UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0465

September Term, 2014

DAVID THOMAS PEAKS, JR.

v.

PRINCE GEORGE'S COUNTY POLICE DEPARTMENT, et al.

Krauser, C.J.,
Wright,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: September 30, 2015

This case stems from an altercation between several Prince George's County police officers and David Peaks ("Peaks"), the appellant. Peaks alleged at trial that he was attacked and injured by one of the officers. The Prince George's County Police Department ("Police Department") presented evidence that Peaks, high on PCP, fought against the officers and hospital staff who were attempting to restrain him. The jury believed the Police Department's version of events and rendered a defense verdict. In this Court, Peaks continues to insist on his version of events and he has presented six questions for our review:

1. Did the trial court err in allowing testimony about Peaks' prior drug use?

2. Did the trial court err in giving jury instructions on contributory negligence and assumption of the risk?

3. Did the trial court err in refusing to allow Peaks to use and/or introduce a prior inconsistent statement of a witness during examination of that witness?

4. Did the trial court err in permitting the opinion testimony of expert Dr. Myerson regarding the effects of PCP on Peaks?

5. Did the trial court err in admitting into evidence articles relied upon by the expert witness?

6. Did the trial court err in failing to have the clerk maintain possession of the trial exhibits?

As we find that the trial court did not err, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Peaks and the Prince George's County Police Department disagree fundamentally about the facts of the case. According to Peaks, he was walking up the sidewalk of Hill

Mar Drive, singing and dancing when he was stopped by several Prince George's County police officers. Peaks did not resist the officers but was handcuffed and placed in their vehicle because the officers suspected he was under the influence of Phencyclidine (commonly known as PCP). The officers first took Peaks to his mother's house and then continued on to the hospital. According to Peaks, during the ride to the hospital he told the officers that he did not need to go to the hospital and that he was fine. He also testified that he stomped his feet in an effort to get the officer's attention but only because he was restrained.

Upon arriving at the hospital, Peaks maintains that he was calm and cooperative. According to his testimony, he remained calm and cooperative while being examined by the triage nurse, while sitting in the waiting area for thirty minutes, and then while walking into an examination room. It was only upon being thrown onto a hospital bed by Officers Jefferson and Mischo and members of the hospital staff that he stopped cooperating. As the two officers and staff attempted to lock Peaks into a four-corner restraint he attempted to free his arms and remove the surgical mask from his face. Officer Mischo then struck Peaks in the face repeatedly, resulting in injury to his eye. Once Peaks was restrained, the mask was removed from his face and he spit up blood. Officer Mischo, believing Peaks spat at him, then struck Peaks again multiple times. Emergency surgery was required to repair Peaks' eye.

The facts elicited by the Prince George's County Police Department are vastly different. According to the Police Department, Officers Jefferson and Mischo responded

to a 911 call reporting someone screaming and moaning in the woods. When the officers arrived on the scene, they heard Peaks yelling and saw him in the middle of the road. Due to Peaks' erratic behavior, the officers believed that he was on PCP and were fearful that he would attack them. The officers apprehended Peaks, placed him in a police van, and transported him to the hospital for evaluation. Along the way, Peaks was yelling incoherently, kicking, and hitting his head in the police van so that the van swayed back and forth. Upon arrival at the hospital, Peaks was still screaming and the officers assisted hospital staff in restraining Peaks so that he could be evaluated.

When the officers and hospital staff attempted to place Peaks in the four-corner restraints, he began to fight and hit the officers and staff. Hospital staff placed a surgical mask over Peaks face to keep him from spitting. According to Officer Mischo's testimony, at one point, Peaks freed himself of the restraints and began to kick a hospital staff member. When Officer Mischo moved to restrain Peaks' leg, Peaks grabbed for Officer Mischo's gun. Officer Mischo struck Peaks in an effort to force him to let go of the gun. According to Officer Jefferson's testimony, it took seven people 15 or 20 minutes to restrain Peaks. Peaks was then sedated.

Peaks filed a civil suit against the Prince George's County Police Department, Officers Jefferson and Mischo, and the hospital. Peaks' complaint alleged battery, assault, intentional infliction of emotional distress, false arrest, false imprisonment, negligence, and a violation of the Maryland Declaration of Rights. Before trial, the circuit court granted the hospital's motion to dismiss. A jury trial was held from April 14 to April 17, 2014, on

the remaining counts against the Prince George's County Police Department and the two officers. On April 17, 2014, judgment was entered in favor of the Police Department and the two officers. Peaks timely appealed.

