

Circuit Court for Charles County
Case No. 08-K-15-352

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1980

September Term, 2016

RONALD E. DAVIS, JR.

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Beachley, J.

Filed: September 18, 2017

*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.

Following a two-day jury trial in May 2016 before the Circuit Court for Charles County, appellant Ronald Davis was convicted of possession of a regulated firearm with a prior disqualifying conviction. On October 14, 2016, the court sentenced appellant to eighteen months in the Charles County Detention Center. Appellant timely appealed and presents three questions for our review:

1. Whether the trial court’s refusal to allow Dresean Stewart to testify on issues relevant to the firearm possession charge constitutes reversible error?
2. Whether the jury’s consideration of inadmissible hearsay—to the effect of “that’s my closet; that’s my key”—was unduly prejudicial?
3. Whether the trial court erroneously refused to give a “mere presence” jury instruction as requested by the defense?

We hold that the trial court’s refusal to allow Dresean Stewart to testify constitutes reversible error and therefore need not reach the remaining issues.

BACKGROUND

On April 7, 2015, Charles County officers assisted the Washington Area Vehicle Enforcement (“WAVE”) Team¹ in executing a search warrant of appellant’s home based on the presence of suspicious vehicles. Before the WAVE Team could execute the warrant, two of the suspicious vehicles left the premises.

The WAVE Team initiated traffic stops on both vehicles. The first vehicle was a black Porsche Cayenne occupied by appellant’s wife, Sirieta Davis, with what appeared to

¹ According to testimony adduced at trial, WAVE is a multijurisdictional task force that investigates stolen vehicles in the metropolitan D.C. area.

be a fake Vehicle Identification Number (“VIN”) concealing the vehicle’s actual VIN. The second vehicle pulled over was a black BMW operated by Joshua Beamon,² which had a fraudulent rear Georgia dealer license plate. The BMW also had a fake VIN sticker pasted over the vehicle’s actual VIN.

While the two traffic stops were taking place, other officers from the WAVE Team made entry into appellant’s house. During their search, officers discovered a locked closet door in the master bedroom. The officers informed appellant, who was home during the search, that they would forcibly open the locked closet if necessary. Appellant explained that the keys to the closet were located in a drawer in the kitchen. Gaining access to the locked closet, officers found male clothing, cologne, sunglasses, jackets, and a locked safe. Inside the safe, officers discovered bank records, title documents, keys, and driver’s licenses—all with appellant’s name on them. While searching some of the clothing located outside of the safe, a loaded handgun fell to the ground.

The State charged appellant with three counts of theft of property valued \$10,000 to \$100,000; one count of theft of property valued \$1,000 to \$10,000; one count of possession of a regulated firearm after being convicted of a disqualifying crime; one count of possession of a stolen regulated firearm; and three counts of obliteration of serial numbers. During his criminal trial, appellant sought to have his son, DreSean Stewart (“Stewart”) testify as a witness for the defense. According to appellant’s trial counsel,

² There was also a passenger in the BMW named Raejon Beamon.

Stewart intended to testify to matters regarding the living situation in appellant’s home, but would invoke his Fifth Amendment privilege if asked about the ownership of the handgun.

Relying on *Gray v. State*, 368 Md. 529 (2002), the trial court refused to allow Stewart to testify. The jury convicted appellant of possession of a regulated firearm with a disqualifying crime, but acquitted him on all other counts.

STANDARD OF REVIEW

The parties disagree on the applicable standard of review for the trial judge’s decision not to allow Stewart to testify. According to appellant, the proper standard is *de novo* because “The determination of whether evidence is relevant is a matter of law, to be reviewed *de novo* by an appellate court.” *DeLeon v. State*, 407 Md. 16, 20 (2008). The State counters that appellate courts review “the trial court’s ruling on a defendant’s ability to a [sic] witness likely to invoke the Fifth Amendment privilege for abuse of discretion.”

Although the parties disagree on the applicable standard of review, they do agree that the trial court relied on *Gray* as its basis to exclude Stewart’s testimony. Appellant argues that the trial court “erroneously interpreted” *Gray* by applying its language to exclude admissible testimony. In other words, appellant alleges that the trial court erred in its application of *Gray*.

We conclude that the proper standard of review of the trial court’s application of *Gray* was articulated in *Bass v. State*:

[A]n exercise of discretion based upon an error of law is an abuse of discretion . . . and when an otherwise discretionary decision is premised upon legal error, that decision is necessarily an abuse of discretion because the

court’s discretion is always tempered by the requirement that the court correctly apply the law applicable to the case.

206 Md. App. 1, 11 (2012) (internal citations and quotation marks omitted).

DISCUSSION

Because it was the basis for the trial court’s decision not to allow Stewart to testify, we begin with a brief overview of *Gray*. In *Gray*, petitioner Gray was convicted of first-degree murder of his wife. 368 Md. at 532. Gray’s defense was that another man—Brian Gatton—was the actual murderer. *Id.* at 533. During Gray’s trial, “[t]here was witness testimony about a relationship between Gatton and Mrs. Gray[,]” as well as testimony about Gatton’s “obsession” with knives, and “his being in possession of jewelry after Mrs. Gray’s murder that . . . was similar to that owned and worn by [Mrs.] Gray but was not found when her body was discovered.” *Id.* at 533-34.

