UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1700

September Term, 2014

DJUAN BROOKS

v.

STATE OF MARYLAND

Wright,
Reed,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: August 3, 2015

Appellant, Djuan Brooks, was tried and convicted by a jury in the Circuit Court for Baltimore City (Shar, J.) of possession with intent to distribute heroin, and possession of heroin. Appellant was sentenced to ten years' incarceration without the possibility of parole for possession with intent to distribute heroin, and a concurrent ten-year term for the conviction of possession of heroin.[1] From his conviction and sentence, appellant filed this timely appeal and presents the following question, which we quote:

> Did the trial court err in ruling that [a]ppellant's prior convictions could be used to impeach him if he testified?

For the reasons set forth herein, we shall affirm his conviction.

FACTS AND LEGAL PROCEEDINGS

Baltimore City Police Officer Jennifer Wortham, who was accepted by the court as an expert in the field of recognition, packaging, and street level distribution of controlled dangerous substances, was called as a witness for the State. She testified that, on July 24, 2014,[2] she was driving her departmental vehicle in the 100 block of Cherry Hill Road. She passed a tan Nissan Maxima with two occupants whose eyes widened and "lit up" in surprise, "as if they were scared," as soon as they saw her. This suggested to the officer "some type of suspicious activity." She made a U-turn and followed the vehicle. As she approached the

[1] The court sentenced appellant on the possession with intent to distribute conviction to ten years of imprisonment without the possibility of parole as a subsequent offender. *See* Md. Code Ann., Crim. Law Art. § 5-608(b).

[2] Officer Wortham testified that the incident that gives rise to the instant case occurred on July 24, 2014, however, the Statement of Charges indicates that the correct date is February 24, 2014.

vehicle, she observed the passenger toss something out of the window. Officer Wortham activated her lights and sirens, intending to pull the vehicle over and issue a citation for littering. As she passed the object that had been thrown out of the window, she saw that it was a slightly open brown bag, in which was what appeared to be gel caps. The gel caps had a shape and size similar to what the officer believed could contain heroin.

After calling for backup, Officer Wortham pulled the vehicle over and ordered that the driver produce his driver's license and vehicle registration. She noticed that appellant, whom she identified as the passenger who had discarded the bag, was shaking. When back-up officers arrived, Officer Wortham retrieved the brown bag, in which were two plastic bags of gel caps containing suspected heroin. Another officer conducted a pat down of appellant. Officer Wortham retrieved $901 from appellant's pocket and placed him under arrest.

Analysis of the gel capsules that were contained in the bag discarded by appellant confirmed that they contained heroin. Based on the amount of drugs and the denomination of the money recovered, Officer Wortham deduced that the drugs were to be sold.

Defense counsel indicated to the court that he expected that his client would be testifying. After the State rested, and before appellant was called to the stand, the court and counsel engaged in the following colloquy regarding whether appellant's prior convictions were admissible for impeachment.

> THE COURT: Okay. so the issue is – they're back there – the issue is impeachables?
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> [STATE'S ATTORNEY]: Yes, Your Honor.

[DEFENSE ATTORNEY]: Yes, sir.

THE COURT: Okay.

[STATE'S ATTORNEY: Your Honor, the defendant has five impeachables, all for either possession with intent to distribute or distribution.

THE COURT: All right. Which, just as a threshold issue, are impeachable offenses.

[STATE'S ATTORNEY]: Yes. Yes, Your Honor.

THE COURT: They're within the last 15 years?

[STATE'S ATTORNEY]: Yes, Your Honor.

THE COURT: Okay. So those are the threshold issues here. There are five of them.

[STATE'S ATTORNEY]: Yes, Your Honor.

[DEFENSE ATTORNEY]: *There are, and I guess it always comes down to the centrality of his testimony, and the probative and prejudicial value*. (Emphasis added)

THE COURT: Yes.

