

Circuit Court for Baltimore City
Case No. 116152013

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0487

September Term, 2020

DAQUAN LITTLE

v.

STATE OF MARYLAND

Arthur,
Shaw Geter,
**Gould,

JJ.

Opinion by Arthur, J.

Filed: September 22, 2021

**Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

*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.

In 2017, a Baltimore City jury found appellant Daquan Little guilty of robbery with a dangerous weapon; assault in the second degree; theft of property with a value of at least \$1,000 but less than \$10,000; theft of property with a value less than \$1,000; openly wearing or carrying a dangerous weapon with the intent and purpose of injuring an individual in an unlawful manner; and possession, discharge, or use of a gas- or air-pellet gun (a BB gun).

The Circuit Court for Baltimore City sentenced Little to 23 years of incarceration: 20 years for armed robbery; three years, to be served consecutively to the sentence for armed robbery, for openly carrying a dangerous weapon with intent to injure; and one year, to be served concurrently with the sentence for armed robbery, for possession of a gas- or air-pellet gun.

In May 2020, after receiving the right to a belated appeal, Little filed this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of May 20, 2016, a man approached Simon Rawlings, a mail carrier, as he was writing a delivery notice. The man pointed what Mr. Rawlings described as a “thin barrel looking gun” at him and ordered him to hand over his wallet and the packages that he was holding. Mr. Rawlings handed the man two packages and his wallet, which contained his driver’s license and \$1,029. Mr. Rawlings testified that the man “looked around for a second and then [] took off” onto a nearby street. Although Mr. Rawlings was familiar with most of the people in the neighborhood, he did not identify Little, a neighborhood resident, as the assailant.

Mr. Rawlings called 911 for assistance and described the suspect as a black male in his early twenties, wearing a long white jacket, dark pants, and a black and white scarf that partially obscured his face. Officer Chantel Taylor, one of the officers who responded to the call, set up a “perimeter” around the area while the police tried to locate the suspect. An anonymous witness informed the officers that the suspect had run into the rear of a house that had picnic tables in the back.

Detective Calvin Moss, a detective with the Baltimore Police Department, arrived at the scene and identified the house with picnic tables as 911 East Lombard Street. Detective Moss went to the front of the house and found Officer Christopher Gatewood, who had also responded to the robbery, speaking to a female occupant of the house. The woman first informed the officers that she was alone, but then stated that her daughter was upstairs with two small children. The woman then informed Detective Moss that her son was upstairs in the shower. Officer Gatewood went upstairs and found Daquan Little in the shower. Little was placed in custody.

Detective Mohammed Ali, of the Citywide Robbery Unit, testified that he asked Little’s mother if there were any grown men inside the house. Over objection, the court permitted Detective Ali to testify that Little’s mother “said her son was the only grown male in the house.” The detective returned to his office and prepared an application for a search warrant. The detective interviewed the victim, Mr. Rawlings, but did not ask Mr. Rawlings to identify Little as the assailant.

After procuring a search warrant, Detective Ali returned to the house. In the attic, he found a light-colored jacket, a BB gun, a wallet containing Mr. Rawlings’s driver’s

license and \$1,090, and two packages. He also found a black and white scarf on top of a washing machine and a pair of black jeans in a bedroom. Although the belongings and clothing were found in the house where Little had been arrested, no forensic evidence (such as DNA or fingerprints) linked him to those items.

The police recovered surveillance footage of the incident, but later lost the thumb drive on which the footage was stored.

On May 31, 2016, Little was indicted on charges of (1) robbery with a dangerous weapon; (2) assault in the first degree; (3) assault in the second degree; (4) theft of property with a value of at least \$1,000 but less than \$10,000; (5) theft of property with a value less than \$1,000; (6) wearing or carrying a dangerous weapon openly with the intent and purpose of injuring an individual in an unlawful manner; and (7) possession, discharge, or use of a gas- or air-pellet gun.

Little's defense turned principally, if not entirely, on the contention that no one had identified him as the assailant. In an effort to explain the presence of the stolen goods and the assailant's clothing in the house where he was apprehended, Little argued that others might have had access to the house.

A jury convicted Little of all charges except assault in the first degree, which the State had nolle prossed. The court sentenced Little to 23 years. His attorney evidently failed to file a timely appeal.

On May 14, 2020, the circuit court issued a post-conviction order granting Little the right to a belated appeal. Little filed this appeal on June 11, 2020.