DISCUSSION

I. Testimony regarding Peaks' prior drug use

Peaks alleges that the trial court erred by allowing the jury to hear testimony regarding his prior use of PCP. Peaks contends that the testimony regarding his prior use of PCP was introduced for the sole purpose of prejudicing the jury by giving the impression that he was dangerous, high, and out of control. Peaks argues that the admission of this testimony was in error for two reasons: *first*, because the testimony was not relevant to Peaks' case (and therefore not admissible under Rules 5-401 and 5-402), and *second*, because the prejudice of the testimony outweighed the probative value (and was therefore improperly admitted under Rule 5-403). The Police Department argues that Peaks' prior PCP use was relevant to his behavior during the incident and was also relevant to the necessity for the police officers' use of force. We conclude that the trial court did not abuse its discretion in finding that the testimony was relevant, and that the probative value of the testimony was not outweighed by unfair prejudice. We explain.

In assessing relevance, context is crucial. Peaks admitted on the stand that he had used PCP earlier on the day of the incident. It was important to his case, however, to establish that his use of PCP affected him by making him feel "high," "calm," mellow, and anesthetized rather than, as the Police Department suggested, that it made him "violent,"

"disconnected from reality," psychotic, and caused him to have hallucinations. This battle over the affect that PCP had on Peaks that day was a major feature at trial and manifested in several ways. For example, Peaks attempted to show that his prior PCP use had resulted in "calm" highs, had not resulted in violent behavior or police altercations, and, as a result of that evidence, he wanted to suggest that it was the police response, not his PCP use, that led to the altercation. The Police Department, of course, wanted to suggest the opposite. Peaks also wanted to suggest that the Police Department was trying to cover up what he characterized as Officer Mischo's violent, unprovoked assault and, according to him, was using the admission of PCP use earlier in the day to bolster its false story of Peaks' violent, dangerous behavior.

In that context, the contested testimony was offered:

[Police Dept. Counsel]:	Your testimony is you think you were using [PCP] at 7:00 p.m. Is that right?
[Peaks]:	I know I was, 7:00 p.m.
[Police Dept. Counsel]:	Okay. Now, you had used PCP before October 20, 2011, had you not?
[Peaks]:	Yes.
[Police Dept. Counsel]:	All right. You began using it when you were 18 years old?
[Peaks' Counsel]:	Objection. We discussed this in the back.
THE COURT:	Over objection.

[Peaks]: The most I used was ten times in my whole life.

[Police Dept. Counsel]: If you would answer my questions, Mr. Peaks, for a moment in fairness to me. You began using PCP at 18 years old?

[Peaks]: That's when I first tried it.

[Police Dept. Counsel]: When you first tried it. I think you used it several times after you were 18. You used –

[Peaks]: A few times.

[Police Dept. Counsel]: I'm sorry?

[Peaks]: I'd say a few times after I first started, then I stopped. That's why I say I used it ten times. I stopped and tried it before.

[Police Dept. Counsel]: So you understand what the effects of PCP are upon you, do you not?

[Peaks]: The effects?

* * *

[Police Dept. Counsel]: That's what I am talking about. It makes you feel high, does it not?

[Peaks]: Yes.

[Police Dept. Counsel]: It gives you a feeling of being high, correct?

[Peaks]: It makes you high.

[Police Dept. Counsel]: Yes. It makes you high. When you say that term, "high," I wanted to delve a bit more deeply as to

	what it means to make you feel high. Can you tell the jury what it means?
[Peaks]:	Basically keep calm. It keeps me calm.
[Police Dept. Counsel]:	Does it give you a feel of elation or feeling that you're not aware of things around you?
[Peaks]:	No, sir.
[Police Dept. Counsel]:	Okay. So you contend you know what's going on?
[Peaks]:	Yes, sir.

