UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1899

September Term, 2015

ERIC NIKWAN BARNETT, SR.

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: October 25, 2016

Eric Nikwan Barnett, Sr., appellant, was convicted by a jury sitting in the Circuit Court for Harford County of conspiracy to distribute methylone, a Schedule I non-narcotic drug.[1] Barnett was sentenced to ten years' imprisonment, with all but six years suspended, and five years' supervised probation.

In his appeal, Barnett asks the following:

1. Did the trial court err in failing to strike a juror who indicated that he would tend to believe a police witness over other witnesses?

2. Did the trial court err in ruling that Barnett's prior conviction could be used to impeach him?

For the reasons that follow, we shall vacate the judgments and remand this case to the circuit court for a new trial.

BACKGROUND

In January 2014, in connection with an investigation into drug distribution in Harford County, a joint task force consisting of federal Drug Enforcement Administration agents and Harford County Sheriff's deputies began conducting a wiretap of Evan Strong's phone. The wiretap revealed communications by Strong with, and about, Barnett, including references to "molly," a street name for powder MDMA, a controlled dangerous substance.[2]

On February 22, 2014, Gary Yoder called Strong and asked for molly, and they arranged to meet at Strong's house. The task force, monitoring this call, dispatched officers

[1] The jury acquitted Barnett of distribution of methylone.

[2] Methylone is chemically similar to MDMA and is sometimes sold as "molly."

to conduct a stop of Yoder's vehicle after the meeting, which resulted in the recovery of six molly pills and six oxycodone pills.

When Yoder again called Strong and asked to come back, he was told that Barnett had molly. Strong then called Barnett and asked him where "them things" were; Barnett responded that he had 'them' with him. At trial, Barnett testified that he and Strong were referring to wristbands for entrance to a party he and his fiancée organized to take place on the night of February 22.

On March 27, 2014, the task force executed a search warrant on Barnett's home, citing probable cause to believe that Barnett was the source of the supply of molly that Strong had been distributing in Harford County. The search resulted in recovery of several cell phones, including the one identified through the wiretap as Barnett's, and one molly pill, found in the purse of his fiancée, identical to those previously recovered from Yoder on February 22.

Barnett was indicted by a grand jury on one count of distribution of a controlled dangerous substance and one count of conspiring with Strong to distribute a controlled dangerous substance. Thereafter, the State served Barnett with a Notice of Mandatory Penalties, indicating an intention to prosecute him as a subsequent offender and to seek mandatory penalties predicated on a 2001 conviction for possession of a controlled dangerous substance with intent to distribute.

At trial, the following discussion ensued when Barnett's counsel moved to preclude the State's use of the 2001 conviction for impeachment:

> [DEFENSE COUNSEL]: And may I inquire as to impeachables?
>
> THE COURT: Certainly. [State].
>
> [STATE]: He does have a conviction in 2001 for possession with intent to distribute cocaine. State would use that only for impeachment. Under case law, it is an impeachable offense. Even in a drug offense, it is still impeachable with a limiting instruction by the Court.
>
> [DEFENSE COUNSEL]: Your Honor, I would ask the Court to exclude that. It is just at the edge of the 15-year period. It's also very similar to the charges here, and the prejudicial effect, I would submit, is going to outweigh the probative value to the State, again, especially given the age of this particular conviction.
>
> THE COURT: I am going to deny that request. It would be available for use by the State to impeach the defendant.

Barnett was convicted, as we have noted. Further details regarding trial proceedings are provided below, as relevant to our discussion.

DISCUSSION

I. Peremptory Challenge

During voir dire, the court posed, *inter alia*, the following question to the venire:

> Is there any member of this panel who would be more likely or less likely to believe the testimony of a police officer just because that person is a police officer?

Prospective juror number 18 approached the bench and responded affirmatively to the question. This colloquy followed:

> THE COURT: But in terms of understanding and evaluating the evidence in this case, would you be able to scrutinize what [the police officers are] saying, or would you just say, "Well, if they said it, it must be true"?

JUROR 18: **I would lean that way. I would listen, but I would be feeling that way up front.**

THE COURT: Would you be able to wait and consider the evidence of all the witnesses?

JUROR 18: I'll listen. I would listen.

THE COURT: And then use some objective criteria that could apply to all witnesses? Things such as the manner in which a witness testifies; do they appear to be telling the truth? Looking at the accuracy of their memory. Do they have a motive not to tell the truth? Do they have an interest in the outcome of the case? Did they say something inconsistent before trial with what they are now saying in trial? Is there other evidence that you believe when you compare it to what they're saying? So would you be able to look at those types of things –

JUROR 18: I would look at that.

THE COURT: – for all witnesses, regardless of their occupation?

JUROR 18: Right.

