UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2301

September Term, 2013

LINWOOD SMITH

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: July 16, 2015

On June 12, 2012, Miguel Bailey was shot and killed in a drug deal that went awry. The State charged Linwood Smith with felony murder, armed robbery, and related charges arising out of the incident. Mr. Smith was tried by jury in the Circuit Court for Baltimore County and convicted of second-degree felony murder, attempted armed robbery, first-degree assault, illegal use of a handgun, and conspiracy to possess with intent to distribute marijuana. On appeal, Mr. Smith asserts *first*, that the circuit court erred in precluding him from eliciting testimony from a prosecutor about the prosecutor's basis for offering a plea bargain to one of the State's witnesses, and *second*, that the State knowingly used perjured testimony to obtain his convictions. We find the first claim without merit and the latter claim unpreserved, and therefore affirm.

I. BACKGROUND

In June 2012, while in line at a Shell gas station in Overlea to purchase a cigarillo, Christopher Everitt struck up a conversation with DeAngelo Johnson, who went by the name of Akeen. At some point, Mr. Johnson asked Mr. Everitt if he knew where he could find some marijuana. Mr. Everitt indicated that he "might be able to put something together," and the two men exchanged phone numbers. To facilitate the transaction, Mr. Everitt asked his coworker Mr. Bailey, with whom he was close, if he was interested in being a part of the deal and would be able to find some marijuana. Mr. Bailey expressed an interest and ultimately secured a quarter-pound of marijuana from a friend.

Mr. Johnson agreed to purchase the marijuana from Mr. Everitt for $3,000, and the two agreed to make the exchange at the same Shell station where they originally met. On June 12, 2012, at around 2:00 p.m., Mr. Everitt and Mr. Bailey drove together to the gas

station in Mr. Bailey's car to make the deal. Before they left, Mr. Bailey decided he would take a small loaded pistol as protection because they didn't know Mr. Johnson very well. After they arrived, Mr. Johnson called and told them to meet him instead at the Carrabba's restaurant up the street. They went to the restaurant, but, upon arrival, Mr. Johnson called again and re-redirected them to a nearby apartment complex. Moderately "spooked" by Mr. Johnson's behavior, Mr. Bailey agreed to move to the rear seat of the vehicle "[s]o that way he would be behind" Mr. Johnson as the exchange was being made. They pulled up in front of the apartment complex and Mr. Everitt spotted Mr. Johnson, who was accompanied by another man, Mr. Smith, to the surprise of Mr. Bailey and Mr. Everitt. Mr. Johnson then got in the back seat of the car with Mr. Bailey and Mr. Smith got in the front seat.

From this point on, the witnesses recounted (and the jury heard) three starkly different accounts of what transpired in Mr. Bailey's vehicle. Everyone involved agrees, however, that the drug deal ultimately went wrong and Mr. Bailey was shot to death.

According to Mr. Everitt, Mr. Johnson and Mr. Smith entered the vehicle, Mr. Bailey handed the marijuana to Mr. Johnson, and Mr. Johnson confirmed that the marijuana was "good." At this point, Mr. Smith "pulled out a pistol and said don't any of you all move, then he said give me your money." Mr. Everitt heard shots, turned his head to see that Mr. Smith's gun was pointed at Mr. Bailey, and wrestled the gun from Mr. Smith. Mr. Everitt got out of the car and ran to open the rear door, but observed that Mr. Bailey was "slumped out" and "limp," and he decided to run away. As he got out of the car, he grabbed his bag and Mr. Smith's gun because he didn't wanted to be linked to the incident, but he

neglected to take Mr. Bailey's weapon with him. He got rid of the gun while he was running (it was never recovered) and decided to run to a friend's house. He did not call the police initially, but instead called his father, who arranged for him to consult with counsel. After the attorney met with Mr. Everitt, he agreed with the State Attorney's Office to testify against Mr. Smith in exchange for immunity from prosecution.

