Circuit Court for Baltimore City
Case Nos. 114237019–20, 114294022,
115147014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 666

September Term, 2016

DARNELL GWYNN

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,
JJ.

Opinion by Nazarian, J.

Filed: September 6, 2017

Darnell Gwynn was tried before a jury in the Circuit Court for Baltimore City and convicted of first-degree murder, first-degree attempted murder, and other offenses arising from two shootings. During *voir dire*, defense counsel moved to strike a juror for cause, arguing that the juror's expressed uncertainty about her ability to follow the judge's instructions would rob Mr. Gwynn of his right to a fair trial. The trial judge denied the motion, and the defense used a peremptory challenge to strike the juror. Then, during trial, the defense sought to exclude, as hearsay and unfairly prejudicial, testimony about "problems" Mr. Gwynn was having with people in the area where both the murder and the attempted murder occurred. The State asserted that the evidence was admissible not for the truth of the statement, but to show the effect these problems had on the witness and to establish that the witness and the defendant had a close relationship. The trial judge agreed with the State and admitted the evidence. On appeal, Mr. Gwynn challenges these decisions. We affirm.

I. BACKGROUND

On the afternoon of June 28, 2014, Mr. Gwynn and two others were passengers in a gold van driven by Kaysee Fauntleroy near the Dolfield area of Baltimore. As they were driving, Mr. Gwynn spotted a large group of people and told Ms. Fauntleroy to pull the vehicle over. After the van stopped, Mr. Gwynn opened the back door and began shooting a gun at the group. A member of the group—later identified as Shakira Jackson—fired a gun back in the direction of the vehicle. Ms. Fauntleroy drove away.

Less than three weeks later, on July 16, 2014, Ms. Jackson was shot fatally at a bus stop near the same area where the June 28 incident had taken place. Ashley Roberts, a friend of Ms. Jackson's and an acquaintance of Mr. Gwynn's, testified that she and her sister had been with Ms. Jackson in a convenience store moments before Ms. Jackson was killed. After Mses. Roberts and Jackson said goodbye to each other, Ms. Roberts and her sister saw a man with a hood tied closely around his face walking towards them. As the man walked past, Ms. Roberts's sister said, "there's Black,"[1] and Ms. Roberts herself called out his name. The man stopped to turn around, but then turned back and continued on his way. He then walked up to Ms. Jackson and shot her.

Mr. Gwynn was indicted for the June 28 attempted murder of Ms. Jackson on August 25, 2014 and the July 16 murder of Ms. Jackson on October 21, 2014. Citing the interrelated nature of the cases and judicial economy, the trial judge granted the State's motion to try the cases together.

During jury selection, the court asked potential jurors whether they had a family member who had been convicted of a crime or if they had strong feelings about this type of crime. Juror 59 answered "yes" to both questions. After questioning him individually, the court determined that the juror was capable of being fair and impartial. The defense disagreed, arguing that the juror "raise[d] a lot of red flags" and moved to strike him for cause. The court denied the motion and defense counsel used a peremptory strike.

[1] "Black" is Mr. Gwynn's nickname.

During the trial, the State sought to introduce testimony and a police statement from Ashley Roberts about a conversation she had with Mr. Gwynn at a Fourth of July block party. Ms. Roberts told police that she had heard that Mr. Gwynn was having "problems" with people in the Dolfield neighborhood, and she approached him at the party to see if everything was okay. The defense objected to this testimony and moved to exclude the statement on the grounds that it was hearsay, irrelevant, or highly prejudicial. The court overruled the objections and denied the motion to exclude, allowed Ms. Roberts to testify about her conversation with Mr. Gwynn, and later admitted into evidence a recording of her statement to police.

The jury found Mr. Gwynn guilty of murder in the first degree, attempted murder in the first degree, first-degree assault, and various firearm offenses, and he appeals.

II. DISCUSSION

Mr. Gwynn challenges two of the trial court's decisions.[2] *First*, he contends that the trial court erred in denying the defense's motion to strike Juror 59 for cause. *Second*, he contends that the trial court erred in admitting Ms. Roberts's conversation about the problems Mr. Gwynn was having with people in the Dolfield area. We hold that the trial court acted within its discretion when it denied the defense's motion to strike Juror 59 for

[2] Mr. Gwynn's brief phrased the Questions Presented as follows:

> 1. Did the trial court err in denying the defense's motion to strike a prospective juror for cause?
> 2. Did the trial court err in admitting evidence that unnamed people had told a witness that Appellant had been having "problems" with "people on Dolfield"?

cause. And we agree with the court's determination that the evidence regarding problems Mr. Gwynn was having with people in Dolfield was neither hearsay, because its purpose was to explain Ms. Roberts's actions, nor unfairly prejudicial, because it did not speak specifically to problems Mr. Gwynn had with Ms. Jackson.

