

Circuit Court for Prince George's County
Case No. CT160844X

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 656

September Term, 2017

RODERICK DUANE TOWN

v.

STATE OF MARYLAND

Woodward, C.J.,
Eyler, Deborah S.,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned)

JJ.

PER CURIAM

Filed: July 2, 2018

*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.

On January 6, 2017, a jury sitting in the Circuit Court for Prince George’s County convicted appellant, Roderick Duane Town, of second degree murder, unlawful possession of a regulated firearm, and use of a firearm in the commission of a crime of violence. The court sentenced appellant to a total term of sixty-five years, with all but forty-five years suspended. Appellant raises three contentions on appeal. Firstly, he argues that the “court abused its discretion by allowing the State to cross-examine [him] with a prior conviction.” Secondly, he asserts that the “trial court erred by instructing the jury that [his] prior robbery conviction could be considered as substantive evidence of guilt.” Finally, he contends that the “court abused its discretion by permitting the prosecutor to argue facts not in evidence during closing argument.”¹ We affirm.

BACKGROUND

On June 1, 2016, Conrad Cole was twenty years old and living at Safe Journey House, a crisis facility located in Hyattsville, for those who suffer from severe to moderate mental health issues or substance abuse. Cole had been living at the facility for several days. Around mid-day, Cole left the house with another resident named Miles,² Courtney Thompson, and Ramiqa Hopewell. Thompson was a case manager at Safe Journey, and Hopewell was the program director. Cole and Miles wished to go outside to play basketball, and the two caregivers left with them to help locate the basketball court and to

¹ Appellant’s brief contained a fourth contention, which has since been withdrawn from our consideration.

² Throughout the trial this resident was referred to by his first name only. His last name did not appear in the record.

supervise. The foursome set out on foot from Safe Journey to the basketball court, which was located less than a mile away in a nearby residential area.

At the same time, Jerrod Parker and Sean Williams stepped outside of Parker's home located at 4834 69th Place in Hyattsville. As they chatted with each other outside of the home, appellant drove up in his mother's Kia Soul, and parked alongside the curb in front of the house. Parker, Williams, and appellant knew each other from middle school. Appellant exited the car and began to speak with Parker and Williams. Shortly thereafter, Williams left and began walking alone up 69th Place.

As the group from Safe Journey walked to the basketball court, Hopewell and Thompson chatted with each other while Cole and Miles bounced a basketball back and forth. As they got closer to the basketball court they found themselves walking down 69th Place, a residential street with single family homes on both sides of the street. The four walked in the middle of the street, as there were no sidewalks. As they continued on 69th Place, and neared the intersection with Greenvale Parkway, the road began to slope downward, and Cole and Miles stopped bouncing the ball. Cole walked a short distance ahead of the other three. As Williams walked up 69th Street, he passed the group going the opposite direction and said "what's up," to Cole. In response Cole said "what." Williams then continued walking up the street, and the group continued walking down the street. At trial Williams testified that Cole appeared to be "upset" or "mad" at someone. On cross-examination, however, Williams admitted that he had testified before the grand jury that he hadn't noticed anything unusual about the group, except that one of them had a basketball.

As the Safe Journey group approached Parker’s home, Cole walked a short distance ahead of the others. Thompson testified that as she was walking down the street talking with Hopewell, she heard two “pop noises” whereupon she looked and saw Cole running down the street. She also observed two men standing on the side of the street. One of the men was wearing a black cap or skull cap, and was standing beside a boxy black car. The other man had dreadlocks and was standing on the curb. She then saw the black car drive away. Thompson ran to where Cole was and saw that he had been shot in the shoulder and was spitting up blood. The man with the dreadlocks remained by the curb and yelled at her to lay Cole down on the ground. She testified that Cole had nothing in his hands during the walk, except the basketball while he was bouncing it with Miles. Miles was unable to tell her what had happened to Cole. While she described Cole as “restless” to play basketball that day, he did not seem aggressive, and appeared to be a “normal person.”

Hopewell testified that on the walk to the basketball court she was talking with Thompson while Miles walked alongside them. Cole was slightly ahead of the group, but still within view. As they walked down 69th Place she saw Cole walking past a black car parked on the left-hand side of the road. She then heard what initially sounded to her as a firecracker, whereupon she looked towards Cole and saw that he was now running down the hill. She then looked and saw two men standing beside the black car. As she looked in their direction, she noticed one of the men had a gun, and as she watched, he fired a second shot towards Cole. The man with the gun then got into the black car and drove down 69th Place and away from the scene. The other man, a man with dreadlocks, remained at the curb, and yelled out, “tell them to lay down.” Hopewell then called 911.

