Circuit Court for Prince George's County
Case No.: CT171620B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2897

September Term, 2018

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DERRICK NUSH TUBMAN

v.

STATE OF MARYLAND

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Nazarian,
Beachley,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Adkins, Sally D., J.

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Filed: April 9, 2020

A Prince George's County jury convicted Appellant, Derrick Nush Tubman, of two counts of conspiracy to commit robbery. We are asked to decide whether the court erred in denying Tubman's motion to postpone trial, and admitting certain testimony from a Prince George's County Detective. For the reasons set forth below, we answer both those questions in the negative, and affirm.

## FACTS AND LEGAL PROCEEDINGS

Tubman was charged with two counts each of armed robbery, robbery, conspiracy to commit robbery, second-degree assault, and theft between $100 to $1500 in connection with a robbery that occurred on October 4, 2017. Bobby Gray, Jr. was charged as a co-conspirator. Gray's trial began on August 20, 2018, and Tubman's began two days later. Judge Leo E. Green, Jr., presided over both trials.

On the morning of the *Gray* trial, Tubman's counsel, Mr. Benjamin Evan, was subpoenaed as a potential defense witness in that trial. Evan had contacted one of the victims, Zharia Mohammed, before the trials and took a statement from her. In doing so, he obtained evidence that potentially could be used to impeach Mohammed in both the *Gray* and *Tubman* trials. Because Evan could have been called to testify, he was not allowed in the courtroom during Gray's trial,[1] and therefore did not hear any witness testimony in the *Gray* case. He ultimately was not called to testify.

[1] Maryland Rule 5–615(a) excludes potential witnesses from the courtroom during trial, in order that they will not hear other witnesses' testimony and be influenced or manufacture testimony.

That evening, following the first day of the *Gray* trial, the court went on record in the *Tubman* case, with both the State and Evan present in front of Judge Green.[2] Judge Green and the State summarized Mohammed's testimony from earlier in the day, so Evan could potentially impeach Mohammed in Tubman's trial if her testimony there was inconsistent with what she said in *Gray*. The conversation went as follows:

> THE COURT: Now, let me—let me—and I'm going to relate to you what I had heard from the female witness. . . . Ms. Mohammed essentially—the State was in the room and Madam Court Reporter obviously. The clerk was too. But my read of what she said was this: "One, I was extremely drunk. I had had shooters of tequila and I was pretty high. I was high during this whole thing. . . ." Upon rehabilitation of the State, she claims to have—my term not what she said—sobered up rather quickly when the incident occurred. And that's essentially, I think what I heard. Is that a fair statement?
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> THE STATE: Correct. And then I asked her about the call with Mr. Evan. And she said I did tell him I had been partying and she explained the reason why she didn't—
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> THE COURT: Well, she explained because she didn't want to be involved in this.
>
> THE STATE: Correct.
>
> THE COURT: She didn't want to come down here.
>
> THE STATE: Correct. And then [Gray's counsel] asked her, I think, some more questions about your conversation with her. She didn't deny any of it. So to force you to be an extrinsic witness at this point, she's not denying it. So your testimony, your potential witness ability in [Tubman's] case, if she testifies the same way is eliminated. You would never be called as an extrinsic witness in this case.

[2] The same State's Attorney prosecuted both Gray and Tubman.

The court then explained how Evan could use the summary to impeach Mohammed in Tubman's trial:

> THE COURT: [Y]ou could make a statement, isn't it true that you told me that you were pretty drunk, and you don't remember any of this? Isn't it true that you told me this? Isn't it true—she acknowledged all of that.
>
> Which would be a fair statement and then you have all of the testimony from—that we have transcribed here that can be used against her to impeach her. I would—State, I would probably give him that leeway to say, isn't it true, blah, blah, blah—which is all good impeachment, which makes you half a witness and half not.
>
> It takes you out of the problem, doesn't it?

The next day, in front of Judge Green, Evan moved to withdraw as Tubman's counsel on the grounds that he was a potential defense witness in Tubman's trial. The court denied the motion, finding that Evan was not a "necessary witness," and that the issue he would testify to was "really an uncontested issue" as Mohammed did not deny nor dispute the conversation she had with Evan during her *Gray* testimony.

