Circuit Court for Anne Arundel County
Case No. C-02-CR-16-001632

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1014

September Term, 2019

MALACHI TAVON ELLIS

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: June 4, 2021

A jury sitting in the Circuit Court for Anne Arundel County found appellant, Malachi Tavon Ellis, guilty of first-degree felony murder and related charges arising from an armed robbery. After the court imposed sentences totaling life plus twenty years, Ellis noted this appeal, raising the following questions:

1. Whether the circuit court erred in admitting letters whose content was irrelevant and unfairly prejudicial; and

2. Whether the circuit court erred in propounding Maryland Criminal Pattern Jury Instruction 3:23 (Consciousness of Guilt).

Finding no reversible error, we affirm.

BACKGROUND

In June 2016, Tamar Wallace and Dalan Plummer attempted to sell marijuana to two strangers, Ellis and a companion, Brandon Holmes. That attempt ended in an armed robbery and the murder of Plummer.

The encounter began when Wallace's friend, Kenyon Ross, while walking along Laurel Fort Meade Road in Anne Arundel County, was hailed by "a man and a woman, in a car," asking if he had any "weed." Ross initially hesitated because he neither knew the car's occupants nor had any marijuana to sell, but he decided to call his friend Wallace to facilitate a sale. Using the "speaker" setting on his phone, Ross asked Wallace whether he wanted to "deal" with the strangers, and the parties ultimately agreed on the quantity, price, and a nearby rendezvous point at a McDonald's restaurant. Ross left to get a haircut, and the strangers drove to the McDonald's to meet Wallace and Plummer.

In the vestibule of the McDonald's, Wallace was met by two men[1] whom he described as "Kenyon's people," that is, the strangers who had been referred to him by Kenyon Ross.[2] Wallace went back inside the McDonald's to summon Plummer, and all four men went outside. At Holmes' suggestion, they walked a short distance to a motel, the Knights Inn, which was more secluded.

During the drug transaction that ensued, Ellis pulled out a .25 caliber semi-automatic handgun[3] and robbed Wallace and Plummer. While he held Wallace and Plummer at gunpoint, he and Holmes rifled through Wallace's and Plummer's pockets. The assailants then ordered Wallace and Plummer to remove their shoes. While Plummer was crouching down to untie his shoes, he reached for Ellis' weapon. Ellis fired a single shot, striking Plummer underneath the chin and severely wounding him. Ellis and Holmes fled with the cash, marijuana, and the cell phones they had seized. They took Wallace's scale but dropped it as they fled.

Wallace entered the motel to get help for Plummer, and a guest at the motel called the police. Plummer was transported to the University of Maryland Shock Trauma Center in Baltimore, where he died eight days later.

[1] Other testimony established that there had been three people, two men and a woman, in the car.

[2] Keyon Ross' name occasionally appears as "Kenyon Ross" in various parts of the transcript.

[3] The murder weapon was never recovered. Police recovered a spent .25 caliber shell casing at the crime scene, and a .25 caliber projectile was recovered from Plummer's head during the autopsy.

Anne Arundel County Police recovered surveillance video from the McDonald's and several other nearby businesses. A detective examined those videos with Wallace and ultimately, the detective identified Holmes as a potential suspect.[4] A search warrant was obtained for the home in Washington, D.C., where Holmes resided with his aunt and uncle. When that warrant was executed, police recovered "personal documents, some photographs, some clothing, cell phones, [and] sneakers."

Holmes' uncle consented to allow police to recover video from his home surveillance system, which showed Holmes leaving at 9:59 a.m. the date of the murder and returning at 3:56 p.m. that afternoon. He was wearing clothes similar to those visible in surveillance footage and consistent with Wallace's description, and upon returning, he was carrying items that appeared to match some of what had been taken in the armed robbery.

The lead detective in the case determined that Holmes "had an associate by the name of Malachi" who also lived in Washington, D.C. "Malachi" turned out to be Malachi Ellis. After Ellis "appeared to be consistent in appearance" with the other assailant police had observed in the McDonald's surveillance video, he was arrested. When Ellis was arrested, he was wearing distinctive Nike "Charles Barkley" shoes, matching the description Wallace had given police when interviewed after the shooting.

