UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1392

September Term, 2015

JOSEPH LOCKWOOD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Woodward,
Berger,

JJ.

Opinion by Berger, J.

Filed: June 3, 2016

Following a jury trial in the Circuit Court for Baltimore City, appellant Joseph Lockwood ("Lockwood"), was convicted of one count of possession with intent to distribute a schedule II controlled dangerous substance ("CDS") (cocaine). On appeal, Lockwood presents three questions for our review, which we have rephrased slightly as follows:

1. Whether the circuit court erred by permitting a police officer to testify that he and other officers knew Lockwood by name.

2. Whether the circuit court erred by permitting certain expert-opinion testimony from two police officers.

3. Whether the circuit court erred and/or abused its discretion when conducting *voir dire* of the jurors in response to reported juror-witness interactions, or alternatively, when denying Lockwood's request for a mistrial.

Perceiving no error, we shall affirm.

FACTS AND PROCEEDINGS

In the afternoon hours of May 2, 2014, Officer Daniel Waskiewicz of the Baltimore City Police Department was engaged in surveillance activity in the 1300 block of Ostend Street at the intersection with James Street. Officer Waskiewicz was surveilling the area due to "numerous citizen complaints and calls for service . . . about narcotics activity." Officer Waskiewicz performed surveillance with binoculars from a vehicle parked at the end of the block, approximately seven houses down the street from Lockwood's home. Four other officers were stationed at a nearby shopping center to serve as an "arrest team" if necessary.

At approximately noon, Officer Waskiewicz observed Lockwood enter a residence at 1415 Ostend Street. Shortly thereafter, Lockwood left the residence carrying a white

plastic bag in his left hand. Officer Waskiewicz observed Lockwood walk across the street to a vacant lot while "looking around up and down the street." After crossing the street, Lockwood removed a black plastic bag from the white plastic bag and dropped the white plastic bag in the grassy area. Lockwood picked up an object from the ground and used the object to dig a hole. When he finished digging, Lockwood looked around again before placing the black bag in the hole. Lockwood covered the hole with dirt using his foot and walked back to the residence across the street. Officer Waskiewicz, who testified as an expert in the packaging, distribution, and identification of CDS, opined that Lockwood was "opening up shop" and "trying to observe if there [were] any police in the area." Officer Waskiewicz characterized Lockwood's activities as "burying a ground stash."

During the next hour, Officer Waskiewicz continued to observe the area while providing updates to the arrest team about his observations. Lockwood went in and out of the residence at 1415 Ostend Street several times, but Officer Waskiewicz did not observe any "hand to hands." After approximately one hour had passed, Lockwood left the residence and began walking southward on Ostend Street toward Officer Waskiewicz's vehicle. At this point, Officer Waskiewicz contacted the arrest team via mobile phone and radio and instructed them to detain Lockwood.

Two members of the arrest team approached Lockwood and detained him directly across from Officer Waskiewicz's location, while the other two officers investigated the area where Officer Waskiewicz had observed Lockwood digging and burying something in the ground. Officer Jonathan Ford recovered a buried black plastic bag which contained

thirty-seven ziplock bags of suspected CDS. Lockwood was subsequently arrested. A search of Lockwood's person recovered $71 in U.S. currency. Officer Ford, who had also been accepted by the court as an expert in the packaging, distribution, and identification of CDS, opined that Lockwood "had the money to conduct CDS transactions with."

The suspected CDS was submitted to chemist Emmanuel Obot for evaluation. Of the thirty-seven ziplock bags of suspected CDS recovered, four were tested. All of the tested bags came back positive for cocaine. The contents of the remaining individual ziplock bags were not analyzed. Each ziplock bag had an estimated street value of $10.

Following a three-day jury trial, Lockwood was convicted of one count of possession of CDS with intent to distribute. Lockwood was sentenced to ten years' imprisonment. This timely appeal followed.

Additional facts will be discussed as necessitated by our consideration of the issues.

DISCUSSION

I.

Lockwood's first contention is that the circuit court abused its discretion when it permitted Officer Ford to identify Lockwood by name. We are unpersuaded.

