Circuit Court for Baltimore City
Case No. 116326045

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2385

September Term, 2017

DEVIN LEE

v.

STATE OF MARYLAND

Wright,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 20, 2019

* Wright, J., now retired, participated in the hearing and conference of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

Christopher Giles was shot to death in a Baltimore alleyway in 2015. Two years later, a jury convicted appellant Devin Lee of first-degree murder, along with the use of a handgun in the commission of a crime of violence and the wearing and carrying of a handgun.

On appeal, Lee challenges: (1) a stipulation informing the jury that Lee had been convicted of a crime that prohibited his possession of a regulated firearm; (2) a detective's testimony about certain information received during the course of the police investigation; and (3) the manner in which a *voir dire* question was posed. Finding no reversible error with respect to any of Lee's three claims, we affirm the Circuit Court for Baltimore City.

BACKGROUND & PROCEDURAL HISTORY

The essential facts are not in dispute. On August 7, 2015, police found Christopher Giles's body lying face-down in an alleyway adjacent to the 4200 block of Ivanhoe Avenue in Baltimore City. Giles had been shot in the face, back, and buttock; the bullet that entered his left cheek severed his brain stem. An impression of tire tread marks appeared on Giles's body and white t-shirt.

Two days later, in response to information received as part of their investigation, the Baltimore Police Department encountered Devin Lee in his two-door black Honda Accord coupe. Riding with Lee in the vehicle were Joseph Davis (who would be tried

alongside Lee as a co-defendant,[1] and acquitted of all charges) and Antone Murray (who was tried prior to and separately from Lee and Davis, and who was acquitted as a co-conspirator).

Murray, having been previously acquitted as a co-conspirator, proved to be the critical witness at Lee and Davis's joint trial in October 2017. In addition to the State's other evidence,[2] Murray testified that he had been riding in the Honda Accord with Lee, Davis, and Giles on the day of the murder. Murray told the jury that at the time of the incident, Giles got out of the car "to pee"—after which Murray heard three gunshots and saw Giles's lifeless body on the ground. Murray claimed that his comprehension of the incident was marred by the fact that he was high on oxycontin at the time, and that he had zoned in and out of perception.

Given Murray's status as a hostile witness,[3] the State also played for the jury the videotaped interview that Murray had given to the Baltimore Police two years earlier, in October 2015. In that interview, Murray explicitly told the police that Lee shot and killed

[1] At the pre-trial motions hearing, the circuit court denied a motion to try Lee and Davis separately.

[2] Other evidence at trial included: (1) a Goodyear Eagle GT tire from Lee's vehicle that was consistent with the tread marks left on Giles's body and white t-shirt; (2) cell phone records showing that Lee, Davis, Murray, and Giles were all in the general area in question at the time of the incident; (3) text messages among Lee, Davis, and Murray, and (4) a cigarette that was found near Giles's body that contained Murray's DNA.

[3] The circuit court had to issue a body attachment to secure Murray's presence at the trial. Murray testified in a prison jumpsuit and in handcuffs.

Giles. The State also introduced into evidence the photo array from that earlier interview, in which Murray identified Lee and wrote "Devin was at the scene[.] He killed Chris."

Furthermore, we note that on two separate occasions during the trial, the defense counsel representing co-defendant Davis told the jury (without objection) that Lee shot Giles.[4] First, when cross-examining Murray, Davis's counsel asked Murray: "Now, when Dev got out of the car and the event [*i.e.,* the shooting] occurred did you have an opportunity to look at Joe Davis' face and his reaction to the sound of the gunshots?" Later, during closing arguments, Davis's counsel was even less equivocal, telling the jury in no uncertain terms: "Mr. Lee gets out and by every good testimony we've got, he individually shoots, jumps back in the car and races off . . . [Davis] didn't shoot, Mr. Lee did. [Davis] didn't run [Giles] over. Lee did."

Ultimately, the jury convicted Lee of first-degree murder, use of a handgun in the commission of a crime of violence, and the wearing and carrying of a handgun. The jury acquitted Lee of conspiracy to commit murder. (Co-defendant Joseph Davis was acquitted of all charges.). At a subsequent sentencing hearing, the circuit court sentenced Lee to life for the murder. The circuit court also imposed a consecutive 20-year sentence for the use of a handgun in the commission of a crime of violence; the conviction for wearing and carrying a handgun merged.

Lee filed a timely appeal.

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[4] Lee has not made an issue of these comments on appeal.

