Circuit Court for Charles County
Case No. 08-K-14-000244

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2708

September Term, 2016

KENNY EARL MORRIS

v.

STATE OF MARYLAND

Berger,
Arthur,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion By: Battaglia, J.

Filed: July 30, 2018

A jury, in the Circuit Court for Charles County, convicted Kenny Morris, appellant, of first and second-degree assault. Morris was sentenced to a term of twenty years' incarceration, with all but nine years suspended, to be followed by a four-year period of probation. In this appeal, Morris presents one question for our review:

> Did the circuit court err in limiting the cross-examination of two of the State's witnesses?

For reasons to be discussed, we answer Morris's question in the negative and affirm the judgments of the circuit court.

BACKGROUND

In 2014, Kenny Morris was arrested and charged following a physical altercation with his neighbor, Tyrone Jeter. At the time, Mr. Jeter and his then-fiancée, Janice Johnson ("Janice"), lived in a townhome located at 1519 Bryan Court in Waldorf, while Janice's sister, Patricia Johnson ("Patricia"), lived in a neighboring townhome with her boyfriend, Morris.

At trial, Mr. Jeter testified that, on the day of the altercation, he had returned from work and parked his car in his townhome's communal parking lot. After going inside his home, Mr. Jeter heard a knock at his front door. When he answered, Mr. Jeter was confronted by his neighbors, Morris and Patricia, who accused Mr. Jeter of parking his car in Morris's space. When Mr. Jeter responded that he had parked in an "open space," Morris threatened to "kick [his] ass." Eventually, Patricia and Morris left and returned to Patricia's home.

Mr. Jeter further testified that, shortly after his confrontation with Morris and Patricia, he left his home and went to "check on Patricia" at her home. Once there, Mr. Jeter was met by Patricia and Morris and was eventually invited inside. According to Mr. Jeter, at some point during that visit, Patricia became "irate" and pushed Mr. Jeter, who pushed Patricia back, causing her to fall. As Mr. Jeter turned to leave, Morris punched him in the face and grabbed him around the neck. When Mr. Jeter attempted to get Morris away from him, Morris stabbed him with a knife. Mr. Jeter ultimately broke free from his entanglement with Morris and left the residence. Mr. Jeter was later taken to the hospital, where he was treated for stab wounds to his left arm, neck, and back.

Morris testified in his own defense. In so doing, he stated that, prior to their confrontation with Mr. Jeter, he and Patricia were in his car traveling to Patricia's house when Morris parked his car in the vicinity of Patricia's residence. After Morris told Patricia that his vehicle had been vandalized in that area before, she suggested that they ask Mr. Jeter to move his vehicle so that Morris could park his car closer to Patricia's residence and because there were other open spots that were closer to Mr. Jeter's residence. Patricia and Morris then went to Mr. Jeter's residence, where Patricia asked Mr. Jeter to move his vehicle. According to Morris, Mr. Jeter responded, "no," and stated that he would come outside and "fuck up" Morris. Morris claimed that he and Patricia then went home.

Morris further recounted that Mr. Jeter later showed up at Patricia's door and asked Morris to step outside and fight him. When Patricia told Mr. Jeter to go home, he burst into the home, picked Patricia up, and threw her on the ground. Mr. Jeter then rushed at Morris and grabbed him around the neck. Morris testified that he and Mr. Jeter fell onto a

wooden filing cabinet, breaking it. At some point, Mr. Jeter began choking Morris, so Morris grabbed a knife and swung it at Mr. Jeter. Morris stated that the fight ended when Mr. Jeter stopped fighting and the knife broke.