During direct examination of Officer Ford, the prosecutor asked Officer Ford what he did after receiving a phone call from Officer Waskiewicz asking the arrest team to stop Lockwood. The following exchange occurred:

> [THE PROSECUTOR]: What did you do in response to that call?

> [OFFICER FORD]: We went down to the corner of James and Ostend Street, [Officer Waskiewicz] advised us of an individual that we know by the name of Joseph --
>
> [DEFENSE COUNSEL]: Objection. Move to strike.
>
> THE COURT: Overruled.
>
> [OFFICER FORD]: That we know by the name of Joseph Lockwood.

Lockwood contends that the trial court abused its discretion by overruling defense counsel's objection because, according to Lockwood, the testimony was irrelevant and any probative value was outweighed by unfair prejudice.

The admission or exclusion of evidence "is generally committed to the sound discretion of the trial court." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 406 (2012) (citing *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619-20 (2011)). Appellate courts reviewing whether a trial judge erred in its relevancy determination engage in a two-step analysis. *Washington Metro. Area Transit Auth. v. Washington*, 210 Md. App. 439, 451 (2013) (citing *State v. Simms*, 420 Md. 705, 724 (2011)). "First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*." *Id.* (citing *Simms*, *supra*, 420 Md. at 725). If we conclude that the challenged evidence meets this definition, we then determine whether the trial court abused its discretion in determining "whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, *supra*, 420 Md. at 725. "We will only find an abuse of such discretion

where no reasonable person would share the view taken by the trial judge." *CR-RSC Tower I, LLC*, *supra*, 429 Md. at 406 (internal quotation and citation omitted).

Pursuant to Maryland Rule 5-401, relevant evidence is defined as

> evidence having 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 the evidence.

Md. Rule 5-401. Maryland Rule 5-402, which governs the admissibility of relevant or irrelevant evidence, provides:

> Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible.

Md. Rule 5-402. All relevant evidence is not necessarily admissible, however. Pursuant to Maryland Rule 5-403, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The State asserts that Officer Ford's testimony was relevant to explain why the arrest team stopped Lockwood. The State further maintains that the testimony was relevant to establish Lockwood's identity as the person Officer Waskiewicz observed burying a plastic bag. Lockwood, however, argues that Officer Ford's use of the phrase referring to a person "that [officers] know by the name of Joseph Lockwood" was irrelevant and highly

prejudicial because it created an inference that the officer knew Lockwood from some prior criminal conduct.

We agree with the State that Officer Ford's testimony was relevant in that it made "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 the evidence." Md. Rule 5-401. Officer Ford's testimony explained why the arrest team stopped Lockwood and helped to establish Lockwood's identity as the person Officer Waskiewicz had observed burying the plastic bag. Indeed, Lockwood's identity was an issue in this case. Defense counsel specifically questioned the accuracy of Officer Waskiewicz's observations in closing argument by pointing to discrepancies between Officer Waskiewicz's report and testimony regarding his use of binoculars and his vantage point. Defense counsel further commented that Officer Waskiewicz was surveilling "through a vehicle with a tint so dark you can't even see in" and argued that Officer Waskiewicz's view was obstructed by bushes, trees, debris, and railroad ties. Defense counsel additionally questioned how Lockwood was identified when he left the residence and emphasized that there was no photographic or video evidence. In light of Lockwood's identity being an issue at trial, Officer Ford's testimony that officers recognized Lockwood and knew him by name was relevant to prove that the person Officer Waskiewicz observed burying the bag and exiting and entering the residence was, in fact, Lockwood.[1]

[1] In his reply brief, Lockwood argues that identity was not actually an issue at trial and that, therefore, Officer Ford's testimony was not relevant. Lockwood asserts that the identity issue was only raised in the context of emphasizing the officers' purported failure (continued...)

