing of an act otherwise lawful in a wrongful manner" and

nonfeasance is "the omitting to do an act which is required by the duties of the office." *Id*. (citing *State v. Carter*, 200 Md. 255, 262-67 (1955)) (further citations omitted).

In the instant case, there is no dispute that Officer Gaff is a public officer and that at the time of the alleged misconduct he was exercising the duties of his office. Further, as the State concedes, because the trial court rejected its argument that Officer Gaff committed an assault while arresting Mr. Wilson, the only category of corrupt behavior upon which the trial court's findings could be premised is misfeasance. Thus, the central dispute is whether the way Officer Gaff performed the lawful act of arresting Mr. Wilson was wrongful and, if so, whether he engaged in that wrongful conduct with the necessary *mens rea*.

Officer Gaff maintains that the trial court's findings that he used foul language, failed to de-escalate, and displayed a lack of common sense did not rise to the level of corrupt behavior sufficient to support a conviction for misconduct in office. The State responds that "there was sufficient evidence of both an improper act and a corrupt intent such that a reasonable factfinder could find [Officer] Gaff guilty of misconduct in office." Two cases decided by this Court are helpful particularly to guide our analysis: *Leopold v. State*, 216 Md. App. 586 (2014), and *Sewell v. State*, 239 Md. App. 571 (2018). In *Leopold*, a County Executive for Anne Arundel County was convicted of two counts of misconduct in office relative to his use of executive protection officers for political and campaign activities and his misuse of those same officers and his assistant for personal purposes. 216 Md. App. at 597-98. At his bench trial, the evidence showed that Leopold

directed County employees to engage in campaign work and directed his executive protection officers and his assistant to empty his catheter bag as part of their job responsibilities. The trial court found that both actions amounted to misconduct, the prior because it was illegal and the latter because it was "simply outrageous, egregious and wildly beyond any authority he possessed or could reasonably have thought he had obtained by virtue of his office." *Id*. at 601-02. Leopold's conduct evidenced "an overbearing arrogance and sense of entitlement [that was] unworthy of someone who [was] supposed to be a public servant." *Id*. The trial judge was concerned particularly with Leopold's requests of his personal assistant, who had left a merit system job to take the at-will position, creating a "power imbalance" that made Leopold's conduct "predatory and cruel." *Id*.

In affirming the judgments of conviction, this Court explained that "[a]cts that qualify as misconduct in office include: . . . '*oppressive and willful abuse of authority* (to be distinguished from mere error of judgment) . . . .'" *Id*. at 605 (quoting *Chester v. State*, 32 Md. App. 593, 606 (1976)) (emphasis in *Leopold*). We reasoned that Leopold's conduct in asking his assistant to empty his urine bag amounted to an oppressive and willful abuse of his authority and that the court's findings that he was cruel and predatory evinced his "ill motive." *Id*. at 606. We rejected Leopold's contention that a charge of misconduct in office was unconstitutionally vague and violated his rights under the Due Process Clause, opining that a "person of ordinary intelligence would know that it is a violation of the law to . . . oppressively and willfully abuse his or her authority to

require an employee to perform offensive and unnecessary tasks wholly beyond their job descriptions." *Id*. at 608 (footnote omitted).

Four years later, this Court analyzed closely in *Sewell*, 239 Md. App. at 579, the type of evidence required to show corrupt intent and when that evidence is required. There, the Pocomoke City Chief of Police was charged with misconduct in office relative to his handling of an investigation of a traffic accident. The State alleged that Sewell and a lieutenant directed their subordinates not to charge or cite a civilian (Matthews) who hit two parked cars while driving home just before midnight from a meeting at a Masonic Lodge. *Id*. at 579. Matthews did not remain at the scene, instead driving to his nearby home. *Id*. at 581. Patrol officers responded to a call for a hit-and-run and located Matthews's car, which had suffered significant damage. *Id*. at 581-82. Sewell and the lieutenant responded to the scene, in plain clothes, and were briefed on the situation. *Id*. at 582. Their presence was "pretty unusual," given the late hour and the fact that it was a "basic accident." *Id*. at 582. Sewell then instructed a patrol officer to file a report labeling the incident an accident and not a "hit and run" and, when the officer attempted to ask Matthews if he was under the influence of alcohol or drugs, answered for him in the negative. *Id*. at 582-83.

