Circuit Court for Howard County
Case No. 13-K-16-056745

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 675

September Term, 2017

DION LAMONT NIAS

v.

STATE OF MARYLAND

Woodward, C.J.
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 14, 2018

A jury, in the Circuit Court for Howard County, convicted Dion Nias, appellant, of second-degree assault. Nias was sentenced to a term of 18 months' imprisonment. In this appeal, Nias presents the following questions for our review:

1. Did the trial court err in allowing the State to present improper and prejudicial expert testimony through lay witnesses?

2. Did the trial court err in allowing the State to make an improper "golden rule" argument at closing argument?

For reasons to follow, we answer the first question in the negative. We do not address the second question, as that issue was not preserved. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

Nias was arrested following an altercation with his girlfriend. While in custody at Howard County Central Booking, Nias spit on a police officer, Matthew Pryor. Nias was eventually charged with second-degree assault based on the spitting incident. At trial, Officer Joel Henderson testified to Nias's behavior at the time of his initial arrest:

[STATE]: When you arrived [at Nias's residence], did you speak with [him] about what happened?

[WITNESS]: Yes. I attempted to ask him what happened and then identify him properly.

[STATE]: And describe his demeanor when you (indiscernible)?

[WITNESS]: He was seated on a bench in front of his residence. He was agitated, visibly angry, and when I asked him for his information to identify him, he gave me his first and last name. I asked him for his middle name and date of birth and he told me he didn't have to tell me anything.

* * *

[STATE]: And did he provide – did he explain to you why he thought he didn't have to provide his middle name?

[WITNESS]: Well, at one point, he said that he was a sovereign citizen and he didn't have to listen to anything that I told him.

[STATE]: And are you familiar with that term, Officer Henderson?

[WITNESS]: I am.

[STATE]: What does it mean to you?

[WITNESS]: Sovereign citizen means that a –

[DEFENSE]: Objection, Your Honor.

THE COURT: No, I'll allow it. Overruled. You can answer.

[WITNESS]: Sovereign citizen means that a person who is a citizen of the United States or anybody who believes they do not have to listen or obey the laws of the land, for instance, State of Maryland or the Federal Government. They can go about their business as if they weren't citizens of the United States and do as they please.

Later, Officer James Morrison, who was also on the scene at the time of Nias' arrest, testified to Nias's behavior:

[STATE]: Now…do you walk over to [Nias]?

[WITNESS]: Yes.

[STATE]: And was anyone else from the police department talking to [Nias] at that point in time?

[WITNESS]: Officer Henderson was attempting to speak with him.

[STATE]: What, if anything, did you hear [Nias] say to Officer Henderson?

[WITNESS]: He told him that he was a sovereign citizen and didn't have to tell him anything.

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: And are you familiar with the term sovereign citizen?

[WITNESS]: Yes.

[STATE]: Could you describe what it means to you?

[DEFENSE]: Objection, Your Honor.

THE COURT: I'll allow it.

[WITNESS]: One that doesn't believe that the laws apply to them.

Nias also testified, claiming that he did not spit on Officer Pryor. On cross-examination, the State asked Nias whether he told the officers that he was a sovereign citizen, which Nias denied. Defense counsel objected and requested a bench conference. At that conference, defense counsel argued that the State's line of questioning was irrelevant and prejudicial. The State responded that Nias had already denied making the statement, which meant that there was "a discrepancy as to what was said." The State also argued that Nias "took an oath to testify honestly" and that it would be fair "to ask whether he does not believe that he's sort of compelled by that oath." The circuit court overruled defense counsel's objection. Following the bench conference, the State continued its line of questioning:

[STATE]: Sir, I'll just ask the question again because there was an objection. That night, you told the officers at some

point that you were a sovereign citizen. You made that claim, correct?

[WITNESS]: No. Incorrect.

[STATE]: So, your testimony is you never made any comment like that that evening?

[WITNESS]: I stated my rights….What I told him was that I knew my rights, I hadn't broken any laws and that he did not have any bond over me is what I told him.

* * *

[STATE]: Now, sir, you do believe, correct, that you don't have to follow the laws of the state the way others do?

[WITNESS]: That is incorrect.

Shortly thereafter, the State concluded its cross-examination of Nias. Later, both parties delivered closing arguments. During the defense's closing argument, counsel asked the jurors to "put yourself in Mr. Nias' position." Then, during the State's rebuttal argument, the prosecutor referenced that comment and told the jurors to "put yourself in Officer Pryor's position." No objection was lodged by the defense.

DISCUSSION

I.

Nias first argues that Officer Morrison's and Officer Henderson's opinions regarding the meaning of "sovereign citizens" was "expert testimony" and that, as a result, the circuit court erred in permitting the officers, neither of whom were qualified as experts, to provide that testimony. We disagree.