Mr. Johnson testified that he grew up with Mr. Smith and bought and sold marijuana with him. On June 12, 2012, hours before the incident, Mr. Johnson contacted Mr. Smith to let him know about the deal he made with Mr. Everitt to obtain a quarter-pound of marijuana. Mr. Johnson claimed that Mr. Smith indicated a desire to rob Mr. Everitt. Mr. Johnson says that he discouraged the idea and told Mr. Smith that his plan was to renege on his promise to pay Mr. Everitt $3,000 for the marijuana and offer only $1,200. Mr. Smith again tried to convince Mr. Johnson that they should rob Mr. Everitt, but Mr. Johnson rejected the idea again. When the time came for the deal to take place, Mr. Johnson and Mr. Smith entered the vehicle and Mr. Johnson offered Mr. Bailey $1,200 for the marijuana and said "take it or leave it." Mr. Bailey accepted the offer and handed the marijuana to Mr. Johnson. But as Mr. Johnson went to retrieve his scale to weigh the marijuana, Mr. Bailey pulled out a gun. Mr. Smith pulled a gun of his own and pointed it at Mr. Everitt. In response, Mr. Bailey shot Mr. Johnson, then shot Mr. Smith. Mr. Johnson fled the scene and went to a friend's house. Mr. Johnson was arrested a week later and made two statements to police. After contacting a lawyer, Mr. Johnson recanted his earlier statements and gave a third statement in connection with a plea agreement, in which he entered an *Alford* plea to robbery and received a reduced sentence. Despite the plea

agreement, Mr. Johnson was emphatic at trial that he never intended to rob Mr. Bailey and Mr. Everitt.

Mr. Smith's version of the events leading to Mr. Bailey's death was quite different. Mr. Smith testified that Mr. Johnson told him that he was in the process of purchasing marijuana and asked Mr. Smith to drive him to the exchange. Mr. Smith agreed and he accompanied Mr. Johnson into the vehicle where the exchange would happen. After Mr. Johnson inquired about the marijuana, Mr. Smith claims that Mr. Everitt pulled out a gun and pointed it at him. Mr. Smith pushed Mr. Everitt's hand away and was shot in the face. He fled the scene, and was later taken to the hospital by his mother. When the police arrived at the hospital, Mr. Smith initially told them that he was trying to purchase some marijuana and was shot during a failed robbery attempt. However, he lied about the location of the incident in an attempt to hide his involvement from his employer, which was located near the incident. He eventually revealed the correct location of the incident after he was arrested. At trial, he denied having a gun with him during the incident and denied ever intending to rob Mr. Everitt and Mr. Bailey.

On June 19, 2012, Mr. Smith was charged with a variety of charges, including felony murder and armed robbery. He was tried by jury in the circuit court over six days and ultimately convicted of second-degree felony murder, attempted armed robbery, first-degree assault, illegal use of a handgun, and conspiracy to possess with intent to distribute marijuana. On December 8, 2013, the circuit court sentenced Mr. Smith to twenty-five years incarceration for the second-degree felony murder conviction, a concurrent twenty

years for the use of a handgun conviction, and a concurrent five years on the conspiracy conviction.[1] He filed a timely notice of appeal.

II. DISCUSSION

Mr. Smith asserts two errors on appeal. *First*, he argues that the circuit court erred in precluding him from questioning a prosecutor about the prosecutor's basis for offering Mr. Everitt, one of the State's key witnesses, immunity in exchange for his trial testimony. *Second*, he asserts that the circuit court erred in denying his motion for new trial because, he contends, the State knowingly introduced the perjured testimony of Mr. Johnson.[2]

A. Evidence Of The State's Reasons For Offering A Plea Bargain To Mr. Everitt Was Inadmissible Attorney Work Product.

At trial, Mr. Everitt testified that after consulting with an attorney, he agreed with the State to testify truthfully against Mr. Smith in exchange for immunity for his involvement in the incident (*i.e.*, his attempt to distribute marijuana). After executing the agreement, Mr. Everitt met with Detective Brian Wolf and Assistant State's Attorney, Garrett Glennon, and made a video proffer of the testimony he would provide at trial. Prior to entering the agreement, Mr. Everitt did not disclose any details about the incident to the

[1] Mr. Smith's convictions for attempted armed robbery and first-degree assault merged with his second-degree felony murder conviction.