[4] The video surveillance footage revealed that the assailants fled the scene in a silver Chevrolet Malibu with a distinctive "raised decal or sticker" on the rear, which "looked like a Texas longhorn." Police were able to determine that the vehicle belonged to Holmes' grandmother, and they observed it parked on the street near the home where Holmes lived with his aunt and uncle.

Police recovered DNA swabs from Holmes, Ellis, Wallace, and Plummer. Ellis' DNA was found on Wallace's shirt, and Holmes' DNA was found on Plummer's pants.

A ten-count indictment was returned charging Ellis with murder in the first degree, conspiracy to commit murder, two counts of armed robbery, two counts of conspiracy to commit robbery, and related firearms offenses. For a time while Ellis was incarcerated at the Anne Arundel County Detention Center awaiting trial, he was placed in administrative segregation with a cellmate, Karl Bland, Jr.[5] During that time, Ellis confided in Bland, and sought advice as to how to prevent Wallace from testifying against Ellis at his pending trial. Ellis wrote his contact information, and contact information for Wallace on a sheet of note paper belonging to Bland, along with a request to find and "deal with" Wallace, because Bland was scheduled to be released on bail in a few days. Bland, however, did not contact Wallace but contacted law enforcement, seeking leniency in his own pending case, in which he faced a charge of home invasion, in return for providing evidence against Ellis. The State offered Bland the deal he sought, and in return he agreed to testify for the State against Ellis.

A trial held in December 2017 ended in a mistrial. At the retrial, after Bland testified, and the note paper with Ellis' handwriting (State's Exhibit 77A) had been admitted into evidence, the State called a handwriting expert to offer testimony as to whether the handwriting on Exhibit 77A belonged to Ellis. As exemplars, the State introduced, over a

[5] Inmates subject to administrative segregation at the county detention center sometimes are housed with one cellmate.

defense objection, Exhibits 78A and 78B. Exhibit 78A was a one-page handwritten letter, addressed to the State's Attorney for Anne Arundel County, complaining about what Ellis regarded as inadequate representation by his public defender. Exhibit 78B comprised two handwritten letters (three pages in all), addressed to the court, making similar complaints about his public defender. In addition, Exhibit 78B included a complaint about Ellis' dissatisfaction with being asked whether he would be willing to accept a plea deal if offered and a reference to his public defender's suggestion "that she could be able to put the blame" on Holmes.

The jury acquitted Ellis of first-degree premeditated murder but found him guilty of first-degree felony murder and related charges.[6] The court imposed a sentence of life imprisonment for first-degree felony murder, and additional consecutive sentences of twenty years. Ellis then noted this timely appeal.

DISCUSSION

I.

Ellis contends that the circuit court erred in admitting State's Exhibits 78A and 78B, two letters written by him, which were introduced by the State as exemplars of his

[6] In addition to finding Ellis guilty of first-degree felony murder (and the lesser included offense of second-degree murder), the jury also found him guilty of two counts of robbery with a dangerous weapon, two counts of use of a firearm in the commission of a felony, and two counts of conspiracy to commit armed robbery. Holmes pleaded guilty, in a separate proceeding, to first-degree murder and use of a firearm in the commission of a felony or crime of violence. He was sentenced to life imprisonment, with all but twenty-five years suspended, for first-degree murder and a concurrent term of five years without the possibility of parole for the firearm offense.

