Circuit Court for Baltimore County
Case No. 03-K-17-000877

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1536

September Term, 2017

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KEVIN BALL

v.

STATE OF MARYLAND

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Meredith,
Reed,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Reed, J.

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Filed: August 1, 2019

A jury in the Circuit Court for Baltimore County convicted Kevin Ball ("Appellant") of second-degree assault following an altercation that occurred with a former girlfriend at her residence. The court sentenced him to a term of imprisonment of ten years, with all five years suspended, to be followed by a three-year period of probation. It is from this conviction for second-degree assault that Appellant files this timely appeal. In doing so, he brings two questions for our review, which we have rephrased:[1]

> I. Did the trial court err in failing to ask potential jurors during *voir dire* about their feelings towards domestic violence?
> II. Did the trial court err in permitting Officer Sholter to testify regarding the medical risks associated with choking without qualifying Officer Sholter as an expert witness?

For the following reasons, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In November 2016, Kevin Ball ("Appellant") and Kya Hicks met through a dating website. About one week after they met, Appellant moved into Ms. Hicks' home. At some point thereafter, Ms. Hicks asked Appellant to leave her home because the relationship was over.

[1] Appellant presented the following questions in his brief:

> 1. Did the trial court err when it failed to ask potential jurors during *voir dire* whether they had strong feelings about domestic violence in this case involving allegations of domestic violence?
>
> 2. Did the trial court err in permitting Officer Sholter to offer expert testimony about potentially life-threatening risks that persist several days after someone is choked without being qualified as an expert witness?

On February 7, 2017, Appellant allegedly entered Ms. Hicks' home and began attacking her. The alleged assault involved Appellant punching Ms. Hicks in the face, accusing her of cheating on him, inserting his fingers in her vagina, and choking her until she blacked out. Ms. Hicks also alleged that Appellant threatened to kill her and attempted to set her on fire with a lighter. After Appellant left her residence, Ms. Hicks called the police.

Following an investigation into the alleged incident, Appellant was charged with first-degree assault, second-degree assault, and attempted fourth-degree sex offense. At trial, a jury acquitted Appellant of first-degree assault and attempted fourth-degree sex offense, but found Appellant guilty of second-degree assault. The trial judge then sentenced Appellant to a prison term of ten years, with all but five years suspended, followed by three years of probation.

## DISCUSSION

### *I. Voir Dire*

Prior to the selection of the jury, Appellant's counsel proposed the following *voir dire* questions (hereinafter "Question 11" and "Question 12"):

> 11. Has any member of this jury panel or a close friend or relative ever been involved in any kind of group, organization, or political activity concerning domestic violence?
> 12. Is there any member of this jury panel who does not feel that he or she can render a fair verdict in this case because it is about "domestic violence?"

After providing a brief synopsis of the parties involved and the location of the alleged incident, the trial court judge asked the venire panel the following:

"The Defendant is charged with first degree assault, second degree assault,

> attempted fourth degree sex offense and malicious destruction of property. Ladies and gentlemen, a Defendant is presumed to be innocent unless and until proven guilty and obviously every case must be decided on the law and the evidence produced in that case. Is there anything about the charges or the information that I've provided to you thus far that would make it difficult for you to listen to the evidence in this case, follow my instructions and render a fair and impartial decision?"

The trial court also asked, "Ladies and gentlemen, are any of you a member of any group, organization or political activity that focuses on domestic violence issues?" Finally, the trial court asked:

> "Ladies and gentlemen, is there anything else, anything at all, anything under the sun, that would impact your ability to listen to the evidence of this case, follow my instructions as you are required to do and render a fair and impartial decision?"

Near the closing of *voir dire*, the following conversation occurred at the bench:

> THE COURT: All right. Was there anything else you wanted me to ask that I –
>
> * * *
>
> APP'T COUNSEL: … I asked a particular question about domestic violence. I know there was something about victims and they said they stood up, did you ask the domestic violence question?
>
> THE COURT: Yeah, I asked them if they had any particular –
>
> APP'T COUNSEL: Problem with it?
>
> THE COURT: -- issues with this particular case, yeah, yeah.
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> APP'T COUNSEL: Yes, okay, thank you, Judge.
>
> THE COURT: Yeah.
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> APP'T COUNSEL: Thank you. No, nothing further.

**A. Parties' Contentions**

Appellant contends that because this case involves allegations of domestic violence, the trial court was required to ask the jury panel about their feelings towards domestic violence when requested by defense counsel. Appellant relies on *State v. Shim*, 418 Md. 37 (2011), in arguing that "domestic violence questions" are designed to identify potential jurors with biases directly related to the alleged crime and is, therefore, a mandatory question.