Having determined that the testimony was legally relevant, we next turn to the issue of whether the circuit court abused its discretion when balancing the probative value of the evidence against the danger of unfair prejudice. As discussed *supra*, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

Lockwood asserts that the trial court abused its discretion by admitting the challenged testimony because it created an inference that the officers knew Lockwood from some prior criminal conduct. Again, we are unpersuaded. Our discussion of a similar issue in *Somers v. State*, 156 Md. App. 279 (2004), is particularly instructive. In *Somers*, a prosecutor asked a state trooper, "Are you familiar with the defendant Larry Somers?" *Id.* at 313. The trooper

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[1] (...continued)
to employ best practices and not as a suggestion that the person observed by Officer Waskiewicz was not Lockwood. Our review of the record indicates that identity was indeed an issue raised in the defense's closing argument. Defense counsel argued as follows:

> Now, let's talk about what [the prosecutor] says Mr. Lockwood did. Mr. Lockwood comes out of his house. Is identified how? There's no picture of that, no video of that. What clothes are Mr. Lockwood wearing? We don't know. There's no picture of that, no video of that.

Defense counsel may have raised the identity issue in the larger context of a discussion of a supposedly inadequate investigation, but regardless of defense counsel's motivation in raising the issue, the record reflects that identity was an issue that was before the jury. As such, Officer Ford's testimony satisfied the definition of relevance set forth in Md. Rule 5-401 in that is made the existence of a fact that was of consequence to the determination of the action more probable than it would be without the evidence.

responded, "I've seen him, and I know the name from other cases." Defense counsel noted an objection, which was overruled by the trial court. On appeal, the defendant argued that the trooper's testimony constituted inadmissible "other crimes" evidence. We held that the trial court did not abuse its discretion by overruling the objection, explaining that the trooper's statement referring to "other cases" did "not necessarily mean cases against [the defendant]" and that, instead, "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. We further emphasized that the prosecutor's "question that did not seek information about a past crime and produced an answer that did not directly elicit information about any criminal past." *Id.*

The challenged testimony in the present case was similarly elicited in response to a question that did not seek information about a past crime. The challenged testimony was in response to the prosecutor's question asking what Officer Ford did in response to Officer Waskiewicz's phone call. Furthermore, as in *Somers*, the challenged testimony did not identify Lockwood as a defendant in any other cases. Indeed, the challenged testimony in this case was even less suggestive of prior criminality than that in *Somers*, given that in *Somers* the challenged testimony specifically referred to familiarity with the defendant from "other cases." In contrast, the challenged testimony in the present case simply referred to the appellant as a person whom officers "know by the name of Joseph Lockwood."

Lockwood points to *Carter v. State*, 374 Md. 693 (2003), in support of his position that the challenged testimony was unfairly prejudicial. In our view, *Carter* fails to provide

support for Lockwood's position. In *Carter*, a criminal defendant was charged with possessing a regulated firearm with a prior conviction for a crime of violence. *Id.* at 697. One of the elements of this offense is a prior conviction for a crime of violence, and, in order to avoid having the nature of his prior conviction presented to the jury, the defendant offered to stipulate that he had been previously convicted of a crime of violence. *Id.* at 701. The State refused to stipulate and the trial court subsequently permitted the admission of evidence demonstrating that the defendant had been previously convicted of robbery with a deadly weapon. *Id.* at 702. The Court of Appeals held that the trial court was required to accept the stipulation because the nature of the defendant's previous conviction was of "negligible probative value" and "unduly prejudiced [the defendant] by possibly luring the jury 'into a sequence of bad character reasoning.'" *Id.* at 721 (quoting *Old Chief v. United States*, 519 U.S. 172 (1997)).

The present case differs from *Carter* significantly. First, unlike in *Carter*, the jury was not presented with evidence that Lockwood had been suspected of, charged with, or convicted of a prior crime. The risk of unfair prejudice is significantly higher when a jury is informed of a specific prior conviction than when a jury is simply told that certain police officers know a particularly individual by name. Furthermore, in *Carter*, the defendant specifically offered to stipulate to the relevant fact, i.e., that he had been convicted of a crime of violence. In the present case, Lockwood did not offer to stipulate to his identity as the person who Officer Waskiewicz observed burying a plastic bag of CDS. Rather,

Lockwood specifically disputed the identification by questioning the accuracy of Officer Waskiewicz's observations.