When a relevancy determination hinges on whether the evidence tends to establish the fact it is offered to prove, we review under an abuse of discretion standard. *Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 619-20 (2011) (contrasting with circumstances in which a relevancy decision turns on a question of law and is reviewed *de novo*). A relevancy assessment in this situation "is not susceptible to precise definition," but "it has been suggested that the answer must lie in the judge's own experience, his general knowledge, and his understanding of human conduct or motivation. Evidence which is … not probative of the proposition at which it is directed is deemed irrelevant." Joseph F. Murphy, Maryland Evidence Handbook § 501 (4th ed. 2010). Relevant evidence is evidence which has any tendency to "make the existence of any fact that is of consequence … more or less probable." Rule 5-401. All relevant evidence is admissible while evidence that is not relevant is not admissible. Rule 5-402. An abuse of discretion exists "where no reasonable person would take the view adopted by the [trial] court," or when the court acts

"without reference to any guiding rules or principles." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (citations omitted).

The questions asked by the Police Department are relevant in at least three ways. First, the testimony was relevant to helping the jury decide which version of events they should believe: Peaks' narrative that he was calm and was needlessly and viciously assaulted, or the Police Department's narrative that he was behaving violently and erratically and the officers were trying to maintain safety. Peaks' description of his prior use of PCP and his prior "calm" high experiences, although not the response the Police Department was probably looking for, was consistent with his version of a "calm" PCP high on the night of the incident. Second, the jury was being asked to evaluate the testimony of Peaks and the two officers to determine whose version of events was more likely true. The credibility of each witness's perception of the events was valuable in making this determination. Peaks' perception of the events could have been affected by his PCP use earlier in the evening. His testimony regarding his prior experiences with PCP was relevant to the jury deciding how well they thought he had perceived what was happening. Finally, the questions regarding Peaks' prior experience with PCP and his awareness of his personal reaction to PCP are material to and have a tendency to prove that he did indeed ingest PCP, and not some other drug, because he could compare the experience to prior PCP intoxications. Therefore, we find that the questioning was relevant and that the trial court did not abuse its discretion by allowing it.

The remaining question, then, is whether the probative value of the testimony is outweighed by the danger of unfair prejudice. We believe the probative value is not substantially outweighed by unfair prejudice and we conclude that the trial court did not abuse its discretion in allowing the testimony. The judge was not required to evaluate the probative value of the testimony by taking into account only Peaks' theory of the case and his version of much calmer events. The trial court could, and properly did, consider the case as a whole. The trial court's decision was not "removed from any center mark imagined by the reviewing court [or] beyond the fringe of what the court deems minimally acceptable," *Consolidated Waste Industries Inc. v. Standard Equipment Co.,* 421 Md. 210, 219 (2011). Therefore, we conclude that the trial court did not abuse its discretion by allowing the question.[1]

II. Jury Instructions

Peaks' next allegation of error is that the trial court erred by giving instructions on contributory negligence and assumption of risk. Peaks argues that the facts adduced at trial did not establish the need for the instructions. We hold that the trial court did not abuse its discretion in giving the contributory negligence and assumption of the risk instructions.

[1] The Police Department also notes that even if the admission of evidence of Peaks' prior drug use was error, then it was harmless error as the jury found that Peaks did not assume the risk of his injury. As we have already held that the trial court did not abuse its discretion in admitting the testimony of Peaks' prior drug use, it is unnecessary for us to engage in a harmless error analysis.

When reviewing a trial court's ruling to grant or deny a requested jury instruction, we consider "whether the requested instruction was [1] a correct exposition of the law, [2] whether that law was applicable in light of the evidence before the jury, and finally [3] whether the substance of the requested instruction was fairly covered by the instruction actually given." *Malik v. Tommy's Auto Serv., Inc.*, 199 Md. App. 610, 616 (2011). The instructions are reviewed under an abuse of discretion standard. *S&S Oil, Inc. v. Jackson*, 428 Md. 621, 640 (2012). Peaks challenges the instructions given on the second factor but does not attack the first or third factors. Therefore, we will confine our analysis to the second factor, whether the instructions given were applicable in light of the evidence before the jury.

Before giving the instructions to the jury, the trial judge and counsel for both parties discussed the instructions, most of which were agreed to without objection. Peaks, however, objected to the proposed instructions on contributory negligence and assumption of the risk. Peaks objected on multiple grounds, including that neither defense was implicated by the evidence presented. The trial judge overruled Peaks' objections and both instructions were given to the jury.[2]

[2] The Police Department's first counter argument is that Peaks did not preserve his allegations of error because the objections made at trial were on different grounds than those now argued. We disagree and are persuaded that Peaks' allegation of error was preserved. While Peaks' arguments at trial are not word for word what he is arguing here, we are persuaded that Peaks' objections at trial fairly covers the same arguments he now advances, namely that the law was not applicable in light of the evidence before the jury.