"Opinion" testimony can generally be divided into two categories: lay opinion and expert opinion. A "lay witness," or non-expert, may give testimony in the form of opinions or inferences, but that testimony "is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701. Expert testimony, on the other hand, is "based on specialized knowledge, skill, experience, training, or education…[and] need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). But, before a witness may give expert testimony, the trial court must determine: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702.

Unfortunately, the bisection of opinion testimony as "lay" or "expert" is not always clear. As the Court of Appeals has explained:

> A witness who has personally observed a given event may nonetheless have developed opinions about it that are based on that witness's specialized knowledge, skill, experience, training, or education. The question then becomes whether the fact of personal observation will permit admission of the opinion by a lay witness under Rule 5-701, or whether the "expert" basis of the opinion will require compliance with Rule 5-702 and admission as expert testimony.

Ragland, 385 Md. at 718.

The Court of Appeals discussed this issue at length in *Ragland, supra.* In that case, members of the Montgomery County Police Special Assignment Team ("SAT") observed several individuals, including the defendant, Jeffrey Ragland, engaged in what the officers

believed to be a drug transaction. *Id.* at 709-10. Ragland was arrested and charged with distribution of a controlled dangerous substance. *Id.* at 710. At trial, two members of the SAT team testified regarding the events leading up to Ragland's arrest. *Id.* at 711, 713. Neither officer was qualified as an expert by the trial court. *Id.* Nevertheless, both officers testified that, based on their training and experience in the investigation of drug crimes, what they observed was a "drug transaction." *Id.* at 712-14. Ragland was ultimately convicted of distribution of a controlled dangerous substance. *Id.* at 715.

On appeal, Ragland argued that the officers' conclusions constituted expert testimony and should have been excluded. *Id.* at 716. The Court of Appeals agreed, noting that both officers "devoted considerable time to the study of the drug trade [and] offered their opinions that, among the numerous possible explanations for the [observed events], the correct one was that a drug transaction had taken place." *Id.* at 726. The Court further observed that "[t]he connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning." *Id.* The Court concluded that "[s]uch testimony should have been admitted only upon a finding that the requirements of Md. Rule 5-702 were satisfied." *Id.*

The Court of Appeals similarly held, in *State v. Blackwell*, 408 Md. 677 (2009), that testimony about the results of a horizontal gaze nystagmus ("HGN") test constituted expert testimony.[1] *Id.* at 691. In that case, the defendant, Paul Blackwell, was convicted of

[1] HGN is "a lateral or horizontal jerking when the eye gazes to the side." *Blackwell*, 408 Md. at 686 (citations and quotations omitted). "Although HGN is a natural phenomenon, alcohol magnifies its effects." *Id.* As a result, "law enforcement officials

driving under the influence after a police officer testified that Blackwell had failed an HGN test. *Id.* at 684-85. On appeal, Blackwell contended that the trial court erred in admitting the officer's testimony because the officer had not been offered or qualified as an expert witness. *Id.* at 685-86.

Applying its holding in *Ragland*, *supra*, the Court of Appeals agreed with Blackwell. The Court noted that the officer "reported, among other things, that Blackwell had 'lack of smooth pursuit' and 'distinct nystagmus at maximum deviation' in each eye." *Id.* at 691. The Court found this significant because "the HGN test is a scientific test, and a layperson would not necessarily know that 'distinct nystagmus at maximum deviation' is an indicator of drunkenness; nor could a layperson take that measurement with any accuracy or reliability." *Id.*

That said, witness testimony in the form of an opinion does not become "expert testimony" merely because the witness has some prior knowledge or experience. This Court expounded on that distinction in *In re Ondrel M.*, 173 Md. App. 223 (2007). In that case, the respondent, Ondrel M., was a passenger in a vehicle that had been stopped by the police. *Id.* at 227-28. Upon approaching the vehicle, Officer Brett Tawes "smelled an odor of marijuana emanating from inside." *Id.* at 228. A search of the vehicle revealed marijuana, and Ondrel M. was arrested. *Id.* At trial, Officer Tawes testified as a non-expert that "in his training at the police academy and in his work in the field as a police

have looked to HGN as an indicator of alcohol consumption for several decades." *Id.* at 687.

officer, he had been exposed previously to the smell of burning marijuana and therefore could recognize its smell." *Id.*

Relying on *Ragland*, Ondrel M. argued, on appeal, that the trial court erred in admitting the officer's "expert opinion" because it was based on the officer's training and experience as a police officer. *Id.* at 238. This Court disagreed and held that Officer Tawes' testimony was properly admitted as lay opinion and did not require prior qualification:

> No specialized knowledge or experience is required in order to be familiar with the smell of marijuana. A witness need only have encountered the smoking of marijuana in daily life to be able to recognize the odor. The testimony of such witness thus would be "rationally based on the perception of the witness." *Ragland*, 385 Md. at 717.