Gray subpoenaed Gatton to testify at the trial, and the trial court learned that Gatton intended to invoke his Fifth Amendment right and not testify. *Id.* at 534. “The trial court, however, refused to permit the petitioner to question Gatton, and thus to have Gatton invoke his rights under the Fifth Amendment, in the jury’s presence.” *Id.*

On appeal, the Court of Appeals noted “that courts should be mindful that a defendant, within evidentiary and procedural restraints, is always entitled to present his full defense to the trier of fact.” *Id.* at 547. In the context of a defendant who wishes to call an exculpatory witness to take the stand to invoke the Fifth Amendment privilege, the Court stated:

When a defendant proffers a defense that the crime was committed by another person and the defendant wants to call as a witness that person *only* to invoke his Fifth Amendment privilege against self-incrimination on the witness stand in the presence of the jury, the trial court, on the record, should make a determination of whether sufficient other evidence has been proffered that, if believed by any trier of fact, might link the accused witness to the commission of the crime.

Id. at 564 (emphasis added). A trial court, then, need only make the threshold determination whether the defendant has proffered sufficient evidence to link the witness to the crime alleged when the sole purpose of the witness’s testimony will be to invoke his Fifth Amendment privilege. *Gray* does not prevent a witness from testifying to other admissible matters unrelated to the invocation of that privilege.

Here, the record indicates that appellant would have called Stewart to testify for two known purposes: to likely invoke his Fifth Amendment privilege in front of the jury when asked about the handgun; and to testify generally about other relevant issues. Appellant’s trial counsel articulated these other relevant issues to the court in the following colloquy:

[DEFENSE COUNSEL]: Well, but see, the young man was going to testify that, “I live there, this is my father.”

[THE COURT]: Right, I understand.

[DEFENSE COUNSEL]: “I live there with the rest of the family.”

[THE COURT]: Uh-hum?

[DEFENSE COUNSEL]: [“]And there is another grown son that lives there. I can go anywhere in the house that I want to.”

[THE COURT]: Yeah?

[DEFENSE COUNSEL]: “I was sleeping in the basement along with Mr. Davis.” He was sleeping in the basement, too, because he was separated from his wife, but living under the same roof.

[THE COURT]: Okay, well we don’t have any evidence of that that you didn’t generate.

[DEFENSE COUNSEL]: Well, you’re not letting me put the witness on. ^[3]

When the trial court refused to allow Stewart to testify, appellant’s trial counsel stated, “I note an exception, and move for a mistrial on the grounds that Your Honor is denying my client his Constitutional right to present witnesses in his defense.”

By applying the rule in *Gray* to proffered testimony unrelated to invoking the Fifth Amendment, the trial court prevented appellant from presenting his full defense. While we express no opinion regarding whether Stewart should have been allowed to invoke his Fifth Amendment privilege in the presence of the jury, the trial court’s decision not to allow Stewart to testify to other relevant issues was an abuse of discretion.

Maryland Rule 5-402 provides that, “Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible.” The following factors are relevant in a possession of contraband case:

- 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the

³ We are not unmindful of the fact that appellant’s trial counsel did not explicitly tell the trial court that Stewart would testify to other relevant matters not falling within the penumbras of *Gray*. Nonetheless, appellant’s trial counsel clearly proffered relevant and admissible evidence in the above colloquy.

automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

Handy v. State, 175 Md. App. 538, 564 (2007). Evidence that a criminal defendant shared a living space can both support and undermine a prosecution for possession of contraband. *Cf. State v. Gutierrez*, 446 Md. 221, 237 (2016) (holding that when drugs and a gun were found in areas of common use in a small apartment shared by two brothers, evidence supported conviction for constructive possession for both); *Moye v. State*, 369 Md. 2, 18 (2002) (stating that defendant’s mere proximity to drugs in a basement where he stayed did not sufficiently establish his constructive possession of those drugs).

Appellant proffered that Stewart would have testified that appellant was separated from his wife, that appellant slept in the basement with Stewart, and that Stewart had access to the entire house—including the kitchen, where the keys to the closet were located. This testimony would have been relevant to whether appellant possessed the firearm. The trial court, therefore, excluded admissible, relevant evidence which appellant was entitled to introduce to the jury. Because “a defendant, within evidentiary and procedural restraints, is always entitled to present his full defense to the trier of fact,” the trial court erred. *Gray*, 368 Md. at 547.

“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). The trial court here prevented appellant from presenting his full defense: that he slept in the basement, was separated from his wife who also lived in the home (and

presumably slept in the master bedroom), that he has two grown sons who also lived in the home, and that Stewart had access to the closet where the gun was found. Appellant contemplated calling Stewart as his sole witness. Under these circumstances, we cannot conclude, beyond a reasonable doubt, that the omission of this testimony in no way influenced the verdict for possession of a regulated firearm after having been convicted of a disqualifying crime. Accordingly, we vacate appellant's conviction and order a new trial.

**JUDGMENT OF THE CIRCUIT COURT
FOR CHARLES COUNTY VACATED.
CASE REMANDED TO THAT COURT
FOR A NEW TRIAL. COSTS TO BE PAID
BY CHARLES COUNTY.**