[DEFENSE ATTORNEY]: Okay. I – obviously my argument [is] it would be prejudicial to have these five convictions. Mr. Brooks will be testifying. Having him be asked about it – and one is close in time. It is from six – June of '12 –

THE COURT: I'm sorry?

[DEFENSE ATTORNEY]: June of '12 is his last conviction, so it is a very recent conviction. The other ones are – two from '09. One's from '06. One's from '02.

While they have value, I think the prejudicial value outweighs the – any probative value because of the amounts. It would be highly prejudicial. It also would have a chilling effect on Mr. Brooks's ability to possibly testify.

So I would ask Your Honor to not allow the convictions to be – come in against Mr. Brooks when he testifies.

THE COURT: What are the – I see the June – I see the June of 2012.

[STATE'S ATTORNEY]: Yes, Your Honor.

THE COURT: And then are there two in July of '09?

[STATE'S ATTORNEY]: Yes, Your Honor.

THE COURT: Two separate ones in July 2009?

[STATE'S ATTORNEY]: Yes, Your Honor.

THE COURT: I see. And then one in '06?

[STATE'S ATTORNEY]: Yes, Your Honor.

THE COURT: Okay. The –

[STATE'S ATTORNEY]: There's one in '02.

THE COURT: Right. I see. I take it that Mr. Brooks – *the substance of his testimony will make Mr. Brooks' credibility to be a central issue*. (Emphasis added).

[STATE'S ATTORNEY]: Yes, Your Honor.

[DEFENSE ATTORNEY]: Yes.

THE COURT: Okay, so I do understand the – that I am looking at the similarity of the convictions, the prior convictions, and the offense charged here. But his credibility is, in fact, and would be, in fact, central to this case. And therefore I certainly would allow the June of 2012 conviction.

Five of them seems to be getting a bit on the end of the spectrum when *we're talking about the prejudicial, becoming more prejudicial than probative. I don't know if it takes five convictions to make the point regarding credibility*. (Emphasis added)

[STATE'S ATTORNEY]: Well, Your Honor, the only thing I'll say about that, and certainly the one from 2012 points to credibility in issue at most, because that's the one where he's backing up time, and he's backing up significant time.

THE COURT: Okay.

[STATE'S ATTORNEY]: So that certainly brings his credibility into issue the most.

However, there is case law that says that when it's one person's word against another –

THE COURT: Right.

[STATE'S ATTORNEY]: – and essentially, that's where we are – *that the probative value outweighs any prejudicial in most instances.* Now, do I need to introduce all five? No, not necessarily. But the point is that the Defendant is a convicted drug dealer –

THE COURT: Correct.

[STATE'S ATTORNEY]: – and that his motive to not necessarily be truthful in this matter, I would argue, specifically when he's only been convicted of doing such things, but again, that adds more to the prejudicial, but his motive for not being truthful in this matter is very, very high, considering the fact that he is facing yet another possession with intent to distribute conviction, and he certainly is familiar with the aspects of what possession with intent to distribute holds. I mean, if you look it [sic] his – I would ask that Your Honor at least allow at least three of them to come in.

THE COURT: Well, that's what I was going – I think that we're pretty much on the same wavelength here. I said I'm certainly allowing 2012.

[STATE'S ATTORNEY]: Yes.

THE COURT: I think five is a bit more than is needed. And you said, "Do I need all five? No."

[STATE'S ATTORNEY]: No, I don't. I'd like all five, but I don't need all five.

THE COURT: My inclination and what I'm going to do is allow – I'll let you use three of the convictions, –

[STATE'S ATTORNEY]: Okay.

THE COURT: – but not all five of them.

[STATE'S ATTORNEY]: That's fine, Your Honor.

[DEFENSE ATTORNEY]: Now, are we talking about the most recent three, Your Honor? Is that what Your Honor – we're addressing?

THE COURT: Do you have – is there any reason you would want to use other than the most recent ones?

[STATE'S ATTORNEY]: Well, I think it shows a pattern. The two happened simultaneous.

THE COURT: I would allow you to use three of the convictions.