The balancing of probative value against the danger of unfair prejudice is within the clear purview of the trial court. In this case, we cannot say that the trial court's ruling was so "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable" so as to constitute an abuse of discretion. *Nash v. State*, 439 Md. 53, 67 (2014) (internal quotation and citation omitted). Accordingly, we hold that the trial court did not abuse its discretion by overruling defense counsel's objection to Officer Ford's testimony.[2]

II.

Lockwood's second contention is that the circuit court erred by permitting certain expert testimony from Officers Waskiewicz and Ford. Specifically, Lockwood asserts that

[2] Lockwood points to a somewhat similar objection during Officer Waskiewicz's testimony, which was sustained by the trial court, as an indication that the trial court improperly overruled the objection during Officer Ford's testimony. During Officer Waskiewicz's testimony, the prosecutor asked, "Do you know Joseph Lockwood?" Defense counsel objected and counsel approached the bench. The prosecutor argued that Officer Waskiewicz's knowledge of Lockwood was relevant to identity, but the court asked, "What difference does it make if [Officer Waskiewicz] knows [Lockwood]?" The court sustained the objection, explaining that permitting the officer to answer the question could create an inference that the officer knew the defendant "from some prior violation."

The trial court's exclusion of relevant evidence during one portion of the trial does not necessarily prevent the court from admitting similarly relevant evidence during a different portion of the trial. Indeed, the court may have been persuaded that the testimony had more probative value following cross-examination of Officer Waskiewicz, during which defense counsel elicited testimony which she would later use in closing argument to challenge the accuracy of Officer Waskiewicz's identification.

the circuit court improperly permitted the officers to testify about whether Lockwood had the "mental state or condition constituting an element of the crime charged" in violation of Md. Rule 5-704(b). Lockwood identifies three separate examples of testimony which he contends were improperly admitted:

> (1) Officer Waskiewicz's opinion that Lockwood was "opening up shop" when "he was looking around up and down the street" as he walked across;
>
> (2) Officer Waskiewicz's opinion that Lockwood was "burying a ground stash" when he buried a bag of CDS in the ground across the street from his residence; and
>
> (3) Officer Ford's opinion that the $71 recovered from Lockwood's person was "money to conduct CDS transactions with."

As we shall explain, we are unpersuaded by Lockwood's allegations of error with respect to the expert testimony of Officers Waskiewicz and Ford.

First, we observe that the third example raised with respect to Officer Ford's testimony is unpreserved. The record reflects that there was no contemporaneous objection to Officer Ford's testimony about the $71 recovered from Lockwood's person. It is well established that a contemporaneous objection must be made at the time contested evidence is admitted. Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.").

On appeal, Lockwood concedes that defense counsel lodged no objection to Officer Ford's testimony but argues that "in light of the judge's previous rulings on this issue, the

futility of further objections was clear." Lockwood cites no authority in support of his assertion that an objection is unnecessary simply because the court's previous rulings suggest that a later objection is likely to similarly be overruled. Such a position is plainly inconsistent with Maryland law. *See, e.g.*, *Fowlkes v. State*, 117 Md. App. 573, 588 (1997) ("Cases are legion in the Court of Appeals to the effect that an objection must be made to each and every question, and that an objection prior to the time the questions are asked is insufficient to preserve the matter for appellate review.") (internal quotation and citation omitted).[3] Because Lockwood failed to object to the relevant portion of Officer Ford's testimony before the trial court, the issue is not properly before us on appeal.

We next turn our attention to the two challenged statements to which defense counsel lodged proper objections below. Pursuant to Md. Rule 5-702, "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." When making that determination, the trial court is required to consider "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the

[3] Indeed, the Court of Appeals has specifically commented that the contemporaneous objection requirement is not excused simply because an objection is likely to be overruled. *State v. Adams*, 406 Md. 240, 272 n.28 (2008), *overruled on other grounds*, *Unger v. State*, 427 Md. 383 (2012). Rather, an objection is deemed futile only when the record reflects "impatience or oppressive conduct on the part of the trial judge." *Id.* (citing *Bobbitt v. Allied-Signal Inc.*, 334 Md. 347, 354 (1997)). The record does not reflect any such egregious conduct on the part of the trial court in the present case.

appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." *Id.*

There are certain limitations on expert testimony. In general, "testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." Md. Rule 5-704(a). The lone exception to this general rule is set forth in Md. Rule 5-704(b), which provides that an expert "may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged."[4] Lockwood asserts that the circuit court "abused its discretion by allowing [Officer Waskiewicz] to testify that Mr. Lockwood intended to distribute drugs." As we shall explain, the circuit court did not abuse its discretion by overruling defense counsel's objections to Officer Waskiewicz's testimony.