Appellant notes that even though the charges in the indictment did not use the term "domestic violence" *per se*, it is "irrefutable" that this was a domestic violence case because of the previous romantic relationship between Appellant and Ms. Hicks. Additionally, Appellant cites to *Thompson v. State*, 229 Md. App. 385 (2016), in arguing that a general "catchall" question is insufficient in questioning a jury panel's potential biases because it puts the burden on the potential jurors to assess their impartiality in a case, something which has been rejected by the Court of Appeals.

Finally, Appellant contends that this issue was preserved for appellate review under Rule 4-323 when Appellant's counsel asked whether the trial court had asked the "domestic violence question." Furthermore, Appellant argues that this is not an instance of "invited error" produced by Appellant, but rather the consequence of a misstatement made by the trial court. As such, Appellant believes that the issue was preserved for appellate review, and that the trial court committed an abuse of discretion and reversible error when it failed to ask the domestic violence question as requested by Appellant's counsel.

The State believes that Appellant's *voir dire* claim was waived because Appellant's

counsel did not give the court the opportunity to correct the error Appellant complains about in his brief. In addition to the belief that the trial court properly asked Question 11, the State argues that Appellant's reliance on *Smith v. State*, 218 Md. App. 589 (2014), is misplaced and this Court should find that Appellant invited the error for failing to properly object to the trial court judge's failure to ask Question 12.

Even if Appellant properly preserved the issue for appellate review, the State contends that Question 12 requested by Appellant was improper and not mandatory. The State relies on *Dingle v. State*, 361 Md. 1 (2000), which holds that a trial court should not ask *voir dire* questions that require a venire person to assess whether their status affects their ability to be fair and impartial. As such, the State believes Question 12, as requested by Appellant, was improper.

Finally, the State argues that the trial court properly adhered to the holding in *Pearson v. State*, 437 Md. 350 (2014), because Appellant failed to request that the trial court ask the venire pool about their "strong feelings" towards domestic violence. As such, the State believes that Question 12 was not mandatory. We agree.

**B. Standard of Review**

"*Voir dire* is 'the process by which prospective jurors are examined to determine whether cause for disqualification exists[,]'" and "'is critical to assure that the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantees to a fair and impartial jury will be honored.'" *Brice v. State*, 225 Md. App. 666, 676 (2015) (citations omitted), *cert. denied*, 447 Md. 298 (2016). "An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir*

*dire* question." *Pearson v. State*, 437 Md. 350, 356 (2014) (citing *Washington v. State*, 425 Md. 306, 314 (2012)).

A court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)). Stated another way, "an abuse of discretion occurs when a decision is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Consol. Waste Indus., Inc. v. Standard Equipment Co.*, 421 Md. 210, 219 (2011) (quoting *King v. State*, 407 Md. 682, 711 (2009)).

**C. Analysis**

A defendant has a right to an impartial jury. U.S. Const. amend. VI; Md. Decl. of Rts. Art. 21. *Voir dire* is critical to implementing the right to an impartial jury. *Washington*, 425 Md. at 312 (citation omitted).

Maryland employs "limited *voir dire*." *Id.* at 313 (citation omitted). That is, in Maryland, the sole purpose of *voir dire* "is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]" *Id.* at 312 (citations omitted). Unlike in many other jurisdictions, facilitating "the intelligent exercise of peremptory challenges" is not a purpose of *voir dire* in Maryland. *Id*. Thus, a trial court need not ask a *voir dire* question that is "not directed at a specific [cause] for disqualification [or is] merely 'fishing' for information to assist in the exercise of peremptory challenges[.]" *Id.* at 315 (citation omitted).

On request, a trial court must ask a *voir dire* question if and only if the *voir dire* question is "reasonably likely to reveal [specific] cause for disqualification[.]" *Moore v. State*, 412 Md. 635, 663 (2010) (citation omitted). There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a "collateral matter [is] reasonably liable to have undue influence over" a prospective juror. *Washington*, 425 Md. at 313 (citation omitted). The latter category is comprised of "biases directly related to the crime, the witnesses, or the defendant[.]" *Id.*

Appellant relies on Maryland case law in arguing that the trial court was required to ask prospective jurors about their feelings towards domestic violence when requested to do so by Appellant's counsel. Appellant cites to *State v. Shim*, 418 Md. 37 (2011), in asserting that Question 12 was a mandatory question meant to determine if any potential jurors lacked impartiality due to the presence of domestic violence issues in this case. In *Shim*, the defendant requested that the venire be asked about their feelings towards the crime with which defendant was charged; however, the trial court declined to do so. On appeal, this Court and the Court of Appeals disagreed with the trial court's decision to refrain from asking the requested question. The Court of Appeals, noting that the question requested by defendant was aimed at uncovering potential biases in prospective jurors, held that, on request, a trial court must ask during *voir dire* whether any prospective juror has "strong feelings" about the crime with which the defendant was charged. 418 Md. at 54-55.

