UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0296

September Term, 2015

DARRYL MARTIN ANDERSON

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A. III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 7, 2016

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

Darryl Anderson was tried in the Circuit Court for Baltimore County for the murder of Derrick Gamble. During the State's case-in-chief, the investigating officer testified that he identified Mr. Anderson by consulting the Baltimore City Homicide Unit and Mr. Anderson's "record," prompting defense counsel to move for a mistrial. The court denied the motion and directed the State to ask a series of curative questions, and the jury convicted Mr. Anderson after a week-long trial. The court (not a jury) sentenced Mr. Anderson to life in prison without the possibility of parole. On appeal, Mr. Anderson argues that the circuit court abused its discretion in denying his motion for mistrial, and also erred by denying his motion for jury sentencing after the State filed its notice to seek a sentence of life without parole. We affirm.

I. BACKGROUND

On the night of July 7, 2012, Phillip Gray and Mr. Gamble went to a bar in the Parkville area of Baltimore County called Tee Bee's. Only Mr. Gray would survive the night.

At trial, Mr. Gray testified that he picked up Mr. Gamble around 10 or 11 PM in a grey rental Nissan and drove them both to the bar. When they arrived, Mr. Gamble introduced Mr. Gray to a man, later identified as Mr. Anderson, to whom he referred as his cousin; the man was short and stocky with dreadlocks and a dark complexion. Mr. Gray had no further interaction with this man, however, and at closing time, Mr. Gamble took Mr. Gray's car keys and said that he would drive them both home, since Mr. Gray had been drinking. Mr. Gray waited just outside the front door of the bar for Mr. Gamble to bring the car around. Suddenly, he heard gunshots in the parking lot, and when he walked over

to his car to investigate, he found Mr. Gamble dead, slumped over in the front seat. The medical examiner would later testify that Mr. Gamble had been shot twelve times.

Since Mr. Gamble had been in the process of pulling out of his parking spot when he was shot, the car rolled into Lisa Jones's black Mercedes, which was parked nearby. Ms. Jones testified that the shooter was a stocky, African-American male with dreadlocks, who wore a white shirt and was standing next to a nearby car with his hand inside the window. She explained that she heard six to twelve shots before the shooter jumped into a white truck. She identified Mr. Anderson as the man she'd seen shooting into the car that night, and said that she did not know him, Mr. Gray, or Mr. Gamble.

Detective Gary Childs of the Baltimore County Police Department was one of two primary detectives assigned to investigate Mr. Gamble's death, and testified as to how he was able to identify Mr. Anderson from Mr. Gray's and Ms. Jones's description of a stocky, dark-skinned male shooter with dreadlocks and wearing a white shirt. After getting that description from Mr. Gray and Ms. Jones, he confirmed from surveillance footage from Tee Bees' and the shopping center next door to it that the shooter was wearing white. The detectives also were able to determine from the footage that the shooter had left the scene in a two-tone 2003 Dodge pickup with a hard cover over the back.

While the detectives pursued the lead on the truck, Francine McNair, a friend of Mr. Anderson's, contacted police after she heard Mr. Anderson say that he'd shot Mr. Gamble in Tee Bee's parking lot and "kept shooting him." In a meeting with Detective Childs and another detective at the federal courthouse, Ms. McNair told the detectives that she knew the shooter as "Krup." Detective Childs then contacted the Baltimore City Homicide Unit,

which identified "Krup" as Mr. Anderson by referring to what Detective Childs termed its "nickname database." He then confirmed, using Mr. Anderson's MVA records, that he had a short and stocky build—five-foot-five, one hundred eighty pounds. He also confirmed, by showing Mr. Anderson's picture to Mr. Gray and Ms. Jones, that Mr. Anderson shot Mr. Gamble that night at Tee Bee's. At this point, defense counsel moved for a mistrial, arguing that the Defective's testimony irreparably prejudiced Mr. Anderson. The court denied the motion.

The jury convicted Mr. Anderson of the first-degree murder of Derrick Gamble, use of a firearm in the commission of a crime of violence, and possession of a regulated firearm. Mr. Anderson moved for sentencing by jury, but the court denied the motion and sentenced him to life imprisonment without parole plus thirty-five years on all three counts. Mr. Anderson filed a timely appeal. We will provide additional facts below as necessary.