Both this Court and the Court of Appeals have addressed the application of Md. Rule 5-704(b) in the context of the offense of possession with intent to distribute CDS. *See Gauvin v. State*, 411 Md. 698 (2009); *Barkley v. State*, 219 Md. App. 137 (2014). In *Gauvin*, an officer testified that "the amount [of CDS recovered from the appellant] would indicate to me that it was possessed with intent to distribute . . . base[d] . . . on different factors." 411 Md. at 702. The officer explained that the relevant factors were the way the CDS was packaged as well as the number of doses of CDS that were recovered. *Id.* When considering whether the officer's testimony violated Md. Rule 5-704(b), the Court

[4] Rule 5-704(b) provides that an expert is permitted to testify as to the ultimate issue of criminal responsibility.

emphasized the distinction between "an explicitly stated opinion that [a] criminal defendant had a particular mental state" and "an explanation of why an item of evidence is consistent with a particular mental state." *Id.* at 708. The Court held that the officer's testimony did not violate Md. Rule 5-704(b) because the officer "never directly and unequivocally testified to [the appellant's] mental state" and "never stated directly that [the appellant] had the intent to distribute." *Id.* at 710 (internal quotation and citation omitted). Rather, the Court explained, the officer's testimony was based upon his "knowledge of common practices in the drug trade, rather than on some special familiarity with the workings of [the appellant's] mind." *Id.*[5]

We addressed a similar issue in *Barkley*, *supra*, 219 Md. App. 137, in which we considered whether Md. Rule 5-704(b) was violated when an officer testified that fifty-three bags of heroin were intended for distribution. We held that the officer's testimony "did not even get close to the line," explaining:

> The [prosecutor's] question itself summed up four undisputed physical circumstances and then asked whether any "individual with this set of facts" would intend to distribute. [The testifying officer] did not even know the appellant and had no special knowledge about the appellant's mind. His opinion was based exclusively on "[w]hat I've heard today based on the amounts that were located, the manner of the bands, the lack of any type

[5] The Court commented that although the officer's testimony did not violate Md. Rule 5-704(b), the prosecutor's question was inappropriate in that it "strayed from the track" established by the Rule. *Id.* at 727-28. The appellant was not, however, entitled to a new trial because the officer's response was admissible under the Rule. In *Barkley*, *supra*, we emphasized that "it is the actual opinion rendered by the expert and not the antecedent question that is controlling in a Rule 5-704(b) analysis." 219 Md. App. at 150.

> of device to utilize the heroin." His expert opinion did not offend Rule 5–704(b). The appellant's state of mind could be inferred from the circumstances themselves, as ultimately it was.

Id. at 137.

In the present case, Officer Waskiewicz's testimony was even more clearly admissible than that in *Gauvin* and *Barkley.* Unlike the testimony in *Gauvin* and *Barkley*, the challenged testimony from Officer Waskiewicz expressed no opinion as to whether the CDS recovered from the bag buried by Lockwood was possessed with intent to distribute or otherwise. Rather, Officer Waskiewicz testified as to his specific observations of Lockwood's behavior as well as his characterizations of Lockwood's behavior, which were based upon his training and experience as an expert in the packaging, distribution, and identification of CDS. Officer Waskiewicz explained that, in his opinion, Lockwood's behavior in walking across the street, looking around, proceeding across the street, and burying a bag which contained thirty-seven separate bags of cocaine suggested that Lockwood was "opening up shop" and "burying a ground stash." Officer Waskiewicz did not testify to Lockwood's state of mind. Instead, Officer Waskiewicz testified to Lockwood's specific actions and the reasons why Officer Waskiewicz characterized Lockwood's conduct in specific ways. As in *Gauvin*, this testimony was permissible because it was based upon Officer Waskiewicz's "knowledge of common practices in the drug trade, rather than on some special familiarity the workings of [Lockwood's] mind."

