UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2776

September Term, 2014

MORGAN FELIX WHITE, JR.

v.

STATE OF MARYLAND

Berger,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 23, 2016

Appellant, Morgan Felix White, Jr., was convicted by a jury in the Circuit Court for Wicomico County of possession of a firearm by a prohibited person, illegal possession of a regulated firearm, and wearing, carrying, or transporting a handgun.

Appellant raises the following question for our review, which we have rephrased:[1]

> Did the lower court properly exercise its discretion when it denied appellant's motion for a mistrial after testimony was that the firearm in question was stolen?

For the reasons to be discussed, we find no abuse of discretion and affirm.

FACTS and PROCEEDINGS BELOW

Appellant was indicted by the Grand Jury for Wicomico County for possession of a firearm, possession of a firearm by a prohibited person, illegal possession of a regulated firearm, wearing, carrying or transporting a handgun, possession of a stolen and regulated firearm, theft under $1,000, resisting arrest, obstructing and hindering, and failure to obey a reasonable and lawful order. Prior to trial, appellant moved to sever the possession of a stolen regulated firearm and the theft count, arguing that evidence that the firearm was stolen would not be admissible at a trial on the possession counts. The court agreed to sever those counts "out of caution." Prior to trial, the State entered a *nolle prosse* to the possession of a firearm, obstructing and hindering, and failure to obey counts.

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[1]In his brief, appellant phrased the question:

> Did the lower court err in failing to declare a mistrial where, during a trial where the only contention was that Mr. White unlawfully possessed a handgun, the State deliberately elicited the fact that the firearm in question was stolen?

Appellant was tried before a jury on September 17, 2013. The court granted appellant's motion for judgment of acquittal as to the resisting arrest count, and a mistrial was declared after the jury was unable to reach a verdict as to the remaining counts. The State entered a *nolle prosse* to the possession of a stolen regulated firearm and theft counts prior to the second trial.

On December 11, 2014, the case was retried before a jury and appellant was convicted of the remaining counts of possession of a firearm by a prohibited person, illegal possession of a regulated firearm, and wearing, carrying, or transporting a handgun.

Trial

Officer Anthony Foy of the Salisbury City Police Department testified that he was on routine patrol on January 2, 2013, at approximately 1:52 p.m. when he observed appellant in the area of Jefferson Street and Kent Avenue. Because Foy recognized appellant and knew him to have an outstanding arrest warrant, he made contact with appellant in an attempt to positively identify him. Upon request, appellant produced his ID and Foy confirmed his identity, and that an arrest warrant was outstanding. As Foy attempted a pat-down for weapons, appellant fled on foot. A "somewhat lengthy foot pursuit" ensued, during which Foy observed appellant "holding the area of his waistband with one arm while the other arm was still swinging[.]" as he ran. Just prior to being apprehended, Foy observed appellant reach "over a wooden fence as if he were [] placing or trying to throw an object over the

fence." After appellant placed his hands over the fence, Foy was able to apprehend him, and appellant was "no longer combative or continuing to resist."

Officer Brandon Caton of the Salisbury City Police Department testified that he responded to the scene as Foy was taking appellant into custody. Within a few minutes after his arrival, Caton recovered a loaded .40 caliber Smith and Wesson handgun from the other side of the fence, approximately ten feet from where appellant was taken into custody. Caton put on gloves, recovered the firearm and rendered it inoperable. Caton noted that while it was cold outside, the firearm wasn't cold and "was warmer to the touch than something that had been sitting out should have been."

Caton then gave testimony that is the genesis of this appeal – that he ran the serial number through dispatch and was told that the firearm had been "stolen from Delaware." Defense counsel objected, and moved for a mistrial. The court sustained the objection, denied the motion for mistrial, and promptly gave a curative instruction to the jury, asking them to "disregard the police officer's testimony regarding the information from dispatch on the status of the gun." We shall discuss this issue in detail, *infra.*

Caton handed over the firearm to Foy who then placed it in a "secured evidence box." The firearm was later processed and swabbed for the presence of DNA, as were nine .40 caliber bullets that were recovered with the firearm. The swabs from the firearm and the bullets were then submitted to the Maryland State Police Forensic Science Division for

analysis. A DNA sample was later obtained from appellant and submitted to the Maryland State Police for analysis and comparison with the swabs from the firearm and the bullets.[2]

The parties stipulated that appellant "was prohibited on January 2, 2013, from possessing a regulated firearm pursuant to two separate statutes, the first being Public Safety Article Section 5-133(c)(1)(ii), and the second Public Safety Article Section 5-133(b)."

