Circuit Court for Baltimore City
Case No. 117347009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3433

September Term, 2018

JOHNNY HARRIS

v.

STATE OF MARYLAND

Friedman,
Beachley,
Gould,

JJ.

Opinion by Beachley, J.

Filed: January 28, 2020

Appellant, Johnny Harris, was arrested and charged with: possession of a firearm with a nexus to a drug trafficking crime; possession of marijuana with intent to manufacture, distribute, and dispense; possession of a firearm after having been convicted of a crime of violence; possession of a firearm after having been convicted of a disqualifying crime; wearing, carrying, and transporting a handgun; assault of an officer; and resisting arrest. During the arrest, the arresting officer failed to activate his body-worn camera until several minutes after approaching appellant. After a jury trial in the Circuit Court for Baltimore City, appellant was convicted of wearing or carrying a firearm, resisting arrest, and one of the charges relating to possession of a regulated firearm. Appellant was sentenced to fifteen years' imprisonment, the first five years to be served without the possibility of parole.

Appellant presents the following questions on appeal:

1. Whether the trial court abused its discretion in preventing defense counsel from cross-examining the arresting officer about his prior failures to turn on his body-worn camera.

2. Whether the trial court imposed an illegal sentence of fifteen years' imprisonment when the jury found [appellant] guilty only of a crime that permits a maximum prison term of five years.

We answer both questions in the negative and affirm.

DISCUSSION

I.

On November 13, 2017, Officers Berdell Presberry and Anthony Brown were patrolling on Segways near Lexington Market in Baltimore City when Officer Presberry heard appellant saying "weed, weed, weed." The officers stopped appellant on suspicion

of distribution of marijuana. After appellant handed the officers several baggies of marijuana, the officers noticed that appellant was "favoring his side" and suspected that he was carrying a gun. When they attempted to place appellant under arrest, he began struggling. As the officers wrestled with appellant, appellant threw a gun onto the sidewalk. Officer Presberry turned on his body-worn camera after appellant handed over the marijuana and shortly before the struggle ensued. Departmental policy requires body-worn cameras to be turned on "immediately upon obtaining probable cause or reasonable suspicion for [an] attempted stop," unless it is "unsafe, impossible, or impractical to do so." Balt. Police, *Policy 824: Body Worn Camera*, 4–5 (Jan. 1, 2018), tinyurl.com/baltimorebodyworncameras.

At a December 3, 2018 pre-trial hearing, appellant moved *in limine* that he be permitted to impeach Officer Presberry during the trial based on three body-worn camera complaints filed with the Internal Affairs Division ("IAD").[1] The three complaints at issue are:[2]

> 1) Case No. 2017-0519, alleging that Officer Presberry failed to activate his body camera;
>
> 2) Case No. 2017-0122, alleging that Officer Presberry "did not provide his body-worn camera footage as appropriate"; and

[1] Appellant also sought to use similar evidence against another officer; however, appellant did not raise any issues on appeal concerning the other officer.

[2] The transcript indicates that appellant's counsel provided the motion court with an e-mail listing Officer Presberry's disciplinary matters. Our thorough review of the record leads us to conclude that no such document was ever marked for identification or admitted as evidence. We also note that there appears to be no dispute that the State produced substantial discovery in response to appellant's requests concerning IAD complaints.

3) Case No. 2017-0054, alleging "a body-worn camera issue" with Officer Presberry.

Only Case No. 2017-0122 resulted in a finding of "facts sustained," a term used when an IAD investigator concludes that there is some merit to the complaint. Case No. 2017-0519 resulted in "non-punitive counseling" and the facts in Case No. 2017-0054 were "not sustained."

The motion court excluded the evidence, stating:

> I don't believe that it is admissible as such. I believe it is certainly fair game to inquire about the use of the camera. Perhaps why -- when it is supposed to be turned on and why it wasn't and even to -- and if that has occurred with the officer before.
>
> If the officer says it has only happened in this instance, I think it is fair game. I don't think that counsel can refer to specific incidences where it was alleged, particularly when it is not facts sustained. But even when it was, I don't think it sufficiently goes to credibility for that purpose. And I don't think it goes to habit. I don't think it establishes the mimic exceptions for prior bad acts. [3]
>
> So I'm going to have to deny -- deny that motion as well.