At the jury trial, the State argued that Sewell had intervened inappropriately in a routine police matter because he, the lieutenant, and Matthews all were Masons. *Id*. at 579. Sewell took the position that his handling of the incident was reasonable and

"consistent with the routine discretion" afforded to police chiefs in small towns. *Id*. Sewell was convicted of misconduct in office, but acquitted of conspiring with the lieutenant to commit misconduct. *Id.*

On appeal from his conviction, Sewell challenged the legal sufficiency of the evidence. A majority of the panel held that there was legally sufficient circumstantial evidence upon which to convict Sewell.[4] In so holding, we clarified the difference between malfeasance and misfeasance:

> By way of example, a public officer tasked with awarding government contracts can commit *malfeasance* by rewarding a political donor with a public contract that the officer had no authority to grant and may commit *misfeasance* by rewarding the donor with a contract that is within the officer's authority to grant. [] Accordingly, a public officer commits malfeasance by corruptly exceeding the scope of his or her authority and commits misfeasance by acting within the scope of his or her authority but doing so corruptly.

Id. at 602 (emphasis in original) (citing Rollin M. Perkins & Roland N. Boyce, *Criminal Law* 545 (3d ed. 1982)) (further citations omitted). In either case, the State bore the burden to prove that the defendant acted ""willfully, fraudulently, or corruptly[,]'" *id*. at 602 (quoting *Friend v. Hamill*, 34 Md. 298, 304 (1871)), "because official misconduct covers only '*corrupt behavior* by a public officer' in the exercise of his or her duties." *Id*. at 602-03 (quoting *Duncan*, 282 Md. at 387) (emphasis in *Sewell*).

Because in a case of malfeasance, the "conduct in question falls outside of the official's discretion and authority," proof that it was done "willfully" is sufficient to

[4] As we shall discuss in Section II of this opinion, this Court nevertheless reversed Sewell's conviction because we held that the trial court erred by excluding his expert witnesses (none of which were to address use of force in the context of that case).

establish corrupt intent without further evidence. *Id*. at 604. In contrast, because misfeasance involves "conduct [that] normally falls within the official's discretion and authority, the State must present evidence that the official *intended* to act corruptly – with a 'sense of depravity, perversion, or taint.'" *Id*. (quoting Perkins & Boyce at 545) (emphasis in original). In the later scenario, proof of corrupt intent serves to "shield[] public officers from liability for 'the consequences of mistakes honestly made.'" *Id*. at 603 (quoting *Bevard v. Hoffman*, 18 Md. 479, 483 (1862)).

The State is not required to adduce direct evidence of corrupt intent, but may rely on reasonable inferences drawn from circumstantial evidence. *Id*. at 607 (citing *Jones v. State*, 440 Md. 450, 455 (2014)). We reasoned that the State had met its burden by showing numerous actions taken by Sewell, relative to the Matthews investigation, that were unusual, including Sewell's appearance in plain clothes at the crime scene, his answering of questions posed to Matthews, and his instructions to his subordinate as to how to write the report about the incident. *Id*. at 608. All these acts by Sewell, viewed together, were "so unusual that it could permit an inference of corrupt intent" and not just a "mere error of judgment." *Id*. at 614–615.

c.

In the case at bar, we conclude that the State adduced legally sufficient evidence that Officer Gaff violated Policy 1115 while performing a lawful arrest of Mr. Wilson. Officer Gaff was obligated by Policy 1115 to "continually assess the situation," to "slow down the situation" to achieve a peaceful outcome, and to withdraw and create distance if possible. He was prohibited from using "tactics designed to intentionally escalate the level of force."[5] The body camera footage supports the court's findings that, in response to Mr. Wilson's incidental contact with Officer Gaff's arm, Officer Gaff "constantly escalat[ed]" the conflict by cursing and hitting Mr. Wilson in the face. These actions were also violations of Policies 301 and 302, which obligated Officer Gaff to behave "courteously and appropriately," in a "professional, civil and orderly" manner and disallowed the use of "coarse, profane, or insolent language" or "unnecessary force." Because Officer Gaff engaged in the "otherwise lawful" act of arresting Mr. Wilson "in a wrongful manner" in direct violation of numerous BPD policies, the evidence was sufficient to show misconduct. *Duncan*, 282 Md. at 387.

There was evidence also from which the circuit court inferred reasonably that Officer Gaff acted with corrupt intent, *i.e.*, "a 'sense of depravity, perversion, or taint.'" *Sewell*,

[5] Officer Gaff argues that because he testified that he never was trained in de-escalation techniques, his failure to de-escalate cannot support a finding of willful misconduct. Officer Gaff testified also that he was aware of Policy 1115, however, and knew he was obligated to comply with that policy and all active BPD policies in effect. The trial court was free to believe or disbelieve Officer Gaff's testimony that he was not trained on de-escalation techniques in the Police Academy. In any event, Policy 1115, of which Officer Gaff was aware, sets out numerous techniques officers are obligated to use to de-escalate a conflict.