The *Shim* decision was later abrogated by the Court of Appeals in *Pearson v. State*, 437 Md. 350 (2014). In *Pearson*, the Court clarified that, if requested to do so by counsel, a trial court must ask prospective jurors about their potential strong feelings towards the

crime charged so long as the responsibility to determine a prospective juror's bias does not rest with the prospective juror.

The State argues that *Shim* and *Pearson* stand for the notion that a trial court is mandated to ask during *voir dire* whether any prospective juror has strong feelings towards the charges against the defendant, not general elements of the case. However, this Court stated in *Thompson v. State* that a requested "strong feelings" question about a *crucial element* of a charged crime is mandatory and failure by a trial court to ask such a question is reversible error. 229 Md. App. 385, 411 (2016).

Before determining if the question posed by Appellant is a mandatory question, however, we must first determine if the potential error committed by the trial court is subject to appellate review. Appellee asserts that, regardless of whether Question 12 is a mandatory question, Appellant is prohibited from raising this issue on appeal because Appellant "invited the error." Appellee relies on *State v. Rich*, 415 Md. 567 (2010), in arguing that Appellant is seeking to obtain a benefit from an error invited by Appellant himself, which is barred by the invited error doctrine. However, *Rich* involved the appellant appealing the use of a jury instruction that was proposed by the appellant. As this Court stated in *Smith v. State*, the invited error doctrine makes sense where an *affirmative act* of an appellant produced the error the appellant raises on appeal. 218 Md. App. at 702 (2014) (emphasis in original). However, simply remaining silent in the face of the trial court's misstatement, as is the case here, is not an affirmative act. The failure to ask potential jurors about their feelings towards domestic violence rests with the trial court, not Appellant. Therefore, this Court holds that the facts in this case are distinguishable from *Rich* and the

invited error doctrine is inapplicable.

Aside from the invited error doctrine, there is still a question of whether Appellant preserved this issue for appeal. Simply put, Appellant failed to object to the trial court's failure to ask Question 12. In *Smith*, where the Court held that the invited error doctrine did not apply, the Court discussed the numerous objections made by defendant's counsel during *voir dire*. Specifically, the Court stated that:

> The broader principle underlying our preservation decisions focuses on **whether party objecting on appeal gave the circuit court a proper opportunity to avoid or resolve errors** during the trial, not on hyper-technicalities.

218 Md. App. at 701–02 (emphasis added). In this case, however, Appellant's counsel made no objections during *voir dire* that referred specifically to Question 12; instead, Appellant relied on the trial court's statement that the jurors had been asked "if they had any particular issues with this particular case," which was an apparent reference to the court's inquiry "Is there anything about the charges . . . that would make it difficult for you to listen to the evidence in this case, follow my instructions and render a fair and impartial decision?" As such, Appellant failed to give the trial court a "proper opportunity" to avoid or resolve the errors associated with Question 12.

While Appellant requested the trial court ask a question regarding potential jurors' feelings towards domestic violence, Appellant failed to object when the trial court failed to do so. Therefore, the issue of whether Question 12 was a mandatory question that the trial court was required to ask during *voir dire* was not properly preserved and is not subject to appellate review by this Court.

## *II. Testimony of Officer Sholter*

During the trial, Officer Barbara Sholter testified as a prosecution witness. Officer Sholter has been a Baltimore County police officer for more than 20 years and is known as "the domestic violence officer." Her duties include following up with victims "in a domestic violence situation[,] . . . advocat[ing] for services, counseling, follow-ups, any assistance with Protective Orders and if there's any case enhancement that needs to be completed, written statements, things like that[.]" Four days after the alleged incident, Officer Sholter visited Ms. Hicks' home and observed bruising and swelling on Ms. Hicks' body. After being told by Ms. Hicks' that Ms. Hicks had been choked, Officer Sholter advice Ms. Hicks to seek immediate medical attention.

When Officer Sholter testified, she was asked by the prosecution why she had advised Ms. Hicks to seek medical attention. Officer Sholter explained, over defense counsel's objection, that she advises everyone who has been choked to seek medical attention because "[s]welling can continue to occur and it could still be a life-threatening condition, even several days after that incident occurs."