Immediately prior to jury selection on January 30, 2019, before a different judge, appellant again raised the issue concerning Officer Presberry's prior failures to activate his body-worn camera resulting in the IAD complaints. In response, the State asserted that the motion court had already ruled on the admissibility of the body-worn camera evidence, to which appellant's counsel responded that the motion court only determined that the

[3] "MIMIC" is a mnemonic device for five of the exceptions to the prohibition against evidence of prior crimes and other bad acts—Motive, Intent, absence of Mistake, Identity, and Common scheme or plan. *See generally Emory v. State*, 101 Md. App. 585, 605–21 (1994).

evidence was inadmissible as "character conformity" evidence. After hearing from counsel, the trial judge stated:

> So here is where I am right now. Right now, I'm inclined to ask you -- I'm inclined to allow you to ask the officer on cross whether he complied with the department's training on the use of body-worn camera. Whether he did so in this case.
>
> And frankly, I think it is a little premature to take up whether you're going to be allowed to ask him about other instances where he failed to use his body-worn camera. At this point, I would not be inclined to allow you, based on what I have been told so far, to ask about previous instances where he had failed to do that.
>
> But I certainly think you can ask him in this case whether he complied with the departmental regulations on the use of the body-worn camera in this instance.
>
> We'll revisit that if need be.

The case proceeded to trial, and during the State's case, Officer Presberry explained that he could not immediately activate his body-worn camera because he needed both hands to operate the Segway that he was riding as he approached appellant. Appellant cross-examined Officer Presberry concerning his operation of the Segway, the manner in which the camera is activated, and why he delayed turning on his camera as he encountered appellant. Officer Presberry admitted during cross-examination that he is required to activate his camera when "engag[ing] with an individual in the public." Appellant made no attempt during cross-examination to inquire about IAD complaints or past instances of failure to use the body-worn camera.

Appellant argues that the trial court abused its discretion by excluding evidence of Officer Presberry's prior failures to activate his body-worn camera. Appellant states that

such evidence is relevant to the officer's credibility and there is a possibility that, had the evidence been introduced at trial, "the jury would not have believed Presberry's account of what occurred in this case when the camera was not recording."

The State responds that the trial court properly exercised its discretion in precluding the evidence, that any error was harmless, and that appellant did not preserve this issue for appeal. We agree that the issue was not preserved and that, even if preserved, the court did not err in excluding the evidence.

When a trial court grants a motion *in limine* to exclude evidence, the steps required to preserve an argument that the ruling was an abuse of discretion differ depending on the clarity of the ruling. *Berry v. State*, 155 Md. App. 144, 169 (2004). Where the trial court "makes a ruling to exclude evidence that is clearly intended to be the final word on the matter, and that will not be affected by the manner in which the evidence unfolds at trial," the proponent of the evidence need not attempt to present the evidence during trial to preserve an objection to its exclusion. *Prout v. State*, 311 Md. 348, 357 (1988), *abrogated on other grounds by Beales v. State*, 329 Md. 263 (1993). However, when the court does not make a clear ruling on the motion, the proponent must make "some effort to introduce the evidence" during trial. *Berry*, 155 Md. App. at 169; *see also Martinez v. John Hopkins Hosp.*, 212 Md. App. 634, 659 (2013). As we shall explain, appellant did not make "some effort to introduce the evidence," and therefore waived his argument. *Berry*, 155 Md. App. at 169.

This case is factually similar to *Berry*. *Berry* involved multiple defendants, each with separate counsel. During a bench conference, counsel for Mr. Berry expressed his

desire to introduce evidence during cross-examination of two police witnesses that "a court, in a different and completely unrelated case, granted a motion to suppress evidence on the ground that [the witnesses] had made a false statement in a warrant application." *Id.* at 164. The prosecutor objected and moved to exclude the evidence. *Id.* at 166. Counsel for Mr. Berry agreed with the trial court's observation that allowing the evidence "might run afoul of the Court of Appeals' decision in *Bohnert v. State*," 312 Md. 266 (1988). *Berry*, 155 Md. App. at 167. After the trial court stated that the proffered evidence would not be admitted, counsel for a co-defendant stated, "I'd like to address it at that time to see where it goes." *Id.* The trial judge replied, "Fine. Okay. No, fine. Fine." *Id.* One of the two detectives was not called as a witness. *Id.* at 169. When the other detective was called as a witness, none of the defendants attempted to raise the issue discussed during the bench conference. *Id.*

We held that the defendants failed to preserve the issue for appellate review for two reasons. First, when counsel for Mr. Berry agreed that the proposed inquiry would be inadmissible, he waived the issue. *Id.* Second, and more pertinent to this case, because the defendants failed to inquire about the previously proffered evidence, "even after having received the court's 'okay' to pursue the matter," the issue was not preserved. *Id.* at 169–70.

