Circuit Court for Prince George's County
Case No. CT-17-0124X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2113

September Term, 2017

KARL JONES

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: October 26, 2018

A jury, in the Circuit Court for Prince George's County, convicted Karl Jones, appellant, of possession with intent to distribute heroin and possession of heroin. Jones was sentenced to a term of fifteen years' imprisonment, with all but seven years suspended, on the distribution conviction and a concurrent term of one year imprisonment on the possession conviction. In this appeal, Jones presents the following questions for our review:

1. Did the trial court err in limiting the cross-examination of the State's key eyewitness?

2. Did the trial court err in refusing to give a "mere presence" jury instruction?

For reasons to follow, we answer both questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

In the morning hours of July 22, 2016, Prince George's County Police Officer Ikemefuna Ejimnkeonye was driving his police vehicle on Martin Luther King, Jr. Highway when he observed an individual, later identified as Karl Jones, "loitering with a group of individuals" in front of the Best One Food Mart on Seat Pleasant Drive in Prince George's County. After coming to a stop at a nearby traffic-light, Officer Ejimnkeonye again looked in Jones' direction and observed Jones involved in "what appeared to be a hand-to-hand transaction." Officer Ejimnkeonye later testified that he did not observe "anything exchange hands except [a] piece of paper."

When the traffic-light turned green, Officer Ejimnkeonye drove his car into the parking lot of the Food Mart, exited his vehicle, and approached the group. After Officer Ejimnkeonye approached the group, the individuals, including Jones, "scattered in different directions." At that point, the officer observed Jones holding "a black computer bag." Officer Ejimnkeonye then walked toward Jones and "told him to step up to [the officer]." Upon doing so, the officer observed Jones "reaching into the bag." At that point, Officer Ejimnkeonye "started towards" Jones, and Jones "dropped the bag and took off." After a brief chase, Jones was apprehended. Officer Ejimnkeonye then recovered the black computer bag, inside of which he discovered a plastic bag containing "thirty-one small baggies" of heroin. Jones was arrested and charged with possession of heroin with intent to distribute, possession of heroin, disorderly conduct, and disturbing the peace.

At trial, Officer Ejimnkeonye testified on direct examination as to his actions and observations around the time of Jones' arrest. The officer explained that, although he believed that he had witnessed Jones "do a hand-to-hand transaction with one of the individuals," the officer's "initial stop was for them loitering at the location, to disperse them." On cross-examination, defense counsel tested the veracity of Officer Ejimnkeonye's direct testimony while questioning him about his actions and observations around the time of Jones' arrest. In so doing, defense counsel asked the officer about his testimony that he saw Jones "loitering":

[DEFENSE]: Officer, are you familiar with the loitering statute of Prince George's County?

[WITNESS]: It states that –

[DEFENSE]: I'm just asking are you familiar with the loitering statute of Prince George's County, yes or no?

[WITNESS]: Yes, sir.

[DEFENSE]: Okay. And you understand that the loitering statute is Section 14-139.03, correct?

[WITNESS]: Yes, sir.

[DEFENSE]: Okay. You understand that the statute gives six ways a person is guilty of loitering, correct?

[STATE]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE]: Okay. And showing you what's marked –

* * *

[STATE]: May we approach?

THE COURT: You may.

(Counsel approached the bench and the following occurred:)

[STATE]: Your Honor, defense counsel intends to introduce the section of the Maryland Code about loitering. The Defendant was not charged with loitering, so the State objects to relevance on that.

[DEFENSE]: It goes to credibility, Your Honor. He's stating my client was loitering and I'm going in to say that he was not loitering. He stated he knew he was loitering, so I'm questioning his credibility. I'm not introducing it. I'm cross-examining him on the fact that he indicated that my clients were loitering.

[STATE]: It's not relevant, Your Honor. The Defendant is not charged with loitering.

THE COURT: What motions were tried in this case? What motions (indiscernible).

