

Circuit Court for Prince George's County
Case No. CT 17-0042X

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1518

September Term, 2017

CHRISTOPHER JONES

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Harrell, Jr., Glenn T.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: October 9, 2018

*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.

Appellant, Christopher Jones, was convicted in 2017 by a jury in the Circuit Court for Prince George’s County of carrying a handgun, using a handgun in the commission of a crime of violence, illegal possession of a firearm, first degree assault, and second degree assault. The court sentenced Jones to a total of forty-five years of incarceration, with fifteen years suspended and five years of probation.

In this timely appeal, Jones poses the following question, which we have rephrased slightly:

Did the trial court abuse its discretion in allowing the State to introduce a gun and loaded magazine into evidence that were found pursuant to a search warrant in an unrelated case?

The State responds first that Jones failed to preserve with a contemporaneous objection his appellate challenge to the admission of the handgun and magazine. If the merits are reached, however, the State maintains that the fact that Jones possessed a handgun two weeks after the assault at issue was not an inadmissible “other bad act” on the record of this case and there was no discovery violation precluding admission of the gun as a sanction.

Factual Background

David Thomas (“Thomas”) owned an auto repair shop, doing business as Elite Automotive Services (“Elite”), in Prince George’s County. Joseph Good (“Good”), an employee at Elite, was a friend of Appellant, Christopher Jones (“Jones”). Rene Tshiasuma (“Tshiasuma”), also an employee at Elite¹, knew Jones because Jones visited Good

¹ Although the State’s brief identifies Tshiasuma as a co-owner of Elite, the record indicates that Tshiasuma was merely an employee.

frequently at Elite.

On 27 October 2016, Jones was visiting Good at Elite. In the course of the visit, Tshiasuma observed Jones spit on the floor of the business. He confronted Jones about his expectoration. An altercation ensued. Jones departed the premises in retreat. Later that day, Thomas and Tshiasuma were in the shop's office when Jones returned, brandishing a handgun. Thomas and Tshiasuma observed the gun through the office's glass door. Thomas called the police. Jones fled.

On 12 November 2016, Jones was arrested pursuant to an open warrant in an unrelated matter. At the time, Jones was driving a vehicle that had two passengers: an adult male and a young child.² The police impounded the vehicle and searched it pursuant to a separate warrant. A silver handgun, with an extended magazine, was recovered on the driver's side floorboard.³

Prior to Jones's trial for the October 27 incident at Elite, the State informed defense counsel that it intended to introduce at trial the gun and magazine recovered from the car Jones was driving on November 12. Defense counsel moved in limine to exclude the gun and any other evidence recovered pursuant to the November 12 arrest and search. The following relevant colloquy ensued pre-trial on the day Jones's case was called for trial:

[DEFENSE COUNSEL]: We would like to make a motion in limine to exclude any evidence from Mr. Jones's other unrelated case. The State informed me - - and I haven't had a chance to convey this to Mr. Jones, but

² The adult male was seated in the front passenger's seat and the child was seated in the rear seat.

³ The record contains conflicting accounts whether the handgun was recovered from the driver's side front or rear floorboard. Nonetheless, it is uncontested that the handgun was recovered from the vehicle floorboard on the driver's side of the vehicle.

the State did inform me that they would seek to introduce a gun that was recovered as party of a stop in that other unrelated case. Again, this is the first we've been notified. We haven't been notified. I think this would fall under prior bad act evidence. There certainly hasn't been any motion to introduce anything of that. . . .

Further, I don't think that - - one, I don't think that there's enough of a probative clear link between the gun that's alleged in this case and whatever gun was recovered in the other case. But I do think that the prejudicial value is incredibly high and far outweighs what we would assert as not much probative value . . . So we move that any evidence, specifically the gun in that case, be excluded.

[STATE]: Your Honor, the State would intend to introduce the fact that the defendant was arrested on November 12, 2016. . . . This case is a first degree assault where the allegation of first degree assault is that the defendant used a gun to threaten somebody. And therefore, it's probative. It's related. It shows that he was in possession of a gun two weeks after this incident or at least in close proximity to a gun two weeks after this incident that we're about to go to trial for and, therefore, it's relevant.

The court denied the defense's motion and indicated that it would allow the handgun to be introduced in the trial, on the condition that a witness could "identify the gun found and connected with the defendant two weeks later or three weeks later as looking like the gun they saw with him in this incident. . . ." The State responded: "[The witnesses] can't say that it's the gun. I believe they will say it looks like the gun."

