Circuit Court for Wicomico County
Case No.: C-22-CR-18-000089

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3299

September Term, 2018

ARNELL BIVANS JR.

v.

STATE OF MARYLAND

Graeff,
Leahy,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: July 27, 2020

Arnell Bivans, Jr., the Appellant herein, was convicted by a jury in the Circuit Court for Wicomico County of three counts of first-degree assault; three counts of second-degree assault; three counts of reckless endangerment; one count of possession of a regulated firearm after a conviction of a disqualifying crime; one count of illegal possession of a regulated firearm by a felon; one count of the use of a firearm in the commission of a crime of violence; one count of wearing, carrying, or transporting a handgun in a vehicle; and one count of possession of ammunition. The jury acquitted Bivans of two other counts of possession of a controlled-dangerous substance and two additional counts of possession of a controlled-dangerous substance with the intent to distribute. The trial judge also granted Bivans's motion for judgment of acquittal of five counts of conspiracy to commit second degree assault and one count of the use of a firearm during a drug trafficking crime. The presiding judge sentenced Bivans to a total of 60 years' imprisonment for the three first-degree assaults, as well as the one count of possession of a regulated firearm after a conviction of a disqualifying crime, the one count of illegal possession of a regulated firearm by a felon, and the one count of the use of a firearm in the commission of a crime of violence; the remaining counts were merged.

Bivans presents questions related to the admission of a statement of an indicted co-conspirator from an "Application for Search and Seizure Warrant," as well as to whether sentencing him for two firearm convictions, based on the possession of one gun, was

appropriate and to whether in sentencing he was entitled to credit for time served.[1]

The indictment, in which Bivans was charged with all of the offenses, related to an affray in Salisbury, Maryland that occurred on December 21, 2017, while he was accompanied by about six other individuals. He was alleged to have brandished a gun at Ambrose and Janel Bishop and fired the weapon.

One of the six individuals in the dust-up, Dae von Wheeless, by separate indictment, also had been charged with various drug-related charges and multiple counts of conspiracy to commit second-degree assault. The State entered nolle prosequis on the drug charges and two of the conspiracy to commit second-degree assault charges. Wheeless entered an *Alford* plea[2] to one count of conspiracy to commit second-degree assault, for which he was incarcerated. Wheeless did not testify at Bivans's trial.

[1] Bivans posits the following questions for our review:

> 1. Did the trial court err in admitting the out-of-court statement of a co-defendant who did not testify?
>
> 2. Are two convictions and sentence based on the possession [of] a single firearm proper?
>
> 3. Did the trial court err in failing to give Appellant credit for time served?

Because we shall reverse based upon error in admitting the statement of a co-defendant, we need not and shall not address questions two and three.

[2] An *Alford* plea "lies somewhere between a plea of guilty and a plea of *nolo contendere*" and "[l]ike a guilty plea and *nolo* plea, the *Alford* plea waives challenges to adverse rulings on pretrial motions and all procedural objections, constitutional or otherwise, limiting appeals to jurisdictional defects and challenges based on the propriety of the trial court's acceptance of the plea." *Jamison v. State*, 450 Md. 387, 389 n.1 (2016) (quoting *Bishop v. State*, 417 Md. 1, 19–20 (2010)).

Fifteen individuals did testify on behalf of the State. Many of them had witnessed the events which transpired with respect to the Bishops. One of the State's witnesses, Trooper James Brant of the Maryland State Police, an officer who also responded to the scene, testified that he obtained a DNA sample from Bivans, pursuant to a warrant, to compare with DNA recovered from the gun. During his cross-examination, defense counsel sought to undermine the credibility of Ambrose Bishop who, during earlier testimony, said that he "could" and "did" identify Bivans as the man who had pointed a handgun at him. Specifically, counsel for Bivans asked Trooper Brant about an interview with Ambrose Bishop in which Mr. Bishop could not identify the shooter[3]:

> [DEFENSE COUNSEL]: As part of the process for obtaining Mr. Bivans' DNA, did you prepare an application for search and seizure warrant?
>
> [TROOPER BRANT]: Yes, sir.
>
> [DEFENSE COUNSEL]: Okay. And I'm going to show what has been marked for purposes of identification as Defendant's Exhibit Number 1.
>
> [THE STATE]: Objection, Your Honor.
>
> THE COURT: What is it?
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> [DEFENSE COUNSEL]: It's an application for search and seizure warrant.
>
> THE COURT: What's your objection?
>
> [THE STATE]: Your Honor, the relevance of it.
>
> THE COURT: Overruled.
>
> [THE STATE]: It was a Court Order.

[3] Ambrose Bishop, when he testified, had not been cross-examined about the statement.