In the instant case, the judge presiding at the December 3, 2018 motion *in limine* hearing clearly stated that evidence of Officer Presberry's prior failures to use his body-worn camera could not be used during trial. Had the issue not been raised again, it likely would have been preserved for our review. However, the issue was revisited before a

different judge—the trial judge—on the first day of trial. Despite being advised by the State that the motion judge had denied appellant's motion *in limine*, the trial judge expressed her willingness to address the issue again during trial, concluding that the issue was "a little premature" and that "[w]e'll revisit that if need be." By stating that it was "a little premature," and that the issue could be revisited, the trial judge was indicating that she did not intend to be irrevocably bound to the motion court's ruling. Therefore, to preserve the issue, appellant must have "made some effort to introduce the evidence" during the trial. *Berry*, 155 Md. App. at 169. Because he failed to do so, the issue was not preserved for appellate review.

Even if the issue were preserved, we discern no error in the court's determination to exclude the IAD complaints as impeachment evidence. Rule 5-608(b) provides:

> (b) **Impeachment by examination regarding witness's own prior conduct not resulting in convictions.** The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

In *State v. Cox*, the Court of Appeals opined that, in evaluating the admissibility of evidence of prior misconduct, "it is the responsibility of the trial judge to determine the relevance and materiality of the alleged prior misconduct[.]" 298 Md. 173, 180 (1983). Further, the alleged bad acts must be "very closely related to the witness' veracity[.]" *Robinson v. State*, 298 Md. 193, 201 (1983).

Here, the trial court's determination that the proffered impeachment evidence was not probative of a character trait for untruthfulness was not an abuse of discretion. We initially note that the facts in Case No. 2017-0054 were not sustained and therefore would not provide a firm basis for believing that the conduct occurred. But even were we to assume a factual basis for the other two complaints, we fail to see how a mere failure to properly activate a body-worn camera qualifies as being "very closely related" to the officer's veracity and truthfulness. When the motion court inquired whether the IAD complaints established that Officer Presberry intentionally failed to activate his body-worn camera, appellant's counsel responded, "Recklessly. I can't speak to his intent." If there were evidence that Officer Presberry intentionally failed to activate his body-worn camera, we agree that such evidence could have constituted admissible evidence under Rule 5-608(b) because it might indicate an intent to suppress material evidence. However, there is no such evidence in this case. Moreover, we recognize that there could be a multitude of reasons—including equipment malfunction and simple negligence—to explain an officer's failure to turn on a body-worn camera. On this record, we cannot conclude that Officer Presberry's mere failure to activate his body-worn camera in and of itself is probative of a character trait of untruthfulness.[4]

[4] We further note that, at the time of trial, Officer Presberry had been employed for nineteen years with the Baltimore City Police Department. This case does not require us to resolve whether the officer's years of service or the number of contacts between the officer and the public is relevant to a Rule 5-608(b) inquiry.

II.

Appellant was charged with two crimes relevant to the illegal sentence issue: possession of a regulated firearm by a person convicted of a disqualifying crime,[5] and possession of a regulated firearm by a person convicted of a crime of violence.[6] The indictment listed the pertinent prior conviction for both counts as one for second-degree assault. At trial, outside the presence of the jury, defense counsel acknowledged that appellant also had two prior drug convictions for possession with intent to distribute, a violation of Maryland Code Ann. (2002, 2012 Repl. Vol., 2018 Supp.) § 5-602 of the Criminal Law Article ("CR").

The parties stipulated to the predicate prior conviction in a stipulation that read, in its entirety:

> The Defendant has been charged with the offense of possession of a regulated firearm. The parties hereby stipulate that the Defendant is prohibited from possession of a regulated firearm because of a previous conviction that prohibits his possession of a regulated firearm.

During the first day of trial, appellant's counsel stated that "the defense and the State have stipulated to the disqualifying/violent crime conviction." Later that day, there was a discussion between the State and the clerk in the presence of appellant's counsel concerning which of the two regulated firearm counts was being sent to the jury. The State

[5] Maryland Code Ann. (2003, 2011 Repl. Vol.) § 5-133(b) of the Public Safety Article ("PS").

[6] PS § 5-133(c).

then clarified that the PS § 5-133(c) charge was to be sent to the jury. Appellant's counsel never attempted to correct or contradict this statement.

The following jury instructions were given for the PS § 5-133 charge:

> The defendant is charged with possessing a regulated firearm after having been convicted of a crime that disqualified him from possessing a regulated firearm. In order to convict the defendant, the State must prove: (1) that the defendant knowingly possessed a regulated firearm; and (2) that the defendant was previously convicted of a crime that disqualified him from possessing a regulated firearm.
>
> …
>
> The State and the defendant agree and stipulate that the defendant was previously convicted of a crime that disqualifies him from possessing a regulated firearm.

