

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1917

September Term, 2014

TREMAINE BROWN

v.

STATE OF MARYLAND

*Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: October 9, 2015

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

** 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.

On April 4, 2014, police observed a suspected drug transaction occur between two men, Appellant Tremaine Brown and John Whitmore, on the 800 block of North Streeper Street in Baltimore City. Both men were arrested, and Brown was charged with possession of a regulated firearm with a felony conviction; wearing, carrying, or transporting a handgun; possession of a controlled dangerous substance with intent to distribute (cocaine); possession of a controlled dangerous substance (cocaine); illegal possession of a firearm; and possession of a stolen pistol.¹ Following a trial held on September 30, October 1, and October 2, 2014 in the Circuit Court for Baltimore City, a jury returned verdicts of guilty of possession of a regulated firearm following a felony conviction and possession of cocaine. Brown was acquitted of wearing, carrying, or transporting a handgun. The court sentenced Brown to 10 years in prison with all but five years suspended, to be served without parole, for possession of a regulated firearm, and a concurrent term of two years in prison for possession of cocaine. Brown filed his notice of appeal on October 10, 2014, and presents two questions for our review:

- I. “Did the trial court err by permitting appellant to be impeached with his prior conviction?”
- II. “Did the trial court err by accepting an inconsistent jury verdict?”

For the following reasons, we affirm the judgments of the circuit court.

¹ On September 30, 2014, the State entered a nolle prosequi on the charge of possession of a stolen pistol. The count of illegal possession of a firearm was not sent to the jury.

BACKGROUND

Brown does not contest the sufficiency of the evidence. Accordingly, we need only recite a summary of the facts that gave rise to this prosecution, or that may be necessary to the resolution of issues raised in this appeal. *See Martin v. State*, 165 Md. App. 189, 193 (2005) (citing *Whitney v. State*, 158 Md. App. 519, 524 (2004)).

On April 4, 2014, at about 6:00 p.m., police officers on patrol in Baltimore City saw Brown walking with John Whitmore in the 800 block of North Streeper Street. One of the officers saw Brown handing objects to Whitmore and throw an object to the ground. He then saw Whitmore hand money to Brown. Two officers stepped out of the police vehicle and stopped both men. The officers picked up from the ground a Ziploc bag containing what was later confirmed to be cocaine, which Detective Laronde submitted to the Evidence Control Unit. The police recovered another three Ziploc bags containing suspected cocaine from John Whitmore. Brown and Whitmore were transported to the Eastern District police station.

After Brown's arrest, \$89.00 was recovered from him, while \$47.00 was recovered from Whitmore. Brown was advised of his rights, waived his right to remain silent, and agreed to speak with the detectives. According to Sergeant Wiman, he told Brown that his "only goal was to get guns off the street." Brown then informed Wiman that he knew where a gun could be found. Sergeant Wiman stated that did not make a promise to Brown for his release in exchange for a gun and that he did not allow Brown to make a telephone call.

Brown told the police that the gun was behind 725 North Streeper Street and stated that he and someone else had “purchased it with a quarter ounce of weed and \$150.” After the detectives failed to locate the handgun, they brought Brown with them to the house, and he showed them where it was hidden. The handgun was introduced into evidence by State. Lorraine Lansey, an expert witness in the field of latent prints and latent print analysis, testified that she examined the handgun but found no latent fingerprints on it suitable for comparison.

Brown’s testimony contradicted the testimony of Sergeant Wiman. According to Brown, police asked him if he knew about any guns that he could give to the police. Brown testified that he told police that he could find a gun for them, and he subsequently signed a waiver form that stated he would be released that day. While in custody, he used a cell phone in his possession to call a friend and asked him to place the handgun near where he was arrested. Brown denied that the handgun found by police belonged to him and stated that he had not seen it before.

