UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0475

September Term, 2016

KEVIN MATTHEWS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 27, 2016

*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.

In the Circuit Court for Baltimore City, Kevin Matthews, the appellant, was charged with possession of a regulated firearm after having been convicted of a disqualifying crime; wearing, carrying, or transporting a handgun; and possession of cocaine. Before trial, the State *nol prossed* the cocaine charge. A jury found Matthews guilty of the felon in possession offense and not guilty of the handgun offense. The court sentenced Matthews to the mandatory minimum of five years of active incarceration without the possibility of parole.

On appeal, Matthews raises three questions, which we have reordered and rephrased:

I. Did the trial court abuse its discretion by admitting certain surveillance evidence?

II. Was the evidence legally sufficient to sustain the conviction?

III. Did the trial court impermissibly restrict defense counsel's closing argument?

We shall affirm the judgment.

FACTS AND PROCEEDINGS

At 1:10 p.m. on July 21, 2015, several members of the Baltimore City Police Department, including Detective Courtney Wright, executed a search and seizure warrant at 2611 Spelman Road, Apartment B1, in Baltimore. Upon entering the two-bedroom apartment, they found Matthews's minor son in the living room. In one of the bedrooms, they found Matthews and his girlfriend asleep in bed. The other bedroom was unoccupied.

Matthews was naked, so the police told him to get dressed. There were piles of men's clothing in the bedroom. He picked through them and selected items to put on. He retrieved a pair of tennis shoes from the bedroom closet and put them on.

The police found a 9 millimeter semiautomatic Luger handgun under the mattress on the side of the bed Matthews had been sleeping in when they entered the bedroom. The handgun, a regulated firearm under Maryland law, was loaded and operable, and the serial number was obliterated. An expert crime technician testified that fingerprints could not be recovered from the handgun.

The parties stipulated that Matthews was "prohibited from possession of a regulated firearm because of a previous conviction that prohibit[ed] his possession of a regulated firearm."

We shall include additional facts as relevant to our discussion of the issues.

DISCUSSION

I. <u>Evidence of Pre-Raid Surveillance</u>

Detective Wright was called as a State's witness. On direct examination, he recounted the facts we have recited above. On cross examination, the following exchange took place:

[DEFENSE COUNSEL]: Detective, to your knowledge, were you presenting a lease in my client's name regarding the property at 2611 Spelman Road, Apt. B1?

DET. WRIGHT: You're asking me if there is a lease in his name?

[DEFENSE COUNSEL]: I'm asking you if you're presenting one?

DET. WRIGHT: No.

[DEFENSE COUNSEL]: How about a deed?

DET. WRIGHT: No.

[DEFENSE COUNSEL]: Detective, you testified to clothes in the bedroom that um, my client and I believe [his girlfriend] were found in. Other than the clothes that you saw him put on, did you see him put on any other clothes in that room?

DET. WRIGHT: No, just the outfit that he went to jail in.

* * *

[DEFENSE COUNSEL]: Um detective, I am approaching you with State's Exhibit No. 6 and you identified this earlier as the picture of the mattress in the bedroom, correct?

DET. WRIGHT: Correct.

[DEFENSE COUNSEL]: And at least the two walls that we can see other than potentially maybe a poster, there are [sic] nothing on those walls, correct?

DET. WRIGHT: That's correct.

[DEFENSE COUNSEL]: Detective, will you be presenting a picture of the toothbrush that would be used by a resident of that house in your case today?

DET. WRIGHT: No.

[DEFENSE COUNSEL]: How about an alarm clock?

DET. WRIGHT: No.

* * *

[DEFENSE COUNSEL]: So you never recovered some keys to 2611 Spelman Road, Apt. B1 from my client?

DET. WRIGHT: I don't recall that.

On redirect, the prosecutor asked:

> Okay. You were asked some questions on cross about a lease or a deed. Have you ever seen the Defendant at 2611 Spelman Road, Apt. B1 before you executed the search and seizure warrant?

Defense counsel objected and argued at the bench that the question was improper because it sought to elicit irrelevant evidence. The court overruled the objection, telling defense counsel: "Well, you put at issue whether [Detective Wright] knew this was [Matthews's] domicile."

The examination resumed:

[STATE]: Detective, I'll repeat my question. Have you ever seen the Defendant at 2611 Spelman Road, Apt. B1 prior to July 21st when you executed the search and seizure warrant?

DET. WRIGHT: Yes. Um before the actual warrant was served, before it was even signed, there's observations that I had made. There is a pre-raid that was done before the night of that.

