Circuit Court for Baltimore City
Case No. 114239026

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1579

September Term, 2016

CHE MCDOWELL

v.

STATE OF MARYLAND

Wright,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: November 22, 2017

Che McDowell, appellant, appeals his conviction in the Circuit Court for Baltimore City of first-degree murder, conspiracy to commit first-degree murder, and use of a handgun.[1] He raises the following question for our review:

> "Did the trial court err in denying Appellant's motion for mistrial?"

We shall hold that the circuit court did not abuse its discretion when it denied appellant's motion for mistrial. Accordingly, we shall affirm.

I.

Appellant was indicted by the Grand Jury for the Circuit Court for Baltimore City with crimes related to the homicide of Bruce Paige. The jury convicted appellant of first-degree murder, conspiracy to commit first-degree murder, and use of a handgun in the commission of a felony. The circuit court sentenced appellant to two concurrent life sentences for murder and conspiracy plus 20 years (to be served consecutively) for use of a handgun, with the first 5 years to be served without the possibility of parole.

The following evidence was presented at trial: On August 5, 2014, Alyasha Scott saw two men chase the victim, Mr. Paige. Ms. Scott recognized appellant as her regular drug dealer and saw him shoot Mr. Paige. Ms. Scott did not recognize the second man, but she did hear the unknown man encourage appellant to kill the victim, after which appellant

[1] Appellant was tried with co-defendant Dominic Deschamps (Case No. 1636/16) in a joint trial. Their appeals were consolidated, but presented separate questions relating to distinct events at the trial. Because the issues in each appeal are separate and distinct, we file separate opinions.

shot Mr. Paige again. Appellant and the unknown man then ran away in different directions, the unknown man running directly past Ms. Scott. Ms. Scott saw no other people in the area.

When questioned by police, Ms. Scott identified appellant as the shooter from a photo array displayed to her by the police. Following appellant's arrest, Detective Joseph Chin monitored appellant's phone calls from the Baltimore City Detention Center.

On August 12, 2014, from the detention center, appellant called a family member's cell phone. During the call, he asked to speak to Nick, and had two conversations with Nick[2] at different times during the call. Based on the call, Detective Chin searched police databases for affiliates of appellant named "Nick" and found a suspect. The detective presented Ms. Scott with a second photo array, and after viewing the photographs, she identified the unknown man from the night of the homicide as Dominic Deschamps.

The State tried appellant and Deschamps in a single trial for the murder of Mr. Paige. Before trial, the State argued at a motions hearing on February 19, 2016, to introduce evidence to establish that appellant and Deschamps had been together on two occasions prior to the shooting. The second occasion involved a homicide investigation into the striking of appellant's nephew and other individuals by a vehicle driven by an acquaintance of Deschamps's. At the time, the trial court did not rule on the matter, but the parties agreed not to introduce information regarding the incident at trial. The first joint trial ended

[2] The person on the other end of the call never identified himself as Nick, but that is who appellant asked for.

in a hung jury on March 1, 2016. At the beginning of the *voir dire* for the April 25 retrial, counsel for appellant renewed all pretrial motions made and ruled upon for the first trial.

During Ms. Scott's testimony at the second trial, appellee's counsel asked Ms. Scott how she could help detectives determine the address of appellant. Ms. Scott referred to the vehicular homicide investigation. That exchange occurred as follows:

> "[THE STATE]: Was there anything else that you were able to remember about the house where you thought Cartoon[3] lived to help the detective figure out the address?
>
> [MS. SCOTT]: Some months beforehand there was an incident at his house where—
>
> [APPELLANT'S COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> [DESCHAMPS'S COUNSEL]: Your Honor, may we approach?
>
> THE COURT: Please approach.
>
> ***
>
> THE COURT: I recollect the concern which gave rise to the objection.
>
> [APPELLANT'S COUNSEL]: Correct, Your Honor. If I could proffer, it's my understanding that she's about to say that she thinks a baby was killed at that house and she doesn't know any of the facts that raises the specter of whether or not my client was involved somehow in the death of a child.
>
> THE COURT: It raises a myriad and host of issues.

[3] Ms. Scott had previously testified that she knew appellant by the nickname "Cartoon."

[APPELLANT'S COUNSEL]: Yes. I actually, you know—she had been directed previously not to discuss this issue at the last trial *and I'm actually moving for a mistrial at this time*, Your Honor. I mean, I think—there's no way to cure that there's a past incident at the house. I mean, there's—

THE COURT: [Counsel for appellant]. Do you want to be heard on the embryonic raising of the Motion for Mistrial at this point given that the only word that came out was 'incident' because that is the most severe, if you will, resolve that the Court will resort to if there was no remedial curative step that the Court could take?

