Circuit Court for Baltimore County
Case No. K14-5479

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2349

September Term, 2015

UKEENAN NAUTICA THOMAS

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: February 21, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Ukeenan Nautica Thomas was convicted in the Circuit Court for Baltimore County of robbery with a dangerous and deadly weapon, use of a handgun in a crime of violence, and conspiracy to commit robbery, and was sentenced to a term of incarceration of thirty years. He presents two questions for our review:

> "1. Did the court err in refusing to ask prospective jurors whether they would give greater weight to the testimony of a police officer based on his/her occupation?
>
> 2. Did the trial judge abandon his neutral role and deprive appellant of a fair trial by frequently interjecting himself into the proceedings, assisting the prosecution at each step of the trial, personally questioning every witness, raising a *sua sponte Batson* challenge, making inappropriate comments, and creating a pervasive atmosphere of derision and partiality?"

We shall hold that, based upon *Thomas v. State*, 454 Md. 495 (2017), the trial court erred in asking the jury venire panel a generalized occupation question which did not single out law enforcement officers and in failing to ask whether any juror would give greater weight or lesser weight to the testimony of a police officer based solely on his or her occupation. We shall hold further that this error was not harmless error. Accordingly, we shall remand this matter to the circuit court for retrial before a different judge.

I.

The Grand Jury for Baltimore County indicted appellant with conspiracy to commit armed robbery, armed robbery, conspiracy to commit robbery, robbery, first-degree assault, use of a handgun in a crime of violence, and theft. The State entered a *nolle prosequi* to the theft charge, and the jury acquitted appellant of conspiracy to commit armed

robbery but convicted appellant on all other charges. The trial court imposed a term of incarceration of thirty years, made up of twenty years for the armed robbery, ten years consecutive for the handgun conviction, the first five without parole, and ten years consecutive for the conspiracy conviction suspended, followed by five years probation upon release.

The following facts relevant to the voir dire question presented in this appeal were revealed at trial. During voir dire, both defense counsel and the State requested the court to ask the jury venire panel whether any juror would give undue weight to a police witness's testimony based on his or her occupation. The court declined to ask the venire that question, and instead, incorporated his question within the following remarks:

> "Another principle of law about which the jury will be instructed is what we call credibility of witnesses. In all jury trials, whether it's civil or criminal, the judge decides issues of law, but the jury decides issues of fact. In that regard, based on testimony and other admissible evidence, the jury decides what evidence they find persuasive. My instructions will include some factors that you may consider in judging witness credibility. Ultimately, if selected as a juror in this case, it will be for you to decide who you believe. That is to say, who is right or wrong, who is truthful or untruthful or who is correct or mistaken. At the conclusion of the case and during deliberations, the jury will have had the benefit of listening to and observing each witness, viewing all of the other evidence presented and discussing the evidence with your fellow jurors. Mindful of that principle, are there any prospective jurors who would automatically give more or less weight to the testimony of any witness merely because of the witness's title, profession, education, occupation or employment? Now, that's a long question and it's asked in a vacuum. To start with, we want jurors who don't know anything about this case. But let me see if I can give you an example of what I'm talking about. If

> anyone here is a physician, I'm not picking on you. We have two physicians. And I pick physicians because they're similarly trained. They went to grade school. High school. College. Medical school. So, they're very—they have very similar characteristics. They're having lunch one day. They walk out of lunch. They're walking down the street. They're chit-chatting, chit-chatting about whatever doctors chit-chat about and there's an accident that happens in front of them. One of the physicians saw it and thought the light was green and the other physician thought the light was red. And if that's all you had, and you were asked to make a decision, how would you decide? Well, most people would say, well, I gotta hear all the facts from everybody. And that's kind of the point of this question. So, stated another way, if you were selected as a juror in this case, would you be able to judge the credibility of each witness's testimony based on their testimony, rather than merely relying on his or her title, profession, education, occupation or employment? *For example, would any of you automatically give more or less weight to the testimony of a physician, a clergyman, a firefighter, a police officer, psychiatrist, social worker, electrician or any other witness merely because of their title, profession, education, occupation or employment? If so, please stand.*"

(Emphasis added.)

No prospective juror answered affirmatively to this question. The case proceeded to trial, and the State called three police officers as witnesses. Following the guilty verdicts, the trial court imposed sentence and appellant noted a timely appeal to this Court.

The Court of Special Appeals filed a certified question of law to the Court of Appeals, pursuant to Md. Rule 8-301(a), which the Court granted but reformulated the question in a broader fashion, *see* Md. Code, Courts and Judicial Proceedings Article, § 12-604, stating "whether potential jurors would give undue weight to a police officer's testimony, based on his or her position as a police officer, when a more specific police-

witness question was requested by Appellant's counsel." *Thomas*, 454 Md. at 498. The Court of Appeals held that "in a criminal case, it is an abuse of discretion for a trial judge to fail to propound the police-witness question when requested by a party to the action" and remanded the case to this court for further proceedings consistent with that opinion. *Id*. at 506, 513–14. The inquiry must be tailored to the witnesses who are testifying in the case and their specific occupation, status, or affiliation. *Id*. at 513.