handwriting to prove that he had written inculpatory notes on a third document, State's Exhibit 77A. Exhibit 77A was introduced into evidence through testimony of the jailhouse snitch, Bland, who had testified that Ellis had written the inculpatory notes at issue. Ellis asserts that, because he had offered to stipulate that he had written the inculpatory notes on Exhibit 77A, Exhibits 78A and 78B were rendered irrelevant, because their only probative value was to prove his authorship of the notes. He further maintains that, even if Exhibits 78A and 78B were relevant, their probative value was substantially outweighed by the risk of unfair prejudice, and that the circuit court therefore abused its discretion in admitting them. According to Ellis, the references to his dissatisfaction with his public defender in the letters were unfairly prejudicial because they informed the jury that he was represented by a public defender, and thus that he was impoverished, which is generally inadmissible evidence of a motive to commit armed robbery. Ellis also contends that Exhibit 78B's references to the possibility that Ellis might accept a plea deal and that he should consider a defense based upon Holmes' criminal agency (which never materialized at trial) were unfairly prejudicial because they were inadmissible evidence of his guilt.

The State counters that Exhibits 78A and 78B were relevant as "known exemplars of Ellis' handwriting for comparison," by its handwriting expert, to Exhibit 77A. Therefore, the State asserts, they were admissible under Maryland Rule 5-901, the rule governing authentication of evidence, as well as Maryland Rule 5-703, the rule governing expert testimony. As for Ellis' apparent suggestion that his offer to stipulate rendered the exemplars irrelevant, the State maintains that it was entitled to present its case without

being required to accept Ellis' stipulation.[7] As for Ellis' contention that the circuit court abused its discretion in weighing the probative value of the letters against their danger of unfair prejudice, the State contends that "Ellis did not articulate his concerns about the content of the letters to the circuit court, he declined the opportunity to redact any particular contents of the letters, and any risk of unfair prejudice is speculative."

We begin by noting our view that the State's use of these particular letters as exemplars of Ellis' handwriting is unfathomable. It is hard to imagine that the State could not have found other exemplars to use, and by doing so, not put its case at risk. Our task, however, is not to review the decision of the State's Attorney to introduce the letters, but to evaluate whether the circuit court erred in admitting them into evidence.

A.

We hold that the exemplars were relevant. They tended to prove that Ellis had written the inculpatory notes on Exhibit 77A, just as Bland had testified. *See* MD. RULE 5-401 (defining "relevant evidence" as "evidence having any tendency to make 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."). Given that Bland, the jailhouse snitch, was a witness of dubious credibility, the State understandably sought to

[7] The State further points out that Ellis did not request a limiting instruction, as was his right under Rule 5-703(c), nor, for that matter, did he suggest any redactions when the circuit court provided him an opportunity to do so.

corroborate his testimony, and it did so in part through the use of the handwriting exemplars.[8]

Moreover, Ellis' offer to stipulate to the authenticity of Exhibit 77A, the note on which he had written the witnesses' contact information so that Bland could "deal with" him, doesn't change the analysis.

The obligation to accept a criminal defendant's offer to stipulate is governed by a line of cases beginning with the United States Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997), and the Court of Appeals of Maryland's decision in *Carter v. State*, 274 Md. 693 (2003). These cases set up a two-part rule. If the defendant offers to stipulate to their own legal status as a convicted felon, the court is required to accept that stipulation and the State is precluded from intruding other evidence to prove the defendant's legal status. *Old Chief*, 519 U.S. at 190-91; *Carter*, 374 Md. at 719. In all other situations where the defendant offers to stipulate to a fact other than their legal status, the State can decide whether to accept the stipulation, and if it declines, is free to put on other evidence to prove the point. *Old Chief*, 519 U.S. at 189; *Carter*, 374 Md. at 718. In this case, Ellis offered to stipulate to the authenticity of Exhibit 77A, the inculpatory note. Because the proffered stipulation related to the authenticity of the evidence, and not Ellis' legal status, the State was not required to accept the stipulation, nor was the circuit court

[8] Ellis' case was tried before October 1, 2020, which was the effective date of new legislation intended to significantly curtail and constrain the use of the testimony of jailhouse snitches. *See* MD. CODE, COURTS & JUDICIAL PROCEEDINGS ("CJP") § 10-924. As a result, those new protections were not in effect.

required to force it to. The offer to stipulate does not make the handwriting exemplars irrelevant.

B.

