Circuit Court for Baltimore City
Case No. 116111012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2731

September Term, 2016

HARRY MALIK ROBERTSON

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: June 6, 2018

Harry Malik Robertson, appellant, was involved in a brawl, at a residential complex near Morgan State University, that ended in the stabbing death of one of the young men participating in that melee. Ultimately, a jury, in the Circuit Court for Baltimore City, found appellant guilty of accessory after the fact to murder but acquitted him of both first- and second-degree murder and of carrying a weapon openly with intent to injure.

On appeal, he raises two issues (which we have rephrased to facilitate review):

I. Whether the trial court erred in permitting the State to question him about his participation in an earlier fight during which a knife had been brandished.

II. Whether the evidence was sufficient to support his conviction for accessory after the fact to murder.

For the reasons that follow, we hold that the trial court erred in permitting the State to question appellant about his involvement in an earlier fight, unrelated to the brawl at issue, where, as the State stressed at trial, a knife had been brandished. And, because we are unable to conclude that that ruling amounted to no more than "harmless error," we shall vacate appellant's conviction and remand this case for a new trial. As for his challenge to the sufficiency of the evidence supporting his conviction, we hold that that claim was not preserved for appeal, as appellant concedes, and decline his request for plain error review.

Facts

On the evening of February 1, 2016, appellant, then a student at Coppin State University, became involved in a brawl between two groups of young men near the Morgan State University campus that climaxed in the stabbing death of one of the participants in

that fight, Gerald Williams, a student at Morgan State (whom we shall hereafter refer to as "the decedent").

The seeds of that brawl were sowed a week earlier, when Daequon Gordon, a Prince George's Community College student, purchased from Brandon Parker, a Morgan State University Student, ten dollars' worth of marijuana, with a counterfeit fifty-dollar bill, and received, in return, from the unwitting Parker, the marijuana he had purchased and forty dollars in change. No evidence was adduced at trial that appellant had participated in that transaction, though it ultimately led to the brawl in question.

When Parker learned that the bill he had received, from Gordon, was counterfeit, he contacted Gordon and demanded his money back. A meeting was then arranged, at which both men showed up with friends; most of whom were students at Morgan State University. Among them were the decedent, who was a friend of Gordon's, and appellant, who was a friend of Parker's. What occurred next was in dispute at trial.

Gordon, whose purchase of marijuana from Parker, with a counterfeit bill, had sparked the fight, testified for the State. He asserted that, when the two groups met that evening, he "told" Parker "I got your money. You'll have to take it from me. I'm not paying you." Then, Gordon "punched" Parker, provoking a larger fight among the young men that were there. He, however, did not see who stabbed the decedent during the ensuing brawl. As appellant and others "ran off," the decedent collapsed and Gordon, upon observing that the decedent had left "a trail of blood[,] . . . called an ambulance."

Another State's witness, Isaiah McClin, who, like Gordon, fought as part of the decedent's group, testified that, after the groups met, "all hell broke loose," and, while he didn't "remember who [he] was fighting, . . . midway through" he "heard [the decedent] yell out something." However, he "couldn't make out what he was actually saying[,]" as "[t]here was a lot going on," and, shortly thereafter, "all the madness pretty much like abruptly ended." McClin then saw the decedent lying "on the ground bleeding out . . . ." Although he "didn't actually see the stabbing" of the decedent, he did see appellant and the decedent fighting at some point during the brawl, but, as far as he could tell, appellant had not used a "weapon" during that physical exchange.

D'ana Glenn, another Morgan State student, who was a witness for the State, testified that she had witnessed the fight and that she never saw "a large group coming at each other. It was just the two individuals." That is, she "saw [the decedent] kind of not running, but charging towards [appellant] and" that appellant, "in an effort . . . to push forward toward him, [] stabbed [him.]" But, she conceded, upon further examination, that her view of appellant "really wasn't that clear[,]" and that she only saw appellant holding a knife after she saw appellant and the decedent "impact."

When appellant testified on his own behalf, he denied fighting or stabbing the decedent, or even having a knife that evening. He asserted that he had fought only with two other young men during the melee: first, Matthew Agogo, and then McClin. Although he

was not aware of everything that was going on around him during the fight, he did hear the decedent "say 'I'm bleeding.'"