During the cross-examination of Mr. Jeter, defense counsel asked Mr. Jeter why he had decided to go to Janice's home following the initial confrontation regarding the parking spot:

> [DEFENSE COUNSEL]: So, if you knew that Mr. Morris was in the home and he was so upset why would you even ring the bell?
>
> [JETER]: I knocked on the door.
>
> Q: Sorry, knocked on the door.
>
> A: Yeah, because I've always been so close to her [Patricia]. You would have to know our relationship.
>
> Q: Why wouldn't you call her or text her?
>
> A: It was; I was right there. You would have to know our relationship and you would have to know me. My whole life is about peace and love for everyone including her. If she was here today I would tell her I love her.
>
> Q: Your whole life's about peace and love?
>
> A: Yes, Sir, it is.
>
> Q: No violence?
>
> A: No violence.
>
> Q: Sir, isn't it true that you were charged with assault?
>
> A: With whom?
>
> [PROSECUTOR]: Objection, Your Honor.
>
> THE COURT: Approach.

(Counsel approaches the bench).

THE COURT: All right, what are we talking about?

[DEFENSE COUNSEL]: He opened the door saying he's full of peace and love; never been violent and he was arrested for assault.

THE COURT: Was he convicted of it?

[DEFENSE COUNSEL]: He was not.

THE COURT: So I don't think an arrest would be impeachment. I'm not even sure that he's really; (unintelligible) he invited it. You asked him a couple times. So let's move on. We going anywhere else with this or just (unintelligible)?

[DEFENSE COUNSEL]: Very briefly.

THE COURT: Okay.

[PROSECUTOR]: Sustained or?

THE COURT: Yeah, sustained.

Mr. Jeter's fiancée, Janice Johnson, also testified. She explained that, on the day of the incident, she was at a basketball game when she received a call from Mr. Jeter, who informed her that "someone was at the door." When Janice returned home approximately 20 minutes later, she went inside and observed "traces of blood in [the] foyer." Janice then "ran upstairs" and found Mr. Jeter, whose "face was gashed open." After an ambulance was called, Mr. Jeter was transported to Shock Trauma. Janice testified that she eventually travelled to Shock Trauma as well, but that she went to her other sister's house first because she "didn't know where Shock Trauma was."

On cross-examination, defense counsel asked Janice about a conversation she had with her other sister on the day of the incident:

[DEFENSE COUNSEL]: And you just mentioned on direct that before you went to shock trauma you went and saw your other sister.

[JANICE]: My older sister; yes.

Q: And what's her name?

A: Loretta Johnson.

Q: And where does Loretta Johnson live?

A: In Washington, D.C., Southeast.

Q: And are you closer with Loretta or Patricia?

A: Patricia.

Q: I'm assuming that Patricia is closer to you than she is with Loretta as well?

A: Yes.

Q: Did you ever tell Loretta that you told Mr. Jeter to stay in the house?

[PROSECUTOR]: Objection, Your Honor.

THE COURT: Sustained.

The jury ultimately convicted Morris of first and second-degree assault. This timely appeal followed.

DISCUSSION

Morris first argues that the circuit court erred in restricting his cross-examination of Tyrone Jeter. Specifically, Morris contends that he should have been permitted to ask Mr. Jeter whether Mr. Jeter had been charged with assault. Morris maintains that the question was proper because Mr. Jeter, by stating that his life was about peace and love, "introduced evidence of his character trait for peacefulness." Morris maintains, therefore, that Mr.

Jeter's arrest for assault was admissible as "a pertinent trait of the victim" and "highly pertinent to [Morris's] defenses of self-defense, defense of others, defense of home, and defense of property." Morris also avers that the evidence served to impeach Mr. Jeter's credibility by showing, pursuant to Maryland Rule 5-616, that Mr. Jeter's "opinion about his own peacefulness was not worthy of belief." In light of those arguments, Morris contends that the court unreasonably restricted his constitutional right of confrontation.

