Circuit Court for Baltimore City
Case No. 117338008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2838

September Term, 2018

GERALD HUNDLEY

v.

STATE OF MARYLAND

Berger,
Nazarian,
Arthur,
JJ.

Opinion by Arthur, J.

Filed: January 17, 2020

After a jury trial in the Circuit Court for Baltimore City, Gerald Hundley, appellant, was found guilty of robbery with a dangerous weapon; second-degree assault; theft of property having a value greater than $100 but less than $1,500; unlawful taking of a motor vehicle; unauthorized use of a motor vehicle; conspiracy to commit robbery with a dangerous weapon; conspiracy to commit second-degree assault; conspiracy to commit theft; conspiracy to unlawfully take a motor vehicle; and conspiracy to use a motor vehicle without authorization. He was sentenced to incarceration for a total of fifteen years, with all but five years suspended. This timely appeal followed.

QUESTIONS PRESENTED

Hundley presents the following questions:

1. Did the trial court err in failing to strike testimony by a police officer that invaded the province of the jury?

2. Did the trial court err in admitting body-worn camera video and an out-of-court statement to police as prior consistent statements of Thomas Richardson [the victim]?

3. Did the trial court abuse its discretion in permitting the State to conduct its entire re-direct examination of Timothy O'Neil in a leading manner?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

On July 17, 2017, Baltimore City Police Officer John Gregorio responded to a call for a carjacking in the 200 block of Harmison Street in the Carrollton Ridge neighborhood of Baltimore City. When the officer arrived, he saw a group of people,

including Timothy O'Neil and Thomas Richardson,[1] who reported that Richardson's pickup truck had been stolen. Other items were also reported stolen, including money, gift cards, money orders, and prescription drugs. Officer Gregorio's body-worn camera recorded his interactions with others at the scene.

O'Neil and Richardson were separated and transported to the police station, where they were interviewed by Baltimore City Police Detective Keith Tondeur. Both men identified Hundley as the person who stole the truck and other items.

The police recovered the stolen truck in the middle of the intersection of Furrow and McHenry Streets, about two to three blocks west of Harmison Street. All of the stolen items were in the truck, except for whatever money had been taken from Richardson.

Richardson testified at trial, but explained that he did not want to do so and only appeared because he "had to." He told the jury that he owned a Ford F-150 pickup truck, but did not have a driver's license and did not drive. On July 17, 2017, he allowed O'Neil to drive the truck while he rode in the passenger seat. At some point, Richardson and O'Neil came upon Hundley and stopped to talk to him. Hundley asked for a ride, but Richardson refused because, he said, he had to go to work. O'Neil got out of the truck, left the driver's side door open, and went to the rear, where he spoke with Hundley. While O'Neil was talking to Hundley, Richardson, who had remained in the passenger seat of the pick-up truck, heard someone say, "[N]o, don't do it." Immediately thereafter,

[1] Richardson is sometimes referred to as "Richards" and as "TJ." For consistency, we shall refer to him as "Richardson."

an unidentified person got into the driver seat and started to drive away. As the truck drove away, Hundley jumped into the truck bed and entered the cab through a small window.

According to Richardson, Hundley held a long knife to his throat, and he felt something against his back or side that he thought was a gun. Hundley told Richardson to empty his pockets. He took Richardson's cell phone, $250 or $280 in cash, his identification card, a Walmart gift card valued at $198 or $200, and an unsigned money order. As the pickup truck made a right turn, Richardson jumped out and ran back toward the spot where the carjacking occurred.

O'Neil testified that he had known Hundley for about eight years and that Hundley was his fiancée's brother. According to O'Neil, he, Richardson, and Hundley were addicted to heroin and cocaine. At the time of the alleged carjacking, he and Richardson were "boosting," a practice he described as stealing things to sell for money, which they used to buy drugs. In the past, O'Neil and Hundley had boosted together. About a week before the carjacking, O'Neil introduced Hundley to Richardson to see if they could all boost together. Thereafter, Hundley joined O'Neil and Richardson in boosting "from time to time."