[STATE]: Okay and when were those observations made?

DET. WRIGHT: Um, those observations was [sic] made before the warrant was written and after the warrant got signed.

[STATE]: Okay and if you remember, what is the approximate number of observations that you made of the location?

DET. WRIGHT: The approximate observation --

[DEFENSE COUNSEL]: I'm going to object, Your Honor.

THE COURT:	Overruled. Go ahead.
DET. WRIGHT:	The approximate hours of the observation would be at least um, I would say 30 hours.
[STATE]:	Okay. That's not all at once though; is it?
DET. WRIGHT:	No, it's like over there an hour and a half, two hours just sitting watching --
[STATE]:	When you say sitting, watching --
DET. WRIGHT:	Sitting, watching in a covert location.
[STATE]:	Mm-hmm.
DET. WRIGHT:	You know, could be sitting, could be watching, I mean could be standing. Um, just observing [Matthews] and you know going in Apt. B1, coming out on several occasions, several nights.
[STATE]:	Okay. So watching [Matthews] go in and out of Apartment B1 specifically.
DET. WRIGHT:	Yes.
[STATE]:	And what time of day did you observe [Matthews] going in and out of Apartment B1?
DET. WRIGHT:	There were times when it was night. It was like late at night. There were early mornings that I observed them going in and out.
[STATE]:	Okay and you described this building beforehand as being a three story row home and the interior being split up into apartments.
DET. WRIGHT:	Yes.
[STATE]:	So how are you able to see him go in and out of this specific apartment, Apartment B1.

DET. WRIGHT:	. . . [T]he way I observed them is we have . . . covert locations that . . . I set up so I can observe that building, observe that door. Um, there are times when I . . . disguise myself [so] . . . that no one could even recognize me. I just look totally like some, somebody else.
[STATE]:	And so you would actually enter the building.
DET.WRIGHT:	I've actually entered the building, been inside the building on the third floor looking down.
[STATE]:	Okay. On the third floor looking down. So is it an open staircase?
DET. WRIGHT:	It's an open staircase. You can actually see all the way down.
[STATE]:	Okay. And from that vantage point, what did you see?
DET. WRIGHT:	Well, I seen [Matthews] go in. There are times when he would have locked the door. There are times, most of the time, the front door, the entry way is open. I guess, I guess because of in the summer, it is like a bakery when that door is closed. I've seen him go in, open it with a key, go inside, come out on several occasions.
[STATE]:	When you say, which uh, which door specifically are you referring to when you say you saw [Matthews] opening it with a key?
DET. WRIGHT:	Apartment B1.
[STATE]:	Okay, and was anyone with [Matthews] when he was going in out of Apartment B1?
DET. WRIGHT:	Yes. There was other, numerous other people.
[STATE]:	But not necessarily the same people.
DET. WRIGHT:	No.

On re-cross, defense counsel followed up, asking: "And you testified that you observed numerous other people other than my client going into the property at 2611 Spelman, Apt. B1, correct?" Detective Wright answered, "Correct." Then, on re-redirect, the prosecutor asked whether the "numerous people" Detective Wright had seen going in and out of the apartment were "with [Matthews] every time." The detective answered, "No, these people that were going in and out were people that was buying drugs." Defense counsel objected, and after a brief bench conference, the court sustained the objection, struck the answer, and gave a curative instruction:

> Ladies and gentleman of the jury, I am going to ask you to, I am going to sustain the objection. I'm going to ask you to disregard the last comment that the witness made. Okay, that is not part of the evidence in the case. Go ahead.

The prosecutor resumed re-redirect:

[STATE]:	*Detective Wright, without talking about the other individuals going in and out of the apartment, just talking about who they were with and length of time, um, who was with them when they were going in and out?*
DET. WRIGHT:	Okay. Um, so they're not like a group of people going in.
[STATE]:	Okay.
DET. WRIGHT:	There would be like one or two.
[STATE]:	Mm-hmm.
DET. WRIGHT:	And when they do, [Matthews] some of the time [Matthews] be outside.
[STATE]:	Okay.

DET. WRIGHT: He will go in. Some of the time, they will go in also.

Defense counsel objected again, this time on relevancy grounds. The court immediately overruled the objection, and the prosecutor once more resumed re-redirect:

[STATE]: When you say inside, do you mean into the apartment?

DET. WRIGHT: Into the apartment.

[STATE]: Okay.

DET. WRIGHT: *Some of the time they will stand outside. He will come back out, hand them something. They hand him something and they will walk away real fast.*

[STATE]: Okay and when they would go in the apartment, how long would they, would you see them exit?