The relevant portion of the jury instructions given by the trial court are as follows:

> For the plaintiff to recover damages, the defendant's negligence must be a cause of the plaintiff's injury. There may be more than one cause of an injury, that is, several negligent acts may work together. Each person whose negligent act is a cause of injury is responsible.
>
> A plaintiff cannot recover if the plaintiff's negligence is a cause of the injury.
>
> The defendant has the burden of proving by preponderance of the evidence that the plaintiff's negligence was a cause of the plaintiff's injury.
>
> A plaintiff cannot recover if the plaintiff has assumed the risk of injury. A person assumes the risk of an injury if that person knows and understands, or much have known or understood the risk of an existing danger, and voluntarily chooses to encounter the risk.

Although contributory negligence and assumption of the risk may stem arise from the same situation and both may defeat recovery, the two are distinct defenses to a negligence claim. *Schroyer v. McNeal*, 323 Md. 275, 281-83 (1991). Contributory negligence is the failure to "observe ordinary care for [one's own] safety." *Thomas v. Panco Mgmt. of Maryland, LLC*, 423 Md. 387, 417-18 (2011) (citations omitted) (holding that contributory negligence is either doing something that a person of ordinary prudence would not do, or the converse, the failure to do something that a person of ordinary prudence would). Assumption of the risk arises when a person has knowledge of a risk of danger, appreciates the risk, and voluntarily confronts the risk. *ADM P'ship v. Martin*, 348 Md. 84, 90-91 (1997) (citing *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630 (1985)). "Contributory negligence defeats recovery because it is a proximate cause of the accident

which happens, but assumption of the risk defeats recovery because it is a previous abandonment of the right to complain." *Schroyer*, 323 Md. at 281 (citing *Warner v. Markoe*, 171 Md. 351 (1937)).

The context of the case is once again crucial because Peak's arguments ignore the overall context of the case. The competing narratives were that Peaks was either calm and cooperative or that he was disconnected from reality and violent. The jury heard evidence that Peaks had put his hand to his face in an attempt to get the surgical mask off his face when Officer Mischo hit him. The jury also heard evidence that Peaks had reached downward and grabbed Officer Mischo's gun prompting Officer Mischo to hit Peaks in an attempt to force him to release the gun. Thus, the same acts were interpreted in two different ways. In addition to the competing testimony, the jury also heard, through Peaks' expert, Mr. Key, that even if Peaks did grab Officer Mischo's gun, the Officer's response was still negligent.

Given the evidence presented, we are persuaded that both instructions were necessary. The jury could have relied on Officer Mischo's statement that "[Peaks] reached and grabbed onto the butt of my gun" and determined that Peaks failed to observe ordinary care by touching or grabbing Officer Mischo's gun and therefore was contributorily negligent. The jury could have also determined that Peaks knew the dangers of grabbing a police officer's gun, that he appreciated the risk of such an action, and that he voluntarily chose to confront that risk. Peaks' argument that the instructions were erroneous in essence is an argument that the trial court should have ignored the differing accounts of the events

and should have relied solely upon Peaks' version of events. Therefore, we are persuaded that, given the testimony and evidence presented to the jury, the trial court did not abuse its discretion in determining that the instructions on contributory negligence and assumption of the risk were applicable. We find no error.

III. Prior Inconsistent Statements

Peaks next argues that the trial court erred by refusing to allow him to impeach Officer Jefferson through the use of a prior inconsistent statement he made during an internal affairs investigation of this same incident. Specifically, at trial Officer Jefferson testified that he personally had *not* been the person who secured Peaks into the 4-corner restraints. Rather, Officer Jefferson testified that he had assisted the hospital security guards, and when asked what he meant by "assisted" he explained that he was "holding [Peaks] to the bed, trying to restrain him from getting back up, not putting him in restraints" and that it was the hospital security guards that put the restraints on Peaks. This allegedly contradicted a statement that Officer Jefferson had given during the internal affairs investigation to the effect that he *had* been the person who restrained Peaks. Peaks proffered that Officer Jefferson had previously stated that "I got my cuff on" and that "[I] did help with the strap." Beyond that brief proffer, however, we do not have any other information about what Jefferson's prior statement was, the form in which it was made (whether it was made orally and then transcribed or whether it was made in written form), nor do we have a copy of it in the record. The record is also silent as to when and how Peaks came to possess the document, which should have been a confidential document in

Officer Jefferson's personnel file. Thus, we must decide whether the trial court erred in failing to allow counsel to ask questions about a (1) relatively minor inconsistency,[3] in a document that (2) we do not have,[4] and that (3) Peaks should not have had. What a mess.

