UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2481

September Term, 2014

BRANDON EARLY

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: April 29, 2016

Brandon Early was charged with the first-degree murder[1] of Adrian Marshall, who died from gunshot wounds at the home he shared with his fiancée, Rashana Taylor. Raekwon Lee, a friend of Mr. Early's, claimed that he and Mr. Early went to Mr. Marshall's home to rob him. After trial by jury in the Circuit Court for Dorchester County, Mr. Early was convicted of first-degree murder, conspiracy to commit armed robbery, use of a firearm in the commission of a felony, and other charges.[2] He appeals his conviction on two grounds, *first* that the circuit court erred by admitting video footage evidence without a proper chain of custody, and *second* that the trial court abused its discretion when it allowed the State to introduce expert testimony from a lay witness while refusing to allow the defense to do the same. We disagree with both contentions and affirm.

I. BACKGROUND

On November 27, 2013, Mr. Marshall returned late in the evening to the home he shared with Ms. Taylor in Princess Anne, Somerset County,[3] and went outside to feed the dog. Ms. Taylor testified that, shortly thereafter, she heard Mr. Marshall ask "who that," then heard gunshots. She ran to the back door, found Mr. Marshall on the ground, and as

[1] He also was charged with second-degree murder, attempted robbery, attempted armed robbery, conspiracy to commit armed robbery, conspiracy to commit robbery, use of a firearm in commission of a felony, first-degree assault, and attempted second-degree murder.

[2] He also was convicted of second-degree murder, assault, attempted robbery, and attempted armed robbery, all of which merged into the first-degree murder count.

[3] The case was transferred upon consent of the parties to Dorchester County on July 8, 2014.

she tried to drag him into the house, someone shot at her. Maryland State Police Trooper Jonathan King responded to a 9-1-1 call, and arrived at Mr. Marshall's residence to find him unresponsive and lying in a pool of blood with no pulse. Other troopers and medical personnel arrived soon after, but he was declared dead at the scene.

Mr. Lee testified that he and Mr. Early drove to Mr. Marshall's home on the night of the incident.[4] When they arrived, Mr. Early went to the back of the house and, as Ms. Taylor had, Mr. Lee heard Mr. Marshall say "who that," followed by five gunshots. Mr. Lee and Mr. Early then ran to the car and left the scene. At trial, Mr. Early argued that the State's evidence against him was insufficient, and that Mr. Lee was the shooter.

Among the evidence gathered over several days, Crime Scene Tech Melissa Harvey testified that she collected four spent .380 shell casings from beside Mr. Marshall's home and a bullet from the back porch. Officer Walter Johnson, the officer assigned to investigate the incident, acquired video footage from William Stapleton, a maintenance man for an apartment complex near Mr. Marshall's home. Officer Johnson downloaded two different videos on two different flash drives: one containing video footage from the night of the incident, which purported to show a black and silver car in the parking lot of

[4] Mr. Lee and Mr. Early were at a friend's house on the night of the incident. They left there to meet two other friends, whom they followed to Princess Anne. The two friends drove a black Mercury, while Mr. Early and Mr. Lee drove a silver Hyundai.

the apartment complex, and the other a reenactment video created later.[5] At trial, Mr. Johnson explained that Mr. Stapleton had downloaded the reenactment video on December 4 on a flash drive, and downloaded the original footage from the night of the incident on another flash drive on December 13. He kept the flash drive containing the original video in his case file in a locked drawer in his desk between December 13 and January 9, but did not note its location on the chain of custody.

During trial, held on October 27-29, 2014, the circuit court granted Mr. Early's motion for judgment of acquittal on two conspiracy counts related to murder. At the close of trial, the jury acquitted Mr. Early of attempted second-degree murder and one count of first-degree assault, but convicted him of the remaining eight counts. He was sentenced to life imprisonment for first-degree murder; twenty years, to be served concurrently, for conspiracy to commit armed robbery; and twenty years, to be served consecutively, for the handgun conviction. He filed a timely notice of appeal.

II. DISCUSSION

Mr. Early raises two issues on appeal.[6] *First*, he argues that the trial court abused its discretion by admitting the original video without a proper chain of custody. *Second*,

[5] After the police seized the two vehicles involved in the incident, Officer Johnson and another officer attempted to replicate the original video by driving through Somerset Apartments while another officer monitored the apartment camera.