DET. WRIGHT: They would be in there for approximately a minute, two minutes.

(Emphasis added.)

At the conclusion of re-redirect, defense counsel approached the bench to object for the third time to Detective Wright's testimony, stating, "They just went directly back to the well, Your Honor. Even though [Detective Wright] didn't say the term drug dealing, that is exactly what he is allegedly describing." The court overruled the objection:

> Okay, you opened it up. You followed through and the, the statement that was drug, that it was drugs was conclusive, but the rest of it was direct observation which is different and you raised the issues of other people

> coming in and whether that might be, you know if another person came in and stashed his gun there, that would obviously be relevant in terms of whether he had possessory interest. In this case, they've established that the other people who came in would not have spent a long amount of time there, but would come in and out and would not be likely. So, I think it's relevant. Um, he described what he saw. The first comment was conclusory. I sustained the objection because he, it's not a drug case and he was concluding that everybody who came in and out was…involved with drugs, but the questions as they were ultimately asked and answered is legitimate. So it's overruled.

Upon the court's ruling, defense counsel moved for a mistrial, which the court also denied.

Matthews's contentions about Detective Wright's testimony are somewhat jumbled. He argues that "[t]his evidence," specifically, the testimony italicized above, was inadmissible because "details of [Detective Wright's] surveillance were completely unnecessary, with one arguable exception of [Matthews's] prior association with the residence, as opposed to any drug dealing that he might have engaged in there." He complains that evidence that in his view would communicate to any Baltimore City juror that he was engaged in drug dealing was irrelevant, as he was not being tried for a drug offense, and was highly prejudicial. He also states, without elaboration, that "the detective's observations bore little to no probative value[.]"

To the extent Matthews is arguing that the court erred or abused its discretion in allowing Detective Wright to give the testimony highlighted above, about conduct suggesting drug dealing, that issue is not preserved for review. Rule 4-323(a) requires that an objection "be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Previously

in Detective Wright's testimony, when he stated that the people he saw going in and out of the apartment "were people that was buying drugs[,]" the court granted a motion to strike and gave a curative instruction. When Detective Wright later testified that *"[s]ome of the time [the people coming to the apartment] will stand outside. He will come back out, hand them something. They hand him something and they will walk away real fast[,]"* there was no prompt objection, motion to strike, or request for a curative instruction. Defense counsel instead waited until the prosecutor finished her re-redirect to approach the bench and object to the testimony. Matthews cannot complain on appeal about testimony he did not timely object to below. Rule 4-323(a).

Even if Matthews did preserve this issue for review, the court did not abuse its discretion in allowing the testimony. The court found Detective Wright's responses to be merely an account of his "direct observation[s]" while surveilling the apartment and therefore not prejudicial to Matthews. We agree with the court. Unlike Detective Wright's previously struck testimony, his testimony at issue here did not put before the jury any conclusions about what the individuals he observed were doing. It simply conveyed how Detective Wright witnessed some individuals interacting with Matthews during the course of his surveillance. Moreover, and as discussed in more detail below, this testimony was highly relevant to both charges against Matthews, as it concerned whether Matthews was living in Apartment B1 and, thus, whether his possession of the handgun found in that apartment could be inferred. Detective Wright's observations that he saw Matthews enter and exit the apartment on several occasions, sometimes with other people, and that those people never stayed long or did not enter the apartment at all, was

probative of whether Matthews in fact lived in the apartment and whether the other individuals did not.

To the extent that Matthews is making a general argument that evidence about Detective Wright's pre-raid investigation was not relevant, and should have been excluded on that basis, the argument lacks merit. Evidence is relevant if it 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." Rule 5-401. Ordinarily, relevant evidence is admissible. Rule 5-402. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 5-403. "[A]n assessment of the admissibility of relevant evidence is reviewed under an abuse of discretion standard." *Brooks v. State*, 439 Md. 698, 708 (2014).

The State maintains that the trial court correctly ruled that Detective Wright's testimony about that part of his pre-raid surveillance of Apartment B1 that showed a connection between the apartment and Matthews was admissible under the "opened door doctrine" and was relevant.[1] The "opened door doctrine" allows a party to "introduce evidence that otherwise might not be admissible in order to respond to certain evidence put forth by opposing counsel[,]" *Mitchell v. State*, 408 Md. 368, 388 (2009), but does not inject collateral issues into the case. *Clark v. State*, 332 Md. 77, 87 (1993).