We hold that Peaks had no right to possession of a document from Jefferson's confidential personnel file and, as a result, had no right to use this document to impeach Jefferson's trial testimony. Preliminarily, we take some guidance from the fact that documents pertaining to internal affairs investigations are generally exempt from disclosure under the "personnel records" exemption to the MPIA. GP § 4-311; *Maryland Dept. of State Police v. Dashiell,* 443 Md. 435, 454 (2015); *Montgomery Cnty. Maryland v. Shropshire*, 420 Md. 362, 378-83 (2011).[5] Courts have explained that this exemption protects the integrity of the disciplinary process and maintains the confidentiality of the

[3] Not every minor inconsistency provides grounds for impeachment and the introduction of extrinsic impeaching evidence. Md. Rule 5-616(b); Maryland Evidence Handbook § 1304[A] ("Proving the falsity of 'collateral' facts brought out on cross is not ordinarily allowed under Md. Rule 5-616(b)(2). … [Y]ou are prohibited from introducing extrinsic evidence that is relevant to no issue other than the issue of whether the witness responded falsely to your cross examination question."); *DeBlasi v. State*, 60 Md. App. 154, 481 (1984) ("It is well established that a witness can be impeached by extrinsic evidence only with regard to material facts and not with respect to facts that are collateral, irrelevant, or immaterial to the issues of the case.").

[4] While we are inhibited by Peaks' counsel's failure to make the physical document a part of the record on appeal, we find that he made a sufficient oral proffer, describing Jefferson's prior, allegedly inconsistent statement, to preserve the issue for review.

[5] The Court of Appeals has also identified an exception to this general rule: In a criminal prosecution, the defendant's right to confrontation may demonstrate a need to inspect otherwise confidential personnel records. *Fields v. State*, 432 Md. 650, 667-68 (2013). That exception obviously does not apply here.

subject of the investigation, particularly in circumstances in which the allegations are not sustained. *Shropshire,* 420 Md. at 380-81. Thus, if Peaks had sought to obtain the documents by MPIA request or through a subpoena, he would have correctly been denied.

Here, however, Peaks had already obtained the document. The issue, therefore, is not whether the documents can be disclosed, but whether Peaks, after an improper disclosure, should have been able to use the documents to impeach Jefferson at trial. We think that the policy considerations that explain the non-discoverability of the documents also support their inadmissibility. The documents, whatever they say, were created in the course of an internal investigation in which the charges were not sustained against the officers. As such, Peaks should not have had possession of them. And while it is not our function to punish Peaks for improper possession of Officer Jefferson's confidential documents, neither will we find error in the trial court refusing to reward him by allowing him to impeach Officer Jefferson with them. *See generally Wood v. State*, 290 Md. 579 (1981) (excluding recorded conversations acquired in violation of the Maryland electronic surveillance law); *Newman v. State*, 156 Md. App. 20, 41 (2003) (excluding from evidence improperly obtained documents); *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 109 (2009) ("[a]ppellate courts can remedy the improper disclosure of privileged materials in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which *the protected material* and its fruits are *excluded from evidence*."). Therefore, in keeping with the considerations explained above, we are persuaded that the trial court did not abuse its discretion by

refusing to allow Peaks to use and introduce Officer Jefferson's prior statements for impeachment purposes.

IV. Expert Testimony of Dr. Myerson

Peaks makes a multifaceted allegation of error regarding the expert testimony of Dr. Ross Myerson. Dr. Myerson testified generally regarding the effects of PCP, including how long PCP stays in a person's body and bloodstream, the unpredictability of PCP intoxication, and how it can affect different users in different ways at different times. Dr. Myerson also testified that, based upon the documents and medical records that he reviewed, he believed that Peaks had become unmanageable in the hospital. Moreover, he testified that Peaks' behavior was consistent with PCP use because violence "is not an unexpected outcome for people who are intoxicated with PCP." He also testified that, despite Peaks' testimony that he had taken PCP, it was possible that Peaks had actually taken a different drug because it is common for PCP to be mixed, at different amounts, with other drugs or for other drugs to be sold as PCP.