QUESTIONS PRESENTED

On appeal, Little presents the following questions:

1. Did the trial court err when it admitted testimony about statements attributed to Mr. Little's mother where those statements were inadmissible hearsay?
2. Did the trial court err when it refused to grant Mr. Little a new suppression hearing despite the discovery of new evidence implicating the credibility of the State's only witness who testified on the motion?
3. Did the trial court err by allowing a State's witness to testify when the State did not disclose that it intended to call the witness, in violation of its discovery obligations?
4. Did the trial court err by instructing the jury on flight where the sole contested issue of the case was the identity of the assailant who fled the scene?
5. Was it plain error for the court to omit from its jury instructions that the burden of proof remained on the State through trial and that Mr. Little was not required to prove his innocence?
6. Did the trial court err when it failed to merge Mr. Little's sentence for armed robbery and openly carrying a dangerous weapon with intent to injure?

In the circumstances of this case, we shall hold that the court abused its discretion in permitting Detective Ali to testify that Little's mother said that Little was the only adult male in her house. Accordingly, we shall reverse the convictions and remand the case for a new trial.

For guidance on remand, we address Little's second question, which concerns whether the court should have reconsidered its denial of a motion to suppress after the disclosure of information that allegedly implicates the credibility of the State's witness. We perceive no error or abuse of discretion in that decision.

In view of our disposition of those issues, it is unnecessary to address any of the other questions that Little has presented, except to note the State's concession that a sentence for wearing and carrying a dangerous weapon merges with a sentence for robbery with a deadly weapon.

DISCUSSION

I.

On direct examination, Detective Ali testified that, when he responded to 911 East Lombard Street, he encountered Little's mother. The following exchange ensued:

Q. And did you make any inquiries of her?

A. I did.

Q. And based on the information she gave you, what did you do next?

[Defense Counsel]: Objection.

[THE COURT]: Overruled.

A. I spoke to her just to get a general knowledge of who lived in the house and if there were any grown males inside and she said her son.

[Defense Counsel]: Objection.

[THE COURT]: Overruled.

A. *She said her son was the only grown male in the house.*

(Emphasis added.)

A moment later, defense counsel objected again just as Detective Ali was about to testify that the other officers and detectives had informed him of a witness. At a bench

conference, the State explained that, in eliciting this information and the information that the detective allegedly obtained from Little's mother, it was attempting to explain how the detective obtained the information that he put into his application for a search warrant. According to the State, the mother's alleged statement, that Little was the only grown male in the house, was "competent hearsay."

After some further discussion, the court came to understand that the State was trying to show that, "as a result of information received," the detective obtained a search warrant. The court recognized that the information "was not necessarily offered for the truth," but instead was offered for the nonhearsay purpose of showing "what [the detective] did as a result of receiving that information." *See Graves v. State*, 334 Md. 30, 38 (1994) (stating that "a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true").

In the midst of the discussion, defense counsel requested a limiting instruction. The court responded, "Well, we're not here to debate that issue." Counsel replied: "I know. We're not there yet."

On appeal, Little argues that the trial court erred because, he says, Detective Ali's account of Little's mother's alleged statement was inadmissible hearsay. Little further argues that, if the statement was admissible for a nonhearsay purpose, the trial court still erred because the statement was irrelevant and unfairly prejudicial. The State disagrees, contending that the trial court had discretion to admit the statement as a relevant

nonhearsay statement. Furthermore, the State argues that any error in admitting the statement was harmless because, it says, a reasonable juror would have concluded, without the statement, that Little was the only adult male in the house.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Md. Rule 5-801(c). “Except as otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes, hearsay is not admissible.” Md. Rule 5-802.

Under the definition of “hearsay” in Rule 5-801(c), “testimony is not hearsay merely because the witness testifies about words spoken by another person outside of court.” *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). “As [the hearsay] definition makes plain, whether an out-of-court statement is hearsay depends on the purpose for which it is offered at trial.” *Id.* at 537 (quoting *Dyson v. State*, 163 Md. App. 363, 373 (2005)). “Evidence of a statement is not hearsay unless it is ‘offered in evidence to prove the truth of the matter asserted.’” *Id.* (quoting Md. Rule 5-801(c)). Thus, if the evidence is not offered for the truth of the matter asserted, “it is not hearsay and it will not be excluded under the hearsay rule.” *Id.* at 536 (quoting *Stoddard v. State*, 389 Md. 681, 689 (2005)).