After the fight broke up, according to appellant, he told his cousin, who also involved in the fight, to "'[g]et in the car, come on, we better go.'" As appellant and his cousin got into his cousin's car, four of their friends "hopped in[,]" including Abayomi Akinwold.

As the car drove off with appellant's cousin at the wheel, Akinwold was, testified appellant, "beating hi[m]self up" in the rear seat and had "blood on his hand" and jacket. At some point the car stopped and, according to appellant, Akinwold got out of the car and tossed a knife in a storm drain. The car then stopped at a friend's residence, whereupon Akinwold entered that residence and, moments later, returned with clean hands, having apparently washed the blood off. Then, after appellant's cousin had dropped everyone else off but appellant, he drove appellant to the home of appellant's mother.

Following his arrest, appellant was detained at "Central Booking." There, according to the testimony of James Alston, who was also, at that time, detained at that facility, appellant admitted to him that he had killed someone during a fight, after "a friend of his" had received a "counterfeit $50 bill" for "some marijuana" the friend had sold. Although, during his testimony, Alston denied receiving anything in return for his testimony, he admitted that the probation violation, for which he was being detained, had been "dropped" prior to appellant's trial.

At the start of trial, appellant faced charges of first-degree murder, second-degree murder, and carrying a dangerous weapon openly with intent to injure. However, at the end of the defense's case, at the suggestion of the court, and with agreement of counsel, an accessory after the fact charge was added. The jury subsequently acquitted appellant of first-degree murder, second-degree murder, and carrying a dangerous weapon openly with intent to injure but found him guilty of accessory after the fact to murder.

I.

Appellant contends that the trial court abused its discretion in permitting the State, during cross-examination, to question him about his involvement in a previous group fight involving a knife, on the grounds that he had "opened the door."[1] Appellant further claims that, as that ruling did not amount to "harmless error," his conviction must be vacated and this matter remanded for a new trial.

[1] Appellant also asserts that, as a result of a motion in limine, "defense counsel successfully moved to exclude" any "evidence relating to" appellant's "involvement" in this earlier incident. Consequently, appellant contends that he is not limited to challenging its introduction simply on "opening the door," and that it should have been excluded under Maryland Rule 5-404(b), which addresses the admissibility of prior bad acts. But, while defense counsel mentioned a motion in limine at trial, no motion appears in the record. Moreover, at the start of trial, the court stated that "there are no motions in limine." In any event, we need not resolve this issue, as there is no dispute that court's "opened the door" ruling was preserved.

The "doctrine of 'opening the door' to otherwise inadmissible evidence is based on principles of fairness." *Little v. Schneider*, 434 Md. 150, 157 (2013). It permits "parties to 'meet fire with fire,' as they introduce otherwise inadmissible evidence in response to evidence put forth by the opposing side." *Id.* (quotations and citations omitted). But, we have cautioned that the "doctrine is narrow, and a response to the issues injected by the adverse party should be tailored appropriately." *Khan v. State*, 213 Md. App. 554, 574 (2013) (quotation omitted).

The fight that the court erred in permitting the State to raise on cross-examination of appellant occurred a year before the brawl at issue, when, for reasons not altogether clear from the record, appellant, who was then attending Morgan State, was punched by one of the university's football players while on the Morgan State campus. He then apparently struck back, prompting his friends and other football players to join the fray. According to appellant, a friend of his, Carlos Mars, came to his rescue, as he was being beaten to the ground. Mars, he claims, stood over him, brandishing a knife "to keep the football players at bay from hopping into the fight." As a result of that incident, Mars was subsequently charged with attempted first- and second-degree murder, assault in the first-and second-degree, and use of a deadly weapon with intent to injure. *See State of Maryland v. Carlos Mars*, Circuit Court for Baltimore City, Case No. 115103008. Appellant, however, was not charged with any offense but was later suspended from Morgan State, whereupon he

transferred to Coppin State. Nonetheless, the State asserted, in its closing argument, without any testimony to that effect, that it was appellant who had brandished the knife.