II. DISCUSSION

Mr. Anderson raises two arguments on appeal: *first*, that the circuit court erred by denying his motion for a mistrial during Detective Child's testimony, and *second*, that he was entitled to be sentenced by a jury under Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 2-304 of the Criminal Law Article ("CR") when the State sought a sentence of life without the possibility of parole.[1]

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[1] Mr. Anderson's brief phrased the questions as follows:

> 1. Did the court abuse its discretion by denying appellant's mistrial motion after the primary detective testified that he contacted "city homicide [d]etectives" regarding

A. The Court Did Not Err In Denying Mr. Anderson's Motion For Mistrial.

Mr. Anderson *first* argues that the circuit court erred by denying defense counsel's motion for mistrial during the State's case-in-chief. The motion came as Detective Childs testified on direct examination about his next steps in the investigation after Ms. McNair told him the shooter's nickname was "Krup":

> [THE STATE]: Okay. So what happens at that point once you received this name?
>
> DET. CHILDS: I called the City Homicide Detectives and see if they had any nickname. They have a database, nickname database. And we wanted to see if they—the name Krup meant anything to them. It didn't mean anything to us. And Detective—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> [THE STATE]: Were you able—were you ever able to associate a real sort of given name, a real name, with the nickname Krup?
>
> DET. CHILDS: Yes.
>
> [THE STATE]: And what name was that?
>
> DET. CHILDS: Darryl Anderson.

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appellant's nickname and then referred to appellant's "record"?

2. Must appellant's life without parole sentence be vacated?

After obtaining Mr. Anderson's real name and identifying him as a suspect, Detective Childs went on to describe how he viewed the surveillance footage again to compare Mr. Anderson's physical appearance to the footage of the shooter:

> [THE STATE]: Is there any sort of more detailed viewing of the surveillance footage? I mean, now that you, you have a name Daryl Anderson? And I assume you could, you could get a, a build, a height, a weight and all that kind of information?
>
> DET. CHILDS: Yeah. After having that we watched the video again. It matches what we have for a height, weight and build *from his record* on the, on the photograph. And his hair and just—

(Emphasis added.)

At this point, defense counsel objected and moved for a mistrial, arguing that Mr. Anderson had been irreparably prejudiced by the Detective's testimony that he had obtained Mr. Anderson's name from the Baltimore City Homicide Detectives' database and obtained information about Mr. Anderson from his "record." Putting these two pieces of testimony together, defense counsel argued, the jury would be unable to "unring the bell" and consider the defendant's case impartially. The court denied the motion, and although it urged the State to be more careful about how it phrased questions for witnesses, it explained that "the Court does not find manifest necessity . . . I think at this point it, it was not terribly noticeable. There was no mention of the word criminal along with record." The court then instructed the Detective to "be more careful about the, the words that, that may be misinterpreted" and the prosecutor "to be more careful and pointed with regard to your questions."

After some additional colloquy about how the Detective might clarify his prior testimony, the State asked some additional questions that pointed expressly to Mr. Anderson's Motor Vehicle Administration records:

> [THE STATE]: Detective Childs, you were just about to give the description of Darryl Anderson. You said you received information from a record. What record were you referring to?
>
> DET. CHILDS: His driving record. . . . Actually ID record.
>
> [THE STATE]: An ID?
>
> DET. CHILDS: It's—with the MVA. He doesn't have a driving record, as you know . . . . But when you get an identification, a driver's identification, you're given a Soundex number and it appears in the MVA and has a height and weight associated with you.

Mr. Anderson argues that the circuit court erred by denying his motion for mistrial because Detective Childs's testimony that he had a "record" and had contacted the Baltimore City Homicide created a danger that the jury would infer that Mr. Anderson had a history of criminal activity and conclude from that inference that he was guilty of shooting Mr. Gamble.[2] Importantly, Mr. Anderson does not argue that the contested testimony rises to the level of "other crimes" evidence made impermissible by Md. Rule 5-404(b).[3] Rather, he argues that the testimony was inadmissible because it would cause

[2] Mr. Anderson also argued for a mistrial in his motion for a new trial, which the court denied in a hearing held March 16, 2015.