Parker, who wore dreadlocks, testified that he saw Cole walking down the street with his arms down by his sides and his fist clenched. He described Cole as appearing upset, but admitted that during his grand jury testimony he had indicated that he believed that Cole “didn’t pose a threat.” As Cole walked past, he heard appellant and Cole saying “what” to each other. After the second “what,” he saw appellant pull out a gun and shoot Cole. Parker then saw Cole run from the area as appellant got in his car and drove away. A short time later Parker went inside his house, and remained there when police arrived, because he didn’t want to be involved. Appellant called Parker ten minutes after the shooting and told him, “don’t say nothing.”

Cole was transported to the hospital where he was declared deceased. An autopsy revealed that he had been shot in the top of the left shoulder and the back of the right arm. The wound to Cole’s left shoulder passed through his body and injured his left lung and the right carotid artery, inflicting fatal damage. James Locke, an assistant medical examiner with the Office of the Chief Medical Examiner testified as an expert in forensic pathology. In his opinion, to a reasonable degree of medical certainty, the cause of Cole’s death was gunshot wounds to his torso and arm. No weapons were found on Cole’s person.

A search warrant was later executed at appellant’s home, located at 5218 Flintridge Drive. A black Kia Soul registered to appellant’s mother was located in the driveway. A wallet with appellant’s documentation inside was found in the vehicle. In appellant’s bedroom, a black wave cap was found on the top of appellant’s bed. An unfired .25 caliber bullet and an empty firearm holster were located underneath the mattress. No handgun was

ever found in the home or the vehicle. The parties stipulated that appellant had been convicted of an offense which prohibited him from possessing a regulated firearm.

Appellant testified that while he was standing outside with Parker, he saw Cole walking down the street in an “aggressive manner.” As he saw Cole walk past Williams, he saw Cole look back at Williams like he was following him and, therefore, he was “on guard for any type of danger.” Appellant hadn’t seen Cole in the neighborhood, and testified that he looked like he might be “on something,” because he was fidgeting with his pants. Cole then walked up within two yards of him and Parker. After exchanging “whats” with Cole, he thought Cole was reaching for a gun, and felt that his life was in danger. In response, appellant pulled out his loaded .25 caliber handgun which was in his pocket and fired at Cole.

DISCUSSION

I. Impeachment with a Prior Conviction

At trial, appellant was instructed by his counsel that should he elect to testify, the State would likely seek to introduce evidence of a prior conviction for impeachment purposes. Appellant chose to testify, and just prior to the State’s cross examination of appellant, the parties approached the bench and the State indicated that it wished to impeach appellant with a prior robbery conviction. The court permitted the evidence, explaining as follows:

You know the jury is already aware because of the stipulation he has a conviction for a disqualifying crime. So that kind of breaks the seal, if you will, on exposure. Otherwise, I think that the test of credibility, his credibility is on the line. And a robbery is ipso facto a crime of I’m fully and I think you probability [sic] that I would allow this. And I don’t see its prejudicial effect,

particularly with already admission that he has a disqualifying crime outweighing the probative value of limited purpose of impeaching his credibility and not for any other purpose.

So because of that and because of the limited nature and it's going to be question or instruction that's published to the jury. Motion in limine is denied. I will allow.

After the court's ruling, defense counsel resumed its direct examination, and in an attempt to "soften the blow," questioned appellant about his prior conviction.

[DEFENSE COUNSEL]: Okay. Also, [appellant], I need to also ask you in 2006, you were convicted of a robbery?

APPELLANT: Yep.

[DEFENSE COUNSEL]: I'm sorry.

APPELLANT: That's a yes.

Maryland Rule 5-609 provides for the impeachment of a witness with a prior conviction, if less than 15 years has elapsed since the date of the conviction. Specifically, the Rule provides:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

Rule 5-609(a). In weighing the probative value of a prior conviction, with the danger of unfair prejudice, the following factors are generally considered:

(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility.

Jackson v. State, 340 Md. 705, 717 (1995).