[DEFENSE COUNSEL]: For purposes of identification only, I'm going to show what has been [sic] as Defendant's Exhibit 1. Is that the application for search and seizure warrant that you prepared and submitted?

[TROOPER BRANT]: Yes, sir.

[DEFENSE COUNSEL]: Yes. And can you explain to the jury just very, very briefly what an application for a search and seizure warrant is?

[THE STATE]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Okay. Let me direct your attention to page 7 of that application, and can you take a moment to review it?

[TROOPER BRANT]: Okay.

[DEFENSE COUNSEL]: Okay. In page 7, does it describe an interview with law enforcement between Ambrose and law enforcement official?

[THE STATE]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Isn't it true that Ambrose could not identify the shooter of the gun other than describe a very general picture of his clothing and his hair?

[THE STATE]: Objection.

THE COURT: Overruled.

[TROOPER BRANT]: And you said this was regarding an interview with Mr. Ambrose Bishop, sir?

[DEFENSE COUNSEL]: Yes, sir.

[THE STATE]: Your Honor, at this point, I'm going to object. The police officer –

[DEFENSE COUNSEL]: It was overruled.

[THE STATE]: Your Honor, if I may be heard?

THE COURT: I overruled – I already overruled it.

[THE STATE]: Your Honor, I believe this may be hearsay information.

THE COURT: Overruled.

[TROOPER BRANT]: According to my knowledge, sir, and even as I'm reading page 7 of the application, I don't see anything captured or outlined regarding an interview with Mr. Ambrose Bishop.

[DEFENSE COUNSEL]: Let's go to page 6 –

[THE STATE]: Your Honor, at this point, I'm going to –

[DEFENSE COUNSEL]: Excuse me.

[THE STATE]: -- object.

THE COURT: Overruled. Counsel, what do you want to ask?

[DEFENSE COUNSEL]: I want to ask whether it states in his application for search warrant that Ambrose could not – Ambrose Bishop could not identify the victim or identify the shooter.

[TROOPER BRANT]: Correct. As captured in the application, it says that the suspect was wearing dark clothing, however, he could not provide any further description.

[DEFENSE COUNSEL]: Correct. And that's Ambrose Bishop could not provide any further description than dark clothing?

[TROOPER BRANT]: Correct, sir.

The State, on redirect examination of Trooper Brant, asked whether the warrant application also recounted statements given by Wheeless. Defense counsel objected:

[THE STATE]: And is there also a statement taken by Dae Von Wheeless?

[DEFENSE COUNSEL]: Objection, Mr. Wheeless.

[THE STATE]: The door has been opened, Your Honor.

THE COURT: Overruled.

[DEFENSE COUNSEL]: Okay.

[TROOPER BRANT]: Yes, ma'am.

[THE STATE]: And what is that statement from Mr. Dae Von Wheeless say?

> [TROOPER BRANT]: During the interview of Mr. Dae Von Wheeless, he advised that he observed Arnell Bivans, the shooter, to be in possession of a handgun during the incident that occurred at [the Bishop's home in] Salisbury, Maryland.
>
> In addition, Dae Von Wheeless advised that he observed Arnell Bivans, Jr., throw a gun out of the front passenger's side window of a black 2016 Chevy Malibu that Arnell Bivans, Jr., occupied when leaving the area of [the Bishop's home].

Bivans contends that the trial judge erred by permitting Trooper Brant to testify about the statements Wheeless gave to police which were included in the warrant application. He contends that the statements were impermissible hearsay of a co-conspirator which were not rendered admissible because Bivans's counsel had sought to elicit statements of Ambrose Bishop to police officers to impeach Mr. Bishop. He further avers that his right to confrontation was violated by the introduction of the statements, because Wheeless did not testify at trial and was not subject to cross-examination.

The State, conversely, argues that the issue is not properly before us as Bivans failed to again object to the specific question, after the defense objection had been overruled, which permitted the officer to testify regarding Wheeless's statements. The State further avers that Bivans failed to request a continuing objection after first objecting to the question mentioning Wheeless and/or request a limiting instruction.

The State also contends, however, that the trial judge properly overruled the objection and admitted Wheeless's statements because Bivans "opened the door" after Bivans's counsel asked about Ambrose Bishop's earlier statements contained in the warrant application.