Peaks alleges that Dr. Myerson, although a toxicologist, was not an expert in observing patients under the effects of PCP. The Police Department counters that Dr. Myerson was fully qualified to testify as an expert in medical toxicology and to opine as to the effects of PCP. We are not persuaded by Peaks' contentions and hold that the trial court did not err in allowing Dr. Myerson's testimony.

Under Md. Rule 5-702, a trial court is required to make three determinations when deciding to admit expert testimony: "(1) whether the witness is qualified as an expert by

knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702. Admission of expert testimony "may be reversed if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion." *Rite Aid Corp. v. Levy-Gray*, 162 Md. App. 673, 708 (2005) (quoting *Radman v. Harold*, 279 Md. 167, 173 (1977)). "[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute a ground for reversal." *Rite Aid Corp.*, 162 Md. App. at 708 (quoting *Radman*, 279 Md. at 173). The Court of Appeals has noted that a trial court does not abuse its discretion "when the expert, although not a specialist in the field having the most sharply focused relevancy to the issue at hand, nevertheless could assist the jury in light of the witness's 'formal education, professional training, personal observations, and actual experience.'" *Deese v. State*, 367 Md. 293, 303 (2001) (quoting *Massie v. State*, 349 Md. 834, 851 (1998))."

In *Blackwell*, the Court of Appeals explained:

> [A] witness, … to qualify as an expert, should have such special knowledge of the subject on which he is to testify that he can give the jury assistance in solving a problem for which their equipment of average knowledge is inadequate…. *A witness is qualified to testify as an expert when he exhibits such a degree of knowledge as to make it appear that his opinion is of some value, whether such knowledge has been gained from observation or experience, standard books, maps of recognized authority, or any other reliable sources.*

Blackwell v. Wyeth, 408 Md. 575, 619 (2009) (quoting *Radman*, 279 Md. at 171) (emphasis in original)). Further, with regard to medical experts, the Court of Appeals has clarified:

> In light of the fact that we have never treated expert medical testimony any differently than other types of expert testimony, we perceive no reason why a person who has acquired sufficient knowledge in an area should be disqualified as a medical expert merely because he is not a specialist or merely because he has never personally performed a particular procedure. . . .
>
> It is the scope of the witness'[s] knowledge and not the artificial classification by title that should govern the [threshold] question of admissibility.

Radman, 279 Md. at 171-72 (internal citations omitted). Therefore, the controlling factor is the scope of the expert's knowledge based on his experience and training, rather than his title.

Dr. Myerson was offered as an expert in the field of medical toxicology. He is licensed to practice medicine in Maryland and is certified by the American Academy of Review Officers as a medical review officer.[6] Dr. Myerson testified that as a medical review officer he reviews drug test results and has to be familiar with many drugs (including PCP) their effects, how they are detected, and the methods of analysis used in laboratories. He also testified that he had worked in emergency rooms throughout his

[6] A medical review officer determines the validity of drug tests. American Association of Medical Review Officers, "About Us," available at: http://perma.cc/32QN-DGF3 ("Medical Review Officers make the final determination of the accuracy of a drug test.")

career until about 2000 and that during his emergency room work he had encountered about a dozen patients under the influence of PCP. Finally, Dr. Myerson is the medical director for Occupational Environmental Medicine at Washington Hospital Center and consults in toxicology and environmental exposures. All of these demonstrate that Dr. Myerson had the necessary experience and education to assist the jury through his testimony. The trial court was not required to find that Dr. Myerson was an expert in the specific and narrow field of observing patients under the effects of PCP to find that Dr. Myerson was a proper expert witness.

We conclude, therefore, that the trial court did not abuse its discretion by admitting Dr. Myerson as an expert.[7]

V. Admission of articles relied on by expert

Peaks argues that the trial court erred in admitting into evidence certain articles because the articles were not reasonably relied upon by Dr. Myerson in forming his opinion.[8] Peaks objected when the trial court admitted these documents into evidence and

[7] Although Peaks argues that Dr. Myerson's expert testimony was not stated "to a reasonable degree of medical certainty" this argument is belied by the record and was not preserved in any event. *Williams v. State*, 131 Md. App. 1, 26 (2000) (stating that when evidence is received without objection, there is no prejudice where other objected to evidence of the same matter is also received).