O'Neil testified that, at the time of the carjacking, the three men were "at each other's throats" about the use of the pickup truck and their respective shares of the money that they got from boosting. According to O'Neil, he and Hundley wanted to keep the

money because Richardson "did absolutely . . . nothing."[2] At one point, they boosted without Richardson, but used his truck. When Richardson found out, he was reportedly "pissed" and took his truck back from O'Neil. A couple of days before the carjacking, Richardson allowed O'Neil to use his truck again.

O'Neil testified that on the day of the carjacking he was driving, and Richardson was in the passenger seat. They saw Hundley standing on a corner and stopped to talk to him. Hundley wanted a ride to his house in southern Anne Arundel County. According to O'Neil, Richardson did not want to give Hundley a ride because he was still upset about being cut out of the profits from the time when Richardson and Hundley had boosted without him.

O'Neil testified that he got out of the truck to settle the confrontation between Richardson and Hundley, which had become "pretty heated." As he exited the truck, O'Neil left the driver's side door open, and Richardson remained seated in the vehicle. While O'Neil and Hundley were speaking to each other, O'Neil heard a door shut. When he looked up, O'Neil saw the truck pulling away, with Richardson still in the passenger seat. Hundley ran after the truck and jumped into the truck bed. O'Neil ran after the truck as well, but it pulled out of his view. When he reached a corner where the truck had turned, O'Neil saw Richardson, who had gotten out of the vehicle. O'Neil did not see the person who drove away with the truck.

[2] Apparently, Richardson did not go into stores and steal; his contribution to the enterprise was the use of his truck.

Although O'Neil had told the police that Hundley displayed a gun in his waistband and used a knife on him, he testified at trial that he had lied. O'Neil explained that Hundley had no gun or knife and that he had told the officers that Hundley did because he was just "pissed off" at Hundley.

After Hundley was arrested, he waived his rights and agreed to speak with Detective Tondeur. According to the detective, Hundley denied robbing anyone and denied having a knife or gun, but acknowledged that he had been at the scene of the carjacking and that he jumped into the bed of Richardson's truck as it was being driven away from the scene by an unidentified person. In a recorded interview with the police, Hundley stated that he was talking to O'Neil when the unidentified person got into the driver seat and started driving away. Hundley jumped into the bed of the truck and entered the cab through the back window. He said that he was hanging half-in and half-out of the window, with his face in the back of the seat as he tried to enter the cab. As the truck turned a corner, Richardson got out and ran away.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Hundley contends that the trial court abused its discretion in failing to strike certain testimony by the patrol officer who located Richardson's truck. He cites the following exchange, which occurred during the direct examination of Baltimore City Police Detective Christopher Faller:

> [PROSECUTOR]: And what did you do when you actually located that vehicle?
>
> [DETECTIVE FALLER]: Well since this was not just a recovered – a vehicle that was stolen, this is a vehicle that was involved in a violent crime –
>
> [DEFENSE COUNSEL]: Objection. Move to strike.
>
> THE COURT: Yeah, do you want to rephrase that?
>
> [PROSECUTOR]: Well, if you could just simply answer and just stick specifically with the answer. What did you do with the vehicle when you did find it?
>
> [DETECTIVE FALLER]: It was towed.

Hundley focuses on the statement, "[T]his is a vehicle that was involved in a violent crime." By not striking the statement, he argues, the court left the reference to "a violent crime" before the jury and prejudiced his right to a fair trial. He maintains that Detective Faller invaded the province of the jury by resolving the issue of whether Richardson's truck was taken by force, whether Hundley was armed with a gun or knife during his altercations with Richardson and O'Neil, and whether he was a knowing participant in the taking of the vehicle or merely got into it because he needed a ride. In addition, he argues that the detective's statement conveyed his "official conclusion that Richardson and O'Neil were credible and that a violent crime in fact had been committed." Pointing out that Detective Faller's role in the investigation was limited to disposing of the abandoned truck, he argues that the detective's opinion was based solely on information obtained from other police officers, including the accusations made by Richardson and O'Neil.