The rule vests the trial court with the discretion to balance the probative value of admitting the prior conviction with the danger of unfair prejudice. *Id.* at 719. The reviewing court is to “give great deference to the court’s opinion” and “will not disturb that discretion unless it is clearly abused.” *Id.*

Appellant first contends that the “lower court erred in permitting introduction of the prior conviction, as it added very little to the [S]tate’s case, while engendering considerable prejudice.” We disagree. All factors weighed in favor of admission of appellant’s robbery conviction. As both parties agree, robbery qualifies as an infamous crime. *Passamichali v. State*, 81 Md. App. 731, 738 (1987). The robbery conviction occurred in 2006, so therefore it was within fifteen years, as required by Rule 5-609(b), and it was not similar to the offense for which he was on trial. No evidence was introduced at trial suggesting that appellant sought any property from Cole. Further, no evidence beyond the fact of the conviction itself was introduced in relation to the 2006 robbery. Appellant’s credibility was of critical importance, in that he did not contest that he shot Cole. The sole contention at trial was whether he had a valid defense to the shooting. His testimony, that he was in fear for his life, and whether or not the jury found it credible, was therefore of central importance to the case. “Where credibility is the central issue, the probative value of the impeachment is great, and thus weighs heavily against the danger of unfair prejudice.” *Jackson*, 340 Md. at 721. As all factors weighed in favor of admitting appellant’s prior conviction, we hold that the trial court did not abuse its discretion in admitting the conviction.

II. Jury Instruction

Next, appellant contends that the court “erred by instructing the jury that [appellant]’s prior robbery conviction could be considered as substantive evidence of guilt.” We disagree.

The jury deliberated on five counts: (1) first-degree murder; (2) second-degree murder; (3) voluntary manslaughter; (4) use of a firearm in the commission of a crime of violence; and (5) unlawful possession of a firearm after being convicted of a disqualifying crime. The jury was instructed on count five as follows:

The Defendant is charged with the crime of possessing a regulated firearm after being convicted of a disqualifying crime.

In order to convict the Defendant the State must prove one, that the Defendant possessed a regulated firearm; and two, at the time of the possession, the Defendant had previously been convicted of a disqualifying crime.

In this case a regulated firearm is a handgun. A handgun is a firearm with a barrel less than 16 inches in length.

The parties agree that the Defendant has been previously convicted of a disqualifying crime. That is one of the stipulations that you will be provided and we will revisit those shortly.

With regard to the stipulations, the court instructed the jury that the “State and the Defense have agreed to certain facts, which have been reduced to writing by the attorneys.” The parties have agreed that appellant “has been convicted of an offense that prohibits him from possessing a regulated firearm. These are the stipulations and you may consider these proven.”

The court instructed the jury regarding impeachment by prior conviction as follows:

You have heard evidence that [appellant], the Defendant, has been convicted of a crime. You may consider this evidence in deciding whether the Defendant is telling the truth but for no other purpose. You must not consider the conviction as evidence that [appellant] committed the crimes of murder, manslaughter or use of a firearm in the commission of a crime of violence that are charged in this case.³

Appellant objected to the court’s instruction, stating:

Your honor, the Defense would have to object to any version of that instruction. The reason being is that, but for the fact that [appellant] testified, we would not be highlighting this at all. There is a stipulation that there was a disqualifying conviction that disallowed [appellant] from carrying a handgun. If there was not a robbery – I mean, if he did not testify, the jury would not hear any further instruction on that. Basically, what the Court is saying now is even though there is this stipulation, now you can use this robbery to also determine whether or not [appellant] is in violation of Count 5. And what that does to as far as the Defense is concerned is does that now make the jury believe that there was this robbery which would not have been in play had [appellant] not testified in another disqualifying conviction.

The court disagreed.

On appeal, appellant argues that, because the court omitted count five, possession of a regulated firearm after being disqualified, from the above instruction, the “court therefore instructed the jury that it *could* consider [appellant’s] robbery conviction as substantive evidence of his guilt on count 5.” (Emphasis in original.) He asserts that, “[b]ecause jurors were informed that they could consider the prior conviction as substantive evidence of [appellant’s] guilt on count 5, this Court must reverse.” We disagree.

³ When listing the crimes, the court did not include count five, possession of a regulated firearm after being disqualified.

“We review a trial court’s decision to give or refuse to give an instruction under the abuse of discretion standard.” *Steward v. State*, 218 Md. App. 550, 565 (2014). To determine if a trial court abused its discretion, “we consider whether the requested instruction was a correct statement of the law, whether it was applicable under the facts of the case, and whether it was fairly covered in the instructions actually given.” *Id.* An error is harmless, however, when “a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.” *Dorsey v. State*, 276 Md. 638, 659 (1976).