[1] The "opened door doctrine" was the express basis for the trial court's ruling. Matthews does not mention it in his brief, however.

Whether Matthews was in possession of the handgun was central to the two charges being tried. Evidence that he was living in Apartment B1 was probative of his knowledge of what was inside that apartment and therefore of whether he had possession of the handgun. On direct, Detective Wright did not testify about the basis for the search and seizure warrant for the apartment or the investigation that lead to the police obtaining that warrant. His testimony focused on Matthews's connection to the bedroom in the apartment in which he and the handgun were found: that he was sleeping in the bed in that bedroom on the side of the bed where the handgun was recovered from under the mattress; that piles of men's clothes were present in that bedroom and, in getting dressed, Matthews selected clothes from those piles to put on; and that the shoes he put on were in the closet in that bedroom. This evidence (and the presence of his son in the living room) all tended to show that Matthews's domicile was Apartment B1, as he was making regular use of the bedroom there.

Only after defense counsel challenged this domicile evidence on cross, by eliciting that there was no lease or deed connecting Matthews to the apartment and, even more significantly, that Matthews had not been found to have a key to the apartment, did the prosecutor elicit the pre-raid surveillance evidence at issue. Specifically, on redirect of Detective Wright, she brought out that he had made covert pre-raid observations of Matthews using a key to enter and exit the apartment at various times of the day and night, sometimes with other people, but with his presence being the common denominator. We agree with the State and the trial court that the defense opened the door

to this testimony by eliciting on cross that Matthews was not found with a key to Apartment B1 and there was no lease or deed connecting him to the apartment.

Ordinarily, evidence about the steps taken in a police investigation that resulted in the charges for which the defendant is on trial is not relevant and therefore not admissible. *See Parker v. State*, 408 Md. 428, 444–445 (2009). The actual investigation does not matter; what matters is the evidence it generated, and if relevant and otherwise admissible, that evidence will come before the trier of fact. Here, however, Detective Wright's testimony about his pre-raid observations of Matthews routinely entering and exiting the apartment, using a key to do so, and sometimes with other people but not with anyone who spent much time there, directly countered the evidence first raised by the defense on cross, suggesting that without a lease, deed, or even a key, the apartment was not Matthews's domicile. The court did not abuse its discretion by applying the "opened door doctrine" to admit Detective Wright's testimony about the covert observations he made during pre-raid surveillance of Apartment B1.

II. Sufficiency of the Evidence

Matthews was found guilty of violating Md. Code (2003, 2011 Repl. Vol., 2016 Supp.), section 5-133(c)(1) of the Public Safety Article ("P.S."), which makes it unlawful for a person who "has been convicted of a disqualifying crime" to possess a regulated firearm. P.S. §5-133(b)(1). It was undisputed that the handgun was a regulated firearm; and, as noted, the parties stipulated that Matthews was "prohibited from possession of a regulated firearm." The issue was whether Matthews was in possession of the handgun.

Possession of an item may be actual or constructive. *Jefferson v. State*, 194 Md.

App. 190, 215 (2010). To prove possession by the defendant, the evidence must show "either directly or inferentially" that he exercised "some dominion or control over the prohibited [item.]" *Parker v. State*, 402 Md. 372, 407 (2007) (internal quotations omitted). Knowledge of the presence of the item is "[i]nherent in the element of exercising dominion and control[.]" *Smith v. State*, 415 Md. 174, 187 (2010). Factors that permit the "inference of control or dominion over an instrumentality of crime" include "the proximity between the defendant and the contraband and the fact that the contraband was within the view or otherwise within the knowledge of the defendant." *Price v. State*, 111 Md. App. 487, 498-99 (1996). "The State has the burden to prove that the accused had actual or constructive possession and control of the [item at issue]" beyond a reasonable doubt. *Handy v. State*, 175 Md. App. 538, 563 (2007).

The parties agree that there was no evidence of direct possession of the handgun. Matthews contends the evidence was legally insufficient to permit a reasonable finding that he was in constructive possession of the handgun, in particular that he had knowledge of the presence of the handgun under the mattress. The evidence did not show that the handgun was within his sight or that its bulk was sufficient that he would feel it. In addition, he argues that it is significant that, as he puts it, "numerous other people whom the State suggested were part of the drug culture, clearly had access to the house" and that there was no forensic evidence linking him to the handgun. The State responds that there was ample circumstantial evidence to prove that Matthew was in constructive possession of the handgun.

Our standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). This "review standard applies to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010).