DISCUSSION

On appeal, Lee contends that the circuit court erred (1) with respect to a stipulation that was read to the jury; (2) in admitting purported hearsay evidence; and (3) by asking one particular *voir dire* question insufficiently. Because Lee's counsel did not object at trial with respect to either the first or third claim (*i.e.*, concerning the stipulation or the *voir dire* question), Lee asks us to find plain error or ineffective assistance of counsel on those questions. With respect to the second issue: whether evidence is hearsay is a legal question that we review *de novo*. *Brooks v. State*, 439 Md. 698, 709 (2014).

I. It Did Not Constitute Plain Error to Read the Jury a Stipulation Concerning a Charge That Was Later Omitted from the Verdict Sheet.

Lee's first argument stems from a discrepancy involving a charge (possession of a regulated firearm after having been convicted of a crime) that was later omitted from the verdict sheet. Specifically, the process that gave rise to the discrepancy was as follows: (1) Lee was charged with possession of a regulated firearm after having previously been convicted of a crime; (2) as such, at the close of the State's case, the State read to the jury an agreed-upon stipulation that Lee "has been charged with the offense of possession of a regulated firearm after having previously been convicted of a crime . . . under state law that would prohibit his possession of a regulated firearm . . . The parties hereby stipulate

that Devin Lee has been previously convicted of such a crime."; (3) the circuit court later instructed the jury to the same effect.[5]

Notwithstanding those three steps, however, the illegal possession count was ultimately omitted from the verdict sheet that was sent to the jury. (As a result, Lee was never convicted of that count.). Prior to the jury returning its verdict, there was no discussion of the omission,[6] let alone any express agreement between the State and defense counsel to deliberately omit the charge from the verdict sheet. Rather, the trial transcript suggests that the omission was an oversight, stemming from the ebb and flow

[5] The circuit court stated: "The State and the defense agree that the defendant Devin Lee has been charged with the offense of possession of a regulated firearm after having been previously convicted of a crime under state law that would prohibit his possession of a regulated firearm. The parties hereby stipulate that Devin Lee has been previously convicted of a crime that would prohibit his possession of a regulated firearm."

[6] After the jury returned its verdict, at the very end of trial, the circuit court judge pointed out the omission to the prosecutor and defense counsel:

> The Court: Sure. But I also wanted to say this, I don't interfere with—this is your case, your cases, we go over the verdict sheets, we go over the instructions, everything, I've had that for you, you know, I made sure it's what you all wanted, correct? . . . On the verdict sheet, there was no felony possession of a handgun. But that's not my case. I just point that out to show you I don't—all right.
>
> [The State]: Yes, Your Honor.
>
> The Court: Okay. Anything else?
>
> [Lee's Counsel]: No, Your Honor.

of the trial and the desire of the circuit court and the parties to complete the trial within one week.

On appeal, Lee argues that because the charge was not included on the verdict sheet, it was prejudicial for the jury to hear that he had been previously convicted of a (non-specified) crime that would preclude his possession of a firearm. On the one hand, Lee acknowledges that this issue is unpreserved because his counsel did not object at trial.[7] Nevertheless, he now argues that it constituted plain error for the circuit court to allow the stipulation to be read to the jury when the court knew that the count was not included on the verdict sheet.

We are not persuaded. To constitute plain error, an error must (among other criteria[8]) "have affected the appellant's substantial rights," meaning that it must have "affected the outcome of the [] court proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (Citation omitted). As the State aptly points out, the discrepancy at issue here most likely *benefitted* Lee, given that it resulted in one less conviction—and on a count

[7] Indeed, as an agreed-upon stipulation, the instruction was clearly not objected to by his counsel.

[8] *See, e.g., Martin v. State*, 165 Md. App. 189, 196 (2005) (Plain error reserved for "blockbuster [] errors") (Quotation marks omitted); *Steward v. State*, 218 Md. App. 550, 566 (2014) (Factors to consider before undertaking plain error review include "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law; the egregiousness of the trial court's error; the impact of the error on the defendant; and the degree of lawyerly diligence or dereliction."); *Kelly v. State*, 195 Md. App. 403, 432 (2010) ("[D]iscretion [] ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.") (Citation and quotation marks omitted).

that otherwise would have inevitably resulted in a conviction. (The stipulation plainly said that Lee was prohibited from possessing a regulated firearm. If the count had been included on the verdict sheet, and the jury found—as it did—that Lee murdered Giles, a conviction on the omitted count would have been legally necessary.).