II.

On the question of harmlessness, appellant argues that the trial court's failure to ask the requested mandatory police-witness voir dire question is reversible error and not subject to harmless error analysis. In essence, appellant asks us to presume prejudice and not consider harmless error. Alternatively, he argues that if harmless error applies, then the error in this case could not be harmless because (1) three detectives testified on behalf of the State; (2) the State relied at trial on the evidence of the lead detective related to execution of a search and seizure warrant; and (3) the prosecutor relied heavily on the detective's credibility in closing argument.

Appellant also asks us that if we reverse in this case and remand for a new trial, we direct that the case be reassigned to a different judge. Appellant argues that the trial judge abandoned his neutral role and deprived appellant of a fair trial by frequently interjecting himself into the proceedings, assisting the prosecution at each step of the trial, questioning every witness, raising a *sua sponte Batson* challenge, and creating a pervasive atmosphere

of derision and partiality. Appellant recognizes that he failed to object to any of the judge's actions or questions but argues that we should recognize this error as plain error.

The State maintains that harmless error analysis applies to this error, and that the error was harmless beyond a reasonable doubt. In the State's view, the police officers' testimony was peripheral and inconsequential in this case, and the prosecutor only referred to the police testimony in her closing argument in a summary manner to explain the officers' conduct and procedures.

The State also argues that the trial judge did not exhibit partiality, did not show a pro-State bias, and merely asked clarifying questions, not expressing disbelief of defense witnesses though its questions.

III.

Thomas v. State controls this appeal. As the Court of Appeals held there, the trial court abused its discretion in failing to ask the requested voir dire question. *Thomas*, 454 Md. at 506. The only question related to the voir dire issue remaining for us to address is whether harmless error analysis applies, and if so, whether the error was harmless.

The core issue in this case is whether the trial court's error, *i.e.*, that in a criminal trial, when a defendant so requested, the court failed to ask the jury venire panel whether any juror would give undue weight to the testimony of a police officer solely because of his or her occupation, denied the defendant his constitutional right to a fair and impartial jury such that the error was presumptively prejudicial and requires automatic reversal. We

agree with the State: the trial court's error in failing to ask the requested police witness question is subject to harmless error analysis and does not warrant automatic reversal.

Although appellant does not mention the term "structural error," we point out that ordinarily *automatic* reversal following trial court error is required only where an error is deemed "structural," *i.e*., a systemic error which erodes the integrity of the judicial process and undermines the fairness of the trial. *See Arizona v Fulminante,* 499 U.S. 279, 306–10 (1991). The Supreme Court has recognized errors as "'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'"[1] *Neder v. United States,* 527 U.S. 1, 8 (1999), quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997). The error appellant alleges in this case is not included in this class.

Judge Sally Adkins, writing for the Court of Appeals in *Newton v. State*, 455 Md. 341 (2017), explained structural error,[2] and its limited availability, stating as follows:

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[1] Judge Sally Adkins pointed out in *Newton v. State*, 455 Md. 341, 354–55 (2017), that the Court of Appeals has recognized structural error in only two cases, *Savoy v. State*, 420 Md. 232, 254 (defective reasonable doubt instruction), and *Harris v. State,* 406 Md. 115, 130–32 (2008) (trial before an unsworn jury).

[2] In explaining structural error, Judge Adkins quoted further from *Arizona v. Fulminante,* 499 U.S. 279 (1991), stating as follows:

> "In *Weaver*, Justice Kennedy, writing for the majority, explained that there are three broad categories of structural error. The first category includes errors in which 'the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,' such as when a defendant is denied the ability to conduct his own defense. *Weaver*, 137 S. Ct. at 1908 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177–78 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)). These errors are (footnote continued . . .)

> "In general, when an appellate court finds that the trial court erred—even in violation of a defendant's constitutional rights—it employs harmless error review to determine whether reversal is warranted. *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Arizona v. Fulminante*, 499 U.S. 279, 306–07, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (collecting cases). Under harmless error review, reversal is warranted unless 'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.' *Simpson v. State*, 442 Md. 446, 457, 112 A.3d 941 (2015) (citation omitted)."

Id. at 353.

> deemed structural because their impact on the outcome of the trial is irrelevant to the right violated. *Id*. The second category includes errors for which the effects 'are simply too hard to measure,' such as a denial of the defendant's counsel of choice. *Id*. (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L. Ed. 2d 409). These errors are structural because it would be 'almost impossible' for the State to show that they were harmless beyond a reasonable doubt. *Id*. Lastly, the third category encompasses errors that 'always result[ ] in fundamental unfairness.' *Id*. These errors include denying an indigent criminal defendant counsel and failing to give a reasonable-doubt jury instruction. *Id*. (citing *Gideon v. Wainwright,* 372 U.S. 335, 343–44, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)). Because these errors always result in a fundamentally unfair trial, it would be pointless for the State to attempt to show that such an error was harmless. *Id.*"

Newton, 455 Md. at 354.