[STATE'S ATTORNEY]: Okay. I would like to use –

THE COURT: Which three are up to you.

[STATE'S ATTORNEY]: – the '06, '09 and the 2012.

[DEFENSE ATTORNEY]: Okay. So '06, '09 and '12.

[STATE'S ATTORNEY]: Yep.

THE COURT: Would you like to advise Mr. Brooks of his Fifth Amendment right?

After being advised of his Fifth Amendment right not to testify, and the fact that he could be questioned about his prior convictions, appellant took the stand on his own behalf. Appellant stated on February 24, 2014, he was employed as a foreman at a construction site. He further testified that a chauffeur, employed by the C&Z Sedan Service, was transporting him from his home to his place of employment when he was arrested in this case. According to appellant, the driver for the sedan service began acting strange; he was "fidgeting" and "acting paranoid." The driver then passed a balled up brown bag to appellant and instructed him to throw it out, which he did. Appellant testified that he did not know what was in the bag. He then looked up and saw police lights and sirens. After the officer stopped the vehicle and conducted a search, they found money that appellant claimed were proceeds resulting from cashing his paycheck. Appellant acknowledged on direct examination that he had been convicted of possession with intent to distribute drugs on three prior occasions and that he was presently on probation for one of those convictions.

APPLICABLE LAW AND STANDARD OF REVIEW

Maryland Rule 5-609 creates a three-part test for determining whether prior convictions are admissible for impeachment purposes.[3] *Giddens v. State*, 335 Md. 205, 213

[3] Maryland Rule 5-609 provides, in pertinent part:

> (a) **Generally.** 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
>
> (continued...)

(1994). First, the conviction must be within the "eligible universe" of convictions that may be used to impeach a witness's credibility. *See* Md. Rule 5-609(a). Second, the conviction must not be more than fifteen years old, reversed on appeal, nor the subject of a pardon or a pending appeal. *See* Md. Rule 5-609(b) and (c). Finally, the court must weigh the probative value of admitting the conviction against the danger of unfair prejudice to the witness. *See* Md. Rule 5-609(a). It is the last step which is at issue here.

"Whether the probative value of impeachment evidence outweighs its prejudice is a matter within the trial court's discretion." *Summers v. State*, 152 Md. App. 362, 370, *cert. denied*, 378 Md. 619 (2003). "'When the trial court exercises its discretion in these matters, we will give great deference to the court's opinion.'" *Id.* (quoting *Jackson v. State*, 340 Md, 705, 719 (1995)). As the Court of Appeals has stated:

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[3](...continued)
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) **Time limit.** 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.
(c) **Other limitations**. Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:
(1) the conviction has been reversed or vacated;
(2) the conviction has been the subject of a pardon; or
(3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.

> Questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. In sum, to be reversed the 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.

In re Adoption/Guardianship No. 3598, 347 Md. 295, 312-13 (1997)(citations and internal quotation marks omitted).

LEGAL ANALYSIS

Appellant concedes that a prior conviction for possession of narcotics with intent to distribute is within the eligible universe of impeachable offenses, and therefore that they were admissible under Rule 5-609(a)(1).[4] The thrust of appellant's argument is that the trial court abused its discretion in determining, pursuant to Rule 5-609(a)(2), that the probative value of the prior convictions outweighed the potential for prejudice. Specifically, appellant contends that the lower court erred in admitting evidence of prior convictions for crimes *that were identical* to the crime that was being alleged at trial. (Emphasis supplied). We disagree.

Prior convictions for the same or similar crimes for which an accused stands trial are not automatically excluded under Rule 5-609, but are, like other prior convictions, subject to the balancing of probativeness versus unfair prejudice. *Jackson*, 340 Md. at 714. As the

[4] Appellant nevertheless maintains that possession of marijuana is not an impeachable offense, "in order to preserve the issue for further review," acknowledging that we are bound by the holdings of the majority in *State v. Giddens*, 335 Md. 205 (1994) and *State v. Woodland*, 337 Md. 519 (1995) upholding admission of drug offenses for purposes of impeachment.

