Circuit Court for Montgomery County
Case No. 118882

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1739

September Term, 2016

TREVLYN HINTON
v.

STATE OF MARYLAND

Leahy,
Reed,
Shaw Geter,

JJ.

Opinion by Reed, J.

Filed: August 17, 2018

After a jury trial in the Circuit Court for Montgomery County, Trevlyn Hinton, Appellant, was found guilty of attempted voluntary manslaughter, two counts of first-degree assault, two counts of use of a firearm in a crime of violence, one count of false imprisonment, and one count of illegal possession of a firearm after a disqualifying conviction. He was acquitted of first- and second-degree attempted murder. Appellant was sentenced to a total of 59 years' imprisonment, with all but 35 years suspended and five years' supervised probation.[1] He filed this timely appeal and presents two questions for our review:

1. Did the trial court err by limiting defense counsel's cross-examination of Corporal Malarkey?

2. Did the trial court err by refusing to disclose internal investigation division records pertaining to Corporal Malarkey?

For the reasons stated below, we answer these questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 25, 2010, while on patrol in the Takoma Park area, Corporal Malarkey saw Appellant behind the wheel of a Camaro. Malarkey testified that he had never seen Appellant behind the wheel before and that Appellant did not fit the demographic of one to drive a "redneck car." Believing that appellant may have been

[1] The court imposed the following sentence: ten years for attempted voluntary manslaughter; consecutive to 12 years (suspending all but eight) for use of a handgun in a crime of violence, 25 years (suspending all but ten) for first-degree assault; 12 years (suspending all but seven) for use of a handgun in the commission of a crime of violence; concurrent sentences of 25 years (suspending all but eight) for false imprisonment and ten years (suspending all but five) for illegal possession of a firearm. The second count of first-degree assault merged.

involved in a felony of a stolen vehicle, Malarkey chased appellant for approximately one mile. Appellant drove to Silver Spring Elementary School, jumped out of his moving vehicle, and ran into the woods. Malarkey followed Appellant down a flight of concrete steps. Appellant then turned and reached for his waistband. Malarkey screamed approximately three times that he was going to shoot. Appellant turned towards Malarkey with a handgun in his right hand, pointed it towards him, turned around, and proceeded to run. Malarkey did not shoot at Appellant because he believed appellant discarded the handgun. Malarkey continued to chase Appellant into the driveway of a residential apartment complex. Malarkey then saw Appellant bent over "racking the slide of the handgun" in his hand preparing to shoot. Appellant lifted his gun at Malarkey and Malarkey fired three shots, missing Appellant. Appellant then grabbed an elderly man[2] who was nearby and pointed his gun at the man. Malarkey jumped behind a car and appellant returned fire**.** Malarkey ordered appellant to release the man. A bystander also advised appellant to release the hostage and drop the gun. Appellant dropped the gun and a backup officer arrived. Malarkey handcuffed appellant. On cross-examination, Malarkey was impeached as to his use of force because he could not remember[3] who fired first or pointed the gun first.

The hostage, Gitaneh Bitew-Fenta, testified that Appellant went up to the side door of his apartment building, directed him to open it up quickly, and pointed a gun at his

[2] The man's name is Gitaneh Bitew-Fenta.

[3] Malarkey testified that after the incident he began seeing a police psychiatrist to question why he couldn't remember certain things.

stomach. He testified that he then heard gunshots and officers ordering Appellant to drop the gun. Bitew-Fenta did not know of anyone else in the area until he heard gunshots and the police orders. Another witness, William Wallace, testified that while watching television at home that night, he witnessed Appellant and Bitew-Fenta squatting against the door of the apartment building. He observed Malarkey with his gun raised ordering Appellant to come out with his hands up and to the release the handgun. Wallace did not see Appellant point his gun or shoot at anyone. Malarkey's Statement of Probable Clause indicated that Appellant fired first, but after Malarkey was questioned,[4] he revealed that he fired first but that he also could not remember.

Appellant testified that he had had previous negative interactions with Malarkey, dating back to 2009 when he was pulled over and surrounded by several police vehicles. The officers had their weapons drawn towards Appellant's vehicle with his son and nephew in the backseat. In 2010, Appellant recalls an encounter with Malarkey, which occurred while he was standing around with friends. Malarkey and other officers approached his group, drew their weapons, and ordered everyone to the ground. A K-9 unit arrived and searched the group**.** Appellant was brought to the police station that night and agreed to be an informant for Malarkey. After Appellant ignored some of Malarkey's phone calls, their relationship further diminished.

[4] Malarkey was questioned by Detective Paula Hamil of the Montgomery County Police Department.

