

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0149

September Term, 2014

MARK ALONZO CANTY

v.

STATE OF MARYLAND

Krauser, C.J.,
*Zarnoch,
Reed,

JJ.

Opinion by Reed, J.

Filed: August 11, 2016

*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 May 21, 2003, a jury in the Circuit Court for Baltimore City convicted Mark Alonzo Canty, the appellant, of five counts of attempted first-degree murder, five counts of use of a firearm in the commission of a crime of violence, two counts of possession of a regulated firearm after having been previously convicted of a crime of violence, and two counts of possession of a regulated firearm after having been previously convicted of a misdemeanor carrying a maximum penalty of more than two years. The trial court imposed an aggregate incarceration term of life plus thirty years, with fifteen years of the consecutive term to be served without the possibility of parole.¹ On February 25, 2014, the Circuit Court for Baltimore City granted, in part, the appellant's petition for post conviction relief. This appeal followed.

¹ There exists an inconsistency between the amended commitment record and the sentence imposed by the trial court at sentencing on September 25, 2003. The trial court initially imposed five-year sentences without the possibility of parole for the possession of a regulated firearm after having been convicted of a crime of violence charges (count 1 of indictment numbers 102274036 and 102274038, respectively). These sentences were to run consecutively to each other, and consecutively to an unrelated sentence the appellant was serving at the time of sentencing. The court then imposed the life sentences for the attempted first-degree murder convictions, running concurrently with each other, but consecutively to the firearm possession sentences. Subsequently, the trial court imposed the twenty year sentences, the first five years of which being without the possibility of parole, for the handgun use in a crime of violence convictions, again, running these sentences concurrently with each other, but consecutively to the sentences imposed in the attempted first degree murder convictions. The trial court did not address the convictions for possession of a regulated firearm after having been previously convicted of a misdemeanor carrying a penalty of two years or more at sentencing. This discrepancy was not raised in the briefs of either party.

The appellant presents three questions for our review, which we rephrased:²

1. Did the trial court err in denying the motion to suppress the appellant's statement to police as involuntarily made?
2. Did the trial court err in failing to sever the counts alleging possession of a regulated firearm after having been convicted of a crime of violence?
3. Did the trial court abuse its discretion by admitting a photograph depicting a victim in a hospital bed into evidence?

For the following reasons, we answer all of the above questions in the negative and affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The instant case originates out of an argument between Nacihia Carter ("Ms. Carter") and one of the victims, Tony Watson ("Mr. Watson"), over a bag of marijuana. Ms. Carter hit Mr. Watson with a small baseball bat and ran into the house owned by her aunt, Margaret Giles. Once inside the house, Ms. Carter, pregnant at the time of the

² The appellant presented the following questions:

1. Did the lower court err in denying the motion to suppress Mr. Canty's statements as involuntary when Mr. Canty testified that he confessed only after an officer threatened him, and the State failed to rebut that testimony?
2. Did the lower court err in denying the motion to sever the felon-in-possession-of-a-firearm counts?
3. Did the lower court abuse its discretion in admitting a prejudicial photograph depicting a victim in a hospital bed?

shooting, called her then-unborn child's father, the appellant, and informed him of the argument. Shortly after that conversation, the appellant arrived and began shooting, striking five victims including three children.

Crime lab technicians recovered two bullet jacket fragments from the crime scene. The firearms examiner analyzed those fragments and determined them to be .38/.357 caliber in size. Also, the police executed a search and seizure warrant on the house in which Ms. Carter and the appellant resided. They recovered two firearms, a .357 Smith and Wesson revolver and a .22 Taurus revolver. Finally, detectives interviewed Ms. Carter and other witnesses and, based upon the evidence available, requested an arrest warrant be issued for the appellant.

The Baltimore City Warrant Apprehension Task Force located and arrested the appellant fifty days after the shooting. Upon arrest, the appellant was taken to the Baltimore City Western District headquarters and interviewed by Detectives Theodore Friel and Donald Bauer. After the detectives explained his rights to him, the appellant signed a document indicating that he wished to knowingly and voluntarily waive those rights and provide a taped statement to police. During his taped statement, the appellant admitted to firing the .357 caliber revolver at Tony Watson. However, the appellant stated that Mr. Watson fired a silver revolver at him first.