The verdict sheet listed the charge as "possession of a regulated firearm after being convicted of a disqualifying crime." The jury found appellant guilty of this charge.

At sentencing, the prosecutor reiterated that appellant was convicted under PS § 5-133(c). Appellant's counsel not only failed to contradict that statement, but described the conviction as carrying a mandatory minimum sentence of five years' imprisonment as provided in PS § 5-133(c).

Appellant asserts that his sentence of fifteen years' imprisonment pursuant to PS § 5-133(c) was illegal. He argues that the wording of the stipulation, jury instructions, and verdict sheet cannot be interpreted as supporting a conviction under PS § 5-133(c). Therefore, in his view, he was only convicted of possessing a regulated firearm after having been convicted of a disqualifying crime as provided in PS § 5-133(b), for which he could only receive a five-year maximum sentence.

The State responds that the parties' understanding of the stipulation and the charges sent to the jury indicates that appellant was convicted under PS § 5-133(c). The State bases its argument on: statements made by defense counsel; the fact that the only prior conviction mentioned in the indictment for both PS §§ 5-133(b) and (c) was a conviction for second-degree assault, which is a "crime of violence"; and the protocol established in *Carter v. State*, 374 Md. 693, 720 (2003), mandating that the "trial court must accept a stipulation or admission that the defendant was convicted of a crime that qualifies under the criminal-in-possession statute" so as to keep the name or nature of the prior conviction from the jury.

An illegal sentence may be challenged at any time, Md. Rule 4-345(a), even where an appellant "1) failed to object to the sentence at the trial level, 2) purportedly consented to the sentence, or 3) failed to challenge the sentence by way of direct appeal." *Carlini v. State*, 215 Md. App. 415, 423 (2013). An illegal sentence is one where the "punishment meted out was . . . in excess of that prescribed by the relevant statutes, multiple terms were . . . imposed for the same offense, [or] the terms of the sentence itself [were] legally or constitutionally invalid." *Id.* at 425 (quoting *Hill v. United States*, 368 U.S. 424, 430 (1962)). "Whether a sentence is an illegal sentence under Maryland Rule 4-345(a) is a question of law that is subject to *de novo* review." *State v. Crawley*, 455 Md. 52, 66 (2017).

The legislature established two separate but related crimes in PS § 5-133. Section 5-133(b) states, in relevant part:

> (b) Subject to § 5-133.3 of this subtitle, a person may not possess a regulated firearm if the person:
>
> (1) has been convicted of a disqualifying crime

A "disqualifying crime" is defined in PS § 5-101(g) as "(1) a crime of violence; (2) a violation classified as a felony in the State; or (3) a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years." Section 5-133(c) states, in relevant part:

> (c)(1) A person may not possess a regulated firearm if the person was previously convicted of:
>
> (i) a crime of violence;
>
> (ii) a violation of § 5-602, § 5-603, § 5-604, § 5-605, § 5-612, § 5-613, § 5-614, § 5-621, or § 5-622 of the Criminal Law Article; or
>
> (iii) an offense under the laws of another state or the United States that would constitute one of the crimes listed in item (i) or (ii) of this paragraph if committed in this State.

A violation of subsection (b) may be punished by a maximum of five years' imprisonment. Subsection (c), however, carries a minimum penalty of five years' imprisonment and a maximum penalty of fifteen years' imprisonment.

We conclude that there are two independent bases to uphold appellant's conviction and sentence. The first basis is found in *Smith v. State*, 225 Md. App. 516 (2015). There, the defendant, Smith, was charged with violating both PS § 5-133(b) (illegal possession of a regulated firearm after having been convicted of a disqualifying crime) and § 5-133(c) (illegal possession of a regulated firearm after a felony drug conviction).[7] *Smith*, 225 Md. App. at 518–19. Smith challenged his firearm convictions on the basis that the State failed to produce evidence of a disqualifying conviction in the State's case-in-chief. *Id.* at 520.

[7] Smith was also convicted of violating PS § 5-144 concerning illegal possession of a firearm in violation of Subtitle 5.

At trial, Smith conceded that he had stipulated to his prior felony conviction outside the presence of the jury. *Id.* at 523. Nevertheless, because the State did not introduce the stipulation as evidence in its case-in-chief, Smith moved for judgments of acquittal as to the firearms counts. *Id.* at 522–23. In response, the State sought permission to re-open its case to "put the stipulation on the record," to which Smith objected. *Id.* at 523. After a brief recess, the trial judge advised the parties that his notes indicated that Smith stipulated, on the record, to the prior conviction. *Id.* at 524. Without expressly ruling on the State's motion to re-open its case, the court informed the jury:

> During the break we have a stipulation for you. And that stipulation is that the parties agree the State and the defense agree that by law Mr. Nathaniel Smith is prohibited from possessing a firearm.