411 Md. at 702. Accordingly, the circuit court did not err by overruling Lockwood's objections to Officer Waskiewicz's testimony.[6]

III.

Lockwood's third and final contention is that the circuit court erred in failing to conduct an appropriate *voir dire* after learning about certain jurors' improper conversations with witnesses, and alternatively, that the circuit court abused its discretion by denying defense counsel's request for a mistrial. The State responds that defense counsel affirmatively waived any issue relating to the adequacy of the *voir dire* and that, alternatively, the circuit court's *voir dire* was adequate and did not warrant the granting of a mistrial. We agree with the State.

A. Factual Background

In the afternoon of the second day of trial, the prosecutor informed the court that a juror had told him that he "reminded her of Clark Kent" and that he had responded by showing her his "Superman ring." Defense counsel moved to have the juror excused. The circuit court did not expressly rule on the defense motion but instead asked defense counsel, "Do you want me to *voir dire* her?" Defense counsel answered affirmatively, and the court proposed conducting the *voir dire* on the next day of trial in order to avoid embarrassing the juror in front of the other jurors. Defense counsel responded, "All right."

[6] Further, although we shall not address the issue because it is not properly before us on appeal, we observe that Lockwood's argument relating to Officer Ford's testimony appears to be similarly without merit.

At the beginning of the third day of trial, defense counsel alerted the court to a second, unrelated issue of concerning juror behavior involving "at least several of the jurors." Defense counsel explained that at the end of the second day of trial, a fellow assistant public defender, Angela Otting,[7] had witnessed several jurors "joking and laughing" in the hallway with two police officers who had testified that day.[8] The prosecutor confirmed that the interaction had occurred and informed the court that he had spoken to the officers about it. According to the prosecutor, two female jurors were involved in the interaction with the officers. One juror told Officer Ford that he looked like someone from a television show. A different juror approached the officers and expressed interest in joining the police department. Officer Ford told the juror, "[W]e're not allowed to talk to you." Officer Waskiewicz directed the juror to the department's website. The prosecutor characterized the interaction as involving "[n]othing inappropriate, nothing about the case."

The court explained that it would "*voir dire* each juror" in order to determine whether any juror "had any conversation with the police that would affect their ability to render a fair and impartial judgment." Defense counsel responded, "That's fine, Your Honor, but after *voir diring* the jury, I would also like to be able to, Your Honor to hear from Ms. Otting." Defense counsel conceded that Ms. Otting did not hear anything specific with respect to the

[7] In the transcript, Ms. Otting's name is spelled "Otting." In Lockwood's brief, her name is spelled "Oetting." We refer to Ms. Otting using the spelling found in the transcript.

[8] The two officers were Officer Waskiewicz and Officer Ford.

jurors' conversation with the officers. The court expressed doubt as to what Ms. Otting's testimony would contribute but agreed to hear from Ms. Otting if she could come to the courtroom immediately. Shortly thereafter, Ms. Otting took the stand and testified that she heard "laughter" and "saw talking amongst the jury and the officers" but "[d]id not hear words."

After hearing from Ms. Otting, the court called each juror individually to the bench. The court began each individual interview with something to the effect of, "I have been told that there [were] some conversations between some jurors and the police that were in this case. Where you involved in any of those conversations?" Juror #1 admitted that she "asked about law enforcement positions as a job." Juror #1 told the court that her conversation with the officers would not affect her ability to be a fair and impartial juror and would not cause her to give more weight to the testimony of police officers. Defense counsel did not ask for any additional questioning or ask any questions herself.

The next several jurors interviewed denied having any conversation with the officers. As Juror #9 was being brought up to the bench, Juror #3 asked to return to the bench. Juror #3 told the court that it had "c[ome] to [her] attention that [she] may have made a passing joke" relating to one of the officers. The court asked Juror #3, "Did you say something, the police officer looked like somebody?" Juror #3 admitted that she had said that one of the

officers looked like an "NCIS character."[9] Juror #3 told the court that her comment to the officer and/or interest in the television show would not have any effect on her ability to be fair and impartial in the case.