Before the trial began, defense counsel asked the court to preclude the State from impeaching him with his prior conviction for possession with intent to distribute a controlled dangerous substance. Defense counsel noted that the conviction was from 2007, seven years prior to trial in this case, that it was for a crime identical to one of the charges before the jury, and that Brown intended to testify in his defense. Defense counsel argued that because of the similarity of the offense, the nature of the offense, and the age of the offense, it would be unfairly prejudicial to allow questioning about the

conviction. The State requested that the conviction be admitted because Brown’s testimony would likely contradict testimony from the State’s witnesses and because evidence of the conviction was relevant to Brown’s credibility. That is, given the secretive nature of the crime, the probative value in terms of assessing Brown’s credibility would outweigh any unfair prejudice. The trial court weighed the probative value of the conviction versus any potential unfair prejudicial effect that it may have and ruled that the State could impeach Brown with his prior conviction for possession with intent to distribute.

After the State rested its case, Brown took the stand. Brown acknowledged that he had a prior felony conviction from 2007. He testified that he was present in the 800 block of North Streeper Street on April 4, 2014, but averred that he was not selling drugs and did not possess any cocaine. Relating that he experienced chronic pain resulting from a prior gun-related injury, Brown explained that he was on North Streeper Street to purchase OxyContin pills from Whitmore to help mitigate his pain. After making the purchase for \$40.00, he hid the pills in his crotch. The police did not discover the pills.

The jury found Brown guilty of possession of a regulated firearm following a felony conviction and of possession of cocaine. Brown was acquitted of possession of cocaine with intent to distribute and of wearing, carrying, or transporting a handgun. Prior to the jury being polled, defense counsel argued that the verdict contained an “inherent inconsistency” because Brown was convicted of possession of a firearm but acquitted of wearing, carrying, or transporting a handgun. The court found that there was

no inconsistency in the verdicts and reasoned that the jury could have found that Brown had indirect possession of the weapon but did not wear, carry, or transport it.

Brown was sentenced on October 2, 2014 and filed a timely notice of appeal on October 10, 2014.

DISCUSSION

I. Admission of Prior Conviction

Brown argues that evidence of his prior conviction was unfairly prejudicial and that the trial court abused its discretion by ruling that the prior conviction was admissible to impeach him. The State responds that the issue was not preserved, and that even if preserved, the court did not abuse its discretion in admitting the conviction.

A. Preservation of the Issue

Ordinarily, “a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted.” *Brown v. State*, 373 Md. 234, 238 (2003) (quoting *Ohler v. United States*, 529 U.S. 753, 755 (2000)). However, in situations where the trial court rules that the defendant may be impeached with his or her prior conviction and the defendant seeks to “draw[] the sting out’ of a conviction by testifying about the conviction on direct examination during the defense case,” the defendant has not waived his or her right to contest the validity of the court’s ruling on appeal. *Cure v. State*, 421 Md. 300, 321 (2011) (citing *Brown v. State*, 373 Md. 234, 251-73 (2003) (Wilner, J., dissenting)).

In *Cure v. State*, the Court of Appeals described the circumstances required to preserve the issue for appeal as:

where (1) the State makes clear that it intends to offer the conviction if the defendant testifies, (2) the defendant makes a clear objection to the evidence, (3) the court makes a definitive ruling, intended to be final, that the evidence will be admitted, and (4) the defendant testifies and, to blunt the force of the conviction, reveals it on direct examination.

421 Md. 300, 321 (2011).

The State now argues that Brown did not preserve this issue because the first and second prongs were not satisfied. Specifically, regarding the first factor, the State contends that it did not bring up Brown’s prior conviction, instead waiting until Brown requested that the court preclude cross-examination on the issue. Regarding the second factor, the State argues that Brown did not make an objection to the evidence.

We hold that, on the record present in this case, Brown adequately preserved the issue. The circumstances of this case present a different procedural posture than the one contemplated in *Cure* because the State did not initially propose to admit the conviction. Here, unlike in *Cure*, it was the defendant, Brown, who requested that the court *prohibit* cross-examination on the subject of the prior conviction. Then, the State opposed Brown’s request and indicated that it would reference Brown’s conviction to impeach his credibility. Stated differently, Brown made a motion, and the court ruled against him—this satisfies the first prong set out in *Cure*. Brown then knew that the State would impeach him with his prior conviction, and, in an effort to mitigate the “sting” of the State’s questioning, proceeded to testify to the conviction’s existence before the State

could bring it up. It would be unreasonable, in this situation, to require that Brown object to his own testimony. Accordingly, the issue of the admissibility of Brown’s prior conviction is adequately preserved.