Detective Friel attempted to interview Mr. Watson at the crime scene but described him as uncooperative. At trial, Detective Friel testified that police place bags over the hands of uncooperative shooting victims in order to preserve possible evidence of gunshot residue. Patrol officers at the crime scene followed this procedure at Detective Friel's

direction. Baltimore City Police Crime Lab technicians later tested Mr. Watson's hands and found no evidence of gunshot residue.

Prior to jury selection, the trial court held a hearing to address the appellant's pretrial motion to suppress the tape-recorded statement he provided to police. The appellant testified that detectives threatened to charge Ms. Carter with attempted murder unless he confessed to the shooting. In contrast, Detective Friel testified that the appellant was not threatened, coerced, or induced into waiving his rights and speaking with him and Detective Bauer on tape. In finding that the appellant voluntarily provided the taped statement to the detectives, the trial court indicated that it gave more credibility to Detective Friel's testimony than to the appellant's. Therefore, the trial court denied the appellant's motion to suppress the recorded statement and proceeded to trial.

After the jury was selected and sworn, but prior to opening statements, the appellant's trial counsel raised a motion to sever the counts alleging possession of a firearm after having been convicted of a crime of violence. The appellant's trial counsel argued that the shooting and the recovery of the weapons constituted separate incidents. He also argued that the evidence of possession of the weapons, in conjunction with the evidence of the appellant's prior violent criminal record, would unduly prejudice the appellant. The State countered that the shooting and the recovery of the weapons occurred close enough in time to be considered parts of the same incident, and that severance could lead to the State being collaterally estopped from pursuing the attempted murder charges. The trial court denied the appellant's motion, but stated that the parties were in a "very sensitive area" and would need to "tiptoe through this minefield."

At trial, the State introduced photographs depicting the crime scene. Included within this group of pictures was a photograph of Mr. Watson lying in a hospital bed with bags covering his hands. The appellant's trial counsel objected to the introduction of this photograph into evidence as duplicative and prejudicial to his client. The court allowed the photograph into evidence upon assertions made by the State that the photograph was demonstrative of Detective Friel's procedural actions in preserving possible gunshot residue evidence on the hands of uncooperative victims.

The jury ultimately convicted the appellant, and the trial court entered the previously described sentence. This Court dismissed the appellant's original appeal, as it was not timely filed. Years later, the circuit court heard the appellant's petition for post conviction relief. The court granted the petition in part, reserving resolution of the remainder of the appellant's claims pending the outcome of this appeal.

DISCUSSION

I. Voluntariness of Confession

A. Parties' Contentions

The appellant claims the State's failure to rebut his testimony during the suppression hearing should compel the court to determine that his statement was not made voluntarily and, thus, should be suppressed. The appellant testified that Detective Bauer threatened to charge Ms. Carter with attempted murder unless he confessed. The appellant directs this Court's attention to the State's burden in a suppression hearing challenging voluntariness: to affirmatively show that the appellant provided the statement voluntarily and not in response to improper promises, threats, or inducements.

In response, the State argues that Detective Friel effectively rebutted the appellant's testimony, and the trial court made a factual determination based upon its perception of the credibility of the conflicting recollections of the events. The State contends that the trial court's factual determination cannot be held as clearly erroneous.

B. Standard of Review

“The trial court's determination regarding whether a confession was made voluntarily is a mixed question of law and fact.” *Hill v. State*, 418 Md. 62, 77 (2011) (quoting *Knight v. State*, 381 Md. 517, 535 (2004)). As such,

[i]f any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous. When reviewing mixed question of law and fact, we will affirm the trial court's judgment when we cannot say that its evidentiary findings were clearly erroneous, and we find no error in that court's application of the law.

Fischbach v. Fischbach, 187 Md. App. 61, 88 (2009) (citations omitted).

C. Analysis

We shall hold that the trial court's factual determinations, assessment of the credibility of the witnesses, and interpretation of the evidence presented in the suppression motion and hearing, which are all to be accorded substantial deference, were not clearly erroneous. Therefore, the trial court appropriately denied the appellant's motion to suppress his voluntary statement to police.