[THE STATE]: Your Honor, I will withdraw the question and move on to a new line of questioning. But as far as any grounds for mistrial, she has not provided any information about anything. And the Detective could testify that he had done some research into Mr. McDowell and found that Mr. Deschamps was known and associated from two incidents from the 1900 block of—strike that—where 'incident' was permitted by the Court.

THE COURT: Incident will come up, but with regard to, I mean, in the use of the word 'incident' will come up.

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THE COURT: Ms. Scott used the word 'incident' once. Juries use their common sense. There has been testimony on direct that, whether believable or not, that Defendant No. 2, Mr. McDowell, is well known to this particular witness because of their prior business activities and her medical needs. And while I'm not going to lead to what a jury should be inferring, a jury could certainly perhaps think that, well, if this had been an ongoing activity, then one would expect that there would be events there, both legal, or incidents, or illegal. So far the jury has heard nothing about the tragic death of—the taking of Mr. McDowell's niece, and it won't and I'm going to, unless there's a continuing objection, instruct this witness to not mention anything about specifics as to that event or incident.

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THE COURT: If it should be that the audiotape is played where Ms. Scott references the prior incident, which is all that's been said so far, if it is admitted, so be it. It will be subject to everyone's examination and not only to [Counsel for Deschamps]'s, but certainly [Counsel for appellant]'s as well. Okay? *The Motion for Mistrial at this time is denied* and the Court is now going to instruct Ms. Scott that she is not going to be questioned about an incident at this time involving Mr. McDowell's niece and she should not speak a word of it.

[THE STATE]: Yes, Your Honor. Just so the record is clear, I don't believe when she talks about the incident she knows or makes reference to the fact that the child is related to Mr. McDowell, just that the incident happened at his house.

THE COURT: Well, an incident involving a child by Mr. McDowell's home who was run over by a deranged woman operating a vehicle, if my memory's correct.

[APPELLANT'S COUNSEL]: It's just that the fragment that she knows and (inaudible) that some baby got killed in front of my client's house.

THE COURT: Well, sure. Well, that's why I didn't want that to get to the jury.

[APPELLANT'S COUNSEL]: Without her knowing somebody killed (inaudible).

THE COURT: It's that old axiom, a little bit of knowledge is dangerous. Right?

[APPELLANT'S COUNSEL]: Exactly.

THE COURT: Okay.

[APPELLANT'S COUNSEL]: That's my problem. If the full investigation came out, fine. But it's not relevant, and so we get these fragments and I just don't know anything on the record that turned out the inference that my client had anything to do with a child in front of his house.

> THE COURT: I'm glad you raised it right away before the horse had been in the next pasture instead of just out of the barn. Hold that one second. Ms. Scott.
>
> [MS. SCOTT]: Yes, sir.
>
> THE COURT: Please listen carefully. [The State] is not at this point going to ask you any questions about an event or incident outside of Mr. McDowell's house involving the child run over by a car. You will be asked no questions about that at this time, and you should not blurt out anything about that incident.
>
> [MS. SCOTT]: Uh-huh.
>
> THE COURT: And I'm just warning you, you're not going to be asked about it and don't refer to it in your testimony.
>
> [MS. SCOTT]: Uh-huh.
>
> THE COURT: Okay?
>
> [MS. SCOTT]: Uh-huh.
>
> THE COURT: Okay. Can we see if the jury's ready? Is there anything else before we resume?
>
> [APPELLANT'S COUNSEL]: No, Your Honor.
>
> [DESCHAMPS'S COUNSEL]: No."

(emphasis added). Ms. Scott abided by the court's instructions and she did not refer to "the incident" again.

As discussed *supra,* appellant was convicted and sentenced. This timely appeal followed.

II.

Before this Court, appellant argues that the trial court erred in denying appellant's motion for a mistrial. Appellant's motion followed Ms. Scott's testimony that she recalled where appellant lived because of a "prior incident" at his home. Appellant argues that unfair prejudice may have resulted from jury speculation about the nature of the "prior incident." Appellant points out that Ms. Scott was the sole eye witness in this case, and the defense strongly challenged the credibility of her memory. Given Ms. Scott's necessity to the case, appellant contends that the possible addition of unfair prejudice may have been the deciding factor between acquittal and conviction. Appellant also notes that Ms. Scott's testimony was in response to a line of questioning by the State, which appellant argues should have been more narrowly focused to avoid soliciting the testimony in question.

Before this Court, the State argues that the trial court did not err in denying appellant's motion for a mistrial. The State maintains that reference to a "prior incident" would not have led the jury to draw a prejudicial inference that appellant had committed another crime. Rather, the jury would likely have interpreted the "prior incident" as dealing with the longstanding relationship between Ms. Scott and appellant. The State further maintains that this testimony did not unfairly bolster Ms. Scott's credibility because it was offered as background regarding how Ms. Scott had assisted police in determining appellant's home address. Therefore, it was not instrumental in Ms. Scott's testimony as to how she could identify appellant as the shooter.