B. Admissibility of Brown’s Prior Conviction

“When reviewing the admissibility ruling for impeachment purposes regarding a defendant’s prior conviction, ‘we will give great deference to the [trial] court’s opinion. Consistent with our prior cases, this court will not disturb that discretion unless it is clearly abused.’” *Cure v. State*, 421 Md. at 323 (quoting *Jackson v. State*, 340 Md. 705, 719 (1995)).

Maryland Rule 5-609, governing the impeachment of a witness by evidence of a prior conviction of a crime, provides, in pertinent part:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness’s credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

(b) Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.

In other words, in order for a prior conviction to be admissible, three factors must be satisfied: (1) the prior conviction must be “an infamous crime or other crime relevant to the witness’s credibility”; (2) the defendant must have been convicted within the past 15 years; and (3) the probative value of the admitting the conviction outweighs the danger of unfair prejudice to the defendant. *See id.*

In weighing the probative value of a past conviction against the prejudicial effect, courts should consider “(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the defendant’s credibility.” *Jackson*, 340 Md. at 717 (citing *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976)).

Brown argues that the court abused its discretion by admitting the conviction because the probative value of admitting the conviction was outweighed by the potential for unfair prejudice because of the similarity between his prior conviction and two of the crimes charged.² However, similarity between the crimes is only one factor of several that a trial court must consider. *See Jackson*, 340 Md. at 717. Before the trial court, Brown’s arguments were more expansive; he asserted that in addition to the similarity between the charged offense and his conviction, conviction’s age and the nature of the offense rendered its admission highly prejudicial.

The court, in its ruling allowing the evidence, stated:

With regard to this matter and the Court weighing the probative matter versus any unfair prejudicial effect that it maybe has, if the defendant should choose to testify, the previous conviction for possession with the intent to distribute, whatever it might have been, dates back to 2007, which is kind of in the middle of the 15-year rule as we normally use in the State of Maryland with regard to the inability to use previous convictions.

² Brown does not dispute that his prior conviction was for an infamous crime or one relevant to his credibility. He also does not dispute that he was convicted within the last 15 years.

So, it's not so ancient that it doesn't have its own probative value in the case. Frankly, the case of *State v. Woodland*, 337 Md. 519 [(1995),] allows the use of the specific charge of possession with the intent to distribute a controlled dangerous substance in an attempt by the State to countermand and/or attack the credibility of any witness who may give testimony -- in this case, the defendant, who has indicated through his counsel that he will testify.

So, I don't find the . . . conviction to be ancient such that it is outdated; nor do I find it not . . . bear[ing] on the credibility of the witness in this case.

Normally, when you're dealing with regard to the issue of either distribution or possession with the intent to distribute there is some kind of further act that is going on in the community that is trying to be secretive or clandestine in its nature; and the jury, I believe, ought to have that information to properly present it for their consideration as to the defendant's credibility.

Therefore, in weighing the probative value versus the prejudicial effect, the Court finds that whenever that conviction is from 2007, it may be used by the State in the issue of credibility.

A trial court abuses its discretion “when no reasonable person would take the view adopted by the [trial] court,” “when the court acts without reference to any guiding rules or principles,” or “where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court[.]” *Kusi v. State*, 438 Md. 362, 386 (2014) (Internal quotation marks and citations omitted). Here, the trial court considered the factors described in *Jackson v. State* before making its ruling admitting the evidence. *See Woodland*, 337 Md. at 526. Moreover, it appears that Brown’s fears of unfair prejudice were not realized—the jury acquitted Brown of possession of cocaine with intent to distribute, the exact offense for which he was convicted in 2007. Accordingly, we hold that the trial court did not abuse its discretion in determining that the probative value of Brown’s prior conviction outweighed the possibility of unfair prejudice.

II. Inconsistent Verdict

Brown next argues that the court erred in accepting an inconsistent verdict after the jury returned a verdict convicting him of possession of a firearm but acquitting him of wearing, carrying, or transporting a firearm. The State responds that the verdicts are consistent, and, even if not consistent, they are only factually inconsistent and do not constitute impermissible legal inconsistencies.

The issue of whether a jury's verdict is inconsistent is a question of law and is reviewed *de novo*. *McNeal v. State*, 426 Md. 455, 462 (2012). We first note that the trial court correctly instructed the jury on the contested weapons charges.³ *See* Md. Crim.