The next juror, Juror #9, was dismissed from the bench after she told the court that she had not had any contact with the officers. The juror was called back, however, after defense counsel identified her as the juror who made the "Superman" comment to the prosecutor. Juror #9 acknowledged that she had said that the prosecutor "looks like Superman." Defense counsel commented, "I can't say I disagree with you." Juror #9 told the court that the prosecutor's appearance would not have any effect on her ability to be a fair and impartial juror. The remaining jurors and alternates denied participating in any conversations with officers.

After the *voir dire* of the last juror was complete, defense counsel moved for the dismissal of Jurors #1 and #3, or, in the alternative, for a mistrial. Defense counsel cited the case of *Dillard v. State*, 415 Md. 445 (2010), in support of her motion and argued that the two jurors had disregarded the court's instruction not to have contact with the witnesses. The court clarified that it had not actually given such an instruction, explaining:

> Well, actually, I didn't say that. I always tell them not to discuss the case among themselves or anyone else . . . I just told them that if anybody comes to talk to them about the case, report it. I never, you know, thought that anybody who says goodbye or hello or you look like Clark Kent or you look like

[9] NCIS is a CBS television crime show involving investigations of criminal activity by the Naval Criminal Investigative Service.

> NCIS, I never, you know -- it's probably not a good thing, but I will, you know -- in the future, I'll tell them not to say anything to anybody who is a witness, but go ahead.

The court asked to see the *Dillard* case, and the prosecutor pointed out that the trial judge in *Dillard* failed to conduct a *voir dire*. Defense counsel responded that her complaint was "not about the *voir dire*," explaining as follows:

> Yes, Your Honor. It's not about the *voir dire*. It's about the solemnity with which the jurors are supposed to treat their, their duty. And, in fact, this case has, there's been a great deal of levity throughout this case, which is fine. We don't want people to hate jury duty. But, I mean, it's come to the point where, you know, people feel that they can make cute remarks to the, to the State, to the police, they can inquire about, about job opportunities? Why would you take that opportunity to inquire about a job opportunity unless you had some, some bias towards the police, some feeling of familiarity and friendliness--

The court responded that it could "only ask people questions under oath and that's what I did." Defense counsel responded, "Yes, Your Honor." The court again emphasized that the jurors "indicated that they didn't have any particular bias with regard to the police, that it would not affect their ability to be fair an impartial jurors." Thereafter, the court explained why it found *Dillard* distinguishable from the present case. The court found that the comments in this case "were at best passing innocuous statements" that "had nothing to do with the question of guilt or innocence." The court denied defense counsel's motion.

Defense counsel renewed her motion for mistrial after the close of the State's case. At this point, defense counsel argued that Juror #3 had initially been dishonest with the court when she did not immediately disclose her comment to the officer. The court disagreed with

defense counsel's characterization of Juror #3 and found that Juror #3 had not failed to tell the truth. The court explained that it had initially asked the juror if she had "any discussions . . . or conversations" and that Juror #3 said that she had not. Later, Juror #3 admitted to making a comment to one of the officers. The court again denied defense counsel's motion.

B. Analysis

Having set forth the relevant proceedings below, we turn to the issue raised on appeal. Lockwood asserts that the judge performed only "a perfunctory *voir dire*" and failed to "engage in a meaningful inquiry sufficient to resolve the numerous factual disputes, which included the number of jurors involved as well as the duration and tenor of the interaction." Lockwood asserts that Juror #3 failed to fully answer the court's questions and that the court failed to ask appropriate follow up questions of Juror #1 and Juror #3. Lockwood further maintains that Ms. Otting's characterization of the conversation she observed as "a long interaction" differed from the jurors' descriptions, suggesting that the jurors may have "downplayed their interaction" and "minimiz[ed] the contact." According to Lockwood, if the jurors were minimizing the contact, "the judge had a duty to inquire into why they were doing so, since this could give rise to a presumption of prejudice." Lockwood further takes issue with the circuit court's failure to call the officers themselves to inquire as to their conversations with the jurors rather than merely relying upon the prosecutor's representations of what the officers told him. Lockwood asserts that the circuit court's "failure to conduct an adequate inquiry into the disputed facts" harmed Lockwood,

positing that if the court had undertaken a "sufficiently thorough investigation," such an investigation would have likely warranted a presumption of prejudice.