We also hold that Exhibits 78A and 78B were not unfairly prejudicial, and that the circuit court did not abuse its discretion by admitting them into evidence. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MD. R. 5-403. Evidence is unfairly prejudicial "when it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which the defendant is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (cleaned up). "Unfairly prejudicial evidence is likely to arouse an emotional reaction—either negative or positive—that might unfairly influence the fact-finder's decision." LYNN MCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL, § 403:1(b), at 651 (3d ed. 2013).

As for his contention that admission of the handwriting exemplars exposed the jury to otherwise inadmissible evidence of his poverty, we note that the authority upon which Ellis relies, *Vitek v. State*, 295 Md. 35 (1982), is not at all like this case. In *Vitek*, the Court of Appeals held that it was reversible error for the trial court to permit the State to cross-examine a defendant, on trial for robbery, about his financial status. *Id.* at 36-37. Nothing of the sort occurred here. There, the State directly cross-examined the defendant about his financial status to establish that he had a motive to rob. Here, the link was far more attenuated. The State introduced the letter as an exemplar of Ellis' handwriting. For a juror to use it for an improper purpose, that juror would have had to have read the

substance of the letter, understand that it was discussing Ellis' representation by the Office of the Public Defender, realize that the Office of the Public Defender uses a means test to determine if defendants are eligible for its services, know what income is required, conclude that Ellis made or had less than that, and infer from that fact, that Ellis had a motive to rob. This is far more attenuated than the direct questioning in *Vitek*, and we hold that Ellis suffered no unfair prejudice from the inadvertent admission that his lawyer was a public defender.

As for Ellis' contention that admission of Exhibit 78B unfairly exposed the jury to his attorney's inquiry about whether he would be willing to accept a plea deal if offered, we have a hard time reading this as anything other than a protestation of innocence, not an admission of guilt. As Ellis wrote: "I had to explain to [counsel] that I am not guilty. I do not want to [accept] any plea." We hold that no possible harm was done to Ellis by putting this protestation of his innocence before the jury.

As for Ellis' contention that admission of Exhibit 78B unfairly exposed the jury to the rejection of his attorney's suggestion "to put the blame" on Holmes, a strategy not pursued at trial, we find no unfair prejudice. To find unfair prejudice here would require us to speculate that a juror both read the substance of the letter against the judge's instructions, and inferred that Ellis' failure to cast the blame on Holmes was an implied admission of guilt.

We hold that Exhibits 78A and 78B were not unfairly prejudicial, and any unfair prejudice that Ellis may have suffered on such speculative grounds is minimal.

C.

Even if we were to find that the admission of the letters was erroneous, we would, nevertheless, find the error harmless beyond a reasonable doubt. An error is harmless only if it "did not influence the verdict." *Williams v. State*, 462 Md. 335, 352 (2019) (cleaned up); *Dorsey v. State*, 276 Md. 638, 659 (1976). According to Bland's testimony, when Ellis showed him a still-frame from the surveillance footage depicting him at the crime scene, Bland aptly said, "that definitely looks like you. You can't deny that picture." In addition to the extensive surveillance footage, which showed both Ellis and Holmes (and their clothing, as described by Wallace) as well as the getaway car with the unique decal, linked to Holmes, Holmes was found to be in possession of property that had been taken from Wallace and Plummer. Moreover, Ellis' DNA was found on Wallace's clothing, and Holmes' DNA was found on Plummer's clothing. Nor did the jury appear to struggle with the evidence. The only communication the jury made with the circuit court was to ask to view one of the surveillance videos. It took the jury only two hours of deliberation to reach its verdict, a relatively short time for a murder trial that spanned several days and had scores of exhibits. In sum, we conclude, on this record, that any errors in allowing the two letters as handwriting exemplars had no influence on the verdict. *Dorsey*, 276 Md. at 659.

II.