### A. Parties' Contentions

Appellant contends that because Officer Sholter was neither offered by prosecution nor qualified by the trial court as an expert, Officer Sholter's testimony about the health risks that persist several days after someone is choked was inadmissible. Appellant relies on case law, including *Ragland v. State*, 385 Md. 706, 725 (2005), in arguing that Officer Sholter's testimony must be considered expert testimony because it was based on her "specialized knowledge, skill, experience, training, or education." Because Officer

Sholter's experience as a domestic violence officer influenced the testimony in question, Appellant believes that the trial court abused its discretion in allowing Officer Sholter to testify as a lay witness regarding information that was the subject of expert testimony. Appellant concludes by arguing that such error by the trial court was not harmless beyond a reasonable doubt.

The State contends that Officer Sholter's testimony was properly allowed by the trial court. The State argues that Appellant did not properly preserve the State's question for appellate review in accordance with Maryland Rules 5-701 and 5-702. Instead, the State claims that Appellant should have but did not move to strike Officer Sholter's answer to the State's question to properly preserve the issue for appeal. As such, the State believes that there is no ruling properly before this Court and that this Court should decline to consider Appellant's complaint.

The State also argues, *in arguendo*, that Appellant is not entitled to any relief in regards to Officer Sholter's testimony because it is admissible as lay opinion testimony under Rule 5-701. In doing so, the State relies on *In re Ondrel M.*, 173 Md. App. 223 (2007), in disputing Appellant's claim that Officer Sholter's testimony relied on specialized knowledge. Instead, the State believes that Officer Sholter's answer to the State's question was lay opinion testimony because it was based on Officer Sholter's "first-hand knowledge" from her experiences as a "domestic violence officer." The State places emphasis on the fact that Officer Sholter's answer was not conclusory and that the jury was not given and expert witness instruction.

Finally, the State contends that any error committed by the trial court in allowing

Officer Sholter's testimony was harmless beyond reasonable doubt. Though any error committed by the trial court would not be considered harmless beyond a reasonable doubt, we agree that the trial court properly identified Officer Sholter's testimony as lay opinion.

**B. Standard of Review**

The determination and admissibility of expert testimony is committed to the sound discretion of the trial court. *Wilson v. State*, 370 Md. 191, 200 (2002); *Deese v. State*, 367 Md. 293, 302 (2001). The court's action in admitting or excluding such testimony seldom constitutes ground for reversal. *Id.* at 302–03; *Oken v. State*, 327 Md. 628, 659 (1992); *Diaz v. State*, 129 Md. App. 51, 75 (1999), *cert. denied*, 357 Md. 482 (2000); *Vandegrift v. State*, 82 Md. App. 617, 634, *cert. denied*, 320 Md. 801 (1990).

Despite the broad discretion vested in a trial court, however, the "'decision to admit or reject [expert testimony] is reviewable on appeal and may be reversed if it is founded on an error of law or if the trial court clearly abused its discretion.'" *White v. State*, 142 Md.App. 535, 544 (2002) (quoting *Cook v. State*, 84 Md. App. 122, 138 (1990), *cert. denied*, 321 Md. 502 (1991)) (alteration added in *White*).

**C. Analysis**

Appellant argues that when Officer Sholter testified regarding the medical complications associated with being choked, she expressed expert opinions. Appellant contends that Officer Sholter's testimony was inadmissible because the State had not identified Officer Sholter as an expert pre-trial and had not qualified her as an expert at trial pursuant to Md. Rule 5-702.

The State first contends that any issues with Officer Sholter's testimony were not properly preserved for appellate review. The State argues that Appellant did not properly preserve the State's question for appellate review in accordance with Maryland Rules 5-701 and 5-702. The State claims that Appellant should have, but did not, move to strike Officer Sholter's answer to the State's question to properly preserve the issue for appeal.

As the Court of Appeals stated in *Baltimore v. O.R. Co. v. Plews*, 262 Md. 442, 470 (1971), a party is deemed to have consented to the introduction of the testimony if it "neither objected at the time the question[s were] asked nor did it move to strike immediately after the answer[s]." Here, Appellant failed not only to object to the questioning of Officer Sholter, but also failed to file a motion to strike Officer Sholter's responses at the conclusion of her testimony. Because Appellant failed to do so, Appellant is deemed to have consented to Officer Sholter's testimony. As such, this Court finds that any issues with Officer Sholter's testimony were not properly preserved for appellate review.