We hold that the trial court's error in this case does not rise to the level of structural error and presumed prejudice. We recognize that we are free to determine that the trial court's failure to ask the required question in the appropriate form is an error so severe as to require reversal, regardless of whether the error would be considered structural under federal law. We conclude, however, that such a ruling would be inconsistent with Maryland harmless error jurisprudence and that the error in this case does not require automatic reversal and is amenable to harmless error review.

Having concluded that the trial court's failure to ask the jury the mandatory voir dire question was error, the question remains whether appellant's conviction can stand because the error was harmless. In Maryland, error is harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976).

Applying our harmless error standard of review to the error in this case, we cannot say that the error in no way influenced the verdict. In order to exercise his challenges for cause in jury selection, appellant was entitled to know whether any juror would give more weight to the testimony of any police officer. In fact, three police officers testified in this case. And the prosecutor, in closing argument, argued to the jury as follows:

> "[Appellant's version of events] made zero sense. It doesn't make any sense at all, meaning, that it doesn't make common sense and you all have the evidence in front of you to see through everything that he said. Again, he didn't have to testify. He didn't have to put any witnesses on the stand—on

> that stand, but once he did, you evaluate their credibility every bit the same way as you evaluate everybody else's. *Look at what we find in that house off Ewing Drive.* We know that's the pink shirt that the victim explained. That's the victim—that's the pink shirt that the BG&E worker described. *And when you evaluate credibility, I'm gonna ask that you remember how Detective Jennifer Bartfeld-Sutton testified.* About how she observed proper, police procedure in every, single thing that she did when she told you about it. She never looked at that phone until she had a Search Warrant for it, before she found out it was password-protected. *But what do you find out about that phone from what she had—after she had gotten a Search Warrant, what did you find out about his phone? Same number used to call the cab driver*. Same number used to text and call the victim so many times before this happened. *What do we know from her testimony? Her very credible, clear testimony* was that the victim's phone was found. She found—later that she testified where it was found on the path to that cab to where Mr. Lyles said the Defendant actually got into his cab. That's where he dropped it, folks. *She testified about the identification procedures with the victim*, and again, remember, it was one person that, that Timothy Butler said did this from the very beginning, was [appellant]. He then identifies a picture of [appellant] once she finds out that they went to the same high school, just as the victim had described you then heard about that, that identification procedure with Timothy Butler regarding the ah, Co-Defendant, Derrick Johnson. Folks, there can't be any doubt in anyone's mind about who did this and whether or not they were acting together. She told you about searching their phones, comparing the numbers. She told you about the money from Lyles and from the Defendant."

(Emphasis added). Clearly, the State relied on the police officers' testimony. The error was not harmless beyond a reasonable doubt.

IV.

The right to trial by an impartial judge is a basic requirement of due process. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). Not only must a court be unbiased but it must avoid the appearance of bias. Although a trial judge is presumed to be unbiased, *see id.*, this presumption can be rebutted by showing that the judge "displayed deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 556 (1994). Courts do not lightly conclude that a judicial bias claim has been established. *See United States v. Microsoft Corp*., 56 F.3d 1448, 1463 (D.C. Cir. 1995).

Where a judge's statements may give the appearance of bias or lack of impartiality, the interests of justice may make it appropriate for an appellate court to order that on remand, the case be assigned to a different judge. *See, e.g.*, *United States v. Spears*, 827 F.2d 705, 709 (11th Cir. 1987). We need not go through each allegation and point/counter-point to determine whether the judge was biased or assisted the State, because after reviewing the entire record, we conclude here that the judge's overall actions in this case raise at least the *appearance* of lack of impartiality. To do so, we need not find actual bias or prejudice, but only that the facts "might reasonably cause an objective observer to question [the judge's] impartiality." *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988); *Offutt v. United States,* 348 U.S. 11, 17–18 (1954).

We have reviewed the entire record, and we are concerned that the judge's conduct or remarks on the record in this case might give the appearance that he was prejudiced

against appellant. Consequently, in the interests of justice, we will direct that this matter on remand be heard by a judge other than the trial judge. *See, e.g.*, *Diggs v. State*, 409 Md. 260, 294–95 (2009) (remanded to different judge based on "judge's egregious and repeated behavior reflecting partiality and bias") ; *United States v. Donato,* 99 F.3d 426, 434–39 (D.C. Cir. 1997) (remanded to different judge because judge's intense hostility toward defendant and defense counsel raised serious question of bias); *Microsoft*, 56 F.3d at 1463–65 (combined effect of judge's rulings and negative comments about defendants would cause reasonable observer to question judge's impartiality); *In re Antar*, 71 F.3d 97, 102 (3rd Cir. 1995) (appearance of bias against defendant created by judge's comments required reversal and remand to different judge).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL UNDER A NEW JUDGE. COSTS TO BE PAID BY BALTIMORE COUNTY.