UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1121

September Term, 2014

JUSTIN MICHAEL McCABE

v.

STATE OF MARYLAND

Woodward,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 30, 2015

*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.

Justin Michael McCabe ("McCabe") was charged in the Circuit Court for Howard County, Maryland with first and second degree assault. After a jury convicted him of second degree assault, McCabe was sentenced to eight years' incarceration. In this timely appeal, McCabe presents one question for our review:

> Did the court err in admitting evidence that appellant said, just before the assault, that he had just gotten out of jail?

I.
TRIAL TESTIMONY

A. Testimony of Nicky Gazy

Shortly after 1:00 a.m. on April 21, 2013, Nicky Gazy ("Gazy") was stabbed in the forearm. The stabbing occurred on Main Street in Ellicott City, Maryland.[1] According to Gazy, appellant stabbed him.

Prior to the stabbing, Gazy and his friends, Nicholas Jackson ("Jackson") and Sean O'Keefe ("O'Keefe"), patronized several bars on Main Street in Elliott City. Because he was the designated driver for his friends, Gazy only drank about one-half of a beer in the hours prior to the stabbing.

After leaving a bar, the three men walked past a hot dog stand where appellant, who was wearing a hoodie and an apron, was selling hot dogs; appellant was in the company of a person that Gazy referred to in his testimony as the "shorter gentleman" (hereafter "the shorter man").

[1]At the time of trial, Gazy was in medical school.

After appellant asked the three men to buy some hot dogs, Gazy said "thanks, we're going to Taco Bell." As they continued to walk away, Gazy heard the shorter man calling Gazy and his friends "faggots" and "fags." Gazy turned around and told the shorter man that he "was being disrespectful." That man, who Gazy described as "pretty intoxicated," then "got in my face and basically like got nose to nose" and started pushing him (Gazy). At around that time, appellant "looked [Gazy] dead in the eyes and said, hey, it's not worth it, I just got out of jail."

The shorter man then started to argue with Jackson and those two started pushing each other. The encounter between Jackson and the shorter man escalated when both men fell to the ground.

At that point, Gazy turned around and saw appellant coming at him with a steak knife. Appellant, according to Gazy's testimony, was holding the knife underhand and was aiming for Gazy's stomach. Gazy put his arm down to his side and was stabbed in the right forearm. Gazy then ran away while yelling "he has a knife, run away." He shouted this warning because he was not sure if appellant was following him or his companions. Next, Gazy turned to look back and saw appellant running in the opposite direction down Main Street.

After he was taken to a shock trauma unit, Gazy was asked by a police officer to identify the man who stabbed him from a group of six pictures. Gazy selected a photograph

and said that the photograph depicted his attacker. The photograph he selected was that of appellant. Gazy later discovered the name of the hot dog stand where the incident occurred, pulled up the stand's website on the internet, and saw a photo of appellant on the site. He sent that photograph of appellant to the police, and it was introduced into evidence. Gazy also positively identified appellant in court as his assailant.

B. Testimony of Nicholas Jackson

Jackson testified that he was with Gazy and O'Keefe prior to the knifing. He admitted that the threesome had been to a number of bars on Main Street in the hours immediately before the stabbing. Near 1:00 a.m., on April 21, 2013, the group left a bar and walked past a hot dog stand. A man sitting next to the stand (not appellant) yelled, "[k]eep walking faggots." The three men turned around and started arguing with that individual. The unidentified man pushed Gazy, which caused Jackson to push the unidentified man. According to Jackson, when the pushing stopped, he started to turn away. At that point, he saw that Gazy was holding his arm. Then Gazy exclaimed: "hot dog guy stabbed me, hot dog guy stabbed me."

Jackson recalled that, prior to Gazy being stabbed, he heard the hot dog vendor (appellant) state "it's not worth it, you don't want to go to jail." Jackson did not identify anyone as being the assailant.