When trial commenced, the defense moved to suppress the handgun. The trial judge excused the jury and held a suppression hearing before the State called its first witness. The State called as suppression hearing witnesses the two arresting police officers from the 12 November 2016 arrest and search. They testified that Jones was arrested pursuant to a warrant and that a handgun was recovered in the "front seat, front floorboard." Defense counsel argued:

The pertinent part is we're talking—based on the witness's testimony

[referring to the anticipated trial testimony of Thomas and Tshiasuma], we're talking about two different guns. There's one witness that says it's similar. Another witness does say he's a hundred percent certain. But again, these aren't any of the—the weapon, as depicted in the photo and specifically a .45 is not what's described by any of the witnesses . . . Beyond that, we're talking a weapon was found where two persons were in the car and that's discovered nine days after the vehicle was impounded. . . . There's certainly nothing to show that this vehicle was sufficiently secured that no one else could have come into contact with it. . . . And I think the prejudicial value of the evidence is essentially all that it needs to be admitted for. There's no other purpose of admitting it other than for it to be prejudicial to Mr. Jones.

The court denied the motion to suppress, concluding that there was a sufficient basis for the police to have arrested Jones on November 12 and that the evidence was probative and not unfairly prejudicial as regards the trial of the October 27 incident at Elite.

When trial resumed, the State offered the recovered handgun as State's Exhibit Two. Thomas testified that Jones wielded a handgun on 27 October 2016 and that the handgun marked as Exhibit Two was, or looked very similar to, the handgun Jones brandished at Elite. Tshiasuma testified that Exhibit Two looked similar to the handgun that he saw Jones display through the glass door at Elite. State's Exhibit Two was received in evidence, without a contemporaneous objection from the defense.

Discussion

I. Preservation.

Jones claims, and we agree, that the question of whether the trial court erred in admitting the gun and magazine was preserved for our review. Jones, although conceding that there was no contemporaneous objection as the handgun and magazine were offered into evidence at trial, argues that requiring him to renew his objection after the court's

ruling on his motion in limine would exalt form over substance. The dispute over the admissibility of the handgun and magazine was discussed fully by the judge and the parties in both the motion in limine and suppression hearings, Jones contends. The trial judge made an unequivocal ruling after opening statements and prior to the State's first witness. The evidence of the handgun and magazine were admitted shortly after the court's ruling. Jones claims that there was no indication that defense counsel intended to withdraw the grounds for his motion in limine in the interim.

The State responds that Jones failed to make a contemporaneous objection, as required by Maryland Rule 4-323(a), and thus any appellate challenge to the handgun and magazine evidence was waived.

Generally, an objection to the admission of evidence must be made "at the time the evidence is offered or as soon thereafter as the ground for the objection becomes apparent." Md. Rule 4-323(a). When a party moves unsuccessfully in limine to exclude arguably irrelevant or otherwise inadmissible evidence, and that evidence is admitted subsequently, "the party who made the motion *ordinarily* must object at the time the evidence is actually offered to preserve [its] objection for appellate review." *Reed v. State*, 353 Md. 628, 637, 728 A.2d 195, 200 (1999) (emphasis added). The Court of Appeals has found preservation, however, despite a lack of objection when evidence is offered in circumstances similar to those appearing in the record of this case. *See Watson v. State*, 311 Md. 370, 535 A.2d 455 (1988) (declaring a challenge preserved for appellate review despite the lack of an objection when the evidence was admitted because requiring appellant to make another objection a short time after the court's ruling to admit the evidence would be to exalt form

over substance); *see also Clemons v. State*, 392 Md. 339, 362-63, 896 A.2d 1059, 1072-73 (2006) (holding that a challenge to the admissibility of testimony was preserved despite lack of renewed objection after a motion in limine because a reasonable person could not infer that defense counsel intended to withdraw his objection and because the objection was in close proximity to the judge’s ruling).

Although Jones did not make a contemporaneous objection at the time the handgun and magazine were offered into evidence, requiring Jones to object again would, as we see it, “exalt form over substance.” The parties and the trial judge conferred regarding the admissibility of the handgun and magazine immediately prior to the State’s first witness. The State’s first and second witnesses were questioned about the handgun and the magazine on direct examination. Consistent with *Watson* and its progeny, Jones’s challenge to the admissibility of the handgun and magazine was preserved for appellate review because of the close proximity in time between the motion in limine discussion and ruling, and admission of the handgun and magazine into evidence. It seems clear to us that Jones did not intend to withdraw his objection. Jones’s appellate challenge to the admissibility of the handgun and magazine was preserved for our review because to find to the contrary on this record would exalt form over substance