³ For the crime of wearing, carrying, or transporting a firearm, the court stated:

The defendant is charged with the crime of carrying a handgun. In order to convict the defendant, the State must prove that the defendant wore, carried, or transported a handgun that was within his reach and available for his immediate use. A handgun is a pistol, revolver, or other firearm capable of being concealed on or about the person and which is designed to fire a bullet by the explosion of gunpowder.

For the crime of possession, the court stated:

The defendant is charged with the offense of possession of a regulated firearm by a prohibited person. In order to convict the defendant, the State must prove beyond a reasonable doubt that the defendant did possess a regulated firearm after having been previously convicted of a crime that would prohibit his possession of a regulated firearm under Maryland law. . . . Possess means having control over an object, whether actual or indirect. Possession can be either exclusive or joint. More than one person can be in possession of the same object at the same time.

A person not in actual possession who knowingly has both the power and the intention to exercise dominion and control over an object either personally or through another person has indirect possession.

(Continued . . .)

Pattern Jury Instructions (“MPJI-Cr”) 4:35.2; *Herring v. State*, 198 Md. App. 60, 85 (2011).

A factual inconsistency in the verdict occurs when “the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge.” *McNeal*, 426 Md. at 458. “A legal inconsistency, by contrast, occurs when the crime for which a defendant is acquitted is, in its entirety, a lesser included offense within the greater inclusive offense for which a defendant is convicted.” *Tate v. State*, 182 Md. App. 114, 131 (2008). The Court of Appeals has described the former as “illogical, but not illegal.” *McNeal*, 426 Md. at 458.

In *Price v. State*, 405 Md. 10 (2008), the Court of Appeals held that inconsistent verdicts would no longer be allowed in criminal cases tried by a jury. The Court, however, failed to distinguish between legally inconsistent verdicts and factually inconsistent verdicts, an omission noted by Judge Harrell in his concurring opinion in that case. *Id.* at 35-38 (Harrell, J., concurring). In *McNeal v. State*, the Court clarified that factually inconsistent verdicts are, in fact, allowed under Maryland law, because of the historical role of the jury as the sole fact-finding body in a criminal jury trial and the risk that the trial judge may invade the province of the jury by criticizing a factually

(. . . continued)

In determining whether a defendant has indirect possession of an object, you should consider all of the surrounding circumstances. These circumstances include the distance between the defendant and the object. Whether the defendant has some ownership or possessory interest in the place where the object was found. And, any indications that the defendant was participating with others in the mutual use and enjoyment of the object.

inconsistent verdict. 426 Md. 455, 471-72 (2012). In sum, legally inconsistent verdicts are disallowed, *Price*, 405 Md. at 29, while factually inconsistent verdicts are permissible, *McNeal*, 426 Md. at 471-73.

The charge of possession of a firearm by a prohibited person contains legal elements that are distinct from the elements in the charge of wearing, carrying, or transporting a handgun. *McNeal*, 426 Md. at 472. There is no lesser included offense or predicate crime involved in the alleged inconsistent verdicts, and therefore, Brown’s verdicts are not legally inconsistent. *See id.*

Brown argues that the court erred because the jury’s verdict was factually inconsistent. True to form, the State argues that the verdict is not factually inconsistent; however, we do not decide whether this is the case, nor must we to resolve the issue.

“To evaluate the considerations of the jury in reaching its verdict would involve pure speculation, or require a reviewing court to inquire into the details of the deliberations.” *McNeal*, 426 Md. at 473. As the Court of Appeals has admonished, “[t]his is not a task that courts should undertake.” *Id.* (citing *United States v. Powell*, 469 U.S. 57, 66 (1984)). For this reason and without deciding the issue, we may assume that Brown’s conviction for illegal possession of a firearm is factually inconsistent with his acquittal on the charge of carrying, wearing, or transporting the firearm, while at the same time acknowledging that “what occurs within the minds of the jurors is outside the reach of our appellate grasp.” *Id.*

However, because factually inconsistent verdicts are not prohibited, as pellucidly stated by the Court of Appeals in *McNeal v. State*, we hold that the court did not err in finding that the jury’s verdict was not impermissibly inconsistent.

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