The Court of Appeals has addressed voluntariness of extrajudicial statements, stating:

Maryland criminal law requires no confession or other significantly incriminating remark allegedly made by an

accused be used as evidence against him, unless it first be shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary.

Hilliard v. State, 286 Md. 145, 150 (1979). If properly challenged through a pretrial motion, the State is required to “affirmatively show” the free and voluntary nature of the statement by a preponderance of the evidence. *See Winder v. State*, 362 Md. 275, 306 (distinguishing the State’s burden of proof in a pretrial motion challenging voluntariness from the burden of proof of beyond a reasonable doubt faced at trial).

As indicated above, the suppression court’s ruling that a confession is voluntary is subject to a *de novo* review on appeal, with credit given to the suppression court’s first level factual findings. *See Hill*, 418 Md. at 77. Furthermore, appellate review of the motion to suppress is limited to the record of the suppression hearing. *See Winder*, 362 Md. at 311 (citing *Cartnail v. State*, 359 Md. 272, 282 (2000)).

The trial court is required to suppress confessions made as the result of improper inducements by law enforcement. *See Hill*, 418 Md. at 76. In *Hilliard*, *supra*, Court of Appeals established a two-prong test to determine whether inculpatory statements are involuntarily made. 286 Md. at 153. A confession is, “considered involuntary and must be suppressed if: (1) any officer or agent of the police force promises or implies to a suspect that he will be given special consideration from a prosecuting attorney or some other form of assistance in exchange for the suspect’s confession, and (2) the suspect makes a confession in apparent reliance on the police officer’s explicit or implicit inducement.” *Hill*, 418 Md. at 76 (citing *Hilliard*, 286 Md. at 153); *see also State v. Tolbert*, 381 Md.

539, 558 (2004) (outlining the similar Constitutional test which emphasizes the causal connection between the inducement and the statement). “Both prongs must be satisfied before a confession is deemed to be involuntary.” *Winder*, 362 Md. at 310.

The appellant failed to sufficiently satisfy the first prong of the *Hilliard* test in the instant case. 286 Md. at 153. In order to determine that a confession is involuntary, a suppression court is required to first decide whether, in light of the conflicting evidence presented, sufficient proof of a threat or inducement exists. *See Jones v. State*, 229 Md. 165, 172 (1962). The facts presented here are identical to those in *Jones*, in that the appellant claims his confession was induced by threats to charge the mother of his unborn child with a crime. 229 Md. at 171. Evidence of threats or inducements in both *Jones* and the instant case were limited to the testimony of the appellants and the contradictory testimony of the police officers. *Id* at 172. This court has previously held that “conflict between the testimony of the appellant and that of [a] police officer concerning any promises made to appellant in return for his confession present[] an issue of fact” *Jackson v. State*, 13 Md. App. 31, 36 (1971). The trial court set forth its findings of fact as follows:

This entire interview was moving phenomenally quickly, and I am satisfied that Detective Friel’s testimony is far more believable, that no promises were made, no threats were made to him, that the Defendant had been advised of his rights and that he freely and voluntarily gave up those rights and, in essence, made a very brief statement after being advised of his rights. I am satisfied, based upon all that is before me, that that was a free and voluntary act on his part.

The appellant argues the State's lack of rebuttal testimony after he alleged that Detective Bauer made an improper inducement to confess demonstrates the failure on the part of the State to affirmatively show that the confession was "the product of neither a promise nor a threat." *Winder*, 362 Md. at 306 (quoting *Hilliard*, 286 Md. at 151). However, the Court of Appeals discredited this very argument in *Jones*: "It undoubtedly would have been more satisfactory had the officers been recalled to refute the claimed threats and inducements, *but it does not follow that failure to do so made the confession inadmissible.*" 229 Md. at 172 (emphasis added).

The trial court clearly outlined its factual findings in its ruling. This Court is required to give deference to the suppression court as to the credibility of witnesses and will not set aside its judgments on the evidence unless clearly erroneous. *See* Md. Rule 8-131(c). Finding that the contested factual determinations were not clearly erroneous, we hold that the suppression court did not err in denying the appellant's motion to suppress the confession.