Id. at 524. Smith did not object and rested his case. *Id.* at 525. Smith, however, did object to the court's jury instruction that "it should be considered proven . . . [that] the defendant, Mr. Smith, is prohibited by law from possessing a firearm." *Id.*

After rejecting Smith's first appellate argument that he did not actually stipulate to the prior disqualifying conviction, *id.* at 525, the Court turned to Smith's contention that the State's failure to introduce the stipulation before the close of its case "undermine[d] the sufficiency of his convictions for illegal possession of a regulated firearm." *Id.* at 526. Relying on federal and out-of-state authority, we stated:

> The reasoning reflected in these decisions is both sensible and fair. We hold that, by consenting to a stipulation, Smith relieved the State of its obligation to prove that he had previously been convicted of a disqualifying crime as part of its case-in-chief. We conclude, as did the *Hardin*[8] Court,

[8] *United States v. Hardin*, 139 F.3d 813 (11th Cir. 1998).

> that Smith received exactly what he bargained for when he agreed to the stipulation and suffered no prejudice when the stipulation was presented to the jury by the court instead of by the prosecutor during the State's case-in-chief.

Id. at 528. Although not expressly articulated, the Court effectively held that the stipulation and ensuing jury instruction that "Smith is prohibited by law from possessing a regulated firearm," was sufficient to support convictions under both PS § 5-133(b) and (c), at least where the defendant stipulates outside the presence of the jury that he has a predicate conviction for PS § 5-133(c) liability.[9]

In this case, unlike *Smith*, the parties' stipulation was admitted as an exhibit in the State's case. The evidentiary stipulation here provided that "[appellant] is prohibited from possession of a regulated firearm because of a previous conviction that prohibits his possession of a regulated firearm." Outside the presence of the jury, the parties "stipulated to the disqualifying/violent crime conviction." Appellant's only violent crime conviction was for second-degree assault as stated in the indictment and recognized by counsel at sentencing. In addition, appellant expressly stipulated to two convictions under CR § 5-602. Either the second-degree assault or a conviction pursuant to CR § 5-602 would serve as a predicate for PS § 5-133(c) criminal liability. Under these circumstances, and consistent with *Smith*, we conclude that the State was relieved of its obligation to prove that appellant had been previously convicted of a "disqualifying crime" under PS § 5-133(b) or "a crime of violence" under PS § 5-133(c). We echo the *Smith* Court's

[9] Smith had stipulated outside the presence of the jury that he had a felony drug conviction as set forth in PS § 5-133(c)(1)(ii).

observation that appellant "received exactly what he bargained for" and therefore suffered no prejudice. *Id.* at 528.

Second, even if we were to assume some error in the procedure utilized by the trial court, we would not reverse appellant's conviction based on a procedure to which he stipulated and agreed. In *Nash v. State*, we found error in the procedure of "bifurcating the elements of the offense, *i.e.*, having the jury consider solely the issue of possession of the firearm, with the issue of the prior conviction to be determined at a later time." 191 Md. App. 386, 399 (2010). Despite the improper bifurcation of issues there, the *Nash* Court, in affirming the convictions, applied the "invited-error" doctrine, which provides that "[a] defendant should not be able to take advantage of an error that he invited or requested the trial court to make." *Id.* at 402–03.

The invited-error doctrine is similarly applicable in the instant case. Here, from the outset of trial, appellant conceded that "the defense and the State have stipulated to the disqualifying/violent crime conviction." Appellant likewise agreed to the stipulation entered into evidence, which removed his previous conviction from jury consideration. When the State clarified for the clerk that only the PS § 5-133(c) charge was being submitted to the jury, appellant made no attempt to correct or contradict the State on this point. Similarly, appellant did not object to the jury instructions or verdict sheet that only advised the jury that he had been convicted of a disqualifying crime.

Finally, at sentencing both the State and appellant understood that appellant was convicted under PS § 5-133(c). Indeed, appellant's counsel expressly stated that the conviction carried the five-year mandatory minimum prescribed by PS § 5-133(c). In

conclusion, we borrow language from *Nash* because of its equal applicability to the case at bar: "Thus, it is clear that defense counsel, along with the State, requested that the court proceed as it did. Under these circumstances, and where there is no dispute that appellant had the requisite prior convictions, the invited error doctrine precludes appellant from taking advantage of this error." *Id.* at 404.

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