II. The Handgun as an “Other Bad Act.”

Appellant urges us to find error in the circuit court’s admission of the handgun and magazine recovered pursuant to the 12 November 2016 arrest. He argues that the trial court abused its discretion in admitting this evidence, thereby violating the principle that

character evidence, in the form of an other bad act, is inadmissible in an unrelated proceeding to prove the defendant more likely acted in the earlier incident in conformity with the unfavorable character trait demonstrated in the subsequent incident.⁴ Additionally, Jones avers that the handgun and magazine do not fall into any of the exceptions listed in Md. Rule 5-404(b).⁵

The State counters that the only issue on appeal is the admission of the handgun and magazine, which are not themselves evidence of an inadmissible other bad act. Even if Jones's later constructive possession of the handgun constituted a bad act, it falls under an enumerated exception in Md. Rule 5-404(b).⁶ Specifically, the State contends that Jones's possession of the handgun on 12 November 2016 was relevant to establish that Jones possessed the handgun then and that, more likely than not, Jones possessed it in the 27 October 2016 incident at Elite.

A trial judge may admit other bad acts evidence if the following three requirements are met:

First, the evidence must be "substantially relevant to some contested issue in the case. . . ." Such evidence may be relevant to prove "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Second, the evidence must be "clear and convincing in establishing the accused's involvement" in the prior bad acts. [Third], the

⁴ This principle is codified as Md. Rule 5-404 (a) and (b).

⁵ The relevant text of this subsection reads: "Such evidence [of other bad acts], however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b).

⁶ Constructive possession of contraband found in an automobile may be imputed to the driver of the vehicle, even when there is a passenger and it is not established that the driver is the owner of the vehicle. *Smith v. State*, 145 Md. App. 400, 414, 805 A.2d 1108, 1116 (2002).

evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ."

Gutierrez v. State, 423 Md. 476, 489-90, 32 A.3d 2, 10 (2011) (internal citations omitted) (quoting *State v. Faulkner*, 314 Md. 630, 634-35, 552 A.2d 896, 897 (1989)). Because each of these requirements implicates a different standard of appellate review, we shall address them separately.

a. Relevant substantially to some contested issue in the case?

In order to be admissible, other bad acts evidence must be relevant substantially to some contested issue in the immediate case to prove motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. *Id.* We extend no deference in our review to the trial court's decision whether the evidence fits within one or more of the recognized prior bad acts evidence exceptions. *Wynn v. State*, 351 Md. 307, 318, 718 A.2d 588, 593 (1997).

As a preliminary matter, relevant evidence is admissible generally. Md. Rule 5-402. Relevant means that the evidence 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." Md. Rule 5-401.

Although relevant evidence is admissible generally, evidence of a defendant's other bad acts are not admissible to prove that he is guilty of the charge or charges for which he is on trial. *State v. Faulkner*, 314 Md. 630, 633, 552 A.2d 896, 897 (1989). As discussed in *Gutierrez* and *supra* note 5, there are exceptions to this proposition. The list of relevancy

exceptions enumerated in Md. Rule 5-404(b) is not exhaustive. *Allen v. State*, 192 Md. App. 625, 652, 995 A.2d 1013, 1029 (2010), *aff'd*, 423 Md. 208, 31 A.3d 476 (2011). Thus, character and other bad act evidence may be admitted against a defendant for purposes other than those identified in Md. Rule 5-404(b).

Jones's constructive possession of the gun on 12 November 2016 was relevant substantially here because it tended to show (consistent with the testimony of Thomas and Tshiasuma) that he possessed that particular handgun and brandished it on 27 October 2016 at Elite. They testified at trial that the handgun recovered from the 12 November 2016 incident was the same handgun Jones brandished on 27 October 2016, or looked very similar to it. Indeed, the State's case hinged on whether the two eyewitnesses, Thomas and Tshiasuma, could identify the handgun as likely the one Jones carried. It follows that Jones's possession of the gun in the 12 November 2016 incident was relevant substantially to a contested issue in the case at bar.

b. Clear and convincing evidence establishing Jones's involvement in the other bad act?

Step two of the analysis regarding admitting character/other bad act evidence requires the court to find clear and convincing evidence establishing the accused's involvement in the bad act or acts. In reviewing the trial court's decision, this Court must decide whether "the evidence was sufficient to support the trial judge's findings." *State v. Faulkner*, 314 Md. 630, 635, 552 A.2d 896, 898 (1989).

Here, the evidence is adequate to support the trial court's findings that clear and convincing evidence existed establishing Jones's involvement in the November 12

incident. It is undisputed that Jones was driving the vehicle on that occasion and a handgun was found on the driver's side floorboard. The police officer who searched Jones's car after the 12 November 2016 arrest, Officer Gross, testified that she executed the search warrant on the vehicle and found the handgun introduced as State's Exhibit Two. As such, the evidence was sufficient to support the trial judge's finding that clear and convincing evidence established Jones's involvement in possessing constructively the gun found during the 12 November 2016 incident.

c. Weighing the probative value against the danger of unfair prejudice.