We agree with the State that there was legally sufficient circumstantial evidence from which reasonable jurors could find beyond a reasonable doubt that Matthews was in constructive possession of the handgun. The handgun was found in the bedroom in which Matthews was sleeping when the police entered the apartment. That bedroom contained men's clothing, and Matthews picked through those clothes in getting dressed. He put on shoes that were in a closet in that bedroom. Matthews's young son was in the living room of the apartment. Detective Wright observed Matthews use a key to enter and exit the apartment regularly. The many other people Detective Wright saw coming and going from the apartment stayed for brief periods, which tended to show that they were visitors, not residents. All of this evidence supported a reasonable inference that

Apartment B1 was Matthews's place of abode and, more specifically, that the bedroom where the handgun was found was his bedroom.

The handgun was under the mattress of the bed in which Matthews was sleeping, on the side of the bed he was sleeping on. Reasonable jurors could find that Matthews was familiar with the contents of his own bedroom, that the gun had been placed under the mattress at a location that would be easily accessible to him, and that, as a person prohibited from possessing a handgun, he would not want the handgun to be in plain view and therefore would want to keep it hidden but within his reach.

Regardless of the absence of forensic evidence or direct evidence of knowledge or possession, the circumstantial evidence clearly was sufficient to allow reasonable jurors to find beyond a reasonable doubt that Matthews knew of the presence of the handgun under his mattress and was in constructive possession of it.

III. Closing Argument

The following transpired during defense counsel's closing argument:

[DEFENSE COUNSEL]:	Well, we don't know [Detective Wright]. You haven't been presented with any information concerning whether, you know, he's a, of integrity or not.
[STATE]:	Objection.
THE COURT:	Sustained.
[DEFENSE COUNSEL]:	He might be --
[STATE]:	Move to strike.
THE COURT:	Ladies and gentlemen, I ask you to disregard that last comment.

[DEFENSE COUNSEL]: What we don't have is we don't have information regarding the officer to help you make a decision on whether to believe the evidence that he is presenting you.

[STATE]: Objection.

The court sustained the objection.

Matthews contends the trial court "impermissibly restricted defense counsel's closing argument" by prohibiting him from arguing "negative evidence concerning the credibility of the State's key witness[,]" Detective Wright. The State responds that the court properly exercised its discretion to limit defense counsel's argument, pointing out that "the defense had never attacked [Detective Wright's] character during the presentation of the evidence," and therefore "the State could not have sought anticipatorily to bolster it[.]"

> A trial court is in the best position to evaluate the propriety of a closing argument as it relates to the evidence adduced in a case. As such, [an appellate court] do[es] not disturb the trial judge's judgment in that regard unless there is a clear abuse of discretion that likely injured a party.

Ingram v. State, 427 Md. 717, 726 (2012) (internal citations omitted). Although, generally, "attorneys are afforded great leeway in presenting closing arguments to the jury[,]" *Degren v. State*, 352 Md. 400, 429 (1999), it is not permissible for "counsel to state and comment upon facts not in evidence or to state what he or she would have proven." *Smith v. State*, 388 Md. 468, 488 (2005). "What exceeds the limits of permissible comment or argument by counsel depends on the facts of each case." *Id.*

There was no abuse of discretion in the court's ruling. On cross (and recross), Defense counsel did not impeach or attempt to impeach Detective Wright's credibility on the ground that he lacked integrity (or on any other ground). If defense counsel had done so, the prosecutor would have been permitted to rehabilitate Detective Wright. *See* Rule 5-616(c) (permitting the rehabilitation of a "witness whose credibility has been attacked"). In the absence of such a credibility attack, the prosecutor could not introduce character evidence about Detective Wright's integrity. *See City of Baltimore v. Zell*, 279 Md. 23, 27 (1977). Defense counsel's comment in closing about the State's failure to present evidence of Detective Wright's integrity was improper because it suggested that the State could have presented such evidence, when under the circumstances it could not have.

This case is not analogous to *Sample v. State*, 314 Md. 202 (1988), and *Eley v. State*, 288 Md. 548 (1980), which Matthews argues support his position that he was "entitled to argue negative evidence—that which the opponent did not prove." In those cases, the Court of Appeals held that it was an abuse of discretion for the trial court to preclude defense counsel from arguing in closing that the State had not introduced fingerprint evidence to link the defendant to the crime. The precluded arguments in those cases addressed the State's failure to present evidence to support a fact central to the case. They did not concern the State's failure to present evidence about the integrity of a witness when the State could not have done so given that the defense did not attack the witness's integrity during the evidence phase of the trial.

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