II. Severance

A. Parties' Contentions

The appellant contends that joinder of the counts of firearm possession after having been convicted of a crime of violence was inappropriate. The appellant argues that

[t]he possession charges required the State to prove that Mr. Canty had a prior conviction for a crime of violence, a fact that had no special relevance to the other charged crimes – other than showing "a probability that he committed th[ose] crime[s] . . . because he is a man of criminal character."

Appellant's Br. at 20 (quoting *McKnight v. State*, 280 Md. 604, 612 (1977)). Therefore, the appellant asserts that the court should not have admitted evidence of his prior criminal conviction³ because, with respect to the non-possession-related charges, it allowed the jurors to make an improper inference as to his character. In other words, because the evidence would not be mutually admissible in separate trials, the counts should be severed. The appellant claims the trial court failed to address the mutual admissibility standard necessary for proper analysis of severance motions. In the alternative, the appellant asserts that the trial court abused its discretion in allowing the jury to decide the firearm possession counts, arguing prejudice to the appellant outweighed the court's interest in judicial economy.

The State argues the trial court did not abuse its discretion in denying the appellant's motion to sever. The State contends the evidence in all counts is mutually admissible due to the close proximity in time and location between the shooting and the recovery of the weapons from Ms. Carter's residence. The State directs this Court's attention to the appellant's statement to police, in which he indicated that he used one of the weapons during the shooting and then placed it in the location where it was recovered.

In response to the appellant's contention that the inclusion of the firearm possession counts impermissibly prejudiced the appellant, the State asserts that the appellant's ability to craft an appropriate stipulation, and the strongly worded jury instruction the trial court provided, mitigated the possible prejudice. Therefore, the State argues the interest in

³ The appellant was previously convicted of Robbery with a Deadly Weapon. *See* Baltimore City Circuit Court Case # 592157009.

judicial economy outweighed the possible prejudice and, as a result, joinder was appropriate.

B. Standard of Review

“The matter of severance or joinder is ordinarily committed to the discretion of the trial judge.” *Frazier v. State*, 318 Md. 597, 607 (1990). In order to reverse under an abuse of discretion standard, “[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *North v. North*, 102 Md. App. 1, 14 (1994).

C. Analysis

The appellant claims the trial court abused its discretion in failing to sever the counts of firearm possession after having been convicted of a crime of violence. The appellant also believes that the trial court neglected to perform an analysis of the mutual admissibility of evidence between the firearm possession charges and the attempted murder charges. Additionally, the appellant argues that the evidence presented to prove the disqualification element of the firearm possession charges, when presented as part of a consolidated trial, unfairly prejudiced the jury against him. We hold the circuit court did not abuse its discretion in denying the motion to sever. The charges for which the appellant was tried were closely enough related in terms of proximity of time, location, and circumstances such that no compulsory severance was required. Additionally, the issue of any prejudice to the appellant was sufficiently alleviated by the joint stipulation of the parties regarding the appellant’s prior conviction and the instruction provided to the jury prior to closing arguments.

“We think that a defendant charged with similar but unrelated offenses is entitled to a severance where he establishes that the evidence as to each individual offense would not be mutually admissible at separate trials.” *McKnight*, 280 Md. at 612 (finding the joinder of four separate robberies to be inappropriate). However, criminal charges “may be joined, absent improper prejudice, if they are closely related and arise from incidents that occur within the same proximate time and space.” *Carter v. State*, 374 Md. 693, 708 (2003) (citing *Frazier v. State*, 318 Md. 597, 611 (1990)). As we shall explain, there is no entitlement to severance under the circumstances of the present case.

The instant case presents a factual scenario in which the appellant confessed to firing a handgun (the .357 revolver), placing that handgun in the location where it was recovered pursuant to a search warrant, and storing a second handgun (the .22 Taurus revolver) in the same general vicinity. The weapons were recovered the day after the shooting. These facts substantially relate to all of the charges.

