UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1380

September Term, 2014

ANTOINE YELITY

v.

STATE OF MARYLAND

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

JJ.

Opinion by Salmon, J.

Filed: October 20, 2015

Antoine Yelity ("Yelity") was convicted by a jury in the Circuit Court for Baltimore City of unlawful possession of a registered firearm and wearing, carrying or transportation of a handgun. He was sentenced to fifteen years' imprisonment, the first five years of which were without the possibility of parole. In this timely appeal, Yelity raises two questions which he phrases as follows:

> 1) Did the trial court err in permitting Officer Soto to offer an expert opinion that the manner in which [a]ppellant was running suggested [that] he was carrying a firearm?
>
> 2) Did the trial court err in admitting other crimes evidence including that the police received a tip of an armed robbery and that [a]ppellant was found in possession of duct tape and a pair of latex gloves?

I.
THE STATE'S EVIDENCE

At 2:00 a.m. on July 8, 2013, Baltimore City Police Officer Victor Soto was at a convenience store located at the intersection of North Avenue and Poplar Grove Street in Baltimore City. While talking to two other police officers, an automobile pulled up next to the officers and a woman rolled down her window and said: "Someone [was] being robbed at gunpoint" at an ATM at a Wells Fargo Bank located at North Avenue and Bloomingdale Road. The vehicle in which the woman was riding then drove away before the officers could get any more information.

Officer Soto drove his police cruiser to the aforementioned Wells Fargo Bank. It took him only about one minute to get there. Upon arrival, Officer Soto did not see anyone at the ATM, but he did see two African-American males walking away, heading north.

Officer Soto pulled his police cruiser up next to the men with the intent of asking them some questions. As he pulled abreast of the two men, one of the men, later identified as Yelity, took off running eastbound through an alley. While running, Yelity, who was wearing jeans, was holding his waistband with his right arm.

In his testimony, Officer Soto opined, over objection, that the manner in which Yelity was running suggested to him that Yelity was "holding a firearm." Officer Soto explained why he held that belief:

> Because usually when people are carrying firearms around their waistband they have to keep it up, for it would not slip down the leg while they're running, so they hold it while they run. So one arm, his left arm, was running - - was doing the motion as if he was running, while the right hand was tucked in.

After that explanation, Officer Soto was asked by the prosecutor to demonstrate to the jury the manner in which Yelity ran. In response, Officer Soto said:

> When he started to run he held here (grasping waistband with right hand) and just took off running like this (holding with right hand, left hand pumping as if running), holding his dip area, or his waistband. So that's why it made me realize that he might have a firearm.

Officer Soto pursued Yelity in his cruiser, losing sight of him at one point but then catching up to him near a library, located on North Avenue. When Officer Soto got near Yelity, he got out of his vehicle. Yelity then looked back at Officer Soto, performed what the officer described as a "fake trip," and using his left hand, threw an object towards the library. Officer Soto could not see the object that Yelity discarded, but he heard a "heavy

metallic thump" when it hit the wall of the library. Next, at gunpoint, Officer Soto ordered Yelity to put up his hands and lay down on the ground. Yelity did so. At the time of Yelity's arrest, he was wearing a pair of latex gloves and he had a roll of duct tape in a jacket pocket.

Other officers arrived at the scene shortly thereafter. Yelity was handcuffed and placed in a police vehicle while Officer Soto and the other officers searched the bushes along the side of the library. There the officers located a revolver in the branches of one of the bushes. Also, in the dirt nearby, the officers found a small steak knife, which Officer Soto described as old and rusted.

Officer Soto believed that the knife that was found was not heavy enough to have produced the noise he heard when the object hit the wall of the library after Yelity threw it. It was for this reason that Officer Soto did not retain the knife.

Officer Soto said on redirect-examination that he did not ask that the gun or gloves be examined for fingerprints or DNA because he personally pulled the gloves off appellant and he found the gun where appellant threw it.

The parties stipulated that, as a result of a prior conviction, Yelity was prohibited from possessing a regulated firearm.

Christopher Faber, a firearms examiner for the Baltimore City Police Department, testified that he tested the revolver, which the police recovered near the scene of Yelity's

arrest. The revolver had a live round in the chamber and, according to Mr. Faber's testimony, the gun was operable.

II.

Over objection of Yelity's counsel, the trial judge allowed Officer Soto to testify as an expert witness regarding the "characteristics of an armed person." On appeal, Yelity claims that the court erred in allowing Officer Soto to testify as an expert as to that subject. He presents three grounds in support of that argument. First, according to Yelity, Officer Soto's training and experience was insufficient to qualify him as an expert. Secondly, Officer Soto "lacked a sufficient basis for expressing his opinion[.]" Third, the expert testimony should not have been allowed because "the jury was fully capable of determining on its own" whether the manner in which appellant ran indicated that he was likely carrying a firearm.