Both the State and appellant acknowledge that the court’s instruction was an attempt to inform the jury that they could consider appellant’s prior conviction as (1) “evidence in deciding whether the [appellant] is telling the truth,” and conceivably, (2) as an element of unlawful possession of a regulated firearm. As the State concludes, “[a]t most, the instruction presented the jury with conflicting directives as to whether or not it could consider evidence of [appellant’s] prior conviction (apart from the stipulation) as substantive evidence with respect to the charge of unlawful possession.” The error, was harmless, however, as appellant did not dispute that he possessed the firearm after having been convicted of a disqualifying offense.

At trial appellant admitted that he had a .25 caliber pistol, and that he knew that he was not permitted to possess the firearm. The parties stipulated that appellant had been previously convicted of a disqualifying crime. During closing, counsel for appellant conceded that appellant was guilty of count five, stating the following:

There is nothing [appellant] can do about having the gun. He knows he had the gun. But that’s the only conviction that [appellant] should get in this situation is for having that gun.

In light of the foregoing, we hold that any error in the instruction did not influence the verdict, and therefore, was harmless beyond a reasonable doubt.

III. Closing Argument

Appellant argues that the “court abused its discretion by permitting the prosecutor to argue facts not in evidence during closing argument.”

During the State’s closing argument, the prosecutor stated:

Judge El-Amin told you motive is not an element because, frankly, **I wish I knew why he did this. I know Conrad’s family wishes they knew why he did this.**

(Emphasis added.) Defense counsel objected and, after the court overruled the objection, the State continued its closing, stating:

We all wish we knew why he did this. We don’t know. We do know Mr. Cole, that morning, wanted to play basketball. A typical morning at the facility he was at. And he and Miles go play basketball on a beautiful June day. And because he wanted to play basketball and walk down 69th Place it was a death sentence.

Maybe he was mean mugging. To [appellant] that get’s [sic] you the death penalty. You mean mugging me, you are going to die.

(Emphasis added.) At the conclusion of the State’s closing, defense counsel asked to approach the bench and stated its reasons for the objection:

Your Honor, the objection that I made, I wanted to state on the record is that I understand counsel has great latitude when giving closing arguments but everything is supposed to be based on the evidence. The fact that the victim’s family wonders why the Defendant did what he did has nothing to do with the evidence and we feel as though it’s out of the scope.

The court responded:

Very well. You put your point on the record. I think that it wasn't. I overruled the objection because doesn't necessarily [sic] there are illusions to closing arguments. There are illusions to poetry, illusions to society. The question in this case is reasonable to ask the question why as a frame of reference.

Appellant asserts that the prosecutor's statements regarding the desire to know why appellant shot Cole was "irrelevant to the question of guilt," and "clearly invited the jurors to disregard their oaths and become non-objective viewers of the evidence." He contends that the court abused its discretion in allowing the statements because they "played a significant role in influencing the rendition of the verdict." We disagree.

We review the trial court's decision to overrule appellant's objection to the State's closing for abuse of discretion. *Shelton v. State*, 207 Md. App. 363, 385 (2012). As the Court of Appeals stated in *Wilhelm v. State*,

Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the [prosecution] produces.

272 Md. 404, 412 (1974). "Comments made in closing argument must be weighed in their context." *Washington v. State*, 191 Md. App. 48, 109 (2010). "Despite the wide latitude afforded attorneys in closing arguments, there are limits in place to protect a defendant's right to a fair trial." *Degren v. State*, 352 Md. 400, 430 (1999). "Not every improper remark, however, necessarily mandates reversal" *Id.* Reversal is only required where "it appears that the jury were actually misled or were likely to have been misled or influenced

to the prejudice of the accused by the remarks of the State’s Attorney.” *Wilhelm*, 272 Md. at 415-16.

Appellant’s defense was that he had shot Cole in self-defense. Therefore, appellant’s motive, and the reasonableness of his testimony, that he had been in fear for his life, was a material issue. The prosecutor’s remarks attacked the credibility of appellant’s testimony, and was not an invitation, as appellant asserts, for “the jurors to disregard their oaths and become non-objective viewers of the evidence.”

**JUDGMENTS OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**