THE COURT: **Because it's hard to say in any given case when we don't know the individual that we just believe them because they're wearing a uniform, and not everybody can be a police officer, right?**

JUROR 18: **Right.**

THE COURT: So if the issue is that you have two witnesses, one saying one thing and the other saying something different, and one of them is a police officer, you're not just going to accept the officer's word without any other type of scrutiny of what they're both saying, are you?

JUROR 18: If I don't have any other thing pointing in another direction, I have this person saying this, and I have this person

saying that, and I have nothing else to go with, **I would go there.**

THE COURT: Only as a last resort, but you're going to be able to contrast it with what other witnesses have said whether there is anything to corroborate what either one says?

JUROR 18: I would listen to what other people say.

THE COURT: All right. Any questions for Juror Number 18, [Defense Counsel]?

[DEFENSE COUNSEL]: Sir, I guess – are you saying that you'd listen to two witnesses. One's not a police officer, one is a police officer. Everything is pretty even. **So are you saying you would give the police officer more credibility just because of their position?**

JUROR 18: **If I have no other thing to go on.**

[DEFENSE COUNSEL]: Okay. Thank you.

THE COURT: [State].

[STATE]: You also understand when you get to the end of the case, the judge is going to instruct you, give you instructions. The judge is going to instruct you as to the law that's to apply and basically how you are going to look at witnesses and evaluate witnesses. Are you going to be able to do that? Basically look at all the evidence, look at the case in its entirety in coming up with your decision?

JUROR 18: I would try to.

[STATE]: Thank you.

THE COURT: Thank you. You may return to the courtroom.

(Whereupon, prospective juror returned to the courtroom.)

[DEFENSE COUNSEL]: Make a Motion to Strike for Cause. I think the one comment he made summarizes that he will listen but he leans towards the police. I know Your Honor talked to

> him again after that, but I'd make the Motion to Dismiss for Cause based on his comments.
>
> THE COURT: [State].
>
> [STATE]: Your Honor, note my objection. He indicated to my questioning that he could be fair, follow the Court's instructions and consider all the evidence that was presented to him. So I would ask the Court to deny the motion.
>
> THE COURT: I am going to deny the motion. I think the juror indicated he would listen to everything, and only if he only had what the occupation of one against the other, but I don't believe even in this case that it's always that stark of a difference.

Ultimately, defense counsel used one of Barnett's peremptory challenges to excuse juror 18, and thereafter exhausted Barnett's peremptory challenges prior to the full jury being seated.[3]

A defendant is guaranteed an impartial jury by the Sixth and Fourteenth Amendments, as well as by Article 21 of the Maryland Declaration of Rights. An impartial jury consists of jurors whose minds "always remain open to the correction of former impressions, and remain entirely impartial, with power to hear and determine upon the real facts of the case, without the least bias in favor of former impressions, whatever they may have been." *Garlitz v. State*, 71 Md. 293, 300 (1889) (quoted in *Calhoun v. State*, 297 Md. 563, 582 (1983)). However, it is essentially assured that all members of the jury pool will

[3] The case law on this matter is clear that, where defense counsel states that a jury is acceptable, he or she waives any prior objection made to the seating of a particular juror. *Foster v. State*, 304 Md. 439, 452 (1985); *White v. State*, 300 Md. 719, 731 (1984); *Thomas v. State*, 301 Md. 294, 310 (1984). Barnett's counsel never stated that the jury, as empaneled, was acceptable to him; the issue arising from his objection to juror 18 and the subsequent strike used to excuse him thus is preserved for our review.

have some bias; the relevant inquiry in choosing a jury is whether a juror can set aside that bias, whatever it may be, and judge the facts and witnesses in an impartial manner:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723 (1961) (also quoted in *Calhoun*, 297 Md. at 580).

One area of bias that a trial court must pursue is whether prospective jurors are inclined to place undue weight on the credibility of police officer witnesses. *Uzzle v. State*, 152 Md. App. 548, 562 (2003) (quoting *Dingle v. State*, 361 Md. 1, 10 n.8 (2000)). Such bias, "if present, would hinder [jurors'] ability to objectively resolve the matter before them." *Id.* The Court of Appeals explained:

> A juror who states on voir dire that he would give more credit to the testimony of police officers than to other persons has prejudged an issue of credibility in the case. Regardless of his efforts to be impartial, a part of his method for resolving controverted issues will be to give greater weight to the version of the prosecution, largely because of the official status of the witness.

Langley v. State, 281 Md. 337, 348 (1977).

The determination of whether a juror is likely to set aside his or her bias regarding a police officer's testimony is within the trial court's discretion. *Morris v. State*, 153 Md. App. 480, 499 (2003). In *Morris*, we considered the denial of a defendant's motions to strike three jurors for cause after they initially expressed some hesitation at first regarding

their biases. *Id.* at 497-99. Ultimately, though, all three answered affirmatively that they would be able to assess the evidence impartially. *Id.* at 498-99.