[8] The articles admitted by the court were:

1) A portion of the Medical Review Officers Manual by Dr. Robert Swotinsky;
2) Wikipedia article on PCP; (continued…)

again when the exhibits were sent back to the jury. Peaks argues that because the articles are not admissible under Rule 5-703 they are inadmissible hearsay. We review the admissibility of evidence under an abuse of discretion standard, and absent a showing that the trial judge abused his discretion, we will not disturb the ruling on appeal. *Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009). We conclude that the trial court did not abuse its discretion by admitting the articles generally and that any error in admitting the Wikipedia article was harmless error.

Rule 5-703 contains two affirmative parts: (a) an explanation of what may be used as a bases for expert opinions, and (b) an explanation of when that information may be disclosed to the jury.[9] Rule 5-703(b) states:

> **(b) Disclosure to Jury.** If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and

3) Casseret and Doull's Textbook of Toxicology table of drugs and substances;
4) Abstract from the Journal of Neuroscience;
5) Drug and Human Performance Fact Sheet by the National Highway Traffic Safety Administration; and
6) National Institutes of Health, National Institute on Drug Abuse, document titled "Drug Facts, Hallucinogens, LSD, Peyote, Silicide and PCP."

While we find in part VI of this Opinion that the failure to maintain the exhibits, including the six articles listed here, was harmless error, we do note that we are unable to give the precise names and citations of each article.

[9] The third part of the rule, not relevant here, preserves the right to challenge the expert. Rule 5-703(c).

> data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

Md. Rule 5-703(b). Thus, to be admissible under Rule 5-703(b), a document must be: (1) trustworthy, (2) unprivileged, (3) reasonably relied upon by an expert in forming his opinion, and (4) necessary to illuminate that expert's opinion. *Brown*, 409 Md. at 601.

Peaks argues that the articles admitted failed the third prong of the test, in that they were not reasonably relied upon by Dr. Myerson in forming his opinion. This argument is based on a misreading of the trial transcript. Below, we have reproduced the line of questioning, from cross-examination, upon which Peaks bases his argument, however we first note that Dr. Myerson testified during direct examination that he "consulted, reviewed, and read" each of the documents in preparation for his testimony and participation in the case.

> [Peaks' Counsel]: Did you use all those things to make your report?
>
> [Dr. Myerson]: I don't recall what I used when I made my report. It's nearly a year ago.
>
> [Peaks' Counsel]: So, we don't know whether you used those items to make your report?
>
> [Dr. Myerson]: We don't know.

But immediately thereafter, Dr. Myerson clarifies his testimony:

> [Peaks' Counsel]: We know precisely which items you used to make your report?
>
> [Dr. Myerson]: Let me answer that this way. The knowledge on [PCP] that is in my report is common knowledge to someone with my credentials. I wouldn't have to check

> any reference materials to come up with those opinions. But as a responsible physician and scientist, before I put something in writing and before I come into a court of law and testify, I review the materials. That's the responsible thing to do.

Thus, taken as a whole, Dr. Myerson's testimony was that he had reasonably relied on the articles as a basis for his opinion. The trial court did not abuse its discretion in determining that Dr. Myerson reasonably relied on the articles in satisfaction of the third prong, or in admitting the articles.

Peaks saves his most strident complaints for a Wikipedia article on the effects of PCP, which Dr. Myerson testified that he relied upon and which was sent back to the jury. Peaks contends, without more, that the Wikipedia article is untrustworthy and was not necessary to illuminate Dr. Myerson's opinion. Dr. Myerson testified that that even though it is not a scientific article, "it's a good quick reference."