The jury returned a guilty verdict as we have noted.

STANDARD of REVIEW

We review the denial of a motion for mistrial under an abuse of discretion standard.

"[T]he declaration of a mistrial is an extraordinary act, which should only be granted if necessary to serve the ends of justice." *Hunt v. State*, 321 Md. 387, 422 (1990) (quoting *Jones v. State*, 310 Md. 569 (1987)). "The granting of a motion for mistrial is within the discretion of the trial judge." *Guesfeird v. State*, 300 Md. 653, 658 (1984). "Trial court judges are entitled great deference in declaring a mistrial" and will not be reversed unless it is shown that they have abused their discretion. *Quinones v. State*, 215 Md. App. 1, 17 (2013). "[T]he trial court in the exercise of its discretion denying a mistrial will not be

[2]The State offered DNA evidence through the testimony of Julie Kempton, an expert in forensic serology and DNA analysis, who opined, based on the swab samples, that appellant was the "major contributor" of DNA found on the firearm. Kempton testified further that DNA from other contributors was found on the firearm, but because of the "complexity of the mixture" she could not make comparisons to the known DNA of appellant or others. She also opined that male DNA profile was found on three of the recovered bullets, but that appellant was excluded as the source of that profile.

reversed on appeal unless it is clear that there has been prejudice to the defendant." *Geusfeird*, 300 Md. at 658. The "trial judge is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case, and therefore to determine whether a mistrial is appropriate or required." *Watters v. State*, 328 Md. 38, 50 (1992).

To determine whether the prejudice caused by the trial court's failure to grant a mistrial was so great as to deny the defendant a fair trial, courts have looked to a number of factors, including:

> whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists[.]

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird*, 300 Md. at 659).

"The trial judge must assess the prejudicial impact of the inadmissible evidence and assess whether the prejudice can be cured. If not, a mistrial must be granted. If a curative instruction is given, the instruction must be timely, accurate, and effective." *Carter v. State*, 366 Md. 574, 589 (2001). It is not "manifestly necessary" for the trial court to declare a mistrial if "the inadmissible and prejudicial evidence" can be "remedied by the lesser alternative of curative instructions to the jury." *Id.* "[G]enerally cautionary instructions are deemed to cure most errors, and jurors are presumed to follow the court's instructions." *Id.* at 592.

DISCUSSION

As we have noted, the testimony that led to appellant's request for a mistrial, and ultimately to the central issue of this appeal, was given by Caton:

> OFFICER CATON: ... So I ran the serial number through dispatch.
>
> [THE STATE]: Okay, were you able to determine ownership?
>
> [OFFICER]: Actually dispatch notified it was stolen from Delaware.
>
> [DEFENSE COUNSEL]: I'm going to object, ask permission to approach Your Honor.
>
> THE COURT: All right, come forward.
>
> (Whereupon, counsel and the Defendant approached the bench and the following occurred at the bench:)
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> [DEFENSE COUNSEL]: Your Honor, I have to move to strike and am going to ask for a mistrial. That testimony is not relevant, it's highly prejudicial. The questions that are before this trier of fact are whether or not he had a gun in his possession on the day in question. Whether or not it is stolen or not, now is a bell that cannot be un rung [sic], Your Honor. It's highly prejudicial information that's not relevant.
>
> [STATE]: It's absolutely relevant, Your Honor, to this Defendant's desire to discard the weapon and not have it on his person thus constituting another criminal offense.
>
> THE COURT: Let's take it in two stages. The first state is is it admissible that dispatch informed him that the firearm was stolen because at a minimum your objection was that – your objection was to that information.
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.
>
> THE COURT: And the basis of your objection is?

[DEFENSE COUNSEL]: It's hearsay information but additionally it's the problematic nature of it that concerns me as well.

THE COURT: Okay, so hearsay and prejudice.

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: How is it not hearsay?

[STATE]: It was my understanding [Defense Counsel] was only arguing relevancy. So based on that that's my response. However, since he's additionally arguing hearsay, I have no argument.