Prior to being allowed to express an opinion concerning whether Yelity ran like a person carrying a firearm, Officer Soto testified that he had been a Baltimore City Police Officer for just under four years. While at the police academy, he had attended a class, which lasted approximately ten hours, that dealt with the subject of "what to look for to see if someone is carrying a firearm." When answering a question as to what he had learned in that class, Officer Soto said:

> Always watch the hands. The hands - - if someone's carrying a firearm that's not holstered they commonly wear - - insert it [in] areas of the body. The waistband, also known as the dip. A lot of the people who carry the

> firearms that are not holstered, they keep it there, check to see and keep it stable and keep it tight to make sure the gun doesn't slide down.

Officer Soto also said that he was taught that an armed person, while running, holds "their hands tight to their bodies." During the classroom training in addition to lectures, books were used, tests were given and "individuals would walk in, show us, act it out for us."

Maryland Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall 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.

In *Simmons v. State*, 313 Md. 33, 43 (1988) the Court said that trial judges are "given broad discretion in ruling on the admissibility of expert testimony. Seldom will the decision in this regard constitute grounds for reversal." *See also Massie v. State*, 349 Md. 834, 850-51 (1998) (Rule 5-702 "vests trial judges with wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony").

In this case, the trial judge did not err or exceed his "broad discretion" when he decided that Officer Soto was qualified as an expert. First, ten hours of training plus nearly four years of on-the-job experience, would plainly give Officer Soto knowledge about the way armed people run that a lay person, such as a juror, would not be expected to possess.

After all, a police officer, in order to fulfill his duties and insure his safety and the safety of others, must have the ability to make very quick determinations as to whether a person he or she is chasing is armed. *See Fitzwater v. State*, 57 Md. App. 274, 281 (1984) ("A witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether special knowledge is based on professional training, observation, and/or actual experience.").

In support of his argument that Officer Soto lacked the requisite "knowledge, skill, experience, training, or education," to express an opinion, Yelity stresses that Officer Soto had never previously been qualified to testify as an expert. Quite obviously, that fact, standing alone, would not disqualify Officer Soto from giving an expert opinion in this case. There has to be a first time for every expert and Md. Rule 5-702 does not require that a witness has previously testified as an expert. The test is whether the witness is "reasonably familiar with the subject under investigation." *Manuel v. State*, 85 Md. App. 1, 23 (1990). Officer Soto was plainly "reasonably familiar" with the subject as to how a person with an unholstered firearm typically runs.

Appellant's claim that Officer Soto's factual basis for his opinion testimony was insufficient, is founded upon the "fact" that there were other viable explanations as to why Yelity was holding onto his waistband area while he ran that had nothing to do with a weapon. According to appellant, he could have possibly been wearing loose fitting pants or carrying a heavy object. We reject that argument. First, there was no evidence that would

suggest that appellant wore pants that did not fit him. According to Officer Soto, appellant was wearing jeans. Second, after he discarded the gun, the object appellant carried (a roll of duct tape) was not heavy.

Officer Soto had a very clear basis for his expert opinion – first-hand knowledge of the manner in which Yelity ran, coupled with classroom and "street" experience. Finally, even if there might be some other conceivable explanation for the awkward way appellant ran that might contradict Officer Soto's opinion, that other explanation would go to the weight of Officer Soto's expert testimony – not its admissibility. *See Tapscott v. State*, 106 Md. App. 109, 131 (1995), *aff'd* on other grounds, 343 Md. 650 (1996).

III.
ADMISSION OF WHAT YELITY CLAIMS WAS "OTHER CRIMES EVIDENCE."

Appellant argues:

> The trial court erred in admitting other crimes evidence including that the police received a tip of an armed robbery and that appellant was found in possession of duct tape and a pair of latex gloves.

Appellant argues that the testimony as to what the unidentified woman told Officer Soto about a robbery in progress was hearsay and therefore inadmissible. In this regard, appellant is wrong. The testimony of the unidentified witness was plainly not admitted in order to prove what the unidentified woman said was true. Instead, the evidence was introduced to show why Officer Soto rushed to the place where the ATM was located and why he wanted to talk to Yelity, and his companion, who were walking away from the ATM

when the officer approached them. *See Parker v. State*, 408 Md. 428, 438 (2009), ("a relevant extrajudicial statement is admissible as non-hearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement[.]").