Initially, we observe that counsel for Bivans did preserve the issue regarding the Wheeless statements for our review. Bivans's counsel objected to the initial question the State asked Trooper Brant about Wheeless's statements. Before the trial judge ruled on the objection, the State responded, "[t]he door has been opened, Your Honor." The judge overruled the objection and Trooper Brant testified about the Wheeless statements. Were we to require another immediate objection after the judge ruled would have been futile and unprofessional. *See State v. Robertson*, 463 Md. 342, 367 (2019); *Johnson v. State*, 325 Md. 511, 514–15 (1992). We shall, therefore, consider whether admission of the Wheeless statements was error.[4]

The admission of evidence "is committed ordinarily to the sound discretion of the trial judge." *Stoddard v. State*, 389 Md. 681, 688 (2005) (internal citation omitted). Rule 5-802, however, states that, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Simply put, a "judge has no discretion to admit hearsay unless it falls within a constitutional, statutory or rule exception." *Stoddard*, 389 Md. at 688.

[4] We need not address Bivans's constitutional argument because our common law renders the statement inadmissible. We generally avoid addressing constitutional arguments when an issue can be properly disposed of on a non-constitutional ground. *Parker v. State*, 408 Md. 428, 435 (2009).

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 5-801(c). In the present case, the Wheeless statements met the definition of hearsay as they were admitted through Trooper Brant and used to show that Bivans was "the shooter" and was "in possession of a handgun during the incident."

The State posits, however, that Bivans "opened the door" to permit admission of the Wheeless statements when his counsel asked Trooper Brant about Ambrose Bishop's statements to police taken from the same search warrant. The "opening the door" doctrine, however, is simply not applicable.

Under the "opening the door" doctrine, "otherwise irrelevant evidence may be admitted when the opposing party has 'opened the door' to such evidence." *Grier v. State*, 351 Md. 241, 260 (1998) (citations omitted). The doctrine "authorizes admitting evidence which otherwise would have been irrelevant in order to respond to . . . admissible evidence which generates an issue"; it "makes relevant what was irrelevant[.]". *Robertson*, 463 Md. at 352 (citations omitted). The "opening the door" doctrine is "implicated when a party seeks to respond to the other party's evidence" with either "evidence which is competent" or "evidence which is similar to the adversary's evidence which was ruled competent *over objection*." *Clark v. State*, 332 Md. 77, 87 (1993) (emphasis in original).

The doctrine, however, does not allow for the admission of evidence otherwise inadmissible for reasons other than relevancy, such as hearsay. *Grier*, 351 Md. at 261 (citation omitted). Pertinent, in this regard, to the present matter with respect to the doctrine's limitations is *Conyers v. State*, 345 Md. 525 (1997), in which the Court of

Appeals held that inadmissible hearsay could not be introduced to address an issue in response to "opening the door." In *Conyers*, at the trial for which Conyers had been charged with crimes involving murder and robbery, the State elicited testimony from a witness that Conyers owned two .38 caliber handguns, the type of weapon which had been used in the underlying murders. *Id.* at 539. The witness testified that she knew Conyers owned one .38 caliber handgun because she had seen it when the two previously lived together; she learned about the second gun during a telephone conversation she had with Conyers, after he had been incarcerated. *Id.*

On cross-examination, counsel for Conyers sought to elicit testimony from the witness regarding another conversation she had had with Conyers while he was incarcerated, the substance of which would have reflected that he stated he did not have possession of the guns at the time of the murder of the victims, as he had given them to someone else. *Id.* at 540. Before the witness could respond to the question, the State objected. *Id.* Conyers insisted that the witness should be permitted to answer the question based upon the doctrine of completeness.[5] *Id.* The trial court disagreed and sustained the State's objection. *Id.*

The Court of Appeals affirmed the preclusion of the second statement from Conyers, noting not only was the doctrine of completeness inapplicable, but also that the second statement was inadmissible hearsay, not rendered admissible by application of the

[5] The doctrine of completeness "allows a party to respond to the admission, by an opponent, of part of a writing or conversation, by admitting the remainder of that writing or conversation." *Conyers v. State*, 345 Md. 525, 541 (1997) (citing *Richardson v. State*, 324 Md. 611 (1991).

"opening the door" doctrine. *Id.* at 546. The Court reasoned that the "testimony was indeed inadmissible, but not because it was irrelevant; the testimony was inadmissible because it was incompetent. The "opening the door" doctrine does not permit the admission of incompetent evidence." *Id.* (citing *Clark*, 332 Md. at 87). Application of *Conyers* to the present case is clear—Wheeless's statements about Bivans's ownership of the gun, elicited from Trooper Brant, was inadmissible hearsay not rendered competent by the "opening the door" doctrine.

The State, nonetheless, alternatively argues that the judge's error was harmless and that the Wheeless statements were merely cumulative, because there was substantial additional evidence supporting Bivans's convictions.