“[A] relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true.” *Graves v. State*, 334 Md. 30, 38 (1994); accord *Parker v. State*, 408 Md. 428,

438 (2009). “One of the frequent applications of the general rule is found in the proper admission in criminal cases of extrajudicial statements relied upon by the police which are relevant on issues of probable cause, lawfulness of arrest and search and seizure where evidence is offered that was obtained as a result of the search for evidence.” *Graves v. State*, 334 Md. at 38; *accord Parker v. State*, 408 Md. at 438-39. But “[a]lthough such extrajudicial statements are relevant . . . , the probative value of that evidence must be weighed against its undue prejudice to the defendant in determining its admissibility before the trier of the fact, either trial judge or jury, on the question of guilt or innocence.” *Graves v. State*, 334 Md. at 38-39. “[T]he trial court, in its discretion, may exclude relevant evidence if it believes that the probative value of the evidence is substantially outweighed by the dangers of unfair prejudice, confusion of the issues or misleading the jury.” *Id.* at 40; *accord Parker v. State*, 408 Md. at 440-41; Md. Rule 5-403.

The Court of Appeals has recognized that, in criminal cases, a jury may misinterpret an out-of-court statement as substantive evidence of the defendant’s guilt even if the court may have admitted the statement for a relevant, nonhearsay purpose, and not for the truth of the matters asserted therein. *See, e.g., Parker v. State*, 408 Md. at 443; *Graves v. State*, 334 Md. at 42-43; *see also Zemo v. State*, 101 Md. App. 303, 306 (1994); *Purvis v. State*, 27 Md. App. 713, 725 (1975). In other words, the Court of Appeals has recognized that, in some criminal cases, the danger of undue prejudice may substantially outweigh the probative value of an out-of-court statement that is admitted for a relevant, nonhearsay purpose, such as explaining why a police officer did what he did.

In *Graves*, for example, the court permitted a police officer to testify that a suspect told him that Graves was his accomplice. *Graves v. State*, 334 Md. at 35. The only nonhearsay purpose for that testimony was to explain why the officer included Graves’s photograph in a photo array that he showed to the victims. *Id.* at 42. “That conduct,” the Court of Appeals wrote, “would have been just as effectively explained by testimony that his selection of the photographs was based ‘on information received.’” *Id.* Weighing “that limited probative value against the unfair prejudice to [Graves] because of the likelihood that the jury would misuse that information as substantive evidence of guilt,” the Court of Appeals held “that the trial judge abused his discretion in admitting the testimony.” *Id.* If the statement “was offered for its limited probative value to show that the officer acted upon it in arranging the photographic array, that probative value was greatly outweighed by its unfair prejudice to Graves because of the danger of misuse of the information by the jury.” *Id.* at 43.

In this case, we assume that the court intended to admit Little’s mother’s alleged statement solely for the nonhearsay purpose of explaining why Detective Ali said what he said in his application for a search warrant. Even so, we are constrained to conclude, under *Graves*, that the court abused its discretion in admitting evidence of the alleged statement. In its brief, State makes no attempt to establish that the mother’s alleged statement had any probative value on the issue of why Detective Ali did what he did. On the other hand, the unfairly prejudicial effect of the statement is obvious: if the jury misused the statement as substantive evidence, as it is very likely to have done, the statement established that Little must have been the adult male assailant who left the

stolen goods, the scarf, etc., in his mother’s house, because he was the only adult male in the house.

Our conclusion is strengthened by the uses to which the State put the alleged statement after the court permitted Detective Ali to testify about it. For example, in opposing Little’s motion for judgment of acquittal, the State argued that Detective Ali “confirmed” that Little “was the only male there.” In other words, the State argued that the jury could find that Little had to have been the man who had robbed the victim because he was “the only male” in the house where the stolen goods and the assailant’s disguise were found.

Furthermore, the State’s rebuttal argument can be read as an invitation to consider the mother’s statement that Little was the only grown man in the mother’s house for its truth:

And Detective Ali takes the steps he’s supposed to take, talks to the victim, gets the description, finds out the house, goes there, *confirms with the mom that yes, he was the only adult male there*, confirms that he matched the description that the victim gave.

(Emphasis added.)

Though couched as a description of the investigation that the detective conducted, the argument comes dangerously close to an argument that the jury should conclude that Little was, in fact, “the only adult male” in the house because the detective received “confirm[ation]” of that fact from Little’s mother.

In addition, at the culmination of its rebuttal, the State made the following argument:

[T]here was not a shred of evidence in this case that there was another adult male in that house. *In fact, Detective Ali confirmed with the Defendant's mother that he was the only adult male in the house.*

It is quite difficult to read this argument as anything other than an invitation to consider the mother's statement that Little was the only adult male in the house for the truth of that statement. *See Parker v. State*, 408 Md. at 443-44 (concluding that the jury was likely to use an informant's extrajudicial statement as substantive evidence of guilt because the State used the statement for the truth of the matters asserted therein in closing argument).