A. The Trial Judge Did Not Err In Denying The Motion To Strike Juror 59 For Cause.

A criminal defendant is entitled to a trial by a fair and impartial jury. U.S. CONST. amend. VI; Md. Decl. of Rts. art. 21. If a party feels that a prospective juror will not be fair and impartial, he can move to strike that juror for cause. Md. Rule 4-312(e)(2). The decision to grant or deny this motion is left to the sound discretion of the trial judge. *Ware v. State*, 360 Md. 650, 666 (2000) (citing *Bowie v. State*, 324 Md. 1, 20 (1991)).

During *voir dire* in this case, the trial judge asked if any potential jurors had a family member who had been convicted of a crime or if they had feelings about the particular type of crime at issue. After Juror 59 responded "yes" to both questions, the trial judge questioned him to determine whether he could be impartial in this case:

> THE COURT: Let's see, you said that you had strong feelings about the nature of the charges in this case. No -- nobody likes, you know, things like murder or attempted murder or the handgun, but the -- the more specific question is, if you were sitting as a juror in this case and the evidence was presented to you, could you base the decision on the evidence or are your feelings so strong about the nature of the charges, because that's what it is at this point, it's a charge, is that -- are you feeling so strong about the nature of the charges that --
>
> JUROR NO. 59: Yeah.

THE COURT: -- it would affect your ability to be fair and impartial?

JUROR NO. 59: That might depend, depending upon what the potential sentencing could be.

THE COURT: Well, jurors don't sentence.

JUROR NO. 59: Okay, but --

THE COURT: Jurors -- jurors determine whether a person is guilty or not guilty. And it's not a death penalty case if that's what you want.

JUROR NO. 59: Okay. But still --

THE COURT: There's no death penalty anymore.

JUROR NO. 59: Still preponderance of evidence could definitely, the amount of evidence that could be going in could be one way, if there's like a ton of witnesses for one side o[r] the other.

THE COURT: Well, that's part of the evidentiary.

JUROR NO. 59: Uh-huh.

THE COURT: My -- my question is, are your feelings about the nature of the charges, themselves, are -- are they so strong that you could not be fair and impartial and hear the evidence and base your decision on that?

JUROR NO. 59: I could be fair and --

THE COURT: Okay.

JUROR NO. 59: -- impartial.

THE COURT: And --

JUROR NO. 59: Yeah.

THE COURT: -- you also indicated that you or a family member were either the victim of a crime, convicted of a crime, or had a pending charge. Can you tell me why you answered that --

JUROR NO. 59: Yes.

THE COURT: -- question?

JUROR NO. 59: A while ago, an uncle of mine, he -- he's still close, close to family, we're a close-knit family --

THE COURT: Uh-huh.

JUROR NO. 59: -- was, pled guilty to a crime. It wasn't a violent crime. It was a white-collar crime.

THE COURT: Okay.

JUROR NO. 59: So --

THE COURT: So --

JUROR NO. 59: -- I don't know how -- I don't know if it would affect this case, I mean, this case one way or the other. (Indiscernible for approximately 3 words).

THE COURT: Well, this -- this isn't a white-collar crime, but --

JUROR NO. 59: Yeah.

THE COURT: -- let me -- let me just give you a hypothetical. If you're sitting --

JUROR NO. 59: Uh-huh.

THE COURT: -- as a juror and all the evidence is presented to you --

JUROR NO. 59: That would not enter into anything.

THE COURT: It --

JUROR NO. 59: Yeah.

THE COURT: It would not affect your ability to be fair and impartial?

JUROR NO. 59: No.

THE COURT: Okay.

JUROR NO. 59: Not really.

THE COURT: Okay, thank you.

After this exchange, Mr. Gwynn moved to strike Juror 59 for cause, and the court denied the motion. Mr. Gwynn argues on appeal, as he did in the trial court, that Juror 59's comments reveal "a substantial probability that he could not fulfill his duties and provide [Mr. Gwynn] with a fair trial." He points specifically to Juror 59's belief that he could decide the case based on a "preponderance of evidence" standard, as opposed to proof "beyond a reasonable doubt." He argues as well that the juror's comments demonstrate an inability to follow the court's instructions or apply the law properly. These exchanges required the court to remove Juror 59 from the venire for cause, he argues, and the court's decision to deny this motion requires reversal.

The State responds that, viewed as a whole, Juror 59's exchange with the court, especially at its conclusion, established that he could be fair and impartial and that the court acted well within its discretion in denying Mr. Gwynn's motion. The State argues that the "preponderance of evidence" remark was made "passing[ly]," that the context of the case

required the trial judge to be "parsimonious" with cause challenges,[3] and that the trial judge could consider more than just the juror's words[4] when determining the juror's ability to be fair and impartial.[5]

A party may challenge a prospective juror for cause based on a juror's answers to questions during *voir dire* if he believes that that juror will be unable to be fair and impartial

[3] The trial began between Christmas and the end of the year, and the judge expressed frustration during *voir dire* at the (small) size of the venire.