[STATE]: This issue was one of them. It was whether he had – it was a motion to suppress the evidence based on his ability to observe and whether his constitutional rights were violated at the time and the motion to suppress was denied.

[DEFENSE]: I'm (indiscernible) credibility, Your Honor. He stated that my client was loitering. I'm going on credibility at this point. Clearly, from the statute, it was not loitering. It doesn't matter whether or not he was –

[STATE]: Which is why he wasn't charged with loitering.

[DEFENSE]: It doesn't matter whether or not he was charged. This officer indicated he was loitering and I'm questioning his credibility now.

THE COURT: Sustained. Sustained.

Following Officer Ejimnkeonye's testimony, Prince George's County Police Officer Kory Maxwell testified as an expert in narcotics distribution. He testified the black computer bag recovered by Officer Ejimnkeonye contained "a larger plastic bag with individually packaged small plastic bags" of "suspected heroin in different increments," and that the packaging was consistent with distribution.

Later, the court instructed the jury on the applicable law. During those instructions, the following colloquy ensued:

THE COURT: Counsel, for the record, we're dealing with possession and possession with intent to distribute, am I correct?

[STATE]: That's correct.

[DEFENSE]: Correct.

THE COURT: [Maryland Criminal Pattern Jury Instructions 4:24 and 4:24.1], am I correct?

[STATE]: Yes.

[DEFENSE]: Well, Your Honor, may we approach?

THE COURT: You may.

(Counsel approached the bench and the following occurred:)

* * *

[DEFENSE]: Presence of the Defendant, 3.25. Proof of Intent, 3.31. I would even ask that 3.05 should have been added, Dismissal of Some Charges Against the Defendant; 3.06, Separate Consideration of Multiple Counts as to One Defendant.

THE COURT: 3.25? Why 3.25?

[DEFENSE]: Presence of Defendant. Just because his presence there alone – it explains that presence there does not necessarily mean that he possessed the (indiscernible). I mean, it specifically goes into that (indiscernible). Nobody is questioning his presence there. It was not –

THE COURT: So why am I – why are we doing it if nobody is questioning his presence?

[DEFENSE]: Because it's still specifically explained, and if I recall on the thing, it means that just because he's there does not necessarily mean that he's guilty of possession with intent to distribute.

THE COURT: State?

[STATE]: State would object…and believes that the Presence of the Defendant would not be relevant.

After a brief discussion on an unrelated topic, the court ended the bench conference without ruling on defense counsel's request for a "mere presence" instruction. The court did, however, state that it was "going to call [counsel] back up." The court then issued the remaining instructions to the jury, including instructions on the elements of possession with intent to distribute a controlled dangerous substance and possession of a controlled dangerous substance, but did not issue a "mere presence" instruction. As promised, the court, at the conclusion of its instructions to the jury, held a bench conference, and asked both the State and defense counsel if they were "satisfied." In responding, defense counsel did not re-raise his request for a "mere presence" instruction, nor did he object to the court's failure to give that instruction. Jones was ultimately convicted, as noted.

DISCUSSION

I.

Jones first argues that the court violated his Constitutional right of confrontation and the Maryland Rules when it denied him the opportunity to cross-examine Officer Ejimnkeonye regarding the section of the Prince George's County Code of Ordinances that prohibits "loitering."[1] According to Jones, Officer Ejimnkeonye "repeatedly falsely

[1] Section 14-139.03 of the Prince George's County Code of Ordinances, which prohibits "loitering," states, in relevant part, that a person may not:

> (1) Remain on a public street, sidewalk, or pathway, including one privately-owned but used by the public in general, so as to obstruct the free passage of a pedestrian or vehicle after a regular or special police officer has notified the person that the action is unlawful and has requested the person to move;
>
> (2) Remain in or on a vehicle on a public street, sidewalk, or pathway, including one privately-owned but used by the public in general, so as to

testified" on direct examination that Jones was "loitering" outside of the Best One Food Mart prior to his arrest.[2] Jones contends, therefore, that he should have been permitted to

obstruct the free passage of a pedestrian or vehicle after a regular or special police officer has notified the person that the action is unlawful and has requested the person to move;