Court noted, "[t]he balancing prong of the rule contains no language prohibiting the use of similar prior crimes," and "a per se rule barring same-crime impeachment would deny trial judges needed flexibility." *Id*. Furthermore, a per se rule would have "the additional undesirable effect of shielding a defendant who specializes in a particular crime from cross-examination regarding his specialty crimes." *Id.* But, the Court observed that,

> [w]here the crime for which the defendant is on trial is identical or similar to the crime for which he has been previously convicted the danger is greater, as the jury may conclude that because he did it *before* he most likely has done it *again*. The net effect of such evidence is offered to discourage the defendant from taking the stand. "Thus, the role of the trial judge takes on added importance. It becomes his function to admit only those prior convictions which will assist the jury in assessing the credibility of the defendant."

Id. at 715 (quoting *Ricketts v. State*, 291 Md. 701, 703-04 (1981)).

The *Jackson* Court discussed the five factors to be considered in weighing the probative value of past convictions against potential prejudicial effect, which it identified as (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. *Id*. at 717 (citing *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976)).

Our review of the record indicates that, as a threshold issue, the court determined that the five prior convictions of possession, and possession with intent to distribute a controlled dangerous substance that the State intended to introduce into evidence were impeachable

offenses, and were all within the past 15 years. The court appropriately found that it would be unfairly prejudicial to allow the admission into evidence of all five of appellant's prior convictions and instructed that counsel submit only three. The court then considered whether the probative value outweighed the unfair prejudice.

Employing the five factors of *Jackson*, we find no abuse of discretion by the trial court. The first factor weighs in favor of admissibility, as "Maryland law is clear that a trial court may properly admit evidence of a defendant's prior conviction for distribution of a controlled dangerous substance for the limited purpose of impeaching his credibility." *Brewer v. State*, 220 Md. App. 89, 106 (2014)(citing *Giddens*, 335 Md. at 218). With respect to the second factor, although the 2012 conviction was relatively recent, potentially increasing the prejudicial effect, it was particularly probative on the issue of credibility because, as the State pointed out, appellant's motive to be untruthful was increased because he was still on probation for that conviction. Factor three weighs against admission, as the prior convictions were identical to the charged crimes, but, as stated above, they were not therefore inadmissible *per se*.[5] Moreover, the court properly instructed the jury that evidence of the prior convictions could be considered in deciding whether appellant was telling the truth, but for no other purpose, and that they could not consider the prior convictions as evidence that appellant committed the crimes charged in the case.

[5] *See, e.g., Brewer v. State*, 220 Md. App 89 (2014)(prior convictions for drug distribution admissible for impeachment purposes during prosecution for possession of cocaine with intent to distribute and possession of heroin with intent to distribute).

Factors four and five weigh heavily in favor of admission. Appellant's credibility was of particular importance in this case. And, as the Court noted in *Jackson, supra*, "[w]here credibility is the central issue, the probative value of the impeachment is great, and thus weighs heavily against the danger of *unfair* prejudice." *Jackson,* 340 Md. at 721 (emphasis in original). Appellant did not dispute that he threw a bag containing heroin out of the window of the vehicle. But, he wanted the jury to believe that the bag was not his, but rather, that the driver of the vehicle handed him the bag with instructions to throw it out the window, and that he simply followed the driver's instructions, not knowing what was contained in the bag. As the trial court observed, the substance of appellant's testimony made his credibility the central issue. Indeed, the jury was tasked with resolving but a single question in arriving at its verdict: Was appellant's testimony, denying ownership of or knowledge of the contents of the paper bag credible? A negative answer to that query would ineluctably result in a jury verdict of guilty of possession of an illegal substance. It is difficult to conceive of a more compelling example of the centrality of the credibility of a defendant's testimony.

We are satisfied, based on our examination of the record in this appeal, that the trial judge's ruling that three of appellant's prior convictions were admissible to impeach his credibility was not an abuse of discretion.

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