239 Md. App. at 604 (quoting Perkins & Boyce at 545). As the Court of Appeals has explained, ""intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence.'" *Galloway v. State*, 365 Md. 599, 650 (2001) (quoting *State v. Raines*, 326 Md. 582, 591 (1992)). The trial court found that Officer Gaff reacted to Mr. Wilson's reflexive contact with him not like an officer attempting to effectuate peacefully an arrest, but like a participant in a "mutual affray." Even when his fellow officers tried to intervene, Officer Gaff was "still smacking [Mr. Wilson] and cussing at him." This was evidence from which the court found that he acted with the "specific intent to impede [the] administration of justice." Officer's Gaff's tone of voice, vulgar language, and actions all reinforced the court's view that Officer Gaff was trying to fight Mr. Wilson, not arrest him. These findings were supported by Officer Torres's body camera footage, coupled with his testimony, that showed that he was trying to calm Officer Gaff down and to pull him away from Mr. Wilson. Officer Boscana also was trying actively to put his arm in between Officer Gaff's body and Mr. Wilson.

Office Gaff's conduct, like that in *Leopold*, was an "oppressive and willful abuse of authority" and it diminished his office. That his behavior was not the norm was apparent from the reaction of his fellow officers, who maintained their calm throughout the encounter and de-escalated by creating distance between Officer Gaff and Mr. Wilson. *See Sewell*, 239 Md. App. at 613–14 (reasoning that the unusualness of Sewell's conduct

gave rise to an inference of corrupt intent). Further, the trial court found reasonably that even if Officer Gaff reacted reflexively to Mr. Wilson's hand making minimal contact with his arm, he had time subsequently to pause and reassess after Officers Boscana and Torres both had their hands on him and Mr. Wilson. At that juncture, instead of stepping back and letting the other officers take control, Officer Gaff again pushed angrily Mr. Wilson in the face while cursing at him. The trial court did not err clearly in finding that Officer Gaff's conduct did not reflect an honest mistake or a lapse of judgment, but a depraved abdication of his responsibility to carry out dispassionately his duties.

II.

Expert Testimony

Officer Gaff designated Dr. Maria Haberfeld as an expert witness to testify about "police training policies, general orders, practices, custom, safety and law enforcement generally" and, specifically, that Officer Gaff's "actions in the arrest of [Mr.] Wilson were reasonable and that any physical contact with Mr. Wilson was legally justified and not excessive." Dr. Haberfeld is a professor at the John Jay College of Criminal Justice in the area of "Police Science."

The State moved *in limine* to exclude Dr. Haberfeld's testimony. On the second day of trial, the court heard argument on the State's motion. As pertinent, the prosecutor argued that Dr. Haberfeld's testimony would not be helpful to the court, as the factfinder, because it would go to the ultimate issue of whether Officer Gaff's conduct was objectively reasonable under the circumstances.

Defense counsel responded that Dr. Haberfeld would "explain the standard, explain policing to help the fact finder make a determination if this behavior fell below the appropriate standard[.]" He emphasized that Policy 1115 was not the law and that Dr. Haberfeld could put that policy in context and define some of its terms. The court queried if Dr. Haberfeld was a police officer and defense counsel responded that she was not, though she had worked as a police officer in Israel many years earlier and was certified to train police officers on use of force.

The trial judge remarked that the case "basically [came] down to what is it that you see on this video." Defense counsel agreed that that was "a big part of the case," but argued that expert testimony was necessary to establish what a police officer is permitted to do. The trial court asked if defense counsel meant whether Officer Gaff used "excessive force" and he responded, "Right." The trial judge emphasized that that was the ultimate issue for her, as the factfinder, and said she was "trying to figure out how . . . this testimony [was] going to be of any assistance to [her] in helping [her] to understand." Defense counsel conceded that if the trial court did not "think it [would] be then, obviously, there's no need for her to testify." He added that Dr. Haberfeld would define "use of force." The trial court responded that there was no dispute that this was a "use of force[,]" but rather whether Officer Gaff used excessive force and whether he acted with corrupt intent. At that juncture, defense counsel stated "then I guess I will submit," adding that based on the trial judge's remarks, he did not think Dr. Haberfeld's testimony would "aid Your Honor in what you are looking for."