Additionally, we do not believe that the stipulation "affected the outcome of the . . . proceedings," *id*., or caused the jury to believe that Lee was "more likely to have committed the crime for which he [wa]s being tried." *Odum v. State*, 412 Md. 593, 610 (2010). To briefly recap the evidence that was presented at trial: the jury heard Murray say in person that Lee and Davis were at the scene of the crime; the jury watched the videotaped interview in which Murray had explicitly told the police that Lee killed Giles; the jury heard expert testimony that cell phone records placed all four men in the general area at the time of the murder; the jury was told about text messages sent by Lee, Davis, and Murray; and the jury was presented with the physical evidence of the tire treads, as well as the cigarette from the crime scene that had Murray's DNA on it. Not to mention, Davis's defense counsel explicitly told the jury on two separate occasions that Lee shot and killed Giles. Furthermore, we add that had the mere knowledge of Lee's prior unspecified conviction been so powerful as to improperly sway the jury, the jury would not have remained so discerning as to acquit Lee of conspiracy. Instead, the jury doubted enough of the State's case to acquit Lee of conspiracy.

In the alternative, Lee argues that his trial counsel's handling of the stipulation issue constituted ineffective assistance of counsel, on the basis that there was no apparent

strategic reason to allow the jury to be instructed that he had a prior conviction that precluded possession of a firearm. In the first place, we agree with the State that such a contention would be better pursued in a post-conviction proceeding, regardless of the merits. *See Mosley v. State*, 378 Md. 548, 562, 565 (2003) ("[W]e prefer post-conviction proceedings to address denial of effective assistance of counsel claims . . . because 'we do not have the benefit of all the facts concerning why defense counsel did or did not do certain things.'") (quoting *State v. Zernechel*, 304 N.W.2d 365, 367 (Minn. 1981)). We further agree that Lee's defense counsel might very well have made a tactical decision not to alert the prosecutor to the omission on the verdict sheet. As mentioned above, the discrepancy in question most likely benefitted Lee. And contrary to Lee's suggestion on appeal that "defense counsel agreed with the State's decision not to send the charge to the jury," there is no indication from the trial transcript that either the State affirmatively decided not to send the charge to the jury, or that there was any express agreement between the State and defense counsel. Rather, the omission appears to be an oversight—an oversight that benefitted Lee. As the State observes, had Lee's counsel attempted to have the stipulation stricken from the record, that would have likely only reminded the prosecutor to add the illegal possession count back onto the verdict sheet.

II. The Circuit Court Did Not Impermissibly Admit Hearsay.

Lee claims that the circuit court impermissibly admitted prejudicial testimony during Detective Ryan Diener's re-direct examination—specifically, that the Baltimore Police Department had received information that led them to look for a car operated by

someone named "Dev." As an initial matter, Lee does not contest that Detective Diener was permitted to testify, on direct examination, that the police received information that led them to look for a two-door black Honda Accord coupe. However, Lee contends that it became impermissible for Detective Diener to further specify on re-direct that in conjunction with the information about the Honda Accord, the police had received additional information that "the person that operated it was an individual that went by the name -- nickname of Dev."

Lee suggests that this statement about "Dev" was impermissible hearsay; in the alternative, Lee contends that the statement's probative value (*i.e.*, explaining Detective Diener's motives for conducting the investigation that led to Lee) was outweighed by the prejudice caused to Lee by "the likelihood that the jury would misuse that information as substantive evidence of guilt[.]" *Parker v. State*, 408 Md. 428, 441 (2009) (Citation omitted).

We disagree. To begin, we agree with the State that the challenged testimony was admissible as non-hearsay, to show the course of the police investigation. *Graves v. State*, 334 Md. 30, 38 (1994) ("It is well established that a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true."); *see Frobouck v. State*, 212 Md. App. 262, 283 (2013) (A deputy's statement was not offered for a hearsay purpose, but "to explain *briefly* what brought the officers to the scene in the first place.") (Emphasis in

original). Here, the statement in question was only important because it contributed to the narrative about how the police investigation eventually came to encounter Lee; whether the statement happened to be true or not—*i.e.*, whether someone nicknamed "Dev" generally operated a particular Honda Accord—was immaterial. *See, e.g.*, *Payne & Bond v. State*, 211 Md. App. 220, 260 (2013), *vacated on other grounds sub. nom. State v. Payne*, 440 Md. 680 (2014) ("[A]n interviewee's statements to an investigating police officer are not 'hearsay' unless and until they are offered into evidence for their truth.") (Citation omitted). Put another way: it did not matter whether the fact contained within Detective Diener's statement about the car being operated by someone named "Dev" was true. What mattered for the purposes of Detective Diener's testimony was simply that the police had received information that, when acted upon, led the police to encounter Lee. Had the police stumbled upon Lee when looking for a red Corvette, the case would not have been any different.