In short, the State's conduct at trial belies its contention that it used the alleged statement only for a relevant, nonhearsay purpose, and not as substantive evidence of Little's guilt.

On appeal, the State does not defend the admission of the alleged statement on the ground that it was relevant to the nonhearsay purpose of explaining why Detective Ali did what he did. Instead, the State advances a new argument, to the effect that Detective Ali's secondhand account of Little's mother's alleged statement was admissible for the nonhearsay purpose of rebutting Little's argument that the State failed to conduct a thorough investigation.

This post hoc rationale is clearly not the one that the State presented to the court, when it argued for the admission of the alleged statement or when it argued that the statement required the court to deny Little's motion for judgment of acquittal. Nor is it the rationale that the State presented to the jury, when it argued that the alleged statement "confirmed" that Little was the only grown man in the house. In any event, it is no less

likely that the jury would misuse the alleged statement as substantive evidence of guilt if the State offered it as proof of a thorough investigation rather than as an explanation for why Detective Ali sought a search warrant. In view of the great likelihood that the jury would misuse the statement as substantive evidence of guilt (as the State, in fact, invited it to do), the court, in our judgment, would still have abused its discretion in admitting the statement had the State advanced its new rationale.

Because we have concluded that the circuit court abused its discretion in admitting Detective Ali's account of Little's mother's statement, we must reverse the conviction unless the error was harmless beyond a reasonable doubt. *Dionas v. State*, 436 Md. 97, 108 (2013). “[H]armless error review ‘is the standard of review most favorable to the defendant short of an automatic reversal.’” *Id.* at 109 (quoting *Bellamy v. State*, 403 Md. 308, 333 (2008)). A “‘reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.’” *Morris v. State*, 418 Md. 194, 221-22 (2011) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). “[T]he burden is on the State to show that [the error] was harmless beyond a reasonable doubt’ and did not influence the outcome of the case.” *State v. Dove*, 415 Md. 727, 743 (2010) (quoting *Denicolis v. State*, 378 Md. 646, 658-59 (2003)) (alteration in original).

The State argues that the error was harmless. It observes that the police established a perimeter around the neighborhood very shortly after the robbery occurred. It also observes that, when the police officers entered 911 East Lombard Street, they encountered no one other than Little and his mother. It observes, further, that no one saw

any other adult male in the house. From these premises, the State argues that the jury would have inferred that Little was the only adult male in the house.

We agree that the jury might have drawn that inference. But we cannot say, beyond a reasonable doubt, that it would have drawn the inference. The State’s case received a tangible boost when the jury heard that a person closely aligned with Little – his mother! – was reported to have said that he was the only grown man in the house (and hence the only person who was likely to have used it as a depository for the stolen goods, the assailant’s weapon and attire, etc.). In our judgment, the error in admitting the statement was not harmless.¹

II.

Little argues that the trial court abused its discretion in declining to reconsider his motion to suppress the evidence seized from his house. We address this issue in order to provide guidance on remand.

Before the trial, Little moved to suppress the evidence, claiming that the police had illegally entered his house without a warrant. At a suppression hearing, Little’s mother testified that she had asked the detectives if they had a warrant to enter her house, but that the detectives claimed not to need one because they had “proper cause,” or probable cause, to enter the house.

¹ Because we hold that the court abused its discretion in admitting Detective Ali’s account of the alleged statement by Little’s mother, and that the error was not harmless, we need not consider whether the court erred in declining to give a limiting instruction. Nor need we consider whether Little waived his right to a limiting instruction by failing to reiterate his request for an instruction after the court initially demurred.

The trial court found that the detectives unlawfully entered the house without a warrant, but that exigent circumstances permitted the entry. The court also found that the warrantless entry was necessary to “prevent the destruction or removal of evidence.” The court found that the officers were confronted with exigent circumstances because the robbery suspect had “run into the house with a gun.” In denying the motion, the trial court expressly found that Detective Moss, the State’s only witness, was a “credible witness.”

Thirty days after the suppression hearing, the State informed Little of ten Internal Affairs Division (“IAD”) files concerning Detective Moss. In response, Little requested that the trial court hold a new suppression hearing to allow him to impeach Detective Moss’s credibility under Maryland Rule 5-608(b), which concerns impeachment by examination regarding the witness’s own prior conduct not resulting in convictions. In asking the court to reconsider the denial of his motion, Little claimed that, while none of the IAD complaints had been “sustained,” the files were “cumulative, in effect” to impeach Detective Moss.