Morris also claims that the circuit court erred in restricting his cross-examination of Janice Johnson. Morris contends that he should have been permitted to ask Johnson whether she had told her sister that she had told Mr. Jeter to stay home on the day of the incident. Morris contends that the question was relevant in refuting Mr. Jeter's claim that he went to Patricia's residence to check on her. Morris also contends that the question was relevant to support his claim that Mr. Jeter went to Patricia's to start a fight. As with his claim regarding the court's restriction of his cross-examination of Mr. Jeter, Morris contends that the court's actions with respect to his cross-examination of Johnson amounted to an unreasonable restriction on his constitutional right of confrontation.

"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 witnesses includes the right to impeach credibility, to establish bias, interest or expose a

motive to testify falsely." *Pantazes v. State*, 376 Md. 661, 680 (2003). Moreover, the Maryland Rules expressly permit a party to attack the credibility of a witness "through questions asked of the witness, including questions that are directed at . . . [p]roving that an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief." Maryland Rule 5-616(a)(3).

"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). 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." In defining the parameters of a judge's discretionary authority to control the questioning of witnesses, 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). For instance, "[a] judge must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices, but the questioning must not be allowed to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion." *Smallwood*, 320 Md. at 307-08 (internal citations omitted). Moreover, "not all relevant impeachment evidence is necessarily admissible, and the trial judge 'must balance the probative value of an inquiry against the unfair prejudice that might inure to the witness.'" *Ware v. State*, 348 Md. 19, 68 (1997) (citations omitted). 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 omitted).

Against that backdrop, we hold that the circuit court did not err in excluding evidence of Mr. Jeter's arrest for assault. Before discussing the merits of Morris's claims, we first note that Morris's argument regarding Mr. Jeter's "character trait for peacefulness" is not preserved for our review. To be sure, Maryland Rule 5-404(a)(2)(B) permits a defendant to offer direct evidence "of an alleged crime victim's pertinent trait of character."

It is evident from the record, however, that Morris did not offer Mr. Jeter's arrest for that reason. At trial, when the State objected to defense counsel's question regarding Mr. Jeter's arrest, defense counsel proffered that he wanted to introduce the arrest based on Mr. Jeter's claims that "he's full of peace and love" and "never been violent." After determining that Mr. Jeter had not been convicted of the assault, the court stated that it did "not think an arrest would be impeachment" and sustained the State's objection. During that colloquy, defense counsel made no attempt to correct the court's characterization of his proffer, nor did he present any argument to suggest that the arrest was generally probative of Mr. Jeter's pertinent trait of character or Morris's self-defense claim. Thus, that portion of Morris's argument is waived. *See, e.g.,* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *State v. Jones*, 138 Md. App. 178, 218 (2001) ("[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'") (citations omitted), *aff'd*, 379 Md. 704 (2004).

Even if preserved, Morris's argument that Mr. Jeter's arrest for assault should have been admitted as direct evidence of his "character trait for peacefulness" is without merit. "Generally, 'evidence of a person's character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion.'" *Lindsey v. State*, 235 Md. App. 299, 324 (2018) (quoting Md. Rule 5-404(a)(1)), *cert. denied,* 458 Md. 593. As noted, however, "'evidence of an alleged crime victim's pertinent trait of character'

may be admissible when that trait is relevant to a contested issue at trial." *Id.* (quoting Md. Rule 5-404(a)(2)(B)). "A trial court's decision to admit or exclude character evidence of the victim lies within its sound discretion." *In re Ryan S.*, 139 Md. App. 94, 115 (2001), *rev'd on other grounds*, 369 Md. 26 (2002).

Here, Mr. Jeter's arrest for assault on some unknown date prior to his altercation with Morris had little relevance to his behavior on the day of the altercation. *See Bell v. State*, 114 Md. App. 480, 510 (1997) (holding that homicide victim's three-year-old altercation with a store security guard "had little relevance" to show that the victim lunged at the defendant during the street fight that led to the victim's death). Moreover, this Court has rejected mere accusations of misconduct as direct evidence to prove that a witness has a proclivity to act a certain way. *See Height v. State*, 185 Md. App. 317, 348-49, *vacated on other grounds*, 411 Md. 662 (2009) ("Mere accusations of misconduct, even an arrest or an indictment, have little probative value[.]"); *See also Harmony v. State*, 88 Md. App. 306, 322 (1991) ("A trial court is not required to permit testimony which attacks a witness' character while in no way relating to any alleged bias."). Accordingly, we cannot say that the circuit court erred in refusing to admit Mr. Jeter's arrest for assault as direct evidence of his "character trait for peacefulness."