[3] Maryland Rule 5-404(b) provides that "evidence of other crimes, wrong, or acts is *not* admissible to prove the character of a person in order to show action in conformity therewith." (Emphasis added.)

the jury to *infer* that he was involved in other crimes, and thereby deny Mr. Anderson his right to an impartial trial.

The State, for its part, argues that the circuit court properly denied Mr. Anderson's motion for mistrial for the reason that Detective Child's testimony was not improper. But we need not conduct a detailed inquiry into the admissibility of the contested testimony, because even if we assume that Detective Child's testimony was inadmissible, (and we make no such finding) we hold that it was not so unfairly prejudicial to Mr. Anderson as to require the "extraordinary remedy" of a mistrial. *Carter v. State*, 366 Md. 574, 589 (2001).

Mr. Anderson rightly points out that whether to grant a mistrial is often framed as a question of prejudice to the defendant as a result of allowing inadmissible testimony. "The trial judge must assess the prejudicial impact of the inadmissible evidence and assess whether the prejudice can be cured. If not, a mistrial must be granted." *Id.* When a defendant claims that his right to a fair trial has been infringed by the admission of inadmissible and prejudicial testimony, the trial court may consider a number of factors to determine whether a mistrial is required:

> [W]hether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists . . .

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). The decision whether to grant a motion for mistrial rests in the discretion of the

trial judge, and although we don't "rubber stamp" the circuit court's decision, our review "is limited to whether there has been an abuse of discretion in denying the motion." *Hill v. State*, 355 Md. 206, 221 (1999) (quoting *State v. Hawkins*, 326 Md. 270, 277 (1992)).

In cases applying the *Rainville* factors, the Court of Appeals has found that a mistrial is not required when the testimony is composed of isolated remarks not uttered by the principal witness; when it does not explicitly reveal that the defendant was arrested, charged, or convicted in a prior case, and does not directly implicate the defendant in any wrongdoing; and when the testimony is not solicited by the prosecutor and is delivered without nefarious intent. *Compare Hawkins*, 326 Md. at 277-78 (upholding the trial court's denial of a motion for mistrial after two different police officers referred to the "polygraph room" in which they had interrogated the defendant, reasoning that the reference was "inadvertent, uttered abruptly and impulsively, with no nefarious intent," that the references "were not solicited or pursued by the prosecutor," and that "[n]either officer stated that [the defendant] had taken a polygraph"), *with Carter*, 366 Md. at 579 (granting a motion for mistrial when the State's lead witness testified that the defendant had a prior arrest, and another witness testified that the defendant was engaged in selling crack cocaine), *and Rainville*, 328 Md. at 401, 409-10 (requiring a new trial for a defendant who was tried on sexual assault charges, when the victim's mother blurted out at trial "that the defendant was in jail for what he had done" to another victim).

Although Detective Childs was a principal witness in the State's case, his testimony regarding the Baltimore City Homicide Unit and Mr. Anderson's "record" were isolated and unintentional remarks. Indeed, he later clarified that he intended to testify that he

looked at Mr. Anderson's MVA records rather than his criminal record. Nor did the Detective's remarks explicitly implicate Mr. Anderson in any prior wrongdoing or reveal that he had been previously arrested, charged, or convicted. The phrase "criminal record" was never mentioned, as the circuit court pointed out when ruling on the mistrial motion. And although the reference to the Baltimore City Homicide Unit (which we should also note was sustained after a defense objection) may have indirectly suggested prior criminal conduct on Mr. Anderson's part, it did not explicitly do so, and therefore was not so prejudicial as to inhibit the jury's ability to impartially decide the case. *See Jones v. State*, 310 Md. 569, 587-88 (1989) (sentence vacated on other grounds) (upholding the trial court's denial of a motion for mistrial after a witness testified that she knew the defendant because she "went to visit him with [her] husband at Lewisburg," reasoning that although the jurors may have understood that she meant the Lewisburg Federal Correctional Institution, the mere reference to "Lewisburg" was not unfairly prejudicial because there was no mention of the defendant's criminal record or that he had been an inmate at the prison).