C. Testimony of Sean O'Keefe

O'Keefe confirmed that he, Jackson and Gazy walked by the hot dog stand after leaving a bar on Main Street. There were two people in or near the stand. One of those men seemed "drunker than we were" and started trying to sell them a hot dog. That man also said: "you faggots come back. You know, what's wrong with hot dogs, stuff like that." According to O'Keefe, Gazy and Jackson became upset and started arguing with this unidentified individual. O'Keefe tried to break up the argument so that they could leave. O'Keefe then saw the unidentified man run from the scene. He also observed that Gazy was "hunched over," and heard Gazy yell "I was stabbed by the guy working – stabbed by the hot dog guy." O'Keefe did not see how Gazy got stabbed, but knew that the wound to Gazy's forearm was a "deep injury" due to the "really deep, dark blood."

During his testimony, O'Keefe admitted that he never clearly saw the assailant's face. He did describe the assailant as a white male, around 6 foot 2 inches in height.

D. Other Evidence

Bethany Geiger ("Geiger") and a group of her friends were leaving a bar on Main Street in Ellicott City in the early morning hours of April 21, 2013 when she heard people arguing at a hot dog cart. Geiger observed a man around 40 years old in a heated verbal argument with a group of men whom she estimated to be approximately 21 years old; she could not recall the race of any of the men.

Geiger and her friends walked past the cart where the argument was ongoing, but later turned around and looked back when she heard shouting and saw that a physical altercation had begun. Geiger testified that the man working at the hot dog stand was a white thin male approximately 27 years in age who was trying to make the older man stop arguing. The younger man said "something along the lines of you don't want to go to jail, I just got out, it's not worth it. She then saw a young man run past her who "was bleeding very bad." That man "panicked," returned to Geiger's group, and exclaimed, "the hot dog guy stabbed me." Geiger looked back down the street and saw a person who had been at the hot dog stand run down Main Street. She testified that the man was wearing a green hoodie but she was unable to identify that person.

On the date of the stabbing, Detective Clay Davis, a member of the Howard County Police Department, learned that appellant lived in a townhouse near the bottom of Main Street in Ellicott City, less than half a mile from the crime scene. Officer Nicholas Ventura, also of the Howard County Police Department, went to the rear ground level entrance to appellant's townhouse that same evening, while other officers went to the front. Police officers knocked on the front door for almost fifteen minutes, but initially no one answered the door even though Officer Ventura saw a woman, later identified as Kelly Tyson ("Tyson"), in the basement. Tyson eventually opened the back door, spoke to Officer Ventura, and told him there were other individuals in the townhome. While Officer Ventura

remained in the basement, Tyson went with other officers up to the second level of the townhome.

About five minutes later, Officer Ventura was informed that a white male "took off running." Ventura then saw appellant running down the stairs into the basement. At that point, Officer Ventura detained appellant. Appellant was released that evening from custody but was later arrested pursuant to an arrest warrant.

Officer Ventura transported appellant to the police station immediately after the arrest warrant was executed. While being transported, appellant made inquiry as to why he was being arrested. Ventura informed appellant that he did not have any further information at that time. Appellant also asked whether he would "have a high bail, or a cash bail," to which Ventura again replied that he did not know. At that point, appellant said: "Well, it's not like I raped or murdered anybody. The guy didn't die."

After his arrest, appellant was interviewed by Detective Davis. A videotape and transcript of the interview was admitted into evidence. During the course of that interview, appellant admitted that he was working at the hot dog stand on the night in question. He also agreed that his friend, Brendan Flannery, was drunk and started arguing with some men and calling them "[f]aggots." In his interview, appellant denied that he stabbed anyone. In fact, appellant claimed in the interview that, when Flannery and the others started to argue,

"I went, I was done, I didn't want to be there, I didn't want to be at work, I ran home to Ana, said Ana, your boyfriends about to be beat up you need to get over there."

In his statement to the police, appellant gave his age as 29. He denied that he said, before the stabbing, that he had just gotten out of jail. According to appellant, he said: "nobody needs to go to, I did not say anything about my personal (inaudible) I said guys, nobody needs to go to jail tonight, we're in Ellicott City, all of you guys are going to go to jail tonight." Appellant agreed that, after he left the hot dog stand and went home, he did not answer the door when police officers knocked.

DISCUSSION

Appellant contends the court erred by admitting evidence that, prior to the stabbing, he stated that he just got out of jail. According to appellant, the statement was inadmissible because the unfair prejudice from that remark exceeded its probative value. The State responds that this issue is not properly preserved, is without merit, and is harmless in any event.