(3) Refuse or fail to leave a private business, commercial establishment, or parking lot that is posted with conspicuous "No Loitering" signs if the business or establishment is not open for business, and the person has been requested to leave by the owner, the owner's agent, or a regular or special police officer, unless the person:

(A) Has written permission from the owner, lessee, or operator to be present; or

(B) Is window-shopping under conditions and at a time of the day or night that would be considered conducive to that activity;

(4) Refuse or fail to leave a private business or commercial establishment that is open for business, or a parking lot of the business or establishment, after having been requested to do so by the owner or the owner's agent;

(5) Refuse or fail to leave a public building, public grounds, or a public recreational area, or a parking lot of a public building, public grounds, or a public recreational area, after being requested to do so by a regular or special police officer or by a regularly employed guard, watchman, or other authorized employee of the agency or institution responsible for the public building, public grounds, recreational area, or parking lot if the circumstances indicate that the person has no apparent lawful business or purpose to pursue at that place;

(6) Return, for no apparent lawful business or purpose, to the same public or private property from which the person was asked to leave and not return for 30 days.

(CB-89-1995; CB-42-2012).

[2] Jones erroneously asserts that the State "conceded at the bench that [Officer Ejimnkeonye's] testimony was inaccurate." The State never indicated that Officer

cross-examine Officer Ejimnkeonye about his knowledge of the County ordinance to test the officer's credibility. In addition, Jones contends that Officer Ejimnkeonye's direct testimony "was relevant to the underlying question of guilt or innocence" because it "would explain why Officer Ejimnkeonye attempted to approach and stop [him]" and because it "tend[ed] to show that [Jones] was 'loitering' with three other men in order to deal drugs." Jones maintains that he should have been permitted to question Officer Ejimnkeonye "on the validity of this assertion."

The State counters that the court properly limited Jones' cross-examination. The State asserts that whether Officer Ejimnkeonye's observations met the statutory definition of "loitering" was irrelevant to any material issue in the case. The State further contends that, even if that line of questioning was relevant to test Officer Ejimnkeonye's credibility, the court did not abuse its discretion because "impeaching the officer with the County loitering ordinance would not have shown that his testimony about those events was false, or even diminished his credibility generally."

"The right of a defendant in a criminal case to cross-examine a witness for the prosecution is grounded in the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights." *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018). "To ensure the right of confrontation, defense counsel must be afforded 'wide latitude to cross-examine a witness as to bias or prejudices.'" *Id.* (citations omitted). "Thus, the defendant's right to cross-examine

Ejimnkeonye testified falsely; rather, the State merely informed the court that Jones was not charged with the crime of loitering.

witnesses includes the right to impeach credibility[.]" *Pantazes v. State*, 376 Md. 661, 680 (2003). Moreover, Maryland Rule 5-616(a)(2) expressly provides that "[t]he credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at … [p]roving that the facts are not as testified to by the witness[.]"

"The right to cross-examine is not without limits, however, and 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (citations omitted); *see also Parker v. State*, 185 Md. App. 399, 426 (2009). Trial judges are also authorized, pursuant to Maryland Rule 5-611(a), to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." *See also* Md. Rule 5-403 ("Although relevant, evidence may be excluded 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.").

In discussing the interplay between a defendant's right of confrontation and a trial court's discretionary authority over cross-examination, the Court of Appeals has stated:

> In 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. Decisions based on a legal determination should be reviewed under a less deferential standard. Finally, when an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

Peterson v. State, 444 Md. 105, 124 (2015).