In re Ondrel M., 173 Md. App. at 243; *See also Norwood v. State*, 222 Md. App. 620, 646 (2015) ("In contrast to expert testimony, lay opinion testimony requires no specialized knowledge or experience but instead is 'derived from first-hand knowledge' and is 'rationally based.'") (citations omitted), *cert. denied* 444 Md. 640.

Against that backdrop, we are persuaded that the officers' testimony in the instant case was not "expert testimony." Unlike the officers in *Ragland* and *Blackwell*, the officers here did not rely on any scientific or technical analysis requiring specialized explanation or measurement, nor did they cite to any specific training when proffering their testimony. Rather, the officers merely testified as to what they understood the term "sovereign citizen" to mean. Moreover, although the officers' testimony may have required some knowledge or experience, there is nothing in the record to suggest that the testimony required

specialized knowledge or experience. *See Paige v. State*, 226 Md. App. 93, 125 (2015) (to testify on any matter, a witness must have personal knowledge, which requires that the witness have "the experience necessary to comprehend his perceptions.") (citations and quotations omitted). To the extent that Nias argues that the officers' testimony was inappropriate lay opinion, we cannot say that the circuit court abused its discretion in permitting the testimony. *See Bruce v. State*, 328 Md. 594, 630 (1992) ("[L]ay opinions which are derived from first-hand knowledge, are rationally based, and are helpful to the trier of fact are admissible."); *See also Warren v. State*, 164 Md. App. 153, 166 (2005) ("The decision to admit lay opinion testimony is vested within the sound discretion of the trial judge.").

Nias also argues that the circuit court erred in admitting evidence regarding his status as a "sovereign citizen" because that evidence was immaterial and prejudicial. We disagree. "It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded 'is committed to the considerable and sound discretion of the trial court,' and that the 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevancy.'" *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619 (2011) (citations omitted). "Maryland Rule 5-402, however, makes clear that the trial court does not have discretion to admit irrelevant evidence." *Id.* at 620. Consequently, a trial court's evidentiary ruling encompasses both a legal and a discretionary determination, which in turn implicates two separate standards of review: (1) a *de novo* standard, which we apply to the trial court's legal conclusion that the evidence was relevant; and (2) an abuse of discretion standard, which we apply to the trial court's

determination that the probative value of the evidence is outweighed by any substantial prejudice. *State v. Simms*, 420 Md. 705, 725 (2011).

Evidence is relevant if it makes "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. In other words, evidence is relevant if it is both material and probative. "Evidence is material if it bears on a fact of consequence to an issue in the case." *Smith v. State*, 218 Md. App. 689, 704 (2014). "Probative value relates to the strength of the connection between the evidence and the issue…to establish the proposition that it is offered to prove." *Id.* (citations and quotations omitted). Generally, evidence that is relevant is admissible; evidence that is not relevant is not admissible. *See* Md. Rule 5-402.

Even if legally relevant, however, evidence may be excluded "if the probative value of such evidence is determined to be substantially outweighed by the danger of unfair prejudice." *Andrews v. State*, 372 Md. 1, 19 (2002). "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith*, 218 Md. App. at 705. On the one hand, evidence of a "highly incendiary nature" may be admissible if it provides significant aid to the jury's understanding of a fact in issue; on the other hand, similar evidence should not be admitted if the evidence's probative value is weak, particularly when the evidence "might produce a jury inference that the defendant had a propensity to commit crimes or was a person of general criminal character." *Id.* (citations and quotations omitted). "This inquiry is left to

the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324 (2003).

Here, we are convinced that the evidence at issue was relevant and not overly prejudicial. The evidence was probative of Nias's generally combative nature at the time of his arrest, which, ultimately, led to him spitting on Officer Pryor. And, as the State argued at trial, the evidence was probative of Nias's credibility as a witness. Although the evidence may have been somewhat prejudicial in that it may have painted Nias in a less-than-favorable light, we cannot say that the evidence was incendiary or that its probative value was *substantially* outweighed by the danger of *unfair* prejudice. *See Odum v. State*, 412 Md. 593, 615 (2010) ("It has been said that '[p]robative value is outweighed by the danger of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.'") (citations omitted) (emphasis in original). Accordingly, the circuit court did not abuse its discretion in admitting the evidence.

II.

Nias next contends that the circuit court erred in permitting the State, during rebuttal closing argument, to make an improper "golden rule" argument, in which the prosecutor told the jurors to "put yourself in Officer Pryor's position." As Nias concedes, however, he failed to object at the time that the State made the comment. Accordingly, that issue is not preserved for our review. *See e.g.* Md. Rule 8-131(a); *Shelton v. State*, 207 Md. App. 363, 385 (2012). We decline Nias's request to review the issue for plain error. *See Morris*

v. State, 153 Md. App. 480, 507 (2003) ("[T]he exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.").

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