[4] For example, "presence, tone, eye contact, and the host of other intangibles that only the trial judge could assess." *Morris v. State*, 153 Md. App. 480, 502 (2003).

[5] Citing *Testo v. State*, 205 Md. App. 334 (2012), the State argues as well that because Mr. Gwynn's counsel did not question Juror 59 himself during *voir dire*, this issue is not preserved for appeal. In *Testo*, we held that the appellant did not preserve his challenge to a juror's inclusion on the panel because he failed to use all of his allotted peremptory challenges and:

> (1) failed to object that no individual questions were asked of [the juror] as to her affirmative response to the question regarding appellant's requirement to prove his innocence by the trial court; (2) failed to ask individual follow-up questions himself; (3) *affirmatively accepted [the juror] for impaneling on the jury*; and (4) affirmatively accepted the jury with [the juror] as a member.

Id. at 370 (emphasis added). Here, however, Mr. Gwynn used all of his peremptory challenges; the trial judge specifically asked Juror 59 about his affirmative responses to his questions regarding whether any jurors had family members who had been convicted of a crime or whether any jurors had strong feelings about this type of crime; Mr. Gwynn's counsel did tell the trial judge that this juror "raise[d] a lot of red flags;" and Mr. Gwynn's counsel used a peremptory challenge to strike him after the judge denied his motion to strike him for cause. Put another way, the defense knew what it needed to know from this potential juror to object to him, and used all of Mr. Gwynn's peremptory challenges. *See Morris*, 153 Md. App. at 496 (holding that there is only reversible error where all allowable peremptory challenges have been exercised). We might see it differently if Mr. Gwynn were arguing that the juror withheld information that counsel never sought through questioning, but under the circumstances we find his challenge preserved.

during the trial. Md. Rule 4-312. Trial judges stand in the best position to determine whether a juror can be fair and impartial, and their decisions on whether to grant or deny a motion to strike a juror are accorded considerable deference. *Ware*, 360 Md. at 666. And we see no abuse of the court's discretion here. *First*, the court's colloquy with Juror 59 itself dispels the contention that he could not be impartial. To be sure, the juror seemed misinformed at first about his role, expressing concern about potential sentencing and whether the death penalty could be applicable to this case. But after assurance from the judge that he would need simply to determine innocence or guilt, the juror replied that he could be "fair and impartial." And the court was well within its discretion to treat the juror's mention of the "preponderance of the evidence" as unwitting, and by someone likely unfamiliar with legal principles, than as an expression of an intent not to follow the court's instructions in deliberations.

Second, trial judges have, and need to have, latitude "to consider the administrative or logistical interests of the local criminal justice system" when determining whether to grant a motion to strike a juror for cause. *Morris v. State*, 153 Md. App. 480, 500 (2003). These administrative interests can include concerns about a diminishing pool of jurors. *Id*. In this case, the trial judge acknowledged that the time of year (between Christmas and the end of the year) diminished the panel of potential jurors, and expressed concern that a second jury panel would be required. Again, under these circumstances, it was not unreasonable for the court to deny Mr. Gwynn's challenge for cause to this juror.

B. The Trial Judge Did Not Err In Admitting Evidence Of Ashley Roberts' Conversation About The Problems Mr. Gwynn Was Having With People In The Dolfield Area.

In her statement to police shortly after Ms. Jackson's murder, Ms. Roberts said that she had heard that Mr. Gwynn was having "problems" with some people in the Dolfield area. She later saw him at a block party on the Fourth of July and asked him if everything was okay. The trial court denied defense counsel's motion to exclude this information from the police statement submitted to the jury, and overruled the defense's objection to Ms. Roberts testifying about it on the stand. Mr. Gwynn contends that (1) this testimony was inadmissible hearsay, and (2) was not relevant, but even if it was, its probative value was outweighed by the risk that it would cause Mr. Gwynn to face unfair prejudice from the jury. *See* Md. Rule 5-403. We disagree.

1. The police statement is not inadmissible hearsay because it was not offered for the truth of the matter asserted.

Hearsay is a "statement,[6] other than one made by the declarant[7] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Whether evidence is hearsay is an issue of law that we review *de novo*. *Parker v. State*, 408 Md. 428, 436 (2009).

[6] A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a).

[7] A declarant is "a person who makes a statement." Md. Rule 5-801(b).