On November 25, 2010, Appellant saw Malarkey at an intersection and he mouthed the words "I've got your ass now." Appellant fled in fear of Malarkey because he heard from his cousin and others that Malarkey could get physical with arrestees.

The 2006 Incident

On January 8, 2006, while off duty, Malarkey pursued a man named John Courtney, after a Sergeant Daniel Frishkorn alerted him about a fleeing suspect. Upon seeing Courtney, Malarkey told him "don't even think about running." Courtney fled on foot but was apprehended by Officer Derek Fields. Fields handcuffed Courtney while he was lying face down on the ground. Officers present indicated that Courtney did not resist or struggle while being arrested. Once Malarkey appeared on the scene, he "came down hard" on Courtney's back with both knees and finished handcuffing him. Malarkey then said some harsh words to Courtney, grabbed him off the ground by the handcuffs, and slammed him into the car's trunk. Courtney suffered three fractured ribs and a collapsed lung as a result.

Three officers on the scene reported Malarkey's behavior and an internal investigation was conducted. Malarkey was charged with second-degree assault. He claimed that he had a bad back injury and was on muscle relaxer medication which affected the way he controlled his body. The State did not find officer Malarkey's testimony to be credible. Malarkey's case resulted in a mistrial. He filed a motion to dismiss, appealed to this court, and after remand, the charge was *nolle prossed*.

The Circuit Court for Montgomery County denied Appellant's request to question Malarkey on this 2006 incident involving Courtney.

DISCUSSION

I. LIMITATION ON THE SCOPE OF CROSS-EXAMINATION

A. Parties' Contentions

Appellant argues that the trial court committed reversible error by preventing defense counsel from cross-examining Corporal Malarkey about a prior assault charge concerning a defenseless arrestee in January of 2006. Appellant contends that the 2006 incident was directly relevant to his claim of self-defense, thus, it should be admitted as substantive evidence. Appellant also asserts that cross-examination should have been permitted to impeach Malarkey under Maryland Rule 5-608(b) because the 2006 incident provides probative evidence of the witness's credibility. Lastly, Appellant asserts that the fact that whether Malarkey would be subject to sanctions for employing excessive force against Appellant gives Malarkey a motive to testify falsely. Therefore, the trial court committed reversible error by preventing defense counsel from cross-examining Malarkey to present Malarkey's possible bias to the jury of a motive to lie about his use of force.

In response, the State argues that the trial court properly exercised its discretion in limiting cross-examination of Malarkey regarding the 2006 incident because Appellant failed to establish an evidentiary foundation as to the four elements of self-defense. When defense counsel tried to cross-examine Malarkey about the 2006 incident, Appellant had not established his self-defense claim. Therefore, the 2006 incident was irrelevant. In addition, the State argues that Appellant's claim of error limiting cross-examination of Malarkey is not preserved for review because Appellant failed to recall Malarkey after

Appellant generated a factual foundation of self-defense. With regard to Appellant's contention concerning the impeachment under Maryland Rule 5-608(b), the State responds that the trial court properly exercised its discretion to limit cross-examination of Malarkey to impeach his credibility for "four reasons: (1) it was not probative of Corporal Malarkey's credibility; (2) Hinton had not established a sufficient factual basis that Corporal Malarkey lied; (3) Rule 5-608(b) specifically precludes admission of the extrinsic evidence Hinton sought to admit; and (4) to the extent that the alleged misconduct had any probative value, it was far outweighed by the possibility of undue prejudice."

B. Standard of Review

An appellate court should review the trial court's restrictions on cross-examination under an abuse of discretion standard. *Peterson v. State*, 444 Md. 105, 124 (2015). In *Peterson*, the Court of Appeals explained that,

> [i]n controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive, probative, harassing, confusing, or the like. The trial court may also restrict cross-examination … based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion.

Id.

If the error alleged by an appellant in a criminal case has been established, the reviewing court may look at whether such error is harmless, or, in the alternative, require reversal:

> Unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict … Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976).

C. Analysis

Appellant requests that this court find that the circuit court erred by limiting defense counsel's cross-examination questions about Corporal Malarkey's prior misconduct from 2006, that Corporal Malarkey's prior misconduct was directly relevant to Appellant's self-defense claim, that Corporal Malarkey's prior misconduct was admissible impeachment evidence, and that Malarkey's misconduct in this case could have led to sanctions and therefore could have proven his bias. We address each issue below.