Prior to jury selection, appellant sought to exclude evidence that appellant stated on the night of the stabbing that he had just been released from jail. The State contended that the statement was admissible because "the Defendant doesn't concede identity" and "[o]ne of the ways the State can prove that this is the Defendant is that the Defendant acknowledges

making statements about jail and all the witnesses say that [the] hot dog[2] vendor made statements that he just got out of jail." The court deferred ruling until the second day of trial when it heard further argument on the issue. In opposition to the motion *in limine*, the State stressed that it was not seeking to admit the remark to show appellant's "actual jail status," but wanted to admit the statement because the statement was probative of identity, specifically, to corroborate the victim's identification of appellant as his assailant. The trial judge and defense counsel then engaged in the following colloquy:

> THE COURT: All right, this is how - this is what I understand the situation to be. There is an attacker, the defense's view is going to be, from what I understood from opening, from what I understood during the course of this case, while the Defense hasn't pinned one defense out there for sure, the more reserved view of we're going to take advantage of whatever option seems best, which is understandable. There are a couple of options, one is I wasn't there, I didn't do it. Two is, I had a reason to do it. Three is, I may have been there, but I'm not the one that did it. Those seem to be like the three primary choices of the defense. There was a suggestion in opening that the Defense is going to focus on, you can't identify me as the person who committed this crime. So identification appears to be an issue here. Mr. Gazy made certain identifications on his own. But what the State is seeking to do is to get into evidence that the attacker said something about being in jail. And the Defendant agrees he said something about jail.
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: There's not going to be any evidence produced that he actually was ever in jail. There's not going to be any evidence produced about backing up. There's just going to be evidence produced that the State's

[2]At trial, at least two witnesses referred to appellant as the "hot dog vendor."

witnesses thought they heard that and he agrees he said something about jail. So, the value of the evidence is to show that the witnesses at the very least were connected to the events enough to hear most, if not everything the Defendant said accurately. I mean, it seems to me that the jury could just assume that Mr. McCabe is correct in what he said. But still, it would be relevant because how often do you have somebody talking about jail? Not very often in these cases. So it seems to me that as long as there's no - now of course the State, you know, always runs this risk because you tell your witnesses you can't talk about backing up 5 years or something and sometimes the witnesses just start talking about things they shouldn't talk about. At which point you run the risk of a mistrial, and that's the risk you run when you use that as this type. But it sounds like that's what I understand the State's use of it and your objection to that would be?

[DEFENSE COUNSEL]: That the - my objection to that is very limited in the sense that we don't believe that my client said the words, I just got out of jail. We believe that he said, as he said in his interview, nobody wants to go to jail and if the jury were to hear something to the effect that, I just got out of jail, that would be overly prejudicial towards my client. So I guess it's a factual matter, and I understand what Your Honor is saying.

THE COURT: Well, I think there's also the fact that when the State's presentation is your client that said it during the affray. It's not independent evidence that the State is trying to bring in. It would be one thing if he yelled, you don't want to go to jail. If everybody agreed he yelled, you don't want to go to jail, you wouldn't have an objection. Your only objection is that he himself said, I've been there, according to the State and the State started producing independent evidence in support that in fact he had been in jail as a way of demonstrating that their witnesses['] recollection of what he said were accurate. Well I've got a new trial (sounds like). But I don't - I understand and appreciate the Defendant's position but I think he's the one who opened his mouth and as long as it's limited to what has been proffered by the State, I would overrule the objection.

After the motion *in limine* was denied, Gazy testified, at trial, as follows:

Q. Okay. Had you heard the Defendant say anything to you while he was coming towards you or immediately prior to him coming toward you?

> A. Well yeah, so actually the shorter gentleman was nose to nose with me, the Defendant said right before that, he said, he looked me dead in the eyes and said, hey, it's not worth it, *I just got out of jail*. And I'm thinking to myself, I'm not even thinking about that right now. So that's the only verbal interaction that happened. *He just said, I just got out of jail*.

(Emphasis added.)

When Geiger was asked what she heard the hot dog vendor (*i.e.*, appellant) say, defense counsel timely objected. The court overruled the objection and Geiger testified that the vendor stated "you don't want to go to jail, I just got out, it's not worth it."