The trial court granted the State's motion to exclude Dr. Haberfeld's testimony, finding that it wasn't "necessary for an expert – this particular expert in this matter, it would not assist the fact finder in this matter, which I believe is the primary function of an expert, to assist and explain information to the fact finder."

On appeal, Officer Gaff argues that the trial court abused its discretion by that ruling because, like in *Sewell*, here expert testimony "was necessary on the issue of 'what is normal and consistent behavior within the scope of a police [officer's actions],'" including what amounts to reasonable de-escalation and when an officer's behavior rises to the level of corruption. (quoting *Sewell*, 239 Md. App. at 626). He maintains that Dr. Haberfeld's testimony would have "directly rebutted the State's circumstantial evidence of corrupt intent[.]"

The State responds that the circuit court did not abuse its broad discretion in ruling that Dr. Haberfeld's testimony would not aid the factfinder. It emphasizes that Officer Gaff did not proffer to the trial court that Dr. Haberfeld would testify about corrupt intent, instead stating only that she would define "use of force," which is not relevant to the sole issue on appeal.

Pursuant to Rule 5-702, if an expert is qualified, will testify on a subject matter that is relevant, and his or her testimony is supported by a sufficient factual basis, that 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." (Emphasis added.) "The determination of whether an expert's testimony is

admissible, pursuant to Rule 5-702, lies 'within the sound discretion of the trial judge and will not be disturbed on appeal unless clearly erroneous.'" *Bomas v. State*, 181 Md. App. 204, 208 (2008) (quoting *Wilson v. State*, 370 Md. 191, 200 (2002)), *aff'd*, 412 Md. 392 (2010). "The court's action in admitting or excluding such testimony seldom constitutes ground for reversal." *Bryant v. State*, 163 Md. App. 451, 472 (2005) (citing *Deese v. State*, 367 Md. 293, 302-03 (2001)), *aff'd*, 393 Md. 196 (2006).

In *Sewell*, 239 Md. App. at 571, which was a jury trial, the proferred expert witnesses would have testified about "the discretion a chief of police enjoys and the objectives – particularly those relevant to a small community – that a chief must consider during an investigation." *Id*. at 616. Sewell's counsel emphasized, in response to the State's motion to exclude that testimony, that it was the State's burden to demonstrate corrupt intent and that the expert testimony that Sewell was acting within the scope of his discretion by determining not to cite Matthews for a hit and run, in keeping with broad law enforcement objectives, could "negate[] the proposition that he act[ed] with the necessary corrupt intent." *Id*. at 617 (First alteration added.) The trial court ruled that it was for the jury to decide if Sewell acted reasonably and whether his decision to intervene in the investigation was willful and corrupt. *Id*. On appeal, we reversed, reasoning that "[w]hether Sewell properly exercised his discretion [was] clearly relevant to the determination of whether his 'unusual' conduct was corrupt." *Id*. at 618. We emphasized that a criminal defendant "is generally permitted to introduce any evidence relevant to [his or her] asserted defense[,]" *id*. at 619 (citation omitted), and that the test

for admissibility of expert testimony is "whether the testimony would be useful to the jury, *not* 'whether the trier of fact could possibly decide the issue without the expert testimony.'" *Id.* at 619 (quoting *Sippio v. State*, 350 Md. 633, 649 (1998)) (emphasis in *Sewell*). We reasoned that Sewell's proffered expert testimony was relevant and necessary to show that "his actions were not corrupt" when viewed in the context of his broad discretion as the police chief of a small town. *Id*. at 626.

In the case at bar, we are concerned only with the trial court's disinclination to hear Dr. Haberfeld's testimony about her interpretation of Policy 1115. Unlike in *Sewell*, where lay jurors were asked to assess whether a small-town police chief's discretionary charging decision amounted to misconduct in office, here, the central dispute at a bench trial before a seasoned jurist was whether the body camera videos showed Officer Gaff using unnecessary and/or excessive force or otherwise violating BPD Policy by escalating, instead of de-escalating, the conflict. The trial court did not abuse its discretion by concluding that Dr. Haberfeld's testimony about use of force and her interpretation of Policy 1115 would not be helpful to the determination of those crucial facts in issue.[6]

[6] Defense counsel made no argument or proffer to the trial court as to how Dr. Haberfeld's testimony would be relevant to the determination of corrupt intent. When the trial court raised the issue of "corrupt intent," defense counsel responded by submitting. Accordingly, we decline to address that argument on appeal. *See* Md. Rule 8-131(a) (We ordinarily "will not decide any [non-jurisdictional issue] unless it plainly appears by the record to have been raised in or decided by the trial court.").

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.