"The conduct of the trial 'must of necessity rest largely in the control and discretion of the presiding judge,' and an appellate court should not interfere with that judgment unless there has been error or clear abuse of discretion." *Thomas v. State*, 143 Md. App. 97, 109-10 (2002) (quoting *Wilhelm v. State*, 272 Md. 404, 413 (1974)). A court abuses its discretion where the ruling is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. *See, e.g.*, *Alexis v. State*, 437 Md. 457, 478 (2014). The determination of whether a trial court abused its discretion "usually depends on the particular facts of the case – on the context in which the discretion was exercised[.]" *Myer v. State*, 403 Md. 463, 485 (2008).

In arguing that the court abused its discretion, Hundley principally relies on *Bohnert v. State*, 312 Md. 266 (1988). In that case, a social worker, who was qualified to testify as an expert in the field of child sexual abuse, opined that the complaining witness, a minor child, "was, in fact, a victim of sexual abuse." *Id.* at 271. The social worker's opinion was based on what the child had said to her and on interviews with others. *Id.* at 271-72. In reversing Bohnert's conviction, the Court of Appeals held that the trial court abused its discretion in admitting the expert's opinion because it was based on the child's unsubstantiated allegations and "a certain sense about children" that the expert believed she possessed. *Id.* at 276. The Court reasoned that the expert's opinion "was not based on facts sufficient to form a basis for her opinion." *Id.* The Court also held that the opinion was inadmissible because "[t]estimony from a witness relating to the credibility of another witness is to be rejected as a matter of law." *Id.* at 278.

In our judgment, Hundley's reliance on *Bohnert* is misplaced. Viewed in context, Detective Faller's testimony was not a comment on the credibility of any witness or an opinion as to any of the charges against Hundley, but rather a prefatory explanation about why he did what he did with the truck: he understood or had been told that the truck had been involved in a violent crime. Because the explanation was not responsive to the question that he was asked ("[W]hat did you do when you actually located that vehicle?"), the court sustained defense counsel's objection and asked the prosecutor to rephrase the question, which he did. We cannot say that the trial court abused its discretion in rejecting defense counsel's motion to strike and choosing, instead, to have the question and answer rephrased.

II.

Hundley contends that the trial court erred in admitting, as prior consistent statements, a body-camera video of Richardson's conversation with Officer Gregorio and Richardson's recorded interview with Detective Tondeur. He maintains that the out-of-court statements did not detract from Richardson's impeachment or logically rebut the impeachment, but instead bolstered Richardson's testimony.

In cross-examining Richardson, defense counsel attempted to impeach him by showing that he had given conflicting accounts about the amount of money that Hundley had taken. Although Richardson testified that Hundley had taken $250 or $280 from him, counsel asked whether he had told Officer Gregorio (at the crime scene) that Hundley took only $100. Referring to the recording of Richardson's statements on the

officer's body-worn camera, defense counsel asked: "So if we watch the video camera, you're going to be saying on there $250?"

Defense counsel also attempted to impeach Richardson by challenging his testimony that Hundley squeezed through the rear window of the pickup truck while it was driving down the street, got onto the seat with him, held onto him with one hand, and assaulted him with a knife and another hard object. Counsel suggested that Hundley would have been face down on the passenger seat as he tried to climb into the cab and that Richardson had jumped out of the truck before Hundley could assault him. Richardson responded by insisting that, when he jumped out and ran away, Hundley was "in the front seat" of the truck.

During the re-direct examination of Richardson, the State sought to admit about three minutes and 30 seconds of the body-camera video of Officer Gregorio's conversation with Richardson. Defense counsel objected on the ground that the video recording was "cumulative" because Richardson's testimony had been basically "consistent with what happened on the street," and introducing the video would be "just like piling it on."

The court admitted the recording. Although the transcript of the proceedings is not entirely clear, it appears that Richardson told the officer that Hundley had taken "a hundred some dollars," and not merely $100.

Later, the State sought to introduce Richardson's recorded interview with Detective Tondeur. Defense counsel objected on the ground that there was no evidentiary reason to introduce the statement other than to "bolster" the State's case.

According to defense counsel, Richardson had "pretty much testified in accordance with his statement."

The court admitted the second recording as well. There, Richardson described Hundley pointing what he thought was a gun and holding him at knifepoint before he was able to break free and get out of the pick-up truck.

