

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1421

September Term, 2015

JAVONE JOSHUA SMITH

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: July 1, 2016

*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.

Appellant, Javone Joshua Smith, was convicted by a jury in the Circuit Court for Anne Arundel County of illegal possession of a regulated firearm, pursuant to Section 5-133 (b) of the Public Safety Article. After he was sentenced to three years, with all but eighteen months suspended, to be followed by three years supervised probation, the appellant timely appealed, presenting the following question for our review:

Did the circuit court abuse its discretion in admitting as evidence a recording of a 911 call?

For the following reasons, we affirm.

BACKGROUND

Corporal Thomas Gillen, of the Anne Arundel County Police Department, arrived at an Exxon gas station, located at Arundel Mills Mall, at around 10:00 p.m. on January 8, 2015 in response to a 911 call. Over defense objection, the recording of that call was played for the jury as follows:

THE CALLTAKER: Anne Arundel County 911 do you need police, fire, or ambulance?

MR. PRICE: Police at -- what's the address here? Are you there? He's at Pump 9. There's a guy outside with a gun at Pump 9.

THE CALLTAKER: What's the address?

MR. PRICE: He won't give me the address.

THE CALLTAKER: What street are you on?

MR. PRICE: 7671 at the Arundel Mills Exxon. I'm trying to pump gas but I –

THE CALLTAKER: 7671 what?

MR. PRICE: What's the street? Arundel Mills Boulevard – 7671 Arundel Mills Boulevard.

THE CALLTAKER: Okay, and it's an Exxon?

MR. PRICE: Yeah. He's still at that pump now and the passenger has a gun. I was trying to pump my gas and I seen him put the gun in front of his face. I believed he was going to rob me so that's why I stood on the opposite side of –

THE CALLTAKER: What kind of vehicle?

MR. PRICE: It's probably an Acura, but he's still at that pump.

THE CALLTAKER: What color? Did you get a tag number?

MR. PRICE: I can't at all. He's still there at Pump 9. The car is like a grayish color.

THE CALLTAKER: Sedan or SUV?

MR. PRICE: Sedan. And he had –

THE CALLTAKER: What's his race?

MR. PRICE: Black. Two black males.

THE CALLTAKER: Long gun or short gun?

MR. PRICE: Long. It's like a – well, it's a legal size. It's like the police kind, it's real thick.

THE CALLTAKER: You said it's the passenger that has the gun?

MR. PRICE: Yes. Just picked it up out of (indiscernible) he got it and I seen the gun, and like I said I was real scared for my life. I was pumping my

gas and he turns around like as if they were going to follow me. And that's why I never left the station, like my gas thing is still open and it's still running gas because I'm not even going back out there.

THE CALLTAKER: Can you see the tag at all?

MR. PRICE: I cannot at all. I'm like really, really scared here.

THE CALLTAKER: What made you think he was going to rob you?

MR. PRICE: Because he kept circling around as they were looking over to see that I had a iPhone.

THE CALLTAKER: He was looking at you?

MR. PRICE: Yes.

THE CALLTAKER: And did what?

MR. PRICE: (Indiscernible.)

THE CALLTAKER: Sir, what? Who are you talking to?

MR. PRICE: He just walked inside the store.

THE CALLTAKER: He's inside the store now?

MR. PRICE: Yes, he's inside the store.

THE CALLTAKER: Are you inside the store as well?

MR. PRICE: Yes. Do you all have these in the (indiscernible)? All right. Anything else you want? Oh, my gosh. It's an Infiniti.

THE CALLTAKER: Infiniti?

MR. PRICE: Yes.

THE CALLTAKER: Can you see – did you just walk back out?

MR. PRICE: No, I'm inside. They pulled up to the front. My car is still sitting there.

THE CALLTAKER: What is he doing in the store?

MR. PRICE: Probably just came in to see what I'm doing. Cause they waiting for me to come out because I have an iPhone 6 Plus, right? I always try to take that in my bag. I'll just take these.

STORE EMPLOYEE: Okay, one moment, sir.

MR. PRICE: Okay, thank you. (Indiscernible.)

THE CALLTAKER: And where are you now?

MR. PRICE: I'm inside the store. And they're waiting for me to come out. So that's why I asked about the donuts and stuff so they would think I was shopping.

THE CALLTAKER: Okay. And the vehicle's still there?

MR. PRICE: Right behind you. Yes, right behind you. That's all right there, right? The Infiniti right there. What? Yeah, yes. No, that's it right there. Just down there. Two black males.

(911 tape ends.)

[PROSECUTOR]: And as part of State's Exhibit 3 the State and the Defense do agree that the person who went inside of the store was not the Defendant.