1. Prior Misconduct

Ordinarily, under Maryland Rule 5-404, "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." However, under this rule, such evidence may be admitted to prove motive, intent, knowledge, or a common scheme or plan. *Id.*

Using *Thomas v. State*, 301 Md. 294, 306-07 (1994), Appellant contends that when self-defense is properly raised, "the violent character of the victim may be introduced to corroborate evidence that the victim was the initial aggressor. It is not necessary to prove that the defendant had knowledge of the victim's reputation." However, *Thomas* also

requires that the proponent of a self-defense claim first establish an evidentiary foundation proving he acted in self-defense in order to use such character evidence. *Id.*

Appellant argues that had the circuit court not limited his cross examination excluding questions concerning the 2006 incident, Malarkey's testimony would have revealed Malarkey as having the "character of initial aggressor" and would have therefore corroborated Appellant's claim of self-defense. Appellant asserts that he established a reasonable factual basis that Malarkey engaged in such misconduct by presenting the referral of the 2006 incident to the State's Attorney's Office for prosecution, the indictment of Malarkey, the elaborate factual background in this Court's reported opinion in *Malarkey v. State*, 188 Md. App. at 131-143 (2009), and the availability of several police witnesses to testify against Malarkey.

In this case, Appellant failed to establish a claim of self-defense before trying to use character evidence against Malarkey. A self-defense claim requires that:

> (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
> (2) The accused must have in fact believed himself in this danger;
> (3) The accused claiming the right of self defense must not have been the aggressor or provoked the conflict; and
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

State v. Faulkner, 301 Md. 482, 485-86 (1984) (internal citations omitted).

At the time of the pre-trial motions in *limine* hearing, the facts presented to the court were that Appellant, who at the time had an outstanding warrant for his arrest on drug

possession charges, fled from Malarkey, was in possession of a handgun, and pointed the handgun at Malarkey and at a bystander that he ultimately held hostage. Combining all of these facts, the circuit court stated that whether Malarkey fired his gun first was of no importance considering the situation in which he was placed by Appellant. Appellant's argument that "there was a clear evidentiary foundation that [he] acted in self-defense" and that the jury was instructed[5] on the matter is insufficient to counter the fact that Appellant had not initially substantiated his claim.

Appellant is correct that this court has held that "a homicide defendant is entitled to introduce evidence of a victim's specific acts of violence to corroborate a claim of self-defense, i.e., that the victim was the initial aggressor" or had violent proclivities. Under *Williamson v. State*, 25 Md.App. 338, 343-44 (1975) a "defendant asserting self-defense may offer evidence of specific acts of which he was aware at the time of the killing…[H]e may show his knowledge of specific instances of violence on the part of the deceased. Previous acts of violence by the deceased, especially if committed recently, known to the defendant, might have an even stronger influence on his mind than would be produced by knowledge of the reputation of the deceased for violence." Typically, the character of the homicide victim is irrelevant unless the defendant asserts a self-defense claim. *Thomas v. State*, 301 Md. 294, 317 (1984). However, the determination for what is and is not relevant

[5] "A trial court must give a requested jury instruction where '(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Carroll v. State*, 428 Md. 679, 689 (2012) (internal citations omitted).

rests with the trial court and such determinations will not be reserved absent a showing of an abuse of discretion. *Thomas v. State*, 301 Md. 294, 317 (1984).

This court agrees with the circuit court's decision to limit the scope of Appellant's cross-examination because Appellant failed to first present evidence of self-defense before attempting to introduce evidence of Malarkey's character and thus, Appellant's questions were irrelevant. Additionally, the circuit court's decision to limit Appellant's cross-examination was proper because Appellant could not establish that his line of questioning would fit within the confines of the character exceptions. The single, unrelated 2006 incident, could not establish that Malarkey had a common scheme or plan to use force when apprehending an arrestee. Nor could Appellant establish that the 2006 incident provided Malarkey with knowledge of how to engage in a pattern of misconduct. One prior incident cannot be used to prove a patterned practice.

Ultimately, the circuit court properly ruled that Malarkey's 2006 incident was not relevant because the facts between the two cases differed. Although defendants in both cases fled from Malarkey, the defendant in the 2006 case was not armed, as Appellant was here. Appellant's correlation between the two incidents is tenuous. Consequently, cross-examination was properly limited.

2. Impeachment

Maryland Rule 5-608(b), provides an additional exception to Rule 5-404 by permitting a witness to be cross-examined about prior acts that did not result in a criminal

conviction, and are probative of untruthfulness. *Pantazes v. State*, 376 Md. 661, 682 (2003). Maryland Rule 5-608(b) states:

> The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

Nevertheless, evidence admitted under 5-608(b) may be excluded under Maryland Rule 5-403 "if its probative value is substantially outweighed by the danger or unfair prejudice, confusion of the issues, or misleading the jury." *Pantazes v. State,* 376 Md. 661, 683 (2003) (internal citations omitted).