Whether a defendant has been afforded the constitutionally required "threshold level of inquiry" depends on whether "the limitations imposed upon cross-examination inhibit the ability of the accused to obtain a fair trial[.]" *Brown v. State*, 74 Md. App. 414, 419 (1988). In the end, "the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is a clear abuse of discretion." *Tetso v. State*, 205 Md. App. 334, 401 (2012) (citations and quotations omitted). "This discretion is exercised by balancing 'the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion.'" *Wagner v. State*, 213 Md. App. 419, 468 (2013) (citing *Pantazes v. State*, 376 Md. 661, 681 (2003)).

Against that backdrop, we hold that the court did not abuse its discretion in refusing to allow Jones to cross-examine Officer Ejimnkeonye about his knowledge of the Prince

George's County loitering statute. Jones was not charged with the crime of loitering, and none of the charged crimes required any determination that Jones was engaged in the act of loitering, illegally or not. Therefore, whether Jones was actually guilty of loitering pursuant to the Prince George's County Code of Ordinances, or whether Officer Ejimnkeonye thought Jones was guilty of loitering, was of no consequence to any issue in the case. And while Officer Ejimnkeonye's explanation as to why he initially noticed Jones prior to the stop (because he was "loitering" with several other individuals outside of the Best One Food Mart) may have held some legal significance in assessing the officer's justification in approaching Jones prior to his arrest, that issue was not before the jury and was therefore irrelevant. *See Green v. State*, 81 Md. App. 747, 760 (1990) (noting that "whether the police have scrupulously obeyed the Bill of Rights or have shamelessly trampled it underfoot … is a very real [concern] to society at large and to the courts in administering the exclusionary rule, but it is simply not the concern of a criminal jury.") (citations and quotations omitted).

To be sure, cross-examining a witness about his knowledge of a particular statute may, under certain circumstances, be relevant in assessing the witness's credibility. *See Devincentz v. State*, 460 Md. 518, 551 (2018) ("We have recognized that a witness's credibility is always relevant."). Here, however, it was not. Officer Ejimnkeonye never testified that Jones was loitering in violation of the law, nor did the officer ever mention the Prince George's County Code of Ordinances. Officer Ejimnkeonye simply stated that Jones was loitering outside of the Best One Food Mart. To "loiter" is "to linger aimlessly

or as if aimless in or about a place." https://www.dictionary.com/browse/loiter (last visited on October 15, 2018). Thus, Jones' contention that Officer Ejimnkeonye "falsely testified" is without merit, as the officer merely related what he observed: that Jones was lingering outside the Best One Food Mart without any apparent purpose. To permit Jones to then cross-examine Officer Ejimnkeonye about a collateral matter, *i.e.*, his knowledge of an unrelated County Ordinance, could have caused confusion to the jury, a needless consumption of time, and embarrassment to the witness. Given that Jones was permitted to thoroughly cross-examine Officer Ejimnkeonye on several other matters, including matters related to the veracity of the officer's direct testimony, we cannot say that the court abused its discretion in curtailing that specific line of inquiry, nor can we say that Jones' ability to receive a fair trial was inhibited. *See Wagner*, 213 Md. App. at 469 (holding that, where a witness's motive to lie was extensively explored on cross-examination, "[c]ounsel's question regarding [the witness's] understanding of her potential eligibility for parole was a collateral issue that could have caused confusion to the jury, and the court properly exercised its discretion in limiting the scope of appellant's cross-examination.").

Assuming, *arguendo*, that the court's decision was erroneous, any error was harmless beyond a reasonable doubt. *Owens v. State*, 161 Md. App. 91, 111 (2005). Although Jones' cross-examination may have established that Officer Ejimnkeonye's knowledge of the Prince George's County Code of Ordinances was lacking or that he was mistaken in declaring that Jones was "loitering," such a showing would have had minimal, if any, effect on the fact that Jones was found in possession of a bag containing thirty-one

individually-wrapped bags of heroin. Moreover, Jones' proposed cross-examination of Officer Ejimnkeonye would have had no effect on the testimony of Officer Maxwell, who stated that the contents of the bag were consistent with an intent to distribute.

II.