THE COURT: Okay. I'm going to sustain the objection because I do believe that it is hearsay. And also because it's being offered for the truth of the matter asserted. And secondly it would be prejudicial.

But the motion for a mistrial is denied because based on your opening statement, counsel, my understanding is that your contention is that he did not possess it. And if he did not posses it, whether it's stolen or not is irrelevant, in fact, it may be beneficial if there's a stolen firearm found in a hidden location in somebody's yard. So I don't believe that it is unduly prejudicial. Furthermore, if you want me to strike it I'm willing to do so, in which case I believe the curative outcome is adequate for purposes of today's hearing.

[DEFENSE COUNSEL]: I am asking that it be stricken.

THE COURT: Do you wish to be heard?

[STATE]: No, Your Honor.

THE COURT: So that I don't make it worse, I'm going to tell the ladies and gentlemen that they should disregard the information from dispatch regarding the status of the gun. Would that be acceptable?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE CLERK: So you're denying a mistrial?

THE COURT: I'm denying a mistrial.

(Whereupon, counsel and the Defendant returned to the trial tables and the following occurred in open court:)

THE COURT: Ladies and gentlemen of the jury, please disregard the police officer's testimony regarding the information from dispatch about the status of the gun.

Applying the *Rainville* factors, we conclude that any prejudice caused by the trial court's failure to grant a mistrial was not so great as to deny the appellant a fair trial. Caton's testimony that dispatch advised him that the firearm was "stolen from Delaware" was the only reference throughout the entire trial that the firearm was stolen.

Appellant, nonetheless, argues that this single, unrepeated, reference was the "product of a deliberate and conscious decision by the State to inject this inadmissable fact into the trial." The State disputes that the prosecutor's intent was to show that, "because the gun was stolen, the jury should infer that White stole it, that he therefore was of bad character, and that it therefore was more likely that he unlawfully possessed the handgun." Rather, the State argues, the prosecutor elicited this testimony "because she believed that its stolen nature explained why White would attempt to discard it." In explaining its rationale in eliciting the testimony, the State reasoned to the trial court, "[i]t's absolutely relevant, Your Honor, to this

Defendant's desire to discard the weapon and not have it on his person thus constituting another criminal offense."[3]

We are not persuaded, as appellant asserts, that the State deliberately and consciously, elicited information regarding the stolen status of the firearm in an effort to "taint Mr. White with the allegation that he was involved in other criminal behavior." The record belies appellant's appellate hyperbole which, in our view, greatly overstates the intent and effect of the question.

In further support of his assertion that a mistrial was warranted, appellant argues that Caton was a critical State's witness. We concur that his testimony was important to the State's case, but he was not, considering the *Rainville* factors, "the principal witness upon whom the entire prosecution depend[ed]." *Rainville*, 328 Md. at 408. Indeed, there was significant additional evidence from which the jury could conclude that appellant possessed the firearm. The State's case also relied upon Foy's testimony that appellant fled after a pat-down for weapons was attempted; that appellant ran while "holding the area of his waistband with one arm while the other arm was still swinging"; that he was seen "reaching over a wooden fence as if he were to be placing or trying to throw an object over the fence"; and that he was thereafter compliant with the officer's requests. Foy testified further that the firearm was found on the other side of the fence, only ten feet from where appellant was

[3]The entire colloquy between counsel and the court occurred at a bench conference; none of the discussion was heard by the jury.

finally apprehended. The State also produced incriminating DNA evidence. Contrary to appellant's assertion that the case against him was "not strong," there was substantial evidence as to his criminal agency.

Following Caton's testimony that the firearm was "stolen," the court provided a timely curative instruction advising the jury to "please disregard the police officer's testimony regarding the information from dispatch on the status of the gun." This instruction was provided immediately following the bench conference, soon after the jury heard the inadmissible evidence, and did not highlight or emphasize the testimony.

Conclusion

In sum, we hold that the trial court did not abuse its discretion in denying appellant's motion for mistrial, for any prejudice to appellant was not so great as to deny him a fair trial. The inadmissable evidence was a "one off" and was neither repeated nor emphasized by other witnesses or by counsel in closing argument. Further, the court's curative instruction was immediate and lessened the prejudice, if any, to appellant.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.