Circuit Court for Anne Arundel County
Case No. C-02-CR-18-000570

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1188

September Term, 2018

MICHAEL ELLIS

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 28, 2019

A jury in the Circuit Court for Anne Arundel County convicted Michael Ellis, appellant, of possession of a weapon in a place of confinement and possession of contraband in a place of confinement. On appeal, Mr. Ellis presents one question for our review:

> Is Mr. Ellis entitled to a reversal of his convictions based on the admission for impeachment purposes of his prior conviction for attempted murder?

We conclude that the circuit court abused its discretion in admitting evidence of the previous conviction, but that the error was harmless. Accordingly, we shall affirm the judgments of the circuit court.

BACKGROUND

The State charged Mr. Ellis with first-degree assault by an inmate, reckless endangerment, and other lesser-included offenses and weapons charges, stemming from an altercation between Mr. Ellis and Mawawi Barber while both men were incarcerated at Jessup Correctional Institution. At trial, the State called four correctional officers, all of whom testified that they saw Mr. Ellis stabbing Mr. Barber with a knife. Mr. Barber appeared to be defending himself. Prison officials utilized pepper spray to break up the fight, at which point Mr. Ellis dropped the knife and was restrained.

According to the testimony of the corrections officers, Mr. Barber sustained lacerations to his head and torso. Mr. Ellis was treated for a cut to his finger, and his medical records indicated that he had two puncture wounds on his back. The day after the incident, Mr. Ellis was taken to the hospital where he underwent treatment for a collapsed lung.

At the outset of the defense portion of the case, the prosecutor stated that if Mr. Ellis chose to testify, she intended to impeach him with a prior conviction for attempted murder. Defense counsel objected, stating that, because Mr. Ellis was charged with a similar offense in this case, the probative value for impeachment was outweighed by the potential for prejudice. The court overruled the objection.

Mr. Ellis elected to testify, and told the jury that he was attacked by a group of people and was stabbed in the hand during the affray. He denied that he stabbed anyone or possessed the knife, but explained that when he complied with orders to put his hands up, the knife that had been used to stab him was "hanging out of [his] finger."

Defense counsel asked Mr. Ellis about his prior conviction for attempted murder in his direct examination, in an apparent attempt to "draw the sting."[1] Defense counsel lodged a general objection when the prosecutor asked Mr. Ellis about the conviction on cross-examination, and the court overruled the objection.

In closing argument, defense counsel asserted that the State had not met its burden of proving that Mr. Ellis assaulted Mr. Barber. Defense counsel pointed out that Mr. Barber did not testify, and the State did not introduce any medical records to prove that he was injured. She suggested that medical records showing that Mr. Ellis sustained stab wounds and was treated for a collapsed lung validated his account that he was the victim of an unprovoked attack. Defense counsel further suggested that, in the "chaos" surrounding the

[1] Where a court has ruled that a prior conviction will be admitted for impeachment purposes, a defendant may, without waiving the right to seek appellate review of that ruling, "draw[] the sting out" of the conviction by testifying about it on direct examination. *Cure v. State*, 421 Md. 300, 321-22 (2011)

altercation, the State's witnesses either did not see what happened or were confused about who stabbed who. Finally, defense counsel argued that if the jury believed that Mr. Ellis stabbed Mr. Barber, he did so only in self-defense.

The jury acquitted Mr. Ellis of first-degree assault, second-degree assault, reckless endangerment, and carrying a weapon with the intent to injure Mr. Barber. The jury convicted Mr. Ellis of possession of a weapon in a place of confinement, and possession of contraband in a place of confinement.

DISCUSSION

Pursuant to Maryland Rule 5-609(a), evidence that a witness has been convicted of a crime is admissible for the purpose of attacking the credibility of the witness 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." In *Jones v. State*, 217 Md. App. 676, 708-09 (2014), we held that a conviction for attempted second-degree murder is "neither an infamous crime nor a crime relevant to credibility," and, therefore, a conviction for that crime is not admissible for impeachment purposes.