It was undisputed below that the parties had agreed that there would be no mention of this earlier fight at trial.[2] Indeed, at the bench conference following the defense's objection to the State's effort's to cross-examine appellant with respect to that fight, defense counsel informed the court that this incident, by agreement of counsel, was not to come in "at all." The court replied that it "underst[oo]d that," and the State did not disagree. The State, however, then interjected that the incident was admissible because the defense had "opened the door." The court agreed and found that appellant had "opened the door" to its admission, when he had, in the court's words, "testified, he's never been in trouble, he's a good boy."

That finding is simply not correct. In reaching the conclusion that appellant had "opened the door," the court relied on no more than appellant's responses to questions posed by his counsel as to whether he had any criminal or juvenile record. Those questions included: whether he had "ever [gotten] into any trouble as a juvenile"; whether he had "ever [been] stopped for some minor issue"; whether he had criminal justice trouble "as an adult, when [he] turned 18"; and, finally, whether he had "ever even" been "arrested for

[2] Although the State describes, in its brief, that "agreement" as only a "discussion," it did not take issue below with defense counsel's representation, to the court, that "we talked about the knife incident [] not coming in at all."

anything?" Appellant responded simply "no" to each of these questions. In sum, counsel's questions were only as to whether appellant had, as a juvenile or an adult, any involvement with the judicial system. No questions were ever asked as to whether he had ever been in trouble other than with the law. That is to say, neither the questions asked of appellant nor appellant's responses to those questions suggested that appellant had never been involved with any other kind of trouble, or that he was necessarily "a good boy."

Hence, as appellant opened the door, at most, to being cross-examined by the State as to his claim that he had never been previously involved with the justice system, as either an adult or juvenile, the State's repeated invocation of an earlier fight was improper as it was not "tailored appropriately" to the issue raised by appellant's testimony, namely, that he had no prior involvement in the justice system. *Khan*, 213 Md. App. 554, 574 (2013).

Nonetheless, relying principally upon *Khan*, the State urges this Court to reach the opposite conclusion. The facts of that case, declares the State, are "precisely what occurred here." But, in fact, that case lends little if any support to the State's position, and, as we shall see, when the *Khan* Court discusses the prejudicial impact of the inquiry in question there, its words actually undermine the State's position as to "harmless error."

Khan was tried and convicted of "assault[ing] two girls in a cosmetics store where [he] worked as a security guard." *Khan*, 213 Md. App. at 561. At trial, after the prosecution had "asked only whether [Khan's manager] had [had] a prior conversation with [Khan] regarding the boundaries and duties of a security guard[,]" the defense, during its

cross-examination of him, asked the manager to describe Khan "as a worker at the store." 213 Md. App. at 564, 574. The manager responded that he was "reliable. He was always early." *Id.* at 564. Next, the defense asked if the manager was "pleased" with Khan's work, to which the manager responded: "Yes. Overall, yes." *Id.* Consequently, the trial court permitted the State, over objection, to ask the manager about an earlier complaint by a customer that Khan had "inappropriately touched her[,]" on the grounds that the defense had "opened the door." *Id.* at 572. To that question, the manager responded that she had a discussion with Khan about that complaint. *Id.* at 565. Then, later at trial, after Khan's wife testified that he was "honest at his job"; his step-son described him as "trustworthy, good moral character, and a man of integrity"; and Khan himself "denied there having been prior customer complaints against him," the State was allowed to question all three of them as to whether they knew of the existence of the earlier customer complaint. *Id.* at 575.

On appeal, Khan contended, among other things, that the trial court had erred in determining that he had "'opened the door' to the State's questions[.]" *Id.* at 572. We disagreed and held that "the proverbial door was opened to the disputed testimony," and that "it remained for the trial court to balance [the testimony's] probative value against its prejudicial nature[.]" *Id.* at 575. And, in stark contrast to what occurred in the instant case, we further noted that, as to its "prejudicial nature," the evidence of the prior complaint was not adduced to prove that it actually occurred, that the substance of that complaint was

never addressed in detail, and that the scope of the testimony was limited by the trial court to whether the three witnesses were simply aware of the prior complaint. *Id.* at 575-76.