[6] Mr. Early phrases the issues as follows:

(continued…)

he argues that the trial court abused its discretion by admitting impermissible lay opinion testimony or, in the alternative, improperly admitting expert testimony from Ms. Harvey, while refusing to allow the defense to present similar evidence as a cure. We find no abuse of discretion in the court's decision to admit the video from the night of the incident, and we agree with the State that Mr. Early waived his claim of error by failing to object when the State asked Ms. Harvey about the difference between a pistol and revolver on direct examination.

A. The Trial Court Did Not Err In Admitting The Video From The Night Of The Incident.

Mr. Early argues that the trial court should not have admitted video footage from the night of the incident because there were "significant problems with the chain of custody [of the video]" and the trial court's admission of the video was prejudicial. The State counters *first* that Mr. Early waived this argument by failing to object when portions of the video were shown to the jury,[7] and *second*, that the trial court properly exercised its discretion in admitting the video into evidence. We will not address the State's

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1. Did the trial court abuse its discretion by admitting a video from the night of the incident without a proper chain of custody?

2. Did the trial court abuse its discretion by excluding evidence that the shell casings found at the scene could have come from a 9 millimeter gun?

[7] Defense counsel objected to the admission of the video footage as evidence after approaching the bench. The trial judge noted counsel's objection and reserved ruling on the admission of the video until after the State's cross-examination of Mr. Lee.

preservation argument because even if we assume that Mr. Early properly objected when the video was shown to the jury, we find no error in the decision to admit it.

Mr. Early contends that because Officer Johnson could not account for the location of the reenactment video, the court could not compare the two videos or determine whether the video shown at trial was the original. He argues as well that the video footage could have been tampered with because Officer Johnson did not log the flash drive's location in his desk on the chain of custody, and because he was unable to produce the reenactment video. The State responds that Mr. Early's assertions do not support a finding that the court abused its discretion in admitting the video into evidence, and that, "[g]iven Trooper Johnson's testimony, the probability that someone broke into his desk and altered [the footage] . . . is almost non-existent."

We begin by reviewing the testimony presented at trial about the provenance of the video footage. Mr. Stapleton testified that he met with Trooper Johnson on December 2, 2013 to look at videos from the apartment complex surveillance cameras. He said that he downloaded a copy of the original footage to a flash drive provided by Officer Johnson at that meeting, and that, on December 13, he downloaded a reenactment video onto another flash drive. He also stated that the video shown to the jury was the original video, not the reenactment video, because the original video had a timestamp.

Officer Johnson said that: (1) he met Mr. Stapleton on November 30 and December 4; (2) Mr. Stapleton downloaded the original footage to his personal flash drive; (3) he did not file a chain of custody document for the flash drive because it belonged to him; (4) his

personal flash drive had been reformatted and reused; (5) he returned to the apartment complex on December 13 with another flash drive and downloaded footage beginning on November 27 from the surveillance camera; and (6) he kept the flash drive in his case file in a locked drawer and did not turn it over until January 9. Officer Johnson also said that he was the only person who had access to the locked desk drawer between December 13 and January 9.[8] At trial, the court noted the inconsistency of the dates between Officer Johnson and Mr. Stapleton's testimony, but found no tampering with the video footage, and the court admitted it into evidence.

Generally, the trial court has the discretion to determine whether evidence is admissible. *Hajireen v. State*, 203 Md. App. 537, 552 (2012). A trial court abuses its discretion only when "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." *King v. State*, 407 Md. 682, 697 (2009). To determine whether a proper chain of custody has been established, the court examines whether there is a "reasonable probability that no tampering occurred." *Breeding v. State*, 220 Md. 193, 199 (1959).

The quantum of evidence necessary to negate the possibility of tampering or of a change of condition will vary from case to case. *Best v. State*, 79 Md. App. 241, 250 (1989). In most cases, an adequate chain of custody is established through the testimony

[8] Mr. Early contends that Mr. Stapleton and Officer Johnson gave conflicting testimony about when they met, when Officer Johnson downloaded the video footage, and whether Johnson downloaded that video footage before or after the reenactment occurred.

of key witnesses responsible for the safekeeping of the evidence, *i.e.*, those who can "negate a possibility of tampering . . . and thus preclude a likelihood that the thing's condition was changed." *Jones v. State*, 172 Md. App. 444, 462 (2007) (citation omitted). The existence of gaps or weaknesses in the chain of custody goes to the weight of the evidence, not admissibility, and does not require exclusion of the evidence as a matter of law. *See Jones*, 172 Md. App. at 463 (upholding the admission of the evidence, but noting that the gaps in the State's chain of custody supported defense counsel's remarks in closing argument that the jury should discount its value).