Mr. Ellis's principal contention is that, under *Jones*, the court erred as a matter of law in allowing the State to impeach him with his prior conviction for attempted murder. Mr. Ellis concedes that this issue was not preserved for our review because he did not assert that attempted murder was inadmissible because it is neither an infamous crime nor relevant to credibility, and therefore inadmissible under Rule 5-609(a)(1). He requests that we either review the issue for plain error, or review, in this direct appeal, his claim of

ineffective assistance of counsel. We decline both requests. *See Morris v. State*, 153 Md. App. 480, 507 (2003) ("appellate invocation of the plain error doctrine" is a "rare, rare phenomenon[,]" and "the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation."); *Crippen v. State*, 207 Md. App. 236, 250 (2012) ("the 'desirable procedure' for presenting claims of ineffective assistance of counsel is through post-conviction proceedings.") (citation omitted). In declining to review the claim of ineffective assistance of counsel, we do not preclude Mr. Ellis from raising the issue in a timely-filed petition for post-conviction relief.

The objection that Mr. Ellis preserved is whether, under Rule 5-609(a)(2), the probative value of the evidence was outweighed by its potential for prejudice. We conclude that the admission of the prior conviction for attempted murder, for the purpose of impeaching Mr. Ellis's credibility, was an abuse of the court's discretion, but that any error was harmless beyond a reasonable doubt. We explain.

The guidelines to be considered in weighing the probative value of a past conviction against its prejudicial effect are: "(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." *Fulp v. State*, 130 Md. App. 157, 168 (2000) (quoting *Jackson v. State*, 340 Md. 705, 717 (1995)).

As we held in *Jones*, 217 Md. App. at 708-09, a conviction for attempted second-degree murder is irrelevant to credibility. Accordingly, Mr. Ellis's prior conviction had

little, if any, probative value for purposes of impeaching his credibility.[2] On the other side of the equation, the crime of attempted murder is similar to the assault charges Mr. Ellis faced at trial,[3] and Mr. Ellis's testimony was important to the defense theory of the case, as was his credibility. Accordingly, we conclude that the prejudicial effect of the previous conviction clearly outweighed its probative value. Any error in admitting the evidence, however, was harmless.

When it has been determined that the trial court erred in a criminal case, reversal is required unless we find that the error was harmless beyond a reasonable doubt. *Porter v. State*, 455 Md. 220, 234 (2017). "[A]n 'error is harmless only if it did not play any role in the jury's verdict.'" *Id.* (citation and emphasis omitted).

We are convinced beyond a reasonable doubt that the evidence that Mr. Ellis had previously been convicted of attempted murder did not influence the verdict. The jury was already aware that Mr. Ellis was incarcerated at the time of the alleged assault. If the evidence that Mr. Ellis was serving time for attempted murder played any role in the jury's

[2] We take judicial notice of the fact that, in July 2011, Mr. Ellis was convicted, in the Circuit Court for Baltimore City, case number 110278028, of attempted murder in the first degree. Mr. Ellis contends that there are no additional elements of truthfulness or veracity required to prove attempted first-degree murder such that it should be treated differently from attempted second-degree murder for purposes of relevancy to credibility. We agree. The State concedes that the first factor in the balancing test, that is, the impeachment value of Mr. Ellis's attempted murder conviction, "does not favor the State."

[3] The elements of attempted first-degree murder are "the intent to commit murder in the first degree and some overt act towards the crime's commission." *Martin v. State*, 218 Md. App. 1, 40 (2014) (citation omitted). In the case before us, the State charged Mr. Ellis with first-degree assault, which is defined, as applied to the facts of this case, as intentionally causing or attempting to cause serious physical injury to another. Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 3-202(a)(1).

verdict, it is reasonable to assume that, instead of acquitting him of assaulting Mr. Barber, the jury would have found him guilty.[4]

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] Mr. Ellis contends that, although he was acquitted on the assault charges, and found guilty only of possession of the knife, evidence of his prior conviction for attempted murder "could have [led] the jury to believe that he was a violent person, and thus, more likely to possess a knife while incarcerated." We are not so persuaded. Not only is this assertion inconsistent with the finding of not guilty of the assault and reckless endangerment charges, but the jury was free to disbelieve Mr. Ellis's testimony that he never used or possessed the knife, and his explanation that the knife was in his hand only because it got stuck there when he was stabbed by someone else. *See Brown v. State*, 234 Md. App. 145, 159 (2017) ("A finder of fact is 'free to believe part of a witness' testimony, disbelieve other parts of a witness' testimony, or to completely discount a witness' testimony.'") (quoting *Smiley v. State*, 138 Md. App 709, 179 (2001)).