Furthermore, even if the statement *were* hearsay, its admission was harmless in light of all the other evidence presented at trial. As mentioned above, the jury heard Murray's firsthand testimony that Lee and Davis had been involved with the crime; watched the videotaped interview in which Murray explicitly stated that Lee shot Giles; saw the photo array in which Murray identified Lee and wrote "Devin was at the scene[.] He killed Chris"; heard expert testimony that cell phone records showed Lee, Murray, Davis, and Giles were generally in the relevant area at the time of the murder; and heard

Davis's counsel suggest twice on the record and without objection that Lee shot Giles.[9] Simply put, we do not believe that a single sentence from Detective Diener that the police were told to look for a Honda Accord operated by someone named "Dev" had any effect on the outcome of the trial, notwithstanding the prosecutor's invocation (without objection) of the statement during closing arguments. We agree with the State that there is no reasonable likelihood that the case would have turned out differently without that one-line testimony about "Dev" operating a Honda Accord.[10]

III. The Circuit Court's Handling of the *Voir Dire* Did Not Constitute Plain Error.

Lee contends that the circuit court's *voir dire* improperly shifted the burden of determining juror bias from the trial court to the jurors themselves. Specifically, Lee takes issue with the manner in which one particular *voir dire* question was posed—when the circuit court asked prospective jurors whether they had strong feelings about the charges faced by Lee (and Davis):

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[9] In addition, the jury heard repeatedly from Murray that Lee was driving the Honda Accord in question on the day of the crime. "Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." *Yates v. State*, 429 Md. 112, 120 (2010) (quoting *Jones v. State*, 310 Md. 569, 588-89 (1987)).

[10] Lee contends that the statement in question—that the subject car of interest was operated by someone with the nickname of "Dev"—was prejudicial because it gave the jury "little difficulty drawing a conclusion that police were given more specific information incriminating Mr. Lee." However, every jury *ought* to infer that the authorities have received at least *some* incriminating information about any suspect on trial, even if the jury ultimately finds those suspicions to be unfounded. Otherwise, a jury would have to believe that the State is blindly putting people on trial for no reason whatsoever.

> Does any member of the jury panel feel that the nature of the charges against the defendants would make it difficult or impossible for them to render a fair or impartial verdict? If so, please stand.

Lee correctly points out that in *Pearson v. State*, 437 Md. 350 (2014), the Court of Appeals held that, upon request, a trial court must simply ask prospective jurors whether they have strong feelings about the crimes charged—and not whether the nature of such charges would make it difficult or impossible for the jurors to render a fair or impartial verdict. As the Court in *Pearson* explained, it must be the trial judge who decides whether prospective jurors might be impermissibly biased, and not prospective jurors evaluating their own potential bias. 437 Md. at 361-62.[11]

Nonetheless, although the circuit court's phrasing was not in line with *Pearson*, Lee acknowledges that his trial counsel did not object. As such, Lee asks us now to find ineffective assistance of counsel or plain error. We decline to do so.

First, for the same reasons mentioned above, we do not believe that this direct appeal is the appropriate forum to consider whether defense counsel's strategy may have constituted ineffective assistance of counsel. *See Mosley*, 378 Md. at 562 ("[W]e prefer post-conviction proceedings to address denial of effective assistance of counsel claims[.]"). Second, we do not believe that the circuit court's phrasing constituted the sort

[11] The specific language rejected in *Pearson* was similar to the court's phrasing here. The question in *Pearson* that was deemed to be improper was: "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?" 437 Md. at 361.

of "blockbuster error" that merits plain error review. *See Martin*, 165 Md. App. at 196. Considered in the full context of the *voir dire* process as a whole (and especially considering the full evidence presented at trial), it is unlikely that the phrasing of this one particular question "affected the appellant's substantial rights," or "affected the outcome" of the proceedings. *Rich*, 415 Md. at 578. As the State points out, after asking the question that is at issue here, the trial judge went on to ask the jury pool:

> Now . . . we're going to talk about strong feelings. The Court's not talking about the ordinary every day feelings that people have. Okay. We're talking about something extraordinary and beyond the norm. Does any member of the jury panel have extraordinary feelings about handguns? If so, please stand. Extraordinary, other than the norm that we don't like guns that kill people."

Given that the entire trial revolved around a murder committed with a handgun, we do not believe that Lee's substantial rights were affected by the earlier question—certainly not to the extent that the "rare, rare phenomenon" of plain error review would now be appropriate. *Hammersla v. State*, 184 Md. App. 295, 306 (2009). Indeed, the same 12 jurors who heard the question at issue went on to acquit Davis of first and second-degree murder, and Davis and Lee of conspiracy. Those acquittals would be anomalous if the *voir dire* question was a "blockbuster error" that "egregious[ly]" failed to screen out impermissibly biased jurors. *See Martin*, 165 Md. App. at 196; *Steward*, 218 Md. App. at 566.

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