The State argued that Little would not have been permitted to impeach Detective Moss based on the IAD files during the suppression hearing if he had been granted earlier access to the files. The State noted that two of the complaints were pending and eight had been closed because the allegations had not been to the satisfaction of the trial board. The trial court denied the motion after finding that Little failed to provide a sufficient factual basis to “support a belief that the misconduct occurred, not merely that it was alleged.”

Little now argues that the trial court abused its discretion in denying his motion because, he says, the court required that he present “dispositive proof” that the allegations occurred. As Rule 5-608(b) requires that allegations be established by a “reasonable factual basis,” Little contends that the court required a higher evidentiary standard than the rule requires.

The State responds that the trial court properly found that Little failed to come forward with a “reasonable factual basis that the prior conduct occurred.” Thus, the State contends, it was within the trial court’s discretion to deny Little’s motion for reconsideration. We agree.

When the court denies a motion to suppress, “the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise.” Md. Rule 4-252(h)(2)(C). We review the trial court’s denial of a motion to reconsider a motion to suppress for an abuse of discretion. *See Marr v. State*, 134 Md. App. 152, 179 (2000); *Long v. State*, 343 Md. 662 (1996).

Under Md. Rule 5-608(b), a party may impeach a witness for prior conduct not resulting in a conviction only if the court determines that the conduct is “probative of a character trait of untruthfulness.” The court may require the questioner to establish a “reasonable factual basis for asserting that the conduct of the witness occurred.” *Id.*

Rule 5-608(b) “provides no specific guidance as to what constitutes ‘a reasonable factual basis.’” *Pantazes v. State*, 376 Md. 661, 687 (2003). When a court considers whether a questioner has a “reasonable factual basis” for asserting that the conduct

occurred, the “relevant inquiry” is “not whether the witness has been accused of misconduct by some other person, but whether the witness *actually committed* the prior bad act.” *Id.* at 685 (emphasis in original) (quoting *State v. Cox*, 298 Md. 173, 181 (1983)). “[A] ‘hearsay accusation of guilt’ [is] not sufficient.” *Id.* at 685 (quoting *State v. Cox*, 298 Md. at 181).

In *Pantazes*, the defendant, an accused murderer, attempted to impeach a witness by questioning her about her alleged participation in another murder in which she had allegedly misidentified the perpetrator. *Id.* at 667-68. The defendant relied on the affidavits of a police officer and a private investigator, which established, at most, that the prosecution had dismissed the charges against the person whom the witness had identified. *Id.* at 688-91. The Court determined that the affidavits “amounted to little more than mere accusations” of the witness’s involvement in the prior bad acts. *Id.* at 691. Reasoning that a “hearsay accusation of guilt has little logical relevance to the witness’ credibility,” the Court held that the defendant failed to establish a “reasonable factual basis” to prove that the prior conduct had occurred. *Id.*

This Court has held, too, that a trial court can reasonably find no factual basis to support impeachment if “there [is] no finding against [the witness] on the underlying charge.” *Height v. State*, 185 Md. App. 317, 348 (2009), *vacated on other grounds*, 411 Md. 662 (2009). In *Height*, the defendant attempted to impeach a detective for falsely reporting overtime. *Id.* at 345-47. It appears that the police department had suspended the detective pending an investigation of the allegations, but had not yet made any finding of misconduct. *Id.* at 346. This Court held that, because the defendant had

“presented the trial court with a mere allegation of misconduct,” there was no “reasonable factual basis for asserting that the untruthful conduct of the witness occurred.” *Id.* at 349.

Here, Little presented the trial court with nothing more than “mere allegations” that Detective Moss had acted improperly in the past. Of the ten IAD files, eight had been closed because the facts underlying the complaints could not be sustained; the other two were pending and had not been resolved one way or the other. The trial court had discretion to conclude that the closed files contained “hearsay accusations” and to disregard the pending complaints in which no finding had been made. The court did not abuse its discretion in finding that there was no reasonable factual basis supporting impeachment.

Finally, we disagree with Little’s claim that the trial court imposed a higher evidentiary standard than the standard required by the rules. Here, the trial court reasonably concluded that a finding of “insufficient facts to prove or disprove” the IAD complaints did not amount to a “reasonable factual basis.” In the absence of evidence that the misconduct alleged in the IAD reports had occurred, the court had discretion to discredit inconclusive allegations. Thus, the trial court acted properly, within its broad discretion, in denying Little’s motion for reconsideration.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY REVERSED.
COSTS TO BE ASSESSED TO THE
MAYOR AND CITY COUNCIL OF
BALTIMORE.**