Given Bland's testimony about Ellis' solicitation of advice about how to prevent Wallace from testifying, the State asked the circuit court to give Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:23 ("Other Crimes or Acts to Prove Motive, Intent, Absence of Mistake, Identity, Common Scheme, etc."). Ellis objected, maintaining that the

instruction was "not sufficiently generated by the evidence and testimony in the case." The State responded that Bland's testimony that Ellis had "asked him to try to intimidate" and even "to potentially kill" Wallace and that Ellis had told him that he had "got[ten] rid of the gun," as well as the video footage recovered near Holmes' home, depicting him holding stolen property, were sufficient evidence of Ellis' consciousness of guilt to warrant the instruction. The circuit court agreed that there had been "at least some evidence" that was sufficient to generate the instruction and overruled Ellis' objection.[9]

Ellis contends that the circuit court erred in propounding MPJI-Cr 3:23 because the State requested it, and the accompanying notes make it clear that only the defense is entitled to request that instruction.[10] Acknowledging that defense counsel had argued that the instruction was "not sufficiently generated by the evidence and testimony in the case," not that the wrong party was requesting it, Ellis makes a two-fold argument as to preservation. *First*, he asserts that the issue is "fully preserved" because the argument he raises on appeal is merely "a specific argument as to how the instruction was not generated." In the alternative, Ellis asserts, *second*, that we should exercise our discretion under Maryland

[9] After the instructions had been given, Ellis renewed his previous objection, appearing to incorporate by reference his previous argument, stating "that the evidence and testimony at the trial did not sufficiently generate [the instruction]."

[10] The accompanying "Notes on Use" state: "This instruction should be given only if requested by the defense and, if so, at the time that evidence of other crimes or bad acts is introduced."

Rule 4-325(e) to notice plain error, because there is no Maryland appellate decision addressing whether MPJI-Cr 3:23 may be given when only the State requests it.[11]

Rule 4-325(e) provides:

> **(e) Objection.** No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

MD. R. 4-325(e).

Ellis is raising a different argument on appeal than he raised at trial. We think the difference between a claim that an instruction is not generated by the evidence and his present claim that it was "not generated in this case because the State, and not the defense, requested it" is self-evident. The claim Ellis raises on appeal is not based on the state of the evidence, as he argued below. We conclude that Ellis failed to preserve this claim for appeal.

[11] In addition, Ellis contends that the circuit court erred in giving MPJI-Cr 3:23 without performing the three-part analysis required by *State v. Faulkner*, 314 Md. 630 (1989), and its progeny. This argument was not raised below, and we decline to consider it. We note that, in any event, the circuit court instructed the jury that any evidence it may have heard suggesting that Ellis had committed the crimes of solicitation and witness intimidation could be considered "only on the question of consciousness of guilt" and not "for any other purpose," such as evidence of "bad character" or propensity to commit crime.

As for plain error, we note that the State points out that, although the circuit court may have erred in giving MPJI-Cr 3:23, it could have given, based upon the state of the evidence, MPJI-Cr 3:28 ("Bribery or Witness Intimidation as Consciousness of Guilt"):

> You have heard that the defendant _____ in this case. Bribery or witness intimidation is not enough by itself to establish guilt, but may be considered as evidence of guilt.
>
> You must first decide whether the defendant _____ in this case. If you find that the defendant _____ in this case, then you must decide whether that conduct shows a consciousness of guilt.

The accompanying "Notes on Use" state: "Insert in the three blanks the alleged conduct of the defendant (e.g., attempted to bribe, bribed, **attempted to intimidate**, intimidated)." (Emphasis added.) There was some evidence that Ellis was attempting "to intimidate a witness (or worse)," evincing a consciousness of guilt. Thus, 3:28 would certainly have been appropriate, even if 3:23 was not.

Plain error review "is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Winston v. State*, 235 Md. App. 540, 579-80 (2018) (Meredith, J., concurring) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). We exercise plain error review "only if the error affects the fairness, integrity or reputation of judicial proceedings." *Newton v. State*, 455 Md. 341, 364 (2017). The error complained of neither rises to the level of "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial," nor does it affect "the fairness, integrity or reputation of judicial proceedings." Therefore, we decline to exercise our discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.