The State responds that this issue, having been affirmatively waived before the circuit court, is not properly before this Court on appeal. The State emphasizes that defense counsel informed the court that her concern was "not about the *voir dire*." Defense counsel explained that her complaint was based upon "the solemnity with which the jurors are supposed to treat their" duties as jurors. Defense counsel expressed further concern that a juror would not inquire about a job opportunity with the police unless the juror "had some, some bias towards the police [or] some feeling of familiarity and friendliness" towards the police.

Maryland Rule 8-131(a) provides that an appellate court normally will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." *Univ. Sys. of Maryland v. Mooney*, 407 Md. 390, 400 (2009). The challenge to the sufficiency of the circuit court's *voir dire* was not raised below, and accordingly, is not properly before us on appeal. Indeed, not only was this issue not considered below, but Lockwood affirmatively waived it by expressing that the issue was "not about the *voir dire*." We have commented that parties are not "permitted to 'sandbag' trial judges by expressly, or even tacitly, agreeing to a proposed procedure and then seeking reversal when the judge employs that procedure; . . . nor [are] they freely be allowed to assert one position at trial and another, inconsistent position on appeal." *Claybourne v. State*, 209 Md. App. 706, 748 n.28 (2013) (internal quotation and citation omitted). Moreover, when a defendant has expressed

satisfaction with a procedure employed by the trial court, rather than simply failing to object to it, the defendant has affirmatively waived any error and the alleged error "does not require even a plain error analysis." *Booth v. State*, 327 Md. 142, 180 (1992).

Furthermore, even if we were to assume *arguendo* that Lockwood had not waived his complaint about the adequacy of the *voir dire*, our review of the record indicates that the issue is wholly without merit. To be sure, "contacts between witnesses and jurors are generally improper because such contacts raise fundamental concerns on whether the jury would reach their verdict based solely on the evidence presented at trial or whether it would be improperly influenced by inappropriate contacts." *Dillard*, *supra*, 415 Md. at 455 (internal quotation omitted). A court has an obligation to investigate allegations of juror misconduct by conducting a *voir dire* examination of jurors. *Id.* at 461. The Court of Appeals has explained:

> An examination of the case law on issues of juror misconduct demonstrates that the court has a duty to fully investigate allegations of juror misconduct before ruling on a motion for a mistrial, and that failure to conduct a *voir dire* examination of the jurors before resolving the issue of prejudice is an abuse of the trial judge's discretion. Generally, in cases where the trial judge or the parties conducted a *voir dire* examination of the juror or jurors in question, the appellate courts have upheld the trial court's decision on the issue of prejudice to the defendant.

Id.

In the present case, the trial court, after learning of alleged juror misconduct, undertook *voir dire* examination of each juror in order to explore the details of the juror-witness conduct and make a determination on the issue of prejudice. As discussed

supra, the court asked each juror about his or her interactions with witnesses. For those jurors who disclosed contact with witnesses, the court asked appropriate follow up questions as to whether the contact would impair the juror's ability to render a fair and impartial verdict. Furthermore, although defense counsel expressed concerns that Juror #3 had not initially been candid with the court, the circuit court expressly found that Juror #3 had not misrepresented anything to the court.

After completing the *voir dire* examination of the jurors, the circuit court determined that the contact between jurors and witnesses consisted of "at best passing innocuous statements" that "had nothing to do with the question of guilt or innocence." The court had sufficient information available to support its determination that the juror-witness interactions were not prejudicial and would not deprive Lockwood of a fair and impartial trial. In this case, the circuit court engaged in precisely the type of analysis we have explained is appropriate when addressing issues of alleged juror misconduct. Accordingly, the circuit court did not abuse its discretion by denying defense counsel's motion to strike the jurors or declare a mistrial.

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