In his brief, Yelity does not explicitly challenge the State's position that the statement at issue was not introduced for the truth as to what the unidentified woman told the police officer. Without such a direct challenge, appellant's contention that admission of the statement violated the hearsay rule fails. *See Stoddard v. State*, 389 Md. 681, 688-89 (2005) (Under Md. Rule 5-801 an out-of-court statement is not hearsay if it is not offered for the truth of the matter asserted therein.).

What appellant does argue, specifically, in regard to the statement of the unidentified woman, is that even accepting the fact that it was the State's true intention to introduce the evidence for a non-hearsay purpose:

> the risk that the jury would misuse the evidence was too great. It would have sufficed for the State to present evidence that Officer Soto went to the location based "on information received" and that Mr. Yelity ran as the officer approached him. It was unnecessary, and extremely prejudicial, for the jury to hear that someone had contacted the police to report an armed robbery at the location. That is particularly so where, as here, the defense was not arguing that the police acted improperly in chasing Mr. Yelity.

It is true, as appellant points out, that Yelity's counsel did not argue that the police acted improperly in chasing Yelity. But, had the evidence concerning what the unidentified woman said not been admitted, there was a substantial possibility that the jury, on its own, would have had serious questions about the propriety of Officer Soto's actions in chasing

Yelity. This was recognized by the trial judge in the following exchange with Yelity's counsel:

> THE COURT: But the probative value clearly would outweigh the prejudicial effect because, again, it leaves open for you the opportunity to argue a number of things that are easily cleared up by why are the officers chasing.
>
> And again, not to be funny, if he's sitting here saying that black men get railroaded and everything, that's the exact argument that you could make. Not that you would, but - -.
>
> [YELITY'S COUNSEL]: I'm probably going to add that to my closing.
>
> THE COURT: Exactly. But that's exactly why it's here. It's like why are they chasing him? You know are they just chasing another black man down the street? Well, because they received information from someone and here's where we are.

We disagree with appellant's contention that the risk was too great that the jury would misuse the evidence concerning what the unidentified woman said. Impliedly, at least, appellant contends that the "risk" that was "too great" was that the jury would believe that appellant had committed an armed robbery. We fail to see any such risk. There was no evidence that appellant committed any crime – other than the ones of which he was convicted. And, at no time during trial did the prosecution even hint that appellant had committed a robbery.

We turn next to appellant's contention that the trial court erred in admitting evidence that, at the time of his arrest, appellant wore latex gloves. Appellant contends, citing Md.

Rule 5-404(b), that this testimony was inadmissible because it suggested that defendant had committed another crime or bad act. A "bad act" under Md. Rule 5-404(b) is an act "that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Smith v. State*, 218 Md. App. 689, 709 (2014) (quoting *Klauenberg v. State*, 355 Md. 528, 549 (1999)). It is not a crime or a "bad act" for someone to wear latex gloves, so Md. Rule 5-404(b) was inapplicable.

Appellant also argues that the evidence that appellant wore latex gloves was highly prejudicial and that prejudice outweighed any possible relevance. Appellant does not, however, explain why he contends the evidence was "highly prejudicial," and in our view, it was not. It is, after all, legal to wear latex gloves and, although it is true that some criminals wear latex gloves when committing some crimes, there are also many lawful uses of such gloves. On the other hand, the fact that appellant was wearing latex gloves when arrested was relevant because it rebutted a frequently heard criticism by defense counsel, *i.e.*, the police were negligent in not testing guns for fingerprints or DNA residue.[1]

We hold that the trial judge was not clearly erroneous when he admitted latex gloves testimony after finding that the relevance of that testimony outweighed any possible prejudice.

[1]Notably, defense counsel, in closing argument, reminded the jury that the State had produced "no fingerprints and no DNA."

Lastly, appellant contends that the trial judge committed reversible error in admitting testimony that appellant, when arrested, had a roll of duct tape in a jacket pocket. On appeal, appellant contends that this was inadmissible "bad act" evidence. But, carrying duct tape is neither a bad act, nor evidence of "other crimes." Moreover, the testimony had at least some probative value because it acquainted the jury with the fact that appellant was carrying only a relatively light object in his pocket when arrested. That testimony helped rebut one of appellant's challenges to Officer Soto's expert testimony, *i.e.*, that appellant may have needed to hold onto his waistband when he ran because he was carrying a heavy object in his pocket. We therefore hold that the trial judge did not err or abuse his discretion in overruling appellant's objection to the testimony that appellant, when arrested, carried a roll of duct tape.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT