

Circuit Court for Anne Arundel County
Case No. C-02-CR-16-000904

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2194

September Term, 2016

DONOVAN JAMAL ROBINSON

v.

STATE OF MARYLAND

Friedman,
Beachley,
Fader,

JJ.

Opinion by Friedman, J.

Filed: July 16, 2018

*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.

A jury in the Circuit Court for Anne Arundel County convicted appellant, Donovan Jamal Robinson, of possession of heroin.¹ He timely noted this appeal, asking us to consider the following questions:

1. Did the trial court err in admitting overly prejudicial documents into evidence and thus depriving Appellant of a fair trial?
2. Did the trial court err in restricting the cross-examination of a state witness regarding alternative suspects?
3. Did the trial court err in allowing improper closing argument?

For the reasons that follow, we affirm.

FACTS AND LEGAL PROCEEDINGS

Annapolis City Police executed a search warrant at an apartment at 9-F Bens Drive in Annapolis, a building in “a high crime, high drug area.” The subject of the warrant was Corben Johnson, who was under investigation for drug dealing and had been seen entering the apartment. Jasmine Johnson, Robinson’s girlfriend, was the leaseholder of the apartment.²

Upon entering the apartment, the officers found Robinson, Jasmine, and Jasmine’s four-year-old child in a bedroom. Corben was not in the apartment. Robinson and Jasmine were read their *Miranda* rights and initially said nothing to the police. A search of the

¹ The jury acquitted Robinson of possession with intent to distribute heroin, conspiracy to possess heroin in sufficient quantity to indicate intent to distribute, and possession of drug paraphernalia (in this case, two scales) with intent to use.

² The police found no evidence that Jasmine Johnson and Corben Johnson were related. Because they share a surname, however, we will refer to each by his or her given name. According to Jasmine, Corben dated her cousin and stayed at her Bens Drive residence from time to time.

apartment revealed women’s undergarments and suspected heroin—packaged in 20 plastic baggies inside one larger baggie—in a dresser drawer in the bedroom.³ In addition, the search turned up plastic baggies and a digital scale showing a “brownish powdery substance” inside a container in the bedroom closet, \$240 in the pocket of a camouflage jacket in the same closet, a second digital scale, also with a powdery substance, on top of the refrigerator in the kitchen, and documents bearing Robinson’s name.

When a detective showed the suspected heroin to Robinson and Jasmine and asked “if these belonged to anybody,” Robinson said that “the drugs were his and that he would take the charge.” Robinson and Jasmine were arrested.⁴ Before being transported to the police station, Robinson asked for clothing from the bedroom closet in which the jacket, baggies, and scale had been found.

An expert called by the State testified that the amount of heroin recovered from Jasmine’s apartment—approximately 10 grams packaged in 20 baggies, each containing approximately 0.5 grams—was “definitely more than personal use.” In the expert’s opinion, the packaging of the heroin in small, individual baggies and the recovery of two scales supported a charge of possession with intent to distribute. He estimated that the recovered heroin had a street value of approximately \$1200.

³ Later laboratory testing confirmed that it was heroin.

⁴ Jasmine was tried with Robinson and convicted of heroin possession.

DISCUSSION

I. "PRIOR BAD ACTS" EVIDENCE

Robinson challenges the circuit court's decision to admit, over his objection, two documents bearing Robinson's name found in Jasmine's apartment (and thus tying him to the location). Robinson's challenge to both documents is identical: the documents each contain references to his previous incarceration, which improperly permitted the jury to infer his involvement in "prior bad acts." He argues, therefore, that the circuit court erred in admitting the documents without first conducting a Maryland Rule 5-404(b) "prior bad acts" analysis. We will review the documents first and then explain our reasoning.

The first document is a \$35 money order, purchased from a CVS Pharmacy and made payable to "AACDF," which we understand stands for the Anne Arundel County Detention Facility. The purchaser of the money order is listed as Donovan Robinson, and the number listed on the "recipient" line corresponds to Robinson's commissary account. We have reproduced the money order as it appears in the record of this appeal:



The second document is a hearing notice issued by the Circuit Court for Anne Arundel County to notify Robinson of a status conference in a case captioned, *State of Maryland v. Donovan Jamal Robinson*. We make two additional observations about this document. First, it is not addressed to Robinson at Jasmine's apartment, where it was found, but rather at 131 Jennifer Road, the location of the AACDF. Second, the hearing notice does not identify or describe the type of case for which notice is given, but the case caption strongly suggests that the case is criminal in nature. Moreover, the notice contains a line titled "Inmate ID Number," which also supports its connection to a criminal case. Again, we have reproduced the notice as we received it:



**CIRCUIT COURT OF MARYLAND FOR
ANNE ARUNDEL COUNTY**
8 Church Circle
Annapolis, Maryland 21401

Main: 410-222-1397
Civil: 410-222-1431
Criminal: 410-222-1420
Juvenile: 410-222-1427
Trust/Adoption: 410-222-1331
TTY for Deaf: 410-222-1429
Maryland Relay Service: 711

To: **DONOVAN JAMAL ROBINSON**
131 JENNIFER ROAD
ANNAPOLIS MD 21401

Case Number:
Tracking Number:
Related Case Number:
Inmate ID Number:

157002000621

**THE STATE OF MARYLAND VS. DONOVAN JAMAL ROBINSON
NOTICE OF HEARING/TRIAL**

You are hereby **NOTIFIED** of the following court date, at the location above, on:

Date: 10/30/2015
Time: 1:30 PM
Type of Proceeding: Conference - Status
Location: 8 Church Circle
Annapolis, Maryland 21401

FAILURE TO APPEAR MAY RESULT IN YOUR ARREST.

Please call the States Attorney's Office at 410-222-1740 if you have any questions. If you plan to attend this hearing, please notify the court, as far in advance as possible, of any reasonable accommodation that is needed because of a disability.

Witness the Honorable Clerk of the Circuit Court.

10/16/2015

Robert P. Duckworth
Clerk of the Circuit Court

As we will discuss, we agree with Robinson that the circuit court erred in failing to conduct a “prior bad acts” analysis prior to admitting the money order and hearing notice into evidence. Md. Rule 5-404(b). Crucially, however, Robinson *admitted to the police* that the heroin recovered in the apartment belonged to him. That admission alone is sufficient for us to conclude, beyond a reasonable doubt, that the jury would not have returned a different verdict, even if the challenged documents had been excluded. Thus, we hold that any error by the circuit court with respect to the documents was harmless. *Donaldson v. State*, 200 Md. App. 581, 595-96 (2011) (“In Maryland, an error is harmless if ‘a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.’”) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

We consider Robinson’s admission of ownership of the drugs dispositive of his appeal and affirm his conviction on that ground. We will, however, in the exercise of our discretion and for the benefit of the trial court and the parties, address the issue of the “prior bad acts” evidence under Maryland Rule 5-404(b). *See, e.g., Taylor v. State*, 388 Md. 385, 399-400 (2005) (holding that verdict could not stand due to trial error but addressing secondary issue anyway, though it did not affect the outcome on appeal).

Rule 5-404(b) reads:

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts ... is not admissible to prove the character of a person ... to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Md. Rule 5-404(b). There are four steps involved in deciding whether to admit or exclude evidence of “prior bad acts.” *First*, the court must determine if, in fact, the challenged evidence concerns a “prior bad act,” meaning that it concerns an “activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one’s character.” *Klaenberg v. State*, 355 Md. 528, 549 (1999). *Second*, if it does, the court must determine if the evidence has some “special relevance” to a contested issue in the case, and thus fits into one of the exceptions provided for in the second sentence of the Rule. *Smith v. State*, 218 Md. App. 689, 710 (2014); Md. Rule 5-404(b). *Third*, if one or more of the exceptions applies, the court must decide whether the defendant’s involvement in the “prior bad act” can be proven by clear and convincing evidence. *State v. Faulkner*, 314 Md. 630, 634 (1989). *Finally*, the court must weigh the probative value of the “prior bad acts” evidence against the potential for undue prejudice that would result from its admission. *Id.* at 635. If the court determines that the probative value outweighs the potential for undue prejudice, then the evidence of “prior bad acts” may be admitted. *Id.* We will review each step in turn.

A. Prior Bad Acts

The first step of the 5-404(b) analysis requires the court to determine if the evidence relates to the defendant’s involvement in a “prior bad act.” That requires the court to decide if the evidence related to conduct that would “impugn or reflect adversely upon [a defendant’s] character.” *Klaenberg*, 355 Md. at 549. The trial judge here misunderstood this test. Rather than evaluating the challenged evidence itself, the trial judge improperly speculated about the jury’s ability to understand the nature of the evidence. To illustrate

the proper considerations the trial court should have made, we discuss each challenged document separately.

1. *The Money Order*

As we described above, the money order is a deposit of funds into Robinson’s commissary account in a correctional facility. The clear implication of the document is that Robinson was incarcerated and, therefore, had engaged in a “prior bad act.” That should have been enough to move to the second step of the analysis. Instead, the trial judge overthought the matter. He speculated that the money order “says nothing” and raised no problem, because an average juror would not know that “AACDF” referred to the Anne Arundel County Detention Facility. Thus, to the average juror, the judge assumed, the money order would not imply that Robinson had engaged in a “prior bad act.” The trial judge may well have been right. Maybe most jurors would not know what “AACDF” stands for. But the judge had no way to know whether, in fact, any single member of *that jury* possessed that knowledge. No *voir dire* had been conducted on that topic. Maybe one juror drove past the facility each day on the way to work. Maybe one juror worked in the Anne Arundel County budget office and was familiar with the initials. Maybe it was an answer to a crossword puzzle one juror worked out. The trial judge had no way to know. That is why the first step under Rule 5-404(b) is an objective test: does the challenged evidence, on its face, suggest that the defendant engaged in a prior bad act? This money order did.

2. *The Hearing Notice*

Also as described above, the State introduced a hearing notice addressed to Robinson at 131 Jennifer Road and indicating that Robinson was to attend a status

conference in a case captioned *State of Maryland v. Donovan Jamal Robinson*. There can be little question that such a document suggests that Robinson is a defendant in a criminal matter. The trial judge, however, again failed to understand the test he was to perform. As with the money order, the trial judge reasoned that the hearing notice “just simply has the address of 131 Jennifer Road, without referring to it as the Detention Center, so I don’t see where that’s an issue.” The judge further explained that he “would probably let it stay even if [it] said Detention Center ... it is what it is. If that was his mailing address, then it is what it is.” Again, maybe the judge was right, and no juror would have known that 131 Jennifer Road was the address of the AACDF. But then again, a single juror might have. Moreover, it doesn’t require specialized knowledge to recognize that criminal cases are captioned as this one was, and even though the trial judge agreed to redact the case number, the document still tied Robinson to a “prior bad act” by referencing his prior incarceration. Thus, with the hearing notice (as with the money order), the trial judge asked the wrong question.

After concluding, erroneously, that neither of the challenged documents were evidence of Robinson’s involvement in “prior bad acts,” the trial court determined that it did not need to conduct any further analysis under Rule 5-404(b). As a result, it proceeded directly to weigh the probative value of the evidence against the danger of unfair prejudice to Robinson, and determined that both the money order and the hearing notice were admissible. Instead, as to each document, the trial court should have proceeded to the second step of the 5-404(b) analysis. We now briefly address how the trial court’s analysis

should have proceeded, in our view, had it employed the proper, objective test required under Rule 5-404(b).

B. Special Relevance

The second step of a 5-404(b) analysis requires the trial court in the first instance, and us on appeal, to determine whether the “prior bad acts” evidence was specially relevant to a contested issue in the case. Md. Rule 5-404(b); *Smith*, 218 Md. App. at 710. Here, to prove that Robinson had possession of the drugs discovered in the apartment where he was not a leaseholder (absent his admission), the State bore the burden of proving that Robinson “exercise[d] actual or constructive dominion or control” over them. Criminal Law (“CR”) § 5-101(v) (“‘Possess’ means to exercise actual or constructive dominion or control over a thing by one or more persons.”). Part of this burden involved proving that Robinson had knowledge that the drugs were located in the apartment. *Bordley v. State*, 205 Md. App. 692, 717–19 (2012) (Knowledge is a required element of possession because “an individual ordinarily would not be deemed to exercise dominion or control over an object about which he is unaware”) (cleaned up).⁵ One way the State could establish the knowledge element of possession was to show that Robinson “ha[d] dominion or control over the contraband itself *or over the premises . . .* in which it was concealed.” *Neal v. State*, 191 Md. App. 297, 316 (2010) (emphasis added). It could have concluded that the money order and the