The final step before admitting character/bad act evidence requires the trial court to weigh the probative value of the contested evidence against the danger of unfair prejudice. If the probative value is outweighed substantially by the danger of unfair prejudice, the evidence should be excluded. Evidence is considered 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, 78 A.3d 371, 384 (2013).

On review, this Court evaluates the trial court's decision for abuse of discretion. *State v. Faulkner*, 314 Md. 630, 635, 552 A.2d 896, 898 (1989). There is no requirement that the trial court's weighing be detailed in the record, as long as the record reflects that the court appreciated that it had discretion and that in fact discretion was exercised. *Walker v. State*, 373 Md. 360, 391, 818 A.2d 1078, 1096 (2003).

It is clear from the record that the trial judge weighed the probative value of admission of the handgun and magazine against the danger of unfair prejudice. The judge

heard from the parties in argument of the motion in limine to exclude the evidence. Additionally, the trial judge made clear that the handgun would be admissible only if a witness could testify that the handgun found pursuant to the 12 November 2016 arrest was likely the same gun used allegedly on 27 October 2016 at Elite. There was no abuse of discretion and thus the third consideration for admitting evidence of the arguable other bad act is satisfied.

III. Discovery Violation.

Jones contends also that the State violated Maryland pre-trial discovery provisions and, thus, the handgun, magazine, and related photographs should have been excluded at trial as a sanction for the State's discovery violation. Specifically, Jones avers that the State violated Maryland Rule 4-263⁷, which protects against unfair surprise and affords the defense an adequate opportunity to prepare its case. *Williams v. State*, 364 Md. 160, 172,

⁷ The applicable subsections of Rule 4-263 are:

(d) Disclosure by the State's Attorney. Without the necessity of a request, the State's Attorney shall provide the defense:

...

(9) *Evidence for Use at Trial.* The opportunity to inspect, copy, and photograph all . . . photographs, or other tangible things that the State's Attorney intends to use at a hearing or trial;

...

(h) Time for Discovery. Unless the court orders otherwise:

(1) the State's Attorney shall make disclosure pursuant to section (d) of this Rule within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-321(c)

771 A.2d 1082, 1089 (2001).

Jones claims additionally that the trial court abused its discretion by failing to make a determination as to whether the State violated Rule 4-263(d). He relies on *Gunning v. State*, 347 Md. 332, 701 A.2d 374 (1997) and *Nelson v. State*, 315 Md. 625, 53 A.2d 667, (1989), in taking the position that a trial judge must exercise discretion in ruling on any matter that falls within the realm of judicial discretion⁸; if the judge fails to do so, reversible error occurs.

In its brief, the State claims that particulars of the 12 November 2016 arrest, along with pictures of the handgun, were provided in discovery in this case. Thus, no discovery violation occurred. The State asserts further that even if a discovery violation were found, the remedy of excluding evidence should not be granted here because exclusion of evidence is only appropriate in extreme circumstances, which this record does not support.

We decline to grant the windfall sought by Jones. As stated succinctly by Judge Moylan for this court:

The discovery rules are not an obstacle course that will yield a defendant the windfall of exclusion every time the State fails to negotiate one of the hurdles. [Their] salutary purpose is to prevent a defendant from being surprised. [Their] intention is to give a defendant the necessary time to prepare a full and adequate defense.

Jones v. State, 132 Md. App. 657, 678, 753 A.2d 587, 598 (2000).

Defense counsel was placed on pre-trial notice that the handgun and magazine would be offered at trial. The State provided details of the 12 November 2016 arrest in

⁸ In his brief, Jones concedes that the remedy for a violation of Rule 4-263 is “within the sound discretion of the trial judge. . . .” *Williams v. State*, 364 Md. 160, 178 (2001).

discovery and provided counsel with pictures of the handgun recovered from the car. As such, defense counsel had the time and information necessary to prepare a full and adequate defense on this point.

IV. Conclusion.

The question of admissibility of the handgun and magazine was preserved for appeal because to hold otherwise on this record would emphasize the form of the objection rule over substance. The handgun and magazine found pursuant to the 12 November 2016 arrest and search were admitted properly at the trial of the 27 October 2016 incident at Elite. The evidence was related substantially to a contested issue in this case, clear and convincing evidence existed to establish Jones's involvement in the 12 November 2016 arrest and search, and the probative value of the evidence did not outweigh substantially the danger of unfair prejudice. No discovery violation existed because Jones was put on pre-trial notice that the State intended to offer the handgun and magazine into evidence and was, thus, afforded an adequate opportunity to prepare a defense.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**