III.

We review the trial court's decision whether to grant a motion for mistrial under an abuse of discretion standard. *See Rutherford v. State*, 160 Md. App. 311, 323 (2004). A ruling reviewed under an abuse of discretion standard will not be reversed solely because the appellate court would not have ruled similarly.

The grant of "[a] mistrial is 'an extreme sanction' that courts generally resort to only when 'no other remedy will suffice to cure the prejudice.'" *Webster v. State*, 151 Md. App. 527, 556 (2003) (quoting *Burks v. State*, 96 Md. App. 173, 187 (1993)). Whether a mistrial is warranted thus hinges upon the extent to which, if at all, the defendant has been unfairly prejudiced. *See Hudson v. State*, 152 Md. App. 488, 521–22 (2003). The Court of Appeals has identified five factors, though not exhaustive, that are relevant to the determination of "whether the evidence was so prejudicial that it denied the defendant a fair trial," thus necessitating a mistrial. *Rainville v. State*, 328 Md. 398, 408 (1992) (quoting *Kosmas v. State*, 316 Md. 587, 594 (1989). Those factors are as follows:

> "[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[.]"

Id. (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

The first *Rainville* factor looks at whether the inadmissible evidence was repeated or an isolated statement. In this instance, Ms. Scott did not repeat the error. As a curative

measure, the judge sustained the objection and counseled Ms. Scott, out of the presence of the jury, to avoid future references. The trial court explained its decision to correct the testimony by counseling Ms. Scott rather than granting a mistrial as follows:

> "Ms. Scott used the word 'incident' once. Juries use their common sense. There has been testimony on direct that, whether believable or not, that Defendant No. 2, Mr. McDowell, is well known to this particular witness [Ms. Scott] because of their prior business activities and her medical needs. And while I'm not going to lead to what a jury should be inferring, a jury could certainly perhaps think that, well, if this had been an ongoing activity, then one would expect that there would be events there, both legal, or incidents, or illegal. So far the jury has heard nothing about the tragic death of—the taking of Mr. McDowell's niece, and it won't and I'm going to, unless there's a continuing objection, instruct this witness to not mention anything about specifics as to that event or incident."

The second *Rainville* factor considers whether the inadmissible testimony was solicited by counsel, or was an inadvertent and unresponsive statement. Since the prior incident in question had been previously discussed at a motions hearing with the parties agreeing not to introduce the information at trial, appellant argued that the State inappropriately solicited the testimony, making the inadmissible testimony even more "egregious" in its prejudicial nature. The State phrased its question as: "Was there anything else that you were able to remember about the house where you thought [appellant] lived to help the detective figure out the address?" Upon objection, the State withdrew the question and agreed to move to a new line of questioning. The State's question and immediate acceptance of the objection indicate that it was not attempting to bring up the incident.

The third *Rainville* factor concerns "whether the witness making the reference is the principal witness upon whom the entire prosecution depends." In this case, Ms. Scott was the sole eyewitness to the crime, and thus the principal witness for the State.

The fourth *Rainville* factor looks at whether the witness's credibility is a crucial issue for the objection to the testimony in question. For analysis of this fourth factor, it is notable that at the motions hearing, appellant's counsel was concerned that discussion of this "prior incident" would further establish an ongoing relationship between appellant and Deschamps, not that it would bolster the credibility of Ms. Scott. Indeed, Ms. Scott's credibility in this case was established through her ongoing relationship with appellant and her witnessing the crime.

The fifth *Rainville* factor considers whether there exists a great deal of other evidence. In this case, although Ms. Scott is the State's main witness, in addition to her testimony, an incriminating jail house phone call factored into the prosecution's case.

As the *Rainville* test balances multiple factors, it is reasonable to conclude, as did the trial judge, that any potential prejudicial impact was of a very limited nature, and Ms. Scott's reference to the "prior incident" was not so prejudicial as to render the court's curative measures ineffective. To be sure, Ms. Scott does have the distinction of being the only eyewitness. While the line of questioning leading to the inadmissible testimony may be reasonably viewed as an inadvertently broad question, however, it does not rise to an intentional solicitation of the objectionable testimony. Also, the testimony to the "prior incident" during the trial did not occur in a manner to suggest an ongoing relationship

between the defendants, the stated reason for exclusion, nor could it be reasonably concluded that the reference actually bolstered Ms. Scott's credibility. Further, while the jail house call arguably might not weigh as heavily in the prosecution's case as did the eyewitness testimony, it remains an important additional factor.

Therefore, in consideration of the totality of the factors in these circumstances, the trial court acted within its discretion to deny appellant's motion for a mistrial because the reference to a "prior incident" was unlikely to unfairly prejudice appellant. We hold that the judge did not abuse his discretion in declining the motion for mistrial.

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