The trial court ruled that Ms. Roberts's testimony was not hearsay and was admissible. The judge agreed with the State that her testimony was offered to explain her actions and her close relationship with Mr. Gwynn rather than to prove a motive for the murder, and admitted both her statement to police and her in-court testimony. The State argues on appeal that the statements were necessary to fill in the gaps in the narrative presented to the jury and that it was offered to show the "effect on the hearer",[8] not for the truth of the matter asserted. As such, the State contends, the testimony was admissible to prove that Ms. Roberts and Mr. Gwynn had a close enough relationship that she would ask if he was doing okay and would recognize him when he walked past her the night of the murder,[9] not to prove Mr. Gwynn's motive. The defense argues that because Ms. Roberts's statement included rumors about Mr. Gwynn that had been given to her by "unnamed out-of-court declarants," the information was hearsay and should not have been admitted.

Where "a statement is offered for some purpose other than to prove the truth of the matter asserted therein, it is not hearsay." *Ali v. State*, 314 Md. 295, 304 (1988), *abrogated in part on other grounds by Nance v. State*, 331 Md. 549 (1993); *see also Holland v. State*, 122 Md. App. 532, 542 (1998) (finding that a statement used to show its effect on the witness is admissible as non-hearsay). Ms. Roberts's statement that she had heard people

[8] Where a verbal event is significant not for the truth of what it asserts but for the effect it had on the witness, it is not hearsay. *Holland v. State*, 122 Md. App. 532, 542 (1998).

[9] In her statement to police, Ms. Roberts stated that when she saw the person walk past, she knew it was Mr. Gwynn. However, during her trial testimony, she said she did not know who the person was. Proving this identification was an important part of the State's case.

saying that Mr. Gwynn was having problems with people in the Dolfield area fits into the definition of 5-801(c) and would be inadmissible on its face if it was offered for the truth of the matter asserted. But the State did not offer the statement and Ms. Roberts's testimony for the truth, *i.e.*, to prove a motive in Ms. Jackson's murder. Instead, the State sought to establish that Ms. Roberts and Mr. Gwynn knew each other well, that they had talked during the Fourth of July party, and that she would have recognized him on the night of the murder. The fact that Ms. Jackson had heard that Mr. Gwynn was having problems with people in this area and approached him at the party to ask him how he was doing showed her concern for him and his well-being. It established a relationship. Taking away the former part of the statement eliminated the context for why she sought him out. As the purpose of the statement was not to prove its truth, it was not hearsay, and the trial judge did not err in admitting it.

2. The police statement was properly admitted because it was relevant and its value was not outweighed by the danger of unfair prejudice.

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Generally, evidence that is relevant is admissible, and evidence which is determined to be irrelevant is inadmissible. Md. Rule 5-402. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Md. Rule 5-403. We review relevance decisions against a two-part test. "First, we consider whether the evidence is legally

relevant, a conclusion of law which we review *de novo*." *Smith v. State*, 218 Md. App. 689, 704 (2014) (quoting *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013)). Then, if the evidence is relevant, we analyze the trial court's Rule 5-403 determination for abuse of discretion. *Id*.

First, we agree with the circuit court that Ms. Roberts's statement to the police was relevant. Relevant evidence has two characteristics: "materiality and probative value." *Id.* (quoting *Williams v. State*, 342 Md. 724, 737 (1996)). "Evidence is material if it bears on a fact of consequence to an issue in the case. Probative value relates to the strength of the connection between the evidence and the issue, to the tendency of the evidence 'to establish the proposition that it is offered to prove.'" *Id*. (citations omitted). And as we discussed previously Ms. Roberts's statement to police regarding Mr. Gwynn's problems with people in Dolfield bore on the conversation that they had at the Fourth of July party and the closeness of their relationship. Further, her statement had probative value because it tended to show that these two had a close relationship and that Ms. Roberts would have recognized Mr. Gwynn as the man who walked past her and shot Ms. Jackson.

Second, the probative value was not outweighed by the danger of unfair prejudice. "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Id.* at 705. The trial judge weighed both of these considerations and determined that there was no unfair prejudice. The court reasoned that in her statement to police, Ms. Roberts was concerned not for the people in

Dolfield with whom (she had heard) Mr. Gwynn had a problem, but rather for Mr. Gwynn himself, and did not identify Ms. Jackson as someone with whom Mr. Gwynn had any problems.

For the same reasons the testimony wasn't hearsay, we see no abuse of discretion in the court's balancing. This testimony demonstrated a relationship between Ms. Roberts and Mr. Gwynn that allowed her to recognize him on the night of the murder. It explained why, after hearing Mr. Gwynn was having problems with people in Dolfield, Ms. Roberts was more concerned for Mr. Gwynn than the people themselves. We acknowledge that testimony about neighborhood disputes could well have been prejudicial to Mr. Gwynn, but not unfairly so, especially since Ms. Roberts did not name Ms. Jackson and referred to "other people" generically in the police statement.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.