Maryland Rule 5-616(c) provides for the rehabilitation of a witness whose credibility has been attacked. It provides, in relevant part, as follows:

> (c) **Rehabilitation**. A witness whose credibility has been attacked may be rehabilitated by:
>
> * * *
>
> (2) Except as provided by statute, evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment.

Richardson's prior statement, that Hundley pointed what he thought was a gun and held him at knifepoint, "detracts from the impeachment" within the meaning of Rule 5-616(c)(2), in that it rebuts the assertion that Richardson jumped out of the moving truck before Hundley could have assaulted him. The court did not abuse its discretion in admitting that prior statement.

Similarly, Richardson's other prior statement, that Hundley had taken "a hundred some dollars," "detracts from the impeachment" within the meaning of Rule 5-616(c)(2), in that it rebuts the assertion that Richardson accused Hundley of taking only $100. Although "a hundred some dollars" may not be exactly the same as the $250 or $280 that Richardson reported as stolen in his trial testimony, we do not think that the court abused

its discretion, in the circumstances of this case, in treating the two statements as functionally consistent.[3]

III.

Hundley argues that the trial court abused its discretion in overruling his objections and permitting the State to conduct its re-direct examination of O'Neil "in a leading and adversarial manner." He also argues that the trial court abused its discretion in declaring O'Neil a hostile witness. Hundley's first objection to the State's questioning of O'Neil occurred at the end of the following exchange:

> [PROSECUTOR]: I thought this [boosting] was something you had done every single day for six months. That it's a job, you do it all day?
>
> [O'NEIL]: It was but like – it was, but like I said, it was coming to an end. Stores start to get to know you. Things start to happen. You gotta start broadening your horizons. You –
>
> [PROSECUTOR]: Things like your buddy carjacking a vehicle? Things like that?
>
> [O'NEIL]: No, things like that don't happen every day.
>
> [PROSECUTOR]: That's out of the ordinary for addicts?
>
> [O'NEIL]: Absolutely, for addicts that I hang out with. Absolutely, I don't hang around – look at my record. It's all petty thefts, I don't have not one violent crime on my record.
>
> [PROSECUTOR]: I'm not saying that you carjack people.

[3] Before it allowed the State to play the recording, the court does not appear to have known exactly what Richardson had said. Instead, the court appears to have relied on the State's representations that the recording would reveal a prior consistent statement. After the recording was played, defense counsel did not object or move to strike the recording on the ground that the prior statement was not consistent with Richardson's trial testimony.

[O'NEIL]: Look, I wouldn't hang out with anybody that [is] carjacking somebody. I don't do crimes –

[PROSECUTOR]: Well, your car got jacked on this day. Not your car, but [Richardson's] car, right?

[DEFENSE COUNSEL]: Objection, leading question.

THE COURT: I'll allow it.

The second objection occurred at the end of the following exchange, which began immediately after the court overruled the first objection:

[PROSECUTOR]: Your car got jacked on this day, didn't it?

[O'NEIL]: I don't know if it got jacked or not, somebody jumped in and took off. Was it Gerry [Hundley] that took in [sic] and took off? No?

[PROSECUTOR]: Well it was Gerry that jumped in and took off wasn't it? Because you testified that he jumped in the bed of the truck with this person no one has any idea who they were.

[O'NEIL]: So now there's somebody – you're asking me – now what you're trying to say now is Gerry jumped in the truck and took off. Gerry can't drive –

[PROSECUTOR]: No, no, no –

[O'NEIL]: That's exactly what you just said, you just said Gerry took the truck. No Gerry did not take the truck.

[PROSECUTOR]: No, I didn't say Gerry took the truck.

[O'NEIL]: That's exactly what you just said.

[PROSECUTOR]: You said Gerry jumped in the truck and took off. Which is what you said, you said he jumped in the bed of the truck and took off.

[O'NEIL]: You're right. Yes, you're right. You're right.

[PROSECUTOR]: If we're splitting hairs, that's what happened, right?

[O'NEIL]: No, Gerry did not take the truck. Gerry jumped in the back of a truck that was pulling off.

[PROSECUTOR]: And took off. All right. It was just going somewhere. You have no idea where it was going, right?

[O'NEIL]: No.

[PROSECUTOR]: All right. Gerry was trying to go home, right?

[DEFENSE COUNSEL]: I'm going to object to all the leading questions, Your Honor.