"In order for the error to be harmless, we must be convinced, beyond a reasonable doubt, that the error in no way influenced the verdict." *Weitzel v. State*, 384 Md. 451, 461 (2004) (citing *Archer v. State*, 383 Md. 329, 361 (2004) and *Dorsey v. State*, 276 Md. 638, 659 (1976)). The Court of Appeals, in *Dionas v. State*, 436 Md. 97 (2013), emphasized the stringency of the harmless error review:

> The harmless error test is well established, and relatively stringent. We stated in *Dorsey*[, *supra*, 276 Md. 638]:
>
> > [W]hen the appellant, in a criminal case, establishes error, unless 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, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of a guilty verdict.

> 276 Md. at 659, 350 A.2d at 678 (footnote omitted). *See Smallwood* [*v. State*], 320 Md. [300,] 308, 577 A.2d [356,] 360 (quoting *Dorsey*, 276 Md. at 659, 350 A.2d at 678) ("[A]n error will be considered harmless if the appellate court is 'satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.'").

Id. at 108.

Once error is established, "the burden falls upon the State, the beneficiary," to prove that the error was harmless beyond a reasonable doubt by affirmatively demonstrating that the error did not prejudice the defendant. *Id.* at 109 (citing *Denicolis v. State*, 378 Md. 646, 658–59 (2003)). "[R]eversal is required unless the error did not . . . play any role in the jury's verdict," *Taylor v. State*, 407 Md. 137, 165 (2009) (citing *Bellamy v. State*, 403 Md. 308, 332 (2008)). "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Id.* (citation omitted). In applying the standard, however, it is not appropriate to simply focus on the strength of other evidence in the State's case or find an "otherwise sufficient" ground for conviction, but, rather, the appellate court must determine "whether the trial court's error was unimportant in relation to everything else the jury considered in reaching its verdict." *Dionas*, 436 Md. at 118; *see also Butler v. State*, 231 Md. App. 533, 556 (2017).

The admission of the Wheeless statements was clearly not harmless, not only because Wheeless was a co-defendant, but also because of the repeated emphasis that the State placed on his statements during the prosecutor's closing argument, when she stressed its importance:

> Detective James Brant of the Maryland State Police also testified to the fact that he applied for a search and seizure warrant for the DNA standard of the Defendant, Arnell Bivans. You heard about the information that was contained in the warrant application. You heard how the co-defendant, Dave Von Wheeless, the person seated directly behind the Defendant in that Chevy vehicle, advised that Arnell Bivans was the person in possession of the gun at [the Bishop's home]. Dae Von also advised that he observed Arnell Bivans throw the handgun out of the front passenger window of the 2016 Chevy Malibu when leaving the [Bishop's home]. And that exactly corroborates the testimony that you heard from Jaquan James yesterday. That he was ten feet behind that vehicle following with Ambrose Bishop when he saw the handgun being thrown out of the passenger side of the Chevy vehicle.
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> ***
>
> Transporting a handgun in a vehicle. The Defendant is charged with the crime of carrying or transporting a handgun in a vehicle while on public roads, highways, waterways, airways or parking lots. In order to convict the Defendant the State must prove that the Defendant wore, carried or knowingly transported a handgun in a vehicle. I don't want to beat a dead horse, but we have the testimony of Jaquan James as well as the testimony of Dae Von Wheeless that it was the Defendant, Arnell Bivans, who had the gun inside of the Chevy.

Not only did the State refer to the Wheeless statements as "testimony" but also used the words on rebuttal as proof that Bivans possessed the gun during the affray:

> And then there's good ole Dae Von Wheeless. Mr. Wheeless spoke to the police, that Arnold Bivans, Jr., was the person to be in possession of the handgun during the incident at [the Bishop's home]. In addition, Mr. Wheeless advised that he observed Arnell Bivans throw a handgun out of the front passenger window of a black 2016 Chevy Malibu that Arnell Bivans occupied while leaving [the Bishop's home].
>
> ***
>
> Now the defense also talks about the inconsistent identification made by Ambrose Bishop. Trooper Brant was on the stand and I went back and I asked him about the identifications that were included, not in the police report but a search and seizure warrant. His testimony was that Janell Anderson Bishop also advised the black male in question had dreadlocks. Jaquan James identified the person with a gun as a black male wearing a

> black hoodie sweatshirt with a hood up, pointed a handgun at him. Asha identified the black male in question with dreadlocks. And Dae Von Wheeless advised that he observed Arnell Bivans with the handgun and saw him throw it out of the car.

Certainly, the State emphasized the Wheeless statements as significant and we, upon our review of the record and application of *Dorsey* and its progeny, cannot conclude beyond a reasonable doubt that the error did not influence the jury's verdict.

For these reasons, we reverse the judgment of the Circuit Court for Wicomico County and remand for a new trial.

JUDGMENTS REVERSED; CASE REMANDED FOR A NEW TRIAL; COSTS TO BE PAID BY WICOMICO COUNTY.