That same day, Evan (as Tubman's counsel, so henceforth "Tubman"), requested a continuance and was sent to the administrative judge-designee. He argued:

> TUBMAN: I have been told by Judge Green and Mr. Hiller that there were dramatic and numerous variations in the testimony from the two State witnesses. Not only from the statements that they made—or verbal statements to police, written statements to police, they completely changed their version of events, eliminating one person entirely from the case and changing about what happened at this house.
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> ***

> The problem is I don't know exactly what was asked, I don't know exactly what the answers were, and more importantly, I have no idea what they said in particular, and I don't have any notes. So, I am at a complete disadvantage. I can't cross-examine. This is a panel case. I went to the Public Defender's Office and asked for funding for overnight transcripts. That was denied. So, I am at a point where I am excluded because I was served as a witness and excluded on a rule of witness. I have no notes, I have no knowledge, I cannot cross examine these witnesses.
>
> It wouldn't be all that important if their stories had stayed the same, but their stories were, from what I'm being told just by comments, dramatically different. . . .
>
> And because of what happened being out of my control, being served and then being excluded and not being able to get transcripts, I need a continuance for that reason, along with what I have already argued pertaining to the prejudice to Mr. Tubman by continuing these motions.

Tubman wanted the continuance until he received and reviewed the *Gray* transcripts, so that he could prepare a "vigorous defense," and effectively impeach witnesses should they give conflicting testimony. The administrative judge denied the motion, finding that a continuance's cost to the witnesses would be prohibitive.

Tubman's trial began on time in front of Judge Green. Both Mohammed and the other victim, Elijah Johnson, testified. On cross-examination, Tubman questioned whether their statements made on direct were consistent with what they told the police the night of the robbery, and what they testified to in the *Gray* trial. Johnson admitted to not telling the police the truth about everything, and Mohammed admitted to lying to both the State and Evan.

Following the victims' testimony, Tubman moved to hold them until the end of trial, so that he might impeach them with the *Gray* trial transcripts—when received, and if they revealed further inconsistencies. The court denied his motion, but stated that it would allow Tubman to read the transcripts into the record as impeachment evidence if they revealed further inconsistencies. The next morning, Tubman confirmed that he had received the transcripts.

The State then called Detective Vincent Simmel of the Prince George's County Police Department to the stand. Simmel testified that he met the victims in a parking lot and obtained a description of the suspects and the property taken. The victims provided him with a general physical description of the assailants, including their skin color, hair style, height, and build. Simmel also learned where the robbery occurred. He was familiar with the area, Riverdale, as "it had been his beat when he was a patrol officer." Simmel and other officers went to the apartment, which was "in disarray," with trash all over the floor. He noted "graffiti of alligators in a swamp . . . [in] a couple of areas" on the wall, and that the graffiti contained the words "Swamp Side," "Gator Boys," and "Riverdale."

After leaving the scene of the crime, Simmel began searching Instagram.[3] He described how he monitored several hundred Instagram accounts of "persons he knew to frequent the immediate area." One account stood out to Simmel "because the person on

[3] Instagram is a free, internet-based photo-sharing application and service that allows users to share picture and videos either publicly or privately. INSTAGRAM, https://help.instagram.com/424737657584573 [https://perma.cc/V7GX-WLDP] (last visited Mar. 4, 2020).

that Instagram account matched the description of one of the suspects and he was posting videos inside the apartment that I had just cleared." Simmel recognized the apartment in the video because of the distinctive alligator graffiti on the walls.

That account's user name was "Nushiano," Simmel testified, and he recognized the person in the "story" to be Tubman, holding "money and bags and . . . the gun." He went on to explain that an Instagram "story" is a video or picture only accessible for twenty-four hours, after which "it will be gone, and nobody will be able to see it again." Because "stories" are temporary, Simmel took several screenshots of the video from the "Nushiano" account, which were admitted into evidence.

When Simmel began to testify about social media accounts, Tubman objected, arguing that the testimony violated the granted motion *in limine* that precluded law enforcement from discussing prior contact with Tubman. The court overruled the objection.

Based on his Instagram findings, Simmel explained that he then prepared a photo array containing Tubman's picture, and another officer administered the array to Mohammed at the police station. She positively identified Tubman as one of the men who robbed her.

Following the State's case, Tubman elected not to testify, and did not present any evidence. He did not move to admit any portion of the *Gray* transcripts as impeachment evidence. The jury found Tubman guilty of two counts of conspiracy to commit robbery.

On November 30, the court sentenced Tubman to fifteen years' incarceration, with all but ten years suspended, and five years of probation. Tubman's timely appeal presents us with two questions:

> 1. Did the circuit court err in denying Appellant's motion to postpone trial?
>
> 2. Did the circuit court err in allowing Detective Simmel to testify that [Tubman] had prior contact with law enforcement?