The appellant objects to the introduction of evidence relating to Mr. Canty’s prior conviction in a consolidated trial, arguing that it would be inadmissible in a separate trial for the attempted murder. This issue was addressed in *Carter*, where the Court of Appeals indicated that “[i]t makes little sense to hold a completely separate trial on the criminal-in-possession charge when the ‘only additional [evidence] as to [that] charge would be the fact of the prior conviction.’” 374 Md. at 709 (quoting *Frazier*, 318 Md. at 611) (alterations in original). The instant case is distinguished from *McKnight*, *supra*, in that it involves a collection of separate charges arising out of one incident rather than similar charges unrelated to each other. *See* 280 Md. at 612.

“If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires. Md. Rule 4-253(c). As the State noted, “trial judges are presumed to know the law and to apply it properly.” *State v. Chaney*, 375 Md. 168, 180 (2003). In admitting the evidence of the prior convictions, the trial court alleviated any possible undue prejudice by admitting the parties’ joint stipulation⁴ and issuing as instruction to the jury which limited their consideration of the prior crimes evidence. *See Frazier*, 318 Md. at 611-612.

“Rulings on matters of severance or joinder of charges are generally discretionary.” *Carter*, 374 Md. at 704-05. We do not believe that the circuit court abused its discretion in denying the appellant’s motion for severance.

III. Admissibility of photograph

A. Parties’ Contentions

Finally, the appellant claims the introduction of a photograph of a victim in a hospital bed into evidence, over the appellant’s objection, was an abuse of the trial court’s discretion. The appellant contends the prejudicial effect of the photograph outweighed its

⁴ The appellant and the State stipulated that “the Defendant, Mark Canty, was previously convicted in 1992 in the Circuit Court for Baltimore City of an offense classified as a crime of violence,” and that he was also “previously convicted, in 1997, in the Circuit Court for Baltimore City of an offense classified as a misdemeanor in the State that carries a maximum penalty of more than two years.”

probative value because it was duplicative and carried the inherent risk of emotionally swaying the jury to convict.

The State counters the appellant's argument, stating that the trial court did not abuse its discretion because the photograph contained enough probative value to outweigh the prejudice to the appellant. The State contends that the photograph depicting one of the victims, Mr. Watson, in a hospital bed includes sufficient relevant information surrounding the preservation of possible evidence of gunshot residue. In the picture, Mr. Watson's hands are bagged and the trial court ruled that the photograph, though cumulative of Detective Friel's testimony, was demonstrative of procedure outlined in that testimony.

B. Standard of Review

As the Court of Appeals has explained,

all photographic evidence is somewhat cumulative. The very purpose of photographic evidence is to clarify and communicate facts to the tribunal more accurately than by mere words. When such evidence is offered, it is for the trial judge, in his discretion, to determine if the pictures are probative and admissible.

Johnson v. State, 303 Md. 487, 503-04 (1985) (citations omitted). Accordingly, "[a] court's determination in this area will not be disturbed unless plainly arbitrary." *Id* at 502.

C. Analysis

The appellant contends the trial court abused its discretion in admitting a photograph depicting one of the victims, Mr. Watson, with bags covering his hands, lying in a hospital bed appearing helpless and in pain. The appellant argues the photograph was cumulative to evidence elicited from testimony; that it was meant to evoke sympathy for the victim

and prejudice the jury against the appellant. However, in exercising its discretion, the trial court indicated that although the photograph “is somewhat cumulative . . . it’s [also] demonstrative, quite frankly, as far as demonstrating what it means to bag someone’s hands. I think it is relevant for that purpose and I will allow it in.” The trial court is granted broad discretion in the admission of photographic evidence and in the instant case there is no clear abuse of that discretion.

The photograph in question showed Mr. Watson, a victim described at trial as uncooperative, in his hospital bed with bags covering his hands. Detective Friel testified as to the purpose of bagging someone’s hands and particularly the purpose for bagging the hands of uncooperative victims. The trial court, in his ruling on admissibility, described the photograph as demonstrative of this procedure. The court determined the photograph to be admissible because its probative value outweighed the danger of unfair prejudice. *See Johnson*, 303 Md. at 403-04. We do not believe the photograph was admitted arbitrarily with little probative value. *Id.* Therefore, we hold that the circuit court did not abuse its discretion in admitting the photograph at issue.

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