THE COURT: I'm going to overrule.

After another three pages of contentious exchanges that passed without an objection, defense counsel's third objection was followed by the State's request to have O'Neil declared a hostile witness:

[PROSECUTOR]: All right. And you've been in and out of jail for the past 20 years?

[O'NEIL]: Yes.

[DEFENSE COUNSEL]: Your Honor, I'd object again. Leading.

THE COURT: Come on up for a second. (Counsel approached bench and the following occurred:)

THE COURT: Geesh. That is a lot of leading, he hasn't yet been declared an adverse witness.

[PROSECUTOR]: Your Honor, I would ask that under Rule 5-611 we declare him as adverse at this time.

THE COURT: I can find that he's adverse.

According to Hundley, there was no justification for the State to conduct its re-direct examination of O'Neil with leading questions and there was nothing to support the

conclusion that O'Neil was a hostile witness. Hundley argues that, as a result of the court's rulings, he was denied a fair trial.

A. Acquiescence

Hundley failed to object to the trial court's decision to declare O'Neil a hostile witness. As a result, that issue was waived and is not properly before us. Md. Rule 8-131(a) (explaining that, except for certain issues pertaining to jurisdiction, an appellate court ordinarily "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"); *Simms v. State*, 240 Md. App. 606, 617 (2019) ("where a party acquiesces in a court's ruling, there is no basis for appeal from that ruling").[4]

B. Leading Questions

Maryland Rule 5-611 provides, in relevant part:

> (c) **Leading questions**. The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be allowed (1) on cross-examination or (2) on the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party.

[4] Defense counsel undoubtedly refrained from objecting because there was no serious question that O'Neil was a hostile witness. He had disavowed his statements to the police, claimed to have lied about Hundley's culpability, and fought incessantly with the prosecutor. In these circumstances, it might have been an abuse of discretion not to find that O'Neil was a hostile witness.

In addition to the court's discretion to allow or not allow leading questions under Rule 5-611(a), a trial court has "wide" discretion in controlling the scope of re-direct examination. *Daniel v. State*, 132 Md. App. 576, 583 (2000).

A leading question is one that "suggests to a witness the specific answer desired by the questioner." Lynn McLain, *Maryland Evidence: State and Federal* § 611.3(a), at 713 (3d ed. 2013). Leading questions are sometimes problematic because "the witness, not the lawyer, is the one with first-hand knowledge of the pertinent facts, and the fact-finder needs to hear the witness's testimony in her own words." *Id.* at 713-15.

Leading questions have been permitted when it is necessary to summarize prior testimony. *Id.* § 611.3(b), at 716-17 & n.11 (citing *Nottingham Village, Inc. v. Baltimore County*, 266 Md. 339, 355-56 (1972); *Boone v. State*, 2 Md. App. 80, 108-09 (1967)). In the instant case, the first two objectionable questions were designed to summarize O'Neil's prior testimony, not to suggest a specific answer.

In the first question, the prosecutor asked: "Well, your car got jacked on this day. Not your car, but TJ's car, right?" That question merely summarized and repeated O'Neil's testimony on direct examination that "[s]omebody" "stole my buddy's truck." The court did not abuse its discretion in overruling an objection to that question on the ground that it was leading.

In the second question, the prosecutor asked, "Gerry [Hundley] was trying to go home, right?" That question, too, merely summarized and repeated O'Neil's testimony

on direct examination that Hundley wanted a ride home. The court did not abuse its discretion in overruling an objection to that question on the ground that it was leading.[5]

In the final question, the prosecutor asked, "[Y]ou've been in and out of jail for the past 20 years?" The trial court effectively overruled the objection by granting the State's request that O'Neil be designated a hostile witness. Again, we see no abuse of discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[5] The objection applied only to the question to which counsel objected. *See, e.g.*, *Fowlkes v. State*, 117 Md. App. 573, 588 (1997) (stating that, unless the court grants a continuing objection to a line of questions, a party must object each time an objectionable question is asked in order to preserve the objection). But even if the objection could be deemed to reach back to encompass some of the preceding questions, they too merely restate facts that Hundley had admitted in opening statement or that had been elicited from other witnesses.