We infer from Peaks' argument that he views Wikipedia articles unfavorably, apparently (although he doesn't explain) because of the unique manner in which they are written. Wikipedia articles are "crowdsourced" and are freely and anonymously editable by the public. *See* Wikipedia Main Page, https://en.wikipedia.org/wiki/Main_Page (last visited Sept. 9, 2015). Evidence, however, suggests that Peaks' concerns about the reliability of Wikipedia may be overwrought. A Wikipedia article on the reliability of Wikipedia, https://en.wikipedia.org/wiki/Reliability_of_Wikipedia (last visited Sept. 24, 2015)(also available at: http://perma.cc/482V-THQX), reports that "[b]etween 2008 and

2012, articles in medical and scientific fields such as pathology, toxicology, oncology, pharmaceuticals, and psychiatry comparing Wikipedia to professional and peer-reviewed sources found that Wikipedia's depth and coverage were of a high standard." *Id*. (internal citations omitted). We note that courts have not been squeamish about relying on Wikipedia articles.[10] Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 Yale J.L. & Tech. 1 (2009) (identifying, as of 2009, 407 reported judicial opinions citing to Wikipedia).

There are few courts which have rejected, or expressed concern about, expert witnesses because the experts relied or based their opinions on Wikipedia articles. *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, No. 05-md-1721-KHV, 2009 WL 2912611 at *5-6 n.3 (D. Kan. Sept. 9, 2009); *Campbell v. Secretary of Health & Human Services*, 69 Fed. Cl. 775 (2006); *United States v. Liew*, Nos. CR 11-00573-1 JSW, CR 11-00573-2 JSW, CR 11-005573-3 JSW, CR 11-00573-4 JSW, 2013 WL 6441259, at *2 (N.D. Cal. Dec. 9, 2013). Despite these, we think that the better reasoned view is that articles published in Wikipedia are not *per se* unreliable nor are they unreliable as a matter of law as a basis for an expert's opinion. Rather, an opponent to the admissibility of a Wikipedia article or to an expert's reliance on a Wikipedia article must identify specific errors that

[10] This includes the appellate courts of Maryland—we note three examples: *Clancy v. King,* 405 Md. 541, 548 n.4 (2008) (using the Wikipedia definition of "book packager"); *Lee v. State*, 405 Md. 148, 181 n.2 (2008) (Harrell, J., concurring) (using the Wikipedia definition of "parallelism"); *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 716 n.37 (2013) (using the Wikipedia definition of "Venn Diagram").

prevent a specific article from being reliable. *Alfa Corp. v. OAO Alfa Bank*, 475 F. Supp. 2d 357 (S.D.N.Y. 2007) (refusing to exclude the expert's testimony when the defendant could not point to any actual errors in the Wikipedia entry and the expert relied on other sources in addition to Wikipedia for the basis of his opinion). Here, Peaks has not identified what if anything he thinks was wrong with the Wikipedia article regarding PCP.

"[E]ven if 'manifestly wrong,' we will not disturb an evidentiary ruling by a trial court if the error was harmless." *Brown*, 409 Md. at 584 (citing *Crane v. Dunn*, 382 Md. 83, 91-92 (2004)). "It has long been the policy in this State that this Court will not reverse a lower court if the error is harmless." *Barksdale v. Wilkowsky*, 419 Md. 649, 657 (2011) (citations omitted). "The burden is on the complaining party to show prejudice as well as error." *Gillespie v. Gillespie*, 206 Md. App. 146, 169 (2012); *Barksdale*, 419 Md. at 660 (noting that other than in limited circumstances, none of which are applicable here, there is not a presumption of prejudice). The complainant must show that prejudice resulted and that the prejudice was "likely" or "substantial." *Id.* at 662 (citations omitted). "Thus, the general rule is that a complainant who has proved error must show more than that prejudice was possible, she must show instead that it was probable." *Id.*

Here, Peaks has offered no explanation for what prejudice resulted from the trial court admitting the Wikipedia article into evidence but just argues that it should not have been admitted. Therefore, absent any allegation that prejudice was the likely or substantial result of having admitted the Wikipedia article into evidence, such error was harmless.

VI. Maintenance of trial exhibits

Rule 16-306(d)(2) requires that all exhibits that are introduced into evidence or marked for identification be retained by the clerk of the court. Peaks argues that the trial court failed to have the clerk of the court maintain the exhibits. Peaks does not, however, allege what harm came from this failure or what exhibits were not available to him for the appeal. As Peaks has identified no prejudice that arose from the trial court's failure to maintain the exhibits we conclude that this violation of Rule 16-306(d)(2) was harmless error. This violation does not have any bearing on our conclusions in the other issues presented in this case.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the Circuit Court for Prince George's County.

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