## DISCUSSION

### Denial Of A Continuance

Tubman argues that the denial of his motion for a continuance prevented him from effectively exercising his constitutional right to confront witnesses, as he was limited in his ability to potentially impeach them. The State counters that Tubman conducted extensive and thorough cross-examinations. The State also stresses that despite having the opportunity to enter conflicting testimony from the *Gray* transcripts into evidence, Tubman declined to do so.

We review a decision to deny a continuance for abuse of discretion. *Abeokuto v. State*, 391 Md. 289, 329 (2006). An abuse of discretion is a decision "beyond the fringe of what the court deems minimally acceptable." *Devincentz v. State*, 460 Md. 518, 550 (2018) (cleaned up). This standard is premised, at least in part, "on the concept that matters within the discretion of the trial court are much better decided by the trial judges than by appellate courts." *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 242 (2011). Absent an abuse of discretion, we have historically not disturbed a decision to deny a

motion for a continuance. *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). We appraise constitutional questions, however, without deference. *Glover v. State*, 368 Md. 211, 221 (2002). We review constitutional issues "in light of the particular facts of the case at hand; in doing so, we accept a lower court's findings of fact unless clearly erroneous." *Id.*

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). It allows parties to expose facts so that the trier of fact "[can] appropriately draw inferences relating to the reliability of the witness[es]." *Marshall v. State*, 346 Md. 186, 193 (1997). "The main and essential purpose of the Confrontation Clause is to ensure that the defendant has an opportunity for effective cross-examination of adverse witnesses, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Taylor v. State*, 226 Md. App. 317, 332 (2016) (cleaned up). Although this opportunity is guaranteed, the Supreme Court has held that it does not mean that parties may exercise this right to whatever extent they wish. *Van Arsdall*, 475 U.S. at 679.

Tubman equates his situation with the Sixth Amendment violations in *Smallwood v. State*, 320 Md. 300 (1990), and *Martinez v. State*, 416 Md. 418 (2010). His reliance on these cases is misplaced.

In *Smallwood*, the trial court allowed testimony about previous charges Smallwood's ex-girlfriend brought against him, but prohibited evidence about the outcome of those charges. 320 Md. at 308. The trial court reasoned that only the filing of the

charges went to the witness's prejudice, but the outcome did not. *Id.* at 309. The Court of Appeals reversed, and held that by not being able to discuss the outcome of the charges (Smallwood was acquitted), Smallwood was unable to show the witness's bias, a Sixth Amendment violation.

In *Martinez*, a detective testified to visiting the victim in the hospital and showing him a photo array of potential suspects. The victim identified Martinez as the person who stabbed him. *Id.* at 421. During trial, the victim identified Martinez as the individual who stabbed him. *Id.* at 425–26. On cross-examination, Martinez requested that the court allow him to ask the victim whether he was currently in police custody due to unrelated charges of felony theft and possession of drug paraphernalia. The request was denied. *Id.* at 426. The Court of Appeals held, like in *Smallwood*, that the trial court erred in denying Martinez the right to question the witness about his bias or self-interest in testifying against Martinez. *Id.* at 432.

In contrast to *Smallwood* and *Martinez*, here the circuit court did not forbid Tubman from asking impeachment questions. Tubman inquired into the witnesses' statements to police, and their testimony in the *Gray* trial. His questions revealed inconsistencies, with Johnson admitting he did not tell law enforcement everything on the night of the crime and Mohammed admitting she lied to both Evan and the State.

Additionally, Tubman had the ability to use the *Gray* transcripts as further impeachment evidence once he received them. Tubman did not move to admit any *Gray* testimony. We can only assume the transcripts showed no further impeachable evidence.

Tubman was afforded a full and fair opportunity to cross-examine the witnesses against him, and therefore his Sixth Amendment rights were not violated. We therefore hold that the court did not abuse its discretion in denying his motion for continuance.

**Simmel's Testimony**

Tubman alleges that the court erred in allowing Simmel to testify that Tubman "had prior contact with law enforcement." He argues that the testimony was "either irrelevant, or substantially more prejudicial than probative."[4] The State counters that Simmel's testimony was relevant, and did not concern prior contact between Tubman and law enforcement. The State asserts that any possible unfair prejudice was far outweighed by the testimony's probative value.

When admitting evidence, the court goes through a two-step process, first asking "whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns." *State v. Simms*, 420 Md. 705, 725 (2011). We review relevance without deference, *Sweeney v. State*, 242 Md. App. 160, 183 (2019), and a trial court's Rule 5-403 balancing test for abuse of discretion. *Simms*, 420 Md. at 725.