Appellant argues that the circuit court should have permitted him to cross-examine Malarkey about the 2006 incident for the purposes of impeachment. Appellant supports his argument by underlining the fact that in the 2006 litigation, the police department and "the State did not find Malarkey's version of events to be credible and at trial argued that it was 'a bunch of malarkey.'" Appellant alluded to a Washington Post article on the 2006 incident that stated that it was "highly unusual for police officers to report one of their own on allegations of excessive force." Appellant contends that the public notoriety surrounding the 2006 incident and possible resulting employment consequences presented Malarkey with sufficient motive to lie about the force he used against Appellant. As such, the statements about Malarkey's potentially incredulous testimony should have been allowed

to establish that Malarkey had a tendency to use excessive force and lie about it during investigations.

The circuit court did not abuse its discretion in deciding to limit Appellant's cross examination as it pertained to Malarkey's impeachment. The State of Maryland, the police department, and appellant's inability to believe Malarkey's testimony does not create an argument for impeachment. Impeachment concerns "[c]rimes that 'bear upon a witness's credibility' [and] tend[ ] to show that the offender is unworthy of belief." *Jones v. State*, 217 Md. App. 676, 706 (2014) (internal citations omitted). "Acts of violence ... generally have little or no direct bearing on honesty or veracity." *Id*. at 707. Malarkey's 2006 incident did not involve a crime of unbelief or dishonesty, but of excessive force. Appellant therefore could not use his, or anyone else's, disbelief of Malarkey's 2006 testimony to impose a crime of dishonesty that Malarkey was not charged with.

As found by the circuit court, although Malarkey's testimony in the 2006 case was contradictory to the other officer-witnesses testifying against him, he had explanations for his conduct. The circuit court also aimed to prevent a mini-trial of Malarkey for an event that occurred years prior, ended in a hung jury, and ultimately in an order of *nolle prosequi*. Furthermore, the circuit court's refusal to allow Appellant's counsel to go on a fishing expedition, thereby "poison[ing] the jury" with facts from an earlier, unrelated event was proper. Under Maryland Rule 5-403 Appellant's attempt to impeach Malarkey had the ability to confuse or mislead the jury and therefore, the probative value of the evidence was outweighed by the danger of unfair prejudice to the State.

3. Sanctions and Bias

Appellant argues that Malarkey had ample motive to lie in the case *sub judice* because the 2006 incident resulted in his Internal Affairs Investigation with the police department, job sanctions, news reports about the incident, a criminal trial, an appeal, and a reported decision by this Court. Appellant argues that if Malarkey believed that he would be subject to indictment or sanctions, Malarkey would falsely testify.

Bias and motive are relevant subjects for impeachment. *Pantazes v. State*, 376 Md. 661, 692 (2002) (internal citations omitted). A trial court has "wide latitude" to impose only reasonable limits on a witness' bias or motive to testify favorably for the State to prevent, prejudice, harassment, confusion of the issues or a repetitive interrogation with only marginal relevance. *Owens v. State*, 161 Md.App. 91, 110 (2005). The circuit court's actions in limiting Appellant's cross-examination to exclude information about Malarkey's potential for bias was proper to avoid confusing the trier of fact about the issues. Again, Appellant seeks to insert testimony from a 2006 event that is irrelevant to the facts at issue.

If, *assuming arguendo*, the circuit court committed any error in excluding testimony that revealed Malarkey's bias, it was harmless. In *Dorsey v. State*, 276 Md. 638, 569 (1976), the Court of Appeals noted that in order to find that a lower court's error was harmless the appellate court had to "be satisfied that there [was] no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." Testimony that revealed Malarkey was bias would not have influenced the jury in this case. Appellant's actions did not align with

that of a person acting in self-defense. If the circuit court committed any error in excluding testimony that revealed Malarkey's bias, it was harmless.

The 2006 charges against Malarkey were *nolle prossed* by the State and Appellant has not provided support for his assertion that Malarkey would face repercussions from the police department as a result of this case. Appellant cannot support his claim that Malarkey had a reason to lie.

4. Records

Appellant contends that the circuit court committed reversible error when it refused to disclose Malarkey's Internal Investigation Division records regarding the 2006 incident. This court disagrees. Internal Investigation Division files are afforded confidential status under MD. CODE ANN., STATE GOV'T. § 10-616. This status does not grant these records complete insulation from discovery, however, the need to access these confidential records must be demonstrated by a need to inspect or a showing that the records will lead to the discovery of admissible evidence. *Fields v. State*, 432 Md. 650, 666-67 (2013). Appellant has not proven so here. As previously discussed, Appellant cannot use the 2006 incident to substantiate his claims because the incident was irrelevant to the present case, could not be used to impeach Malarkey, and testimony regarding the incident would have been unfairly

prejudicial. Consequently, the circuit court did not err when it excluded Malarkey's Internal Investigation Division records from discovery.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.