[2] Mr. Smith's brief listed the Questions Presented as follows:

1. Did the trial court err in precluding [Mr. Smith] from calling Garrett Glennon as a witness in his defense?

2. Did the trial court err in denying the motion for new trial?

State. Detective Wolf explained that, a day after the incident, on June 13, 2012, Mr. Everitt's attorney contacted him about having Mr. Everitt tell his side of the story. Detective Wolf contacted Mr. Glennon about the proposal and Mr. Glennon indicated he would be interested in hearing what Mr. Everitt had to say. The meeting took place the next morning. Detective Wolf conceded that, at the time the agreement was made, he did not know what Mr. Everitt was going to say during the proffer session. He also testified that Mr. Glennon had not spoken directly to Mr. Everitt before they entered the agreement.

After Detective Wolf's examination concluded, Mr. Smith attempted to call Mr. Glennon as a witness and sought to question him about his basis for offering Mr. Everitt a proffer agreement rather than charging him:

> [COURT]: So what do you intend to ask Mr. Glennon?
>
> [COUNSEL FOR MR. SMITH]: Did he have any information before he made the decision to give Mr. Everitt the proffer protection, did he have any information about the nature of the investigation? Because Detective Wolf testified that he had plenty of information about what had already happened. There is no information about whether or not Mr. Glennon did.
>
> [COURT]: And how is that relevant?
>
> [COUNSEL FOR MR. SMITH]: Because it is my position that it potentially was inappropriate or perhaps [Mr. Everitt's counsel] gave misleading information to Mr. Glennon . . .
>
> [COURT]: So do you think if I were to let you call Mr. Glennon, that you will be able to elicit from Mr. Glennon what [Mr. Everitt's counsel] told him?
>
> [COUNSEL FOR MR. SMITH]: I believe I would be able to elicit from Mr. Glennon what information he had about the nature of the investigation to date and in order to make his

> decision based upon whatever was provided to him by [Mr. Everitt's counsel], that this was a good idea.
>
> [COURT]: That what was a good idea?
>
> [COUNSEL FOR MR. SMITH]: Giving Mr. Everitt a proffer agreement as opposed to [charging] him and interviewing him in that fashion. But in giving him that protection of the proffer agreement, I believe it would be appropriate for me to ask Mr. Glennon what he knew at that point . . .
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> * * *
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> [COUNSEL FOR MR. SMITH]: So I want to be able to ask Mr. Glennon what was the basis of him making that decision and are there other avenues that could have been taken? . . .

The circuit court rejected Mr. Smith's request, finding that Mr. Glennon's basis for entering the proffer agreement with Mr. Everitt was not relevant and was inadmissible attorney work product.

Mr. Smith contends that the circuit court erred in precluding him from questioning Mr. Glennon about his basis for offering Mr. Everitt a proffer agreement. The State responds that the circuit court properly precluded the testimony because it was inadmissible attorney work product.[3] We agree with the State.

The attorney work product doctrine encompasses information and materials prepared in anticipation of litigation:

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[3] To the extent Mr. Smith is now arguing that he should have been allowed to question Mr. Glennon about whether he or Detective Wolf revealed otherwise unknown facts to Mr. Everitt, we agree with the State that *that* argument was not raised in the circuit court and, therefore, is not preserved. Md. Rule 8-131(a). He has, based on the colloquy reproduced above, preserved his argument that he should have been allowed to question Mr. Glennon about why Mr. Everitt was offered a deal.

> The work product doctrine is broader than the attorney-client privilege. It protects materials prepared in anticipation of litigation from disclosure. Two categories of attorney work product, fact and opinion, are included within the doctrine. Fact work product generally consists of "materials gathered by counsel (or at counsel's instructions) in preparation of trial." Opinion work product concerns the attorney's mental processes. Neither fact nor opinion work product is ordinarily discoverable, but opinion work product, in particular, "is almost always completely protected [from] disclosure."