Corporal Gillen testified that, after he arrived, he went inside the store and encountered Tyrone Price, the 911 caller. Mr. Price told Corporal Gillen that the suspects were outside in a silver Lexus parked in front of the store. At that time, the officer saw that

a passenger, identified as the appellant, was exiting the front passenger seat of the vehicle. Corporal Gillen went outside and detained him. On cross-examination, Corporal Gillen agreed that Mr. Price never identified appellant as the person he saw with a gun.

Assisting Corporal Gillen was Corporal Dennis Schuman, also with the Anne Arundel County Police Department. When Corporal Schuman arrived at the scene, the appellant was already in custody and was sitting on the ground nearby. Corporal Schuman ran the tags for the vehicle and determined that the license plates did not belong on the vehicle. Corporal Schuman approached the vehicle, illuminated the interior from the passenger side, and then observed an object on the driver's side floorboard. Believing the object to be a handgun, Corporal Schuman went to the driver's side and confirmed his observations. A loaded, semi-automatic handgun was located under the driver's seat.

The parties stipulated that the handgun was test-fired and determined to be operable. The parties also stipulated that the appellant was previously convicted of a disqualifying crime that prohibited him from possessing a regulated firearm.

We shall include additional detail in the following discussion.

DISCUSSION

Appellant maintains that the trial court abused its discretion in admitting the recording of the 911 call, solely on the ground that its probative value was substantially outweighed by the danger of unfair prejudice. Appellant argues that some of the statements

suggested to the jury that appellant was a robber when he was not charged with robbery. The State disagrees, contending first that the appellant failed to request that the alleged prejudicial statements be redacted from the 911 call and that the appellant's motion to exclude the entire recording was a "deliberate tactical gamble" that put the trial court in an "all or nothing" choice.

After jury selection, and prior to calling the first witness, defense counsel moved *in limine* to exclude the entire 911 call. The following transpired:

THE COURT: What's the basis for excluding the whole 911 call?

[DEFENSE COUNSEL]: Well, throughout the 911 call I think there is evidence that would be excluded under 5-403. He is referring multiple times to suspecting these people – we don't know who they are – are going to rob him; making speculation as to what their intentions are and why they're coming after him; making speculation as to the fact that they are coming after him. I mean, putting aside the issue of the gun there is – throughout the call it's like peppered with different things that should be excluded because they are not probative of any fact that's in question at this trial. It is not a robbery trial. It's just was he in possession of this item or not, and is it a firearm.

Any probative value of the things that he's talking about is substantially outweighed by the danger of unfair prejudice and also confusion. I wouldn't want a jury to hear that this man was afraid of being robbed when my client is not charged with robbing him. Because they're just going to think, this guy's a dangerous person, he put this person in fear of being robbed – which is exactly the kind of thing that you need to be careful to avoid in a criminal trial. Because the only evidence that they're supposed to be considering is the stuff about the gun. It's a possession case.

THE COURT: Counsel.

[PROSECUTOR]: Your Honor, Defense counsel jumps around quite a bit in terms of different types of objections. Bottom line, it is the State's position, one, that it is the same gun; two, that the 911 call is admissible evidence because while it may be initially hearsay it is not hearsay, it falls under the exceptions of excited utterance and present-sense impression. And it becomes specifically relevant, one, because we have the description of the vehicle; we have a description of the gun; and we have the 911 caller saying that car right there. That's how we get within just a few moments – while he's on the phone – from – he's on the phone, officer arrives, that car right there. That is why this is relevant, because he's seeing that same gun.

And if there is some prejudice it is not – the prejudicial value is not more than the probative value. The probative value here is extremely important because we are getting to that gun right there, passed to the Defendant. And we get to that gun, that car, right there. That's all within just a matter of moments – again, while he's on the phone. I believe that the 911 is absolutely admissible. We certainly don't have to try this case in a vacuum.

And, Your Honor does have a point about the Defense being able to summons Mr. Price. We did speak to him a couple of weeks ago. He was terrified, had been threatened, and also indicated that he had spoken to the Defense investigator who came, I believe, to his home. So the Defense certainly knows where he is. And if they knew that they wanted to question him about what he said on the 911 – and they knew that we were going to be using the 911 – they certainly could have summonsed him.

THE COURT: I'm going to deny the motion at this time. If something arises during the trial that is different than what we've talked about here and you wish to renew the motion, you may.

Defense counsel maintained that the declarant's description of a gun was inadequate, that the 911 tape was irrelevant, and that he had no burden to call the declarant, Mr. Price. After the court responded that the State was simply pointing out that appellant could have called Price, defense counsel offered another reason to exclude the 911 call. Counsel argued

that the declarant appeared to be identifying a person and that that was “misleading because there is no identification of my client.” Counsel continued:

I think it’s irrelevant unless they can show that the person that he is referring to throughout this tape is my client rather than the other person who got away, some third person, fourth person, I don’t know. There’s potential for so many people to be involved that it’s unfairly prejudicial. I’m not saying prejudicial, I’m saying that the probative value is outweighed by the risk of unfair prejudice. That’s all I have on the 911 for now.