Even had Appellant properly preserved any issues with Officer Sholter's testimony, no relief would be available to Appellant. Under Maryland Rule 4-263(b), upon request of the defendant, the State must disclose to the defendant the name and address of each person the State intends to call as a witness at trial to establish its case in chief or to rebut alibi. Also, upon request, Rule 4-263(b)(4) requires the State to produce and permit a defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State and furnish the defendant with the substance of any oral report and conclusion. The purpose of this Rule is to assist the defendant in preparing his

or her defense, and to protect the defendant from surprise. *Hutchins v. State,* 339 Md. 466, 473 (1995).

In this instance, this Court must determine whether Officer Sholter's testimony was that of a lay person or of an expert witness. Maryland Rule 5–701 governs the admissibility of lay opinion. It states:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's or the determination of a fact in issue.

Maryland Rule 5–702 governs the admissibility of expert testimony. It states:

> 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.

As such, expert opinion testimony is testimony that is based on specialized knowledge, skill, experience, training, or education. Expert opinions need not be confined to matters actually perceived by the witness. Lay opinion testimony, on the other hand, is testimony that is rationally based on the perception of the witness.

However, Maryland has recognized at least one class of opinions that potentially falls within both lay opinion and expert testimony. As stated by the Court of Appeals in *Ragland v. State*:

> A witness who has personally observed a given event may nonetheless have developed opinions about it that are based on that witness's specialized knowledge, skill, experience, training, or education. The question then

> becomes whether the fact of personal observation will permit admission of the opinion by a lay witness under Rule 5-701, or whether the "expert" basis of the opinion will require compliance with Rule 5-702 and admission as expert testimony.

385 Md. 706, 718 (2005). The *Ragland* court specifically noted the predicament presented when calling police officers to testify, stating:

> Maryland courts have recognized that the specialized training, experience, and professional acumen of law enforcement officials often justify permitting a police officer to offer testimony in the form of lay opinion. To restrict such testimony to underlying factual observations would often deprive the trier of fact of the necessary benefit of the percipient mind's prior experiences. In those circumstances, these prior experiences would be a *sine qua non* to a full understanding of the underlying factual data.

*Id.* at 719-20 (quoting *Robinson v. State*, 348 Md. 104, 120 (1997)). In attempting to solve this quandary, the Court of Appeals placed great emphasis on *People v. Stewart*, 55 P.3d 107 (Colo. 2002). There, the Colorado court held that "where an officer's testimony is 'not only based on her perceptions and observations of a crime scene but also on her specialized training or education,'" she must be properly qualified as an expert before offering testimony. *Ragland*, 385 Md. at 725 (quoting *Stewart*, 55 P.3d at 124). In adopting a similar narrow view, the *Ragland* court ultimately held that "Rules 7-501 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training of education." *Id.* at 725.

With that said, not all testimony presented by a police officer is deemed expert testimony simply because it is based on knowledge accumulated while serving as an officer. In 2009, this Court reviewed *In re Ondrel M.*, 173 Md. App. 223 (2007), which involved testimony of a police officer regarding the odor of marijuana. This Court held that

an expert was not required to identify the odor of marijuana because a witness need only have encountered the smoking of marijuana in daily life to be able to recognize the odor. As such, the officer's testimony was based not on specialized knowledge, but rather "rationally based on the perception of the witness." *In re Ondrel M.*, 173 Md. App at 243. Furthermore, it is not the status of the witness that is determinative; rather, it is the nature of the testimony. *Id.* at 244.

Appellant argues that Officer Sholter's testimony should be deemed inadmissible under *Ragland* because she was not qualified as an expert but testified based on "specialized knowledge, skill, experience, training or education." Appellee, on the other hand, asserts that Officer Sholter's testimony was not based on specialized knowledge but rather on her first-hand knowledge gained during her time as the domestic violence officer. As such, Appellee contends that *In re Ondrel M.* is applicable and Officer Sholter's testimony was proper.

Here, this Court must determine if Officer Sholter's testimony was based on "specialized knowledge" gained during her time as the domestic violence officer or if it was "rationally based" on her "perception" of the victim's injuries. Based on the facts, Officer Sholter's testimony required no specialized knowledge. Officer Sholter provided no diagnosis of the victim regarding her injuries. She simply stated that complications may result days after being choked, something that any lay person could assume following a traumatic experience. Additionally, unlike in *Ragland*, Officer Sholter's testimony was not conclusory – Officer Sholter did not testify, as a matter of fact, that the victim was strangled by Appellant. As such, Officer Sholter's testimony was properly deemed lay opinion

testimony under Rule 5-701 by the trial court.

Accordingly, the judgment of the Circuit Court for Baltimore County is affirmed.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**