> [A] trial judge might choose, albeit not legally required to do so, to exercise discretion by bending over backwards in a defendant's favor and removing any lingering possibility of juror bias. Such a tilt, however, would be quintessentially discretionary and not something the defendant would be entitled to as a matter of right.

Id. at 499-500.

Juror 18 stated at least four times to the court that he would initially weigh a police officer's testimony more favorably than that of a civilian witness on the same subject. After the court explained a juror's role in assessing the credibility of witnesses and juror 18 responded that he would listen to all witnesses before deciding, he again asserted, in response to defense counsel's questions, that he would, all things being equal, find a police officer more credible. In contrast to *Morris*, excusing this juror would not amount to the court "bending over backwards" to accommodate a sensitive defendant. We conclude that Barnett's motion to excuse juror 18 for cause ought to have been granted.

Barnett argues that, because the court's error in failing to excuse juror 18 deprived him of one of his four peremptory challenges, prejudice is presumed and he is entitled to reversal. The State responds that, ultimately, Barnett was not prejudiced by juror 18's bias, because Barnett exercised a peremptory challenge to excuse him.

"Peremptory challenges . . . are challenges exercised without a reason stated, without inquiry, without being subject to the court's control and for either a real or imagined partiality that is less easily designated or demonstrable than that required for a

challenge for cause." *Curtin v. State*, 393 Md. 593, 601 (2006) (internal citations and quotation marks omitted).

Where afforded by statute or rule, peremptory strikes are an integral aspect of the seating of an impartial jury. "The denial or impairment of the right to exercise peremptory strikes is reversible error without a showing of prejudice." *Whitney v. State*, 158 Md. App. 519, 532 (2004) (internal marks omitted); *Collini v. State*, 227 Md. App. 94, 105 (2016). Their importance is such that "any significant deviation from the prescribed procedure that impairs or denies the privilege's full exercise is error that, unless waived, ordinarily will require reversal without the necessity of showing prejudice." *King v. State Roads Comm'n*, 284 Md. 368, 371 (1979).

Here, we conclude that by not excusing juror 18 for cause, Barnett's right to exercise peremptory strikes was impaired.

II. Admission of Impeachment Evidence

Barnett next asserts that the court erred in ruling that his 2001 conviction could be used by the State for impeachment purposes. We need not decide whether, on this record, the 2001 conviction was admissible for impeachment purposes, for we conclude that, in ruling the conviction admissible, the court erred in failing to perform the balancing test required by Md. Rule 5-609(a), which governs the admission of impeachment evidence based on prior convictions.

The court must determine whether "the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party." Md. Rule

5-609(a). It is the trial court's "function to admit only those prior convictions which will assist the jury in assessing the credibility of the defendant." *Ricketts v. State*, 291 Md. 701, 703 (1981). "A trial court must first test all such evidence that a witness has been convicted of an infamous crime or other crime bearing on credibility, balancing its probative value against its potential for unfair prejudice to the witness or to the objecting party." *Beales v. State*, 329 Md. 263, 273 (1993).

The analysis is crucial to the function of this rule. The Rules Committee, after adding the now-required balancing test, described the previous rule of impeachment as "dangerously inflexible" where it required admission of all prior infamous crimes. *Id.* at 272. As a predicate to admissibility, the prior conviction must have sufficient probative value, as such evidence is meant only to assist the factfinder in measuring the witness's credibility and veracity. *See Bells v. State*, 134 Md. App. 299, 306-08 (2000). There exists within Maryland jurisprudence a plethora of guidance for trial courts in weighing the probative value against potential prejudice. For instance, the Court of Appeals has enumerated a non-exhaustive list of factors a trial court may consider in deciding to admit such impeachment evidence: "(1) the impeachment value of the prior crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility." *Jackson v. State*, 340 Md. 705, 717 (1995); see also, among others, *King v. State*, 407 Md. 682, 700-01 (2009); *Cure v. State*, 195 Md. App. 557, 576 (2010); *Summers v. State*, 152 Md. App. 362, 370 (2003); *Williams v. State*, 110 Md. App. 1, 23-25 (1996). The Court further acknowledged that trial courts

are "not obliged to detail every step of their logic," but urged them "to place the specific circumstances and factors critical to the decision on the record." *Jackson*, 340 Md. at 717.

Here, while the court may well have considered these factors and weighed them against the probative value of determining Barnett's credibility, its analysis was not articulated on the record. Defense counsel framed his argument to exclude evidence of the 2001 conviction in the language of *Jackson*, but the court, after hearing from defense counsel and from the State, said only, "I am going to deny that request. It would be available for use by the State to impeach the defendant." The court detailed no steps in its analysis and failed to enumerate even one of these factors, giving no indication that it conducted a balancing test to arrive at its conclusion.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED; CASE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.
COSTS ASSESSED TO HARFORD COUNTY.