In this case, we agree with the State that the testimony sufficiently established the chain of custody of the video. Officer Johnson testified that he kept the flash drive in his locked desk for a period of three weeks and that he was the only person who had access to the locked drawer. Granted, there were some inconsistencies in the dates Mr. Stapleton and Officer Johnson met, but that goes toward the weight of the evidence, and the jury had the opportunity to decide what weight to afford it. *See id.* Given Officer Johnson's testimony that the flash drive was secured in his locked drawer, the court could reasonably have concluded that the video was not tampered with. Nor does the answer change as a result of the gap in time between when the video was accounted for in Officer Johnson's locked desk and when it was found in the evidence room. Mr. Early argues that the extended period that the video was left in the desk drawer raises the possibility that the video was tampered with, but that's pure speculation, and there is no evidence to support that hypothesis here. *See Nixon v. State*, 204 Md. 475, 483 (1954) (the probability that a

third party may have had access to evidence kept in an officer's car is extremely slight). We see no abuse of discretion in the trial court's finding that no tampering occurred or its decision to admit the video into evidence.

B. Mr. Early's Challenge To Ms. Harvey's Testimony Was Not Preserved.

Next, Mr. Early challenges Ms. Harvey's testimony about the difference between the ammunition of a pistol and of a revolver. He argues that because the court admitted Harvey's testimony—testimony he characterizes as "an impermissible expert opinion masquerading as lay testimony"—the court should have allowed her to testify that the shell casings seized at the scene could have come from a 9-millimeter handgun pursuant to the "curative admissibility" doctrine. The State counters *first* that Mr. Early did not preserve his complaint because he failed to proffer the answer he expected to receive from Ms. Harvey upon asking the question, and *second*, that Mr. Early's reliance on the "curative admissibility" doctrine is misplaced. We agree with the State's first argument and need not reach the second.

As the State asked Ms. Harvey about the difference between a pistol and a revolver, the defense remained silent:

> [THE STATE]: If you can *from your experience* testify what is a .380, like where would that casing – what type of gun is a .380 that that casing would come from?
>
> [MS. HARVEY]: A .380, a handgun, the .380 caliber handgun.
>
> [THE STATE]: Okay is that a revolver or a pistol?
>
> [MS. HARVEY]: A pistol.

> [THE STATE]: And specifically just real briefly if you're able to [tell] the difference between a pistol and a revolver if you could just tell the ladies and gentlemen of the jury what a pistol does and its ammunition and what a revolver does?
>
> [MS. HARVEY]: Yes. A revolver has a cylinder that shell casings or the cartridges and as the gun is fired the shell casings remains in the handgun, the revolver.
>
> A pistol is an automatic or semi automatic where it ejects the shell casings after it has been fired.

(Emphasis added.)

Later, during cross-examination, defense counsel attempted to ask Ms. Harvey whether a 9-millimeter gun could fire a .380 round.[9] The court sustained the State's objection that Ms. Harvey had not been qualified as a firearm expert. Mr. Early contends the trial court erred when it allowed Ms. Harvey to answer the State's questions about the difference between a pistol and revolver, but not his question about whether a 9-milimeter gun can shoot .380 rounds.

We agree with the State that Mr. Early's allegation of prejudicial error was not preserved for appellate review because he failed to proffer the contents and relevancy of the excluded testimony. In *Mack v. State*, the Court of Appeals explained that "the question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been a formal proffer of what the

[9] At trial, Mr. Lee testified that on the night of the incident, he had a 9-millimeter gun and Mr. Early had a .380 gun. Ms. Harvey then testified that she collected four spent .380 shell casings at the scene of the crime.

contents and relevance of the excluded evidence would have been." 300 Md. 583, 603 (1984) (citations omitted). Mr. Early offered neither. And because defense counsel failed to explain to the trial judge that Ms. Harvey's answer to his question was admissible under the curative admissibility doctrine, he failed to preserve the error for appellate review. *See generally* L. McLain, 5 *Maryland Evidence*, § 103:20 at 47 ("When evidence is excluded that on its face is inadmissible but that properly could be admitted under some theory, there is no error, unless the proponent of the evidence has explained to the trial judge how the evidence is admissible and offered it for that purpose.").

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