*Relevance*

Tubman argues that testimony about "the manner in which [his] photo came to be placed in the photo array"—through Simmel monitoring social media and recognizing

[4] Most evidence is prejudicial. The test under Maryland Rule 5-403, however, is whether the evidence's probative value is substantially outweighed by the danger of *unfair* prejudice.

Tubman in the apartment on the "Nushiano" Instagram account—is irrelevant. He asserts that its only possible use is to "impermissibly suggest[] that [Tubman] had a propensity for crime because of his prior contacts with police," and therefore it has no relevance. We disagree.

All evidence admitted at trial must be relevant. *Simms*, 420 Md. at 724. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action, more probable or less probable than it would be without evidence." Md. Rule 5-401. The two components of relevance are materiality and probative value. *Sweeney*, 242 Md. App. at 183. "Evidence is material if it bears on a fact of consequence to an issue in the case, and probative value is the tendency of evidence to establish the proposition that it is offered to prove." *Id.* (cleaned up).

Tubman contends that "the fact that [Tubman's] social media account was being monitored by the police, and that Detective Simmel recognized and knew [Tubman] by name, did not 'afford a reasonable presumption or inference as to the principal fact or matter in dispute.'" Whether Tubman was at the scene of the crime, however, is a fact of consequence, and therefore material. Testimony that video on Tubman's Instagram account[5] showed him at the scene of the crime within twenty-four hours of the crime does afford an inference—and therefore is probative.

[5] Although strongly implied at trial, Simmel never testified—and the State never argued—that the Instagram account "Nushiano" actually belonged to Tubman. Tubman's brief to this court, however, refers to the account as "Tubman's social media account."

Police officers, in testifying about their investigation, cannot introduce irrelevant or otherwise inadmissible evidence. *See Zemo v. State*, 101 Md. App. 303 (1994) (detective's testimony that a defendant invoked his right to silence in a case where his silence was not admissible, and that a confidential informant told him that the defendant committed the crime, was unfairly prejudicial and not admissible). They can, however, testify to relevant matters as to which evidence would have been admissible. *See Geiger v. State*, 235 Md. App. 102 (2017) (detective's testimony that the defendant presented a fake ID to the victim, and the identification of the defendant as the thief, was relevant and admissible evidence). As discussed above, Simmel's testimony was relevant.

It was also admissible. Tubman's argument that the testimony "impermissibly suggests a propensity for crime," implicitly invokes Md. Rule 5-404(a)(1), "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." We discussed this issue in *Somers v. State*, 156 Md. App. 279 (2004), where a police officer testified that he knew the defendant's name "from other cases." *Id.* at 313. Like the officer's testimony in *Somers*, Simmel's statement that he knew Tubman is not propensity evidence. He did not state that Tubman had committed other crimes. "The testimony just as well could mean that [the defendant] was a witness, a victim, or otherwise peripherally involved in other cases, without having been accused or found guilty of any crime." *Id.* at 314. Simmel did not ever connect Tubman with any legal issues or cases. Had Tubman been concerned about

improper character evidence, he could have requested a curative instruction. *Id.* No such request was made.

In sum, Simmel's testimony is more akin to *Geiger* than *Zemo*, as he did not reveal any irrelevant or otherwise inadmissible information to the jury under the guise of "the course of his investigation." Simmel's testimony was relevant and admissible.

*Probative Value v. Unfair Prejudice*

"To justify excluding relevant evidence, the danger of unfair prejudice must not simply outweigh probative value but must, as expressed directly by Rule 5-403, do so substantially." *Newman v. State*, 236 Md. App. 533, 555 (2018). In weighing the evidence, the very wording of Rule 5-403 has "steeply tilted the weighing process in favor of admissibility." *Id.* As we stated above, a police officer's testimony that he recognized a defendant is not inadmissible character evidence. It also does not constitute unfair prejudice. [6]

Simmel did not discuss any specific contact with Tubman. No implication or accusation was made that Tubman has a history of criminal activity. *Cf. Parker v. State*, 408 Md. 428, 442 (2009) (a detective's testimony that he received a tip about a "black male wearing a blue baseball cap and black hooded sweatshirt at the corner of Carey and Laurens selling heroin" was held to be inadmissible because the detail of criminal activity was

[6] Tubman does not argue that the screenshots themselves should have been excluded under Maryland Rule 5-403, and so we do not consider that question.

unfairly prejudicial). As Simmel's testimony was probative and not unfairly prejudicial, we hold that the court did not err in its admission.

**JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**