Morris's argument that Mr. Jeter's arrest should have been admitted as impeachment evidence is also without merit. Maryland Rule 5-608(b) provides that a court "may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness." In addition, Maryland Rule 5-616 provides, in pertinent part, that the

"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 . . . [or] that an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief[.]" Md. Rule 5-616(a)(2) and (3).

That said, the Court of Appeals has "long-held that 'mere accusations of crime or misconduct may not be used to impeach. . . . [A]ccusations of misconduct are still clothed with the presumption of innocence and receiving mere accusations for this purpose would be tantamount to accepting someone else's assertion of the witness' guilt and pure hearsay.'" *Ellsworth v. Baltimore Police Dept.*, 438 Md. 69, 87-88 (2014) (quoting *State v. Cox*, 298 Md. 173, 179-80 (1983)). "Indeed, 'when impeachment is the aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person, but whether the witness actually committed the prior bad act.'" *Fields v. State*, 432 Md. 650, 674 (2013) (quoting *Cox*, 298 Md. at 181). Moreover, "not all acts of misconduct are 'prior bad acts that are relevant to assessing the witness's credibility regardless of whether a conviction resulted,' but only those crimes or bad acts that logically relate to a witness's character for untruthfulness." *Id.* at 88 (quoting *Robinson v. State*, 298 Md. 193, 197 (1983)). Therefore, "'if the bad acts are not conclusively demonstrated by a conviction, the trial judge must exercise greater care in determining the proper scope of cross-examination.'" *Fields*, 432 Md. at 673 (quoting *Robinson*, 298 Md. at 200).

Here, it is undisputed that Mr. Jeter's arrest for assault represented a mere accusation of misconduct. Thus, even if the evidence was offered for impeachment purposes, we cannot say that the trial court necessarily erred in refusing to admit it. Importantly, we

cannot say that the trial court's decision denied Morris his constitutionally protected threshold level of inquiry and inhibited his ability to obtain a fair trial. When Mr. Jeter made the statement that his life was "about peace and love," the trial court allowed defense counsel to ask Mr. Jeter several follow-up questions, including whether his life included any "violence." That the court drew the line at the admission of Mr. Jeter's assault arrest did not, under the circumstances, constitute an abuse of discretion. *See Cox*, 298 Md. at 181 ("A hearsay accusation of guilt has little logical relevance to the witness' credibility.").

Finally, with respect to Morris's claim that he should have been permitted to ask Janice whether she had told her sister that she had told Mr. Jeter to stay home on the day of the incident, we again find no error in the circuit court's decision to limit that evidence. The testimony was clearly inadmissible hearsay, as it was "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801; *See also* Md. Rule 5-802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."). Moreover, Morris's reliance on several exceptions to the hearsay rule – namely, that the evidence bore "on the state of mind of [Mr.] Jeter and the explanation for his subsequent conduct" – is misplaced, as those exceptions apply only in the context of the declarant, not a third-party. *See, e.g., Kirkland v. State*, 75 Md. App. 49, 54 (1988) ("One [exception to the hearsay rule] is 'state of mind,' which allows the declaration to be received into evidence as an accurate depiction **of the declarant's** state of mind at the time the declaration was made.") (emphasis added); *Id.* at 56 ("[O]ut-of-court statements which tend to prove a plan, design, or intention **of the declarant** are

admissible[.]") (emphasis added) (citations omitted). For those reasons, the trial court's decision to limit Morris's cross-examination of Janice did not infringe upon Morris's constitutional right of confrontation.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.