B. The Circuit Court Correctly Denied Mr. Anderson's Request for Jury Sentencing.

Mr. Anderson argues *next* that because the State filed a notice of intention to seek a sentence of life without the possibility of parole, he was entitled to elect sentencing by jury, and the circuit court erred in denying his motion for sentencing by jury. His argument is primarily a statutory one—that the language the General Assembly left behind in CR

§ 2-304(b) after removing the parts relating to the death penalty,[4] unambiguously extended to defendants facing life without parole the sentencing by jury procedures previously reserved for capital defendants. He argues as well that once Maryland repealed its death penalty, a sentence of life without the possibility of parole became more than an enhanced sentence—it is "now the most severe sentence a defendant can receive in Maryland," to which the constitutional protections accorded previously to defendants facing life sentences now attach.

[4] CR § 2-304, as amended, provides in subsection (a) that a court should conduct the sentencing proceeding in life without parole cases, but in subsection (b) provides for jury sentencing. We have reproduced the applicable provisions below, providing emphasis to indicate the references to the jury upon which Mr. Anderson relies:

> *(a) In general*. – If the State gave notice under § 2-203(1) of this title, *the court* shall conduct a separate sentencing proceeding as soon as practicable after the defendant is found guilty of murder in the first degree to determine whether the defendant shall be sentenced to imprisonment for life without the possibility of parole or to imprisonment for life.
>
> *(b) Findings*. – (1) A determination *by a jury* to impose a sentence of imprisonment for life without the possibility of parole must be unanimous.
>
> (2) If *the jury* finds that a sentence of imprisonment for life without the possibility of parole shall be imposed, the court shall impose a sentence of imprisonment of life without the possibility of parole.
>
> (3) If, within a reasonable time, *the jury* is unable to agree to imposition of a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life.

In the time since the briefs were filed in this case, however, we had occasion to address and reject the same arguments in *Bellard v. State*, ___ Md. App. ___, No. 1281, Sept. Term 2014 (filed August 31, 2016). As the Supreme Court's death penalty jurisprudence has long recognized, the death penalty is different, and the unique permanence of capital punishment compels procedural safeguards that other punishments do not—even punishments, such as life imprisonment without parole, that are meant to be permanent. *Id.* slip op. at 11-12. Although the legislation repealing Maryland's death penalty did, through apparent clerical inadvertence, create some ambiguity in the statute governing sentencing procedures in life without parole cases, *see id*. slip op. at 14-17, the structure and legislative history left no doubt that the purpose of that legislation was to repeal the death penalty, not to alter the sentencing procedures or create new rights for defendants where the State seeks life without parole:

> But we need not dig deeply into Senate Bill 276 to find its purpose. The bill's Preamble says in so many words that its purpose was "repealing the death penalty," and the Fiscal and Policy Note states that the bill "repeals the death penalty and all provisions relating to it." Fiscal and Policy Note Revised, S.B. 276 Md. at 1. Neither mentions other alterations to the sentencing authority or procedures for first-degree murder, and the provisions of the bill itself simply removed portions of the Maryland Code relating to the death penalty and replaced references to repealed language. This obviously was a complicated task, and details can—and apparently did—get overlooked. But our two alternatives are to acknowledge that subsection (b) of CR § 2-304 has become purely vestigial, or to interpolate an intention on the part of the General Assembly to create jury sentencing rights that previously didn't exist in non-capital first-degree murder cases. We see nothing in the purpose or language of the legislation itself that suggests any intent to expand jury sentencing to defendants facing life without parole. And although we could have stopped there, we

> reviewed the legislative history as well, and it too supports a conclusion that the purpose of the legislation was to repeal the death penalty, rather than alter sentencing procedures in non-capital murder cases.

Id. slip op. at 18.

In rejecting Mr. Anderson's contention that § 2-304 unambiguously requires that a life without parole sentence be imposed by a jury, we must also reject his request that we apply the rule of lenity. The rule, which would require that we construe in favor of the defendant any ambiguity in a criminal penal statute, applies only when a "statute is open to more than one interpretation *and the court is otherwise unable to determine which interpretation was intended by the Legislature*." *Oglesby v. State*, 441 Md. 673, 676 (2015) (emphasis added). But the tools of statutory construction have not failed us here: the legislature intended to repeal the death penalty, *not* to create a right to jury sentencing in life without parole cases. To hold otherwise, we would need to find, in the face of long-standing (and controlling) precedent to the contrary, that death was not, in fact, different, or that life without parole became "different" once the death penalty was repealed.

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