"Trial judges generally have 'wide discretion' when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011) (citation omitted). Although "trial judges are vested with discretion in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *Id*. The "*de novo* standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not of consequence to the determination of the action." *Id*. at 725 (citation and internal quotations omitted). Thus, ordinarily we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns. *Id*.

"Generally, in order for evidence to be admissible, it must be relevant." *Thomas v. State*, 429 Md. 85, 95 (2012). "Pursuant to Md. Rule 5-401, evidence is relevant if it has '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.'" *Id*. at 95-96 (citation omitted).

Here, as the trial court observed, identity was a contested issue in this case. Appellant told the police that he left before any physical altercation, and denied that he stabbed anyone. Although only one witness (Gazy) could identify appellant as the assailant, Gazy testified that appellant was wearing a "hoodie" and was the person who said that he just got out of jail. Geiger said that the man she heard make the "just got out of jail" statement was wearing a "hoodie," was about 27 years old and was the person who, initially, was trying to make the "older man" stop arguing. From her testimony, the jury could properly infer that it was appellant that made the just got out of jail statement, and not the man who made the remark about "faggots." The fact that Geiger heard appellant make the "just got out of jail statement" shortly before the stabbing, tended to corroborate Gazy's identification of appellant as his assailant. *Cf. Emory v. State*, 101 Md. App. 585, 610 (1994) (observing that other crimes evidence may be specially relevant to show "the defendant's identity from a remark made by him") *cert. denied*, 337 Md. 90 (1995). The trial court ruled that the fact

that appellant made the statement was relevant and in this appeal, appellant does not contend that the court was wrong when it made that finding as to relevancy.

Appellant's sole contention on appeal is that the trial court abused its discretion in admitting this evidence because, purportedly, the relevance of the evidence was far outweighed by its potential prejudicial effect on the appellant. *See Wagner v. State*, 213 Md. App. 419, 454 (2013) ("The weighing determination is left to the trial court's discretion and is reviewed for abuse of discretion.") (citing *Simms*, 420 Md. at 725); *see also Cousar v. State*, 198 Md. App. 486, 517 (2011) (The "'final balancing between probative value and unfair prejudice is something that is entrusted to the wide discretion of the trial judge'") (quoting *Oesby v. State*, 142 Md. App. 144, 167 (2002)). And, "'[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.'" *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Murphy, *Maryland Criminal Evidence Handbook* § 506(B) (3d ed. 1993 & Supp. 2007)) (emphasis in original).

We are persuaded that the trial court did not err in balancing the probative value of the evidence against the possibility of unfair prejudice. Important to our conclusion in this regard is the fact that the State never attempted to show appellant's criminal propensity by a prior incarceration. In fact, at no time during trial did the State even hint or insinuate, in any way, that appellant had a criminal record. Instead, the State steadfastly maintained that

the statement was important because it established that two individuals heard appellant make a similar remark at around the time of the stabbing. A fair interpretation was that appellant made the statement because initially he was trying to calm the situation by essentially reminding the participants that an altercation under the circumstances was not worth the possible repercussions. Under such circumstances, it was extremely unlikely that the jury would have been unfairly prejudiced by the statements.[3] Thus, we hold that the trial judge did not abuse his discretion in allowing the statements at issue into evidence.[4]

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

---

[3]We note that the acquittal by the jury of the greater offense, *i.e.*, first degree assault, "indicates that the jury was not so inflamed by the complained-of evidence that it was incapable of examining the evidence in a reasoned and dispassionate manner." *See Degren v. State*, 352 Md. 400, 435 (1999) (noting that a jury's split verdict demonstrated that it was not persuaded by the prosecutor's improper remarks).

[4]In view of our holding, it is unnecessary for us to consider the State's alternative argument that the issue presented by appellant on appeal was not preserved, because although appellant made a motion *in limine* to preclude the evidence, his counsel did not make a contemporaneous objection to the evidence when Gazy testified. *See Lee v. State*, 193 Md. App. 45, 70 ("An unsuccessful motion *in limine* to exclude certain evidence does not absolve the moving party of his or her duty to object at the time the evidence . . . is admitted.") *cert. denied*, 415 Md. 339 (2010).