⁵ “Cleaned up” is a new parenthetical intended to simplify quotations from legal sources. See Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143 (2017). Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

hearing notice, both of which bore Robinson’s name and were found in the bedroom Robinson shared with Jasmine (where the drugs were found), were specially relevant to establishing Robinson’s possessory connection to the apartment. Thus, the court could have found that the documents had special relevance to proving Robinson’s knowledge of the drugs. Md. Rule 5-404(b) (“Evidence of other crimes ... may be admissible ... as proof of ... knowledge.”).

C. Clear and Convincing Evidence

The third step of the Rule 5-404(b) analysis would require the trial court to conclude that Robinson’s involvement in the “prior bad acts” could be proven by clear and convincing evidence. *Snyder*, 361 Md. at 604. There was no such evidence in the record so we don’t resolve this question, but we note that the money order related to a conviction for which Robinson served a term of incarceration, and for which a public record presumably exists. If the circuit court was similarly satisfied that Robinson’s participation in the acts connected to the hearing notice could be proven by clear and convincing evidence, it should then have proceeded to the fourth and final step of the Rule 5-404(b) analysis.

D. Weighing Probative Value and Potential for Prejudice

Under the final step of the 5-404(b) analysis, the trial court must determine whether the probative value of the evidence outweighs the danger for unfair prejudice and that, therefore, the evidence is admissible. *Snyder*, 361 Md. at 604. It is not our province, on review, to conduct this weighing test. We note, though, that when reviewing the documents initially, the circuit court found that they had significant probative value, particularly because they helped establish Robinson’s possessory interest in the apartment where the

drugs were found. Because the circuit court failed, however, to conduct the proper analysis under 5-404(b), we do not think it adequately considered the danger of unfair prejudice that the money order and hearing notice presented as evidence of Robinson’s “prior bad acts.” Thus, the circuit court erred by determining that the documents were admissible without first applying the proper balancing test.

In any event, our discussion as to whether the documents should or should not have been admitted is largely academic, given, again, that Robinson confessed to police that the drugs belonged to him. Thus, even though the circuit court did not engage in the proper analysis under Rule 5-404(b) when determining whether to admit the documents into evidence, its failure to do so was harmless. *Dorsey*, 276 Md. at 659 (1976). We, therefore, affirm Robinson’s conviction.

II. CROSS-EXAMINATION ABOUT CORBEN JOHNSON

Robinson next claims that the trial court erred when it prohibited defense counsel from cross-examining a detective about Corben Johnson, the original target of the search warrant. In Robinson’s view, the detective’s testimony would have offered the jury an “alternative suspect and the target of the warrant,” and the court’s ruling denied him the “most basic right to present a defense.”

The search warrant for Jasmine’s apartment was issued, partly, based on the detective’s observation of Corben participating in a hand-to-hand drug sale at the Bens Drive apartment building. When defense counsel attempted to ask the detective about this, the State objected on relevancy grounds. Robinson claimed that Corben’s drug dealing was exculpatory to Robinson because the detective had not seen Robinson engage in any drug

sale. The trial court, however, agreed that that testimony was irrelevant to the case against Robinson.