Blair v. State, 130 Md. App. 571, 607-08 (2000) (citations omitted); *see also Morris v. State*, 59 Md. App. 659, 669 (1984) (work product doctrine "is intended to protect and to act as a limitation upon pretrial discovery of a lawyer's strategies, legal theories and mental impressions"). Mr. Smith sought to question Mr. Glennon at trial about his basis for offering Mr. Everitt immunity only two days after the incident occurred. This evidence sought to reveal the prosecutor's internal *thought processes* in deciding to offer a plea deal to Mr. Everitt, which was classic *opinion* work product that is "almost always completely protected [from] disclosure." *Blair*, 130 Md. App. at 608 (citation omitted).

Mr. Smith does not seriously dispute that the testimony would reveal the prosecutor's opinion work product, but counters that the State "opened the door" to this testimony by (1) questioning Mr. Everitt about the circumstances surrounding the proffer agreement; (2) attempting to refute the suggestion that Mr. Glennon provided investigative details to Mr. Everitt during the proffer session; and (3) attempting to refute the suggestion that anyone told Mr. Everitt what to say during the proffer session. To be sure, "[t]he privilege derived from the work-product doctrine is not absolute [and] [l]ike other qualified privileges, it may be waived." *United States v. Nobles*, 422 U.S. 225, 239 (1975). But we

disagree that the State waived any work product protection by revealing the fact and terms of the deal, including the requirement that Mr. Everitt testify truthfully. The videotaped proffer session was provided to Mr. Smith in discovery. He was free to cross-examine both Mr. Everitt and Detective Wolf based on the proffer and the process leading to it, and he did. Mr. Smith was free as well to try and demonstrate that Mr. Everitt's testimony was not truthful and to argue that the jury should not believe it, and to use the plea deal as grounds for that argument. But even if the State's rationale for offering Mr. Everitt a plea deal were relevant—and we don't think it was—the State did not open the door to its work product by eliciting testimony about its genesis and circumstances. We find no error in the circuit court's decision to preclude Mr. Smith from calling Mr. Glennon as a witness. *See* Md. Rule 4-263(g)(1) ("Notwithstanding any other provision of this Rule, neither the State's Attorney nor the defense is required to disclose (A) the mental impressions, trial strategy, personal beliefs, or other privileged attorney work product . . ."); *see also State v. Melancon*, 339 P.3d 151, 155 (Ut. App. 2014) (holding that defendant was not entitled to question prosecutor about his thought processes for offering a plea deal to one of the State's witnesses because of the attorney work product doctrine); 23 Am.Jur.2d *Depositions and Discovery* § 278 (2014) (noting that "the accused is not entitled to learn about the prosecutor's decision whether to prosecute" including the "opinion work product prepared by the prosecution in anticipation of any criminal prosecution, not merely the particular prosecution in which the request for disclosure is made").

B. Mr. Smith's Objection To Mr. Johnson's Testimony Was Not Preserved.

Mr. Johnson testified at trial that he never intended to rob Mr. Everitt and Mr. Bailey and that it was entirely Mr. Smith's idea to rob them. He testified as well that he repeatedly attempted to discourage Mr. Smith from robbing Mr. Everitt and Mr. Bailey. According to Mr. Smith, the fact that Mr. Johnson accepted a plea deal and was subsequently convicted of robbery means that "the State called a witness who was perjuring himself during the course of his trial testimony" and his "conviction must be set aside." But this contention was not preserved for appellate review. As he concedes in his brief, Mr. Smith did not raise his objection to Mr. Johnson's testimony until his motion for new trial at the sentencing hearing, and that is too late. *See Washington v. State*, 191 Md. App. 48, 121 n.22 (2010) ("Raising trial errors for the first time in a motion for a new trial is not a substitute for preservation." (citation omitted)); *Torres v. State*, 95 Md. App. 126, 134 (1993) ("A post-trial motion cannot be permitted to serve as a device by which a defendant may avoid the sanction for nonpreservation.").

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.