Jones next argues that the court erred when it "clearly and unambiguously refused" his request to instruct the jury that a defendant's presence at the time and place of a crime is not, by itself, enough to prove that the person committed the crime. Jones notes that defense counsel argued at trial that Officer Ejimnkeonye could not have seen "a hand-to-hand transaction" from his vehicle and that "ultimately no money was found on Jones' person." Jones also notes that, at the time of his arrest, he "was standing near three other people," but when he was caught, "he was . . . the one left holding the bag." Jones contends, therefore, the court was required to give the requested instruction because it was generated by the evidence and because it supported the defense's theory of the case.

We hold that the issue was not preserved. Maryland Rule 4-325(e) states that "[n]o party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly *after the court instructs the jury*, stating distinctly the matter to which the party objects and the grounds of the objection." (emphasis added). Here, although defense counsel did ask the court to give the requested instruction, he did so in the middle of the court's instructions to the jury. After the court finished instructing the jury, the court called counsel back to the bench and asked if he was satisfied. At that point, defense counsel did not re-raise the issue or object to the court's instructions, despite the

fact that the court had not given the requested instruction. Consequently, that issue is not preserved for our review.

Jones argues that the issue was preserved because defense counsel's actions were in "substantial compliance" with Rule 4-325(e). We disagree. To be in substantial compliance with Rule 4-325(e):

> [t]here must an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Bowman v. State, 337 Md. 65, 69 (1994) (citations omitted).

As noted, defense counsel made his request in the middle of the court's instructions. Rather than issuing a ruling, however, the court deferred and stated that it would "call [counsel] back" to the bench at the conclusion of its instructions. The court did not, as Jones suggests, "clearly and unambiguously" refuse. As such, a renewal of defense counsel's request at the close of the court's instructions would not have been futile or useless. Instead, such an objection would have reminded the court of defense counsel's request and permitted the court to assess the appropriateness of the instruction in light of the instructions given. *See Stabb v. State*, 423 Md. 454, 465 (2011) ("The timing of the objection is important because it should give the trial court an opportunity to correct the instruction in light of a well-founded objection.").

Nonetheless, even if the issue had been preserved, we are persuaded that the court did not err in refusing to give the requested instruction. Maryland Rule 4-325(a) provides

that a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." *Id.* "Rule 4-325(c) has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (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." *Dickey v. State*, 404 Md. 187, 197–98 (2008). "If, taken as a whole, the court's instructions correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Howard v. State*, 232 Md. App. 125, 163 (2017) (citations and quotations omitted), *cert. denied* 453 Md. 366.

The requested instruction in the present case – Maryland Criminal Pattern Jury Instruction 3:25 "Presence of Defendant" – is as follows:

> A person's presence at the time and place of a crime, without more, is not enough to prove that the person committed the crime. The fact that a person witnessed a crime, made no objection, or did not notify the police does not make that person guilty of the crime. However, a person's presence at the time and place of the crime is a fact in determining whether the defendant is guilty or not guilty.

Although the concept of "mere presence" typically arises in the context of accomplice liability, "the trial court may be required to charge the jury as to the effect of mere presence where the defendant is charged with possession of contraband as a result of being present at or near where the contraband was found." *Fleming v. State*, 373 Md. 426, 433–35 (2003). On the other hand, "[a] mere presence instruction is not necessary when the jury is instructed properly on the elements of the crime." *Id.* at 435. "The purpose of

a mere presence instruction in a drug case is to inform the jury that simply because the defendant was in close proximity to the drugs in question, it may not infer knowledge and intent to exercise dominion and control from that fact alone." *Id.* at 439.

Here, the court properly instructed the jury on all of the elements of the crimes charged. Thus, there was no need for the court to give a "mere presence" instruction. *Compare to Id.* (holding that trial court erred in failing to give "mere presence" instruction where the court "failed to explain adequately to the jury that … knowledge is an element of the offense of possession of a controlled dangerous substance.").

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.