The State offered to stipulate that appellant was not the person who entered the store, and defense counsel agreed that would be “fine.” The court then reiterated its ruling denying the motion to exclude the 911 recording.

On appeal, the appellant concedes that portions of the 911 call were admissible, including the description and identification of the vehicle, the statement that the passenger possessed a gun, and the fact that the call was contemporaneous with the arrival of the police. Appellant maintains, however, that the remainder of the call was not admissible, including Price’s statements that he feared for his life and that the suspects in the vehicle were going to rob him.

In response, the State contends that the trial court did not abuse its discretion in admitting the entire 911 call because the appellant did not request “the more limited remedy of redaction[.]” The State has not provided us with any authority to support this contention. To the extent that the State is suggesting some sort of procedural default or waiver by the appellant, we recognize that this Court has held that a claim that portions of a statement

should not have been admitted was not preserved when the grounds raised on appeal were not presented during trial *and* where there was no request for redaction. *See Williams v. State*, 117 Md. App. 55, 68 (1977).

In the case before us, appellant did object to the admissibility of the statements during the 911 call. Although the “limited remedy of redaction” was not requested, the issue on appeal was squarely presented to the trial court and we consider the issue adequately preserved for our review. *See In re Ryan S.*, 369 Md. 26, 35 (2002) (“Thus, as long as the party, whether in a civil or criminal case, clearly makes the judge aware of the course of action he or she desires the court to take and the reasons for such course of action, the party shall have adequately preserved that issue for appellate review”); *State v. Greco*, 199 Md. App. 646, 658 (2011) (concluding that an issue was not waived where the State generally made the argument at trial, and where the trial court clearly decided the issue on the grounds raised on appeal) (citing Maryland Rule 8-131), *aff’d*, 427 Md. 477 (2012).

Turning to the merits of the appellant’s argument:

Determinations regarding the admissibility of evidence generally are left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court’s evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). *Accord Nixon v. State*, 204 Md. 475, 483 (1954) (reviewing trial court’s ruling excluding evidence based on inadequate chain of custody for an abuse of discretion). A trial court abuses its discretion only when “no reasonable person would take the view adopted by the [trial] court,” or when the court acts “without reference to any guiding rules or principles.” *King v. State*, 407 Md. 682, 697 (2009).

Easter v. State, 223 Md. App. 65, 74-75, *cert. denied*, 445 Md. 488 (2015); *accord Baker v. State*, 223 Md. App. 750, 759 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 708-09).

Maryland Rule 5-403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In evaluating prejudice under this Rule, the Court of Appeals has provided:

[T]hat “the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403.” MCLAIN, *supra*, § 403:1(b) (2d ed. 2001); *accord* JOSEPH F. MURPHY JR., MARYLAND CRIMINAL EVIDENCE HANDBOOK § 506(B) (3d ed. 1993 & Supp. 2007). Evidence may be unfairly prejudicial “if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he is being charged.” MCLAIN, *supra*, § 403:1(b). The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial.

It has been said that “[p]robative value is outweighed by the danger of ‘unfair’ prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.” MURPHY, *supra*, § 506(B) (emphasis in original).

Odum v. State, 412 Md. 593, 615 (2010).

In this case, observing that Mr. Price never identified the appellant, the appellant contends that the probative value of Mr. Price’s statements in the 911 call were outweighed by the danger of unfair prejudice. Appellant cites the statements from Mr. Price that “I believed he was going to rob me...;” “I was real scared for my life;” “I was pumping my gas

and he turns around like as if they were going to follow me;” “I’m not even going back out there;” “I’m like really, really scared here;” “[H]e kept circling around as they were looking over to see that I had a iPhone;” “He just walked inside the store;” (where there was a stipulation that whoever walked into the store was not Mr. Smith); “Probably just came in to see what I’m doing;” and “[T]hey waiting for me to come out because I have an iPhone 6 Plus ...[.]”

The issue in this case was whether the appellant illegally possessed a handgun. We are persuaded that Mr. Price’s statements were relevant because they tended to establish that occupants of the subject vehicle were in possession of the handgun. *See generally, Kamara v. State*, 205 Md. App. 607, 632-33 (2012) (defining “possession” to include actual and constructive possession). Price’s statements that he thought he was going to be robbed and was in fear were probative because they were supportive of Mr. Price’s claim that an occupant of the vehicle had a gun.

We disagree with the appellant’s argument that the probative value of Mr. Price’s statements were substantially outweighed by the danger of unfair prejudice. The statements were simply Mr. Price’s expression of his own state of mind under the circumstances. Although arguably prejudicial, Price’s statements were not unfairly so and we do not

conclude that the court abused its discretion in ruling that the entirety of the recorded 911 call was admissible at trial.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY AFFIRMED.**

**COSTS TO BE PAID BY
APPELLANT.**