We see no error in the trial court’s determination. The only relevance of the detective’s observation of Corben’s drug sales was that it led to the probable cause finding necessary to obtain the search warrant. Robinson does not argue that the probable cause finding was defective or that the execution of the search warrant was illegal. Moreover, the execution of that warrant revealed the presence of heroin in the bedroom in which Robinson and Jasmine were sleeping. Thus, whether or not Corben was observed dealing drugs outside the apartment had no bearing on whether Robinson, individually or jointly, possessed the drugs found in the apartment at the time the police executed the search warrant. CR 5-101(v) (possession concerns the “actual or constructive dominion or control by one *or more* persons.”) (emphasis added). And, finally, following the execution of the warrant, Robinson confessed that the drugs belonged to him. Therefore, the trial court did not abuse its discretion by determining that the detective’s testimony was irrelevant to the case.⁶

III. STATE’S CLOSING ARGUMENT

Finally, Robinson contends that the trial court erred in permitting the prosecutor to make “improper and prejudicial statements by arguing facts not in evidence to the jury”

⁶ The court’s limitation of this line of questioning also did not prevent the defense from attempting to present Corben as an alternate suspect, as Robinson contends. Both Robinson’s and Jasmine’s attorneys made clear that Corben was the original target of the police investigation that led to the issuance of the search warrant and that neither Robinson nor Jasmine were intended targets.

during closing argument. As established by the testimony of the detective who executed the search warrant, \$240 was found “in a camouflage jacket that was located in the same closet that I located the baggies and scale.” The detective testified that he could not recall if the jacket “was a men’s jacket or a [woman’s] jacket.” He told the jury, though, that after Robinson was arrested and was about to be transported to the police station, he asked for some clothing from “the same closet” in which the scale and baggies had been found.

During closing argument, the prosecutor stated:

There is an argument by defense counsel that ... Robinson has no connection to this place. Well, if someone’s in bed at one-thirty in the morning someplace, they have a connection to the place. They conduct a search. What do they find during the search? They find documents in the name of Donovan Robinson in the closet. ... His items were in the closet.

What else was in the closet? You heard a men’s camouflage jacket.

At that point, defense counsel objected, and the court overruled the objection. The prosecutor continued:

A men’s camouflage jacket with two hundred and forty dollars in the pocket. What else was in there? He had scales, and a bunch of plastic baggies. ... A bag of heroin containing twenty other bags of heroin, portioned out in generally half gram amounts.

* * *

When he was transported to the police station, he asked for clothes that came out of the same exact closet that had the jacket that had the documents that had the scale that had the sandwich bags.

Robinson argues that the prosecutor’s statement was a “deliberate mischaracterization” that the jacket was designed for a man when the testimony had not

conclusively established that fact. In Robinson’s view, the prosecutor’s statements were improper and “calculated to establish [his] connection to the apartment outside of his mere presence.” We find no error in the prosecutor’s comment, but, even if we did, that error was harmless.

Attorneys are afforded “considerable leeway in closing argument, and [the] regulation of closing arguments falls within the sound discretion of the trial court.” *Frazier v. State*, 197 Md. App. 264, 283 (2011). In general, “counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom.” *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). Even if counsel makes improper remarks during closing argument, the comments would only warrant reversal if they “actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.” *Spain v. State*, 386 Md. 145, 158 (2005) (quoting *Degren v. State*, 352 Md. 400, 431 (1999)).

Although the detective’s testimony did not establish definitively that the jacket in which the cash was found was a man’s jacket, that information had previously been placed before the jury during the state’s opening statement, without objection by the defense. Jasmine’s attorney also stated in his opening, without objection, that “[t]here was money that was seized from a man’s jacket.” The jury also heard testimony that, before being transferred to the police station, Robinson asked for clothing from the closet where the

jacket and cash were found. Therefore, the jury reasonably could have inferred from the evidence that the camouflage jacket belonged to a man.⁷

Moreover, it makes no difference if the jacket was for a man or a woman, as Robinson confessed that the drugs belonged to him, and the jury, if it believed him, could have convicted him on that fact alone.

**JUDGMENTS OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED; COSTS ASSESSED TO
APPELLANT.**

⁷ Defense counsel reiterated in his closing argument that the detective testified that “he doesn’t remember whether that was a men’s jacket or a woman’s jacket” and stated, “there’s no evidence about this jacket, and what kind of jacket that was.” The jury was thus aware that the State and the defense contested whether the jacket was a man’s or a woman’s. It was permitted to accept the characterization by either side. Therefore, it is extremely unlikely that the jury was misled by the prosecutor’s single comment, even if it was erroneous.