Unlike in *Khan*, where the trial court ruled that the door was opened, by the defense, for the State to inquire whether the witnesses were aware of a prior customer complaint with respect to Khan, given their descriptions of him as "reliable," "honest," and "trustworthy, good moral character, and a man of integrity[,]" *id.* at 564, 575, here, there was no suggestion by the questions posed to appellant or his responses to those questions that he possessed any of those traits or, indeed, any specific characteristics or traits at all. The defense's questions were narrowly tailored to whether he had ever been involved with the justice system and his cross-examination by the State should have been similarly so tailored.

And, in further contrast to *Khan*, here, the questioning at issue was intended to show that the prior incident had occurred and that event was delved into by the State at length and in detail, which leads to and largely answers the next question of whether the court's error in permitting the testimony in question amounted to no more than harmless error, as the State contends.

If the error was "merely harmless error," appellant's judgment of conviction would "stand." *Conyers v. State*, 354 Md. 132, 160 (1999) (quotation omitted). But, we can only reach such a conclusion when, based upon an "independent review of the record[,]" we are

"able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dorsey v. State*, 276 Md. 638, 659 (1976).

Given the similarity of the earlier incident to the charges appellant faced, the cumulative effect the State's relentless and repeated invocation of that incident, and its statement in closing that the earlier incident showed that appellant "has a penchant for fighting[,] [f]or fighting with knives[,] [a]nd that's exactly what happened here[,]" we cannot say, beyond a reasonable doubt, that the decision to permit inquiry about the previous incident was harmless error. Hence, appellant's conviction for accessory after the fact must be vacated and this matter remanded for a new trial.

II.

Appellant further contends there was not sufficient evidence to support his conviction for accessory after the fact. Although, he admits, that error was not preserved, he invokes the "plain error doctrine" and requests we review it for error. We shall deny that request.

In considering the sufficiency of the evidence, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533 (2003). But, to preserve an insufficiency claim, "a defendant must move for judgment of acquittal during trial, specifying the grounds for the motion in accordance

with Maryland Rule 4-324(a)."[3] *Cagle v. State*, 235 Md. App. 593, 604 (2018) (citations and quotations omitted). However, "[t]he language of Rule 4-324(a) is mandatory, and review of a claim of insufficiency is available only for the reasons given by appellant in his motion for judgment of acquittal." *Id.*

At trial, appellant was, at first, only charged with first-degree murder, second-degree murder, and carrying a dangerous weapon openly with intent to injure. During trial, in appellant's initial motion for acquittal, following the State's case, counsel asserted that there was insufficient evidence of murder in the first- or second-degree. The court denied that motion. Then, at the end of appellant's own case, the trial court, apparently because of appellant's own testimony, suggested adding an accessory after the fact charge. After defense counsel responded that an accessory instruction "would be appropriate," the State agreed, and an accessory after the fact charge was added to the jury instruction sheet. Then, defense counsel, without elaboration, "renew[ed]" his earlier "Motion for Acquittal," which the court denied. Hence, appellant's concession appears to be that that "renewal" of

[3] Maryland Rule 4-324(a) states, in pertinent part:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted.

his original motion for acquittal could not incorporate and therefore preserve accessory after the fact, as it was not previously raised.

Appellant seeks to avail himself of plain error review. But, in the words of this Court in *McIntyre v. State*, "we have been" unable to find a "Maryland case" that "utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered." 168 Md. App. 504, 528 (2006).

And, while appellant offers a recent exception to Maryland's appellate courts practice of not reviewing unpreserved evidentiary insufficiency claims, *Haile v. State*, 431 Md. 448 (2013), the review that occurred in that case was unique to the circumstances presented, which warranted, in the Court's view, a review to, among other things, clarify the "purpose and scope[,]" of the statute under which Haile was convicted. *Id.* at 465.

In *Haile*, the Court of Appeals first affirmed that a "trial counsel's failure to move for judgment of acquittal" leaves "unpreserved [an] evidentiary insufficiency claim." *Id.* at 463-64. Nonetheless, it reviewed Haile's unpreserved insufficiency claim but, in so doing, made clear that it was only "exercis[ing]" its "discretion . . . to interpret" the animal cruelty law, under which Haile was convicted, "and to make clear its purpose and scope." *Id.* at 465. No such interpretation is needed here, nor does appellant claim otherwise. Hence, the reasons that warranted review in *Haile* do not warrant review here. We therefore decline to review appellant's insufficiency of the evidence claim for plain error.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.