Circuit Court for Anne Arundel County

Case No. C-02-CR-20-001208

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0662

September Term, 2023

STEPHEN JARROD DAVIS, II

v.

STATE OF MARYLAND

Wells, C.J.,
Tang,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: August 30, 2024

Appellant, Stephen Davis, was convicted in the Circuit Court for Anne Arundel County of first-degree murder. Appellant presents the following question for our review:

> 1. "Did the lower court err in allowing the State's forensic psychiatrist to testify that there were 'hesitation marks' on the victim's neck, supporting her conclusion that Appellant was not psychotic at the time of the killing?
> 2. Did the lower court err in allowing the State to erroneously define Appellant's burden of proof throughout its closing argument?"

For the reasons set forth below, we shall hold that the circuit court erred in both respects, and we shall reverse.

I.

Appellant was indicted by the Grand Jury for Anne Arundel County of first-degree murder, first-degree child abuse, and unlawful trafficking of a motor vehicle. Appellant entered a guilty plea and a plea of Not Criminally Responsible for first-degree murder and the State entered a *nolle prosequi* as to first-degree child abuse and unlawful trafficking of a motor vehicle. Appellant proceeded to trial before a jury trial on criminal responsibility. Appellant was found criminally responsible. The court sentenced appellant to life imprisonment with all but sixty years suspended, followed by five years probation.

When appellant was seventeen years old, he killed his 5-year-old sister, A.A. He stabbed her twenty-one times. Appellant does not contest the underlying facts, but, rather, appellant contests the State's use of expert testimony during his trial on criminal responsibility and the State's description of the law on unanimity in closing arguments.

At trial, appellant alleged that he was suffering from an acute major depressive episode with an overlay of psychotic features that caused him to be unable to conform his behavior to the requirements of the law or to appreciate the criminality of his conduct at the time of the offense. Appellant presented Dr. Hyde, an expert in "clinical forensic neurology, and psychology, and psychiatric disorders." Dr. Hyde met with appellant several times and conducted a forensic examination to evaluate criminal responsibility. Dr. Hyde testified that appellant had been withdrawn, suffering symptoms of major depression, and exhibiting suicidal ideation leading up to the killing. According to Dr. Hyde, appellant believed that an external force had taken over his mind and was compelling his behavior on the night he killed his sister. This "external force" caused him to hear voices. Dr. Hyde described appellant's symptoms as follows:

> "So a subset of patients with depression have such severe depression that they become psychotic. So they experience hallucinations, they may experience delusional thinking, they'd have unusual beliefs. And [appellant] clearly was having hallucinatory experience and had this delusional belief that there was a force—he was experiencing force. And you see this in a minority patient, but it would accompany—I've seen it in a number of classically psychotic individuals. There was an external force that is directing their mind with so called minding control."

Dr. Hyde concluded that appellant "could not conform his behavior to the dictates of the law and did not appreciate the criminality of his behavior at the time of the acts he committed."

The State presented Dr. Annette Hanson, an expert in forensic psychiatry. Professionally, she was a forensic psychiatrist, which she described as "someone who has

specialized training in the evaluation and treatment of people with serious mental illness who are also involved in the criminal justice system."

She interviewed appellant and reviewed reports of other psychiatrists' evaluations of appellant, along with other documents, including the medical examiner's report and photos of the autopsy. Dr. Hanson noted that, shortly after the attack, medical personnel did not observe signs of psychosis or "document anything of concern with regard to being out of touch with reality." This, she concluded was a sign that, if appellant did have a mental health disorder, he was able to control his symptoms. She interpreted his behavior in the period leading up to the attack as a sign that he was steeling himself to commit a violent act rather than a sign of psychosis. She testified that appellant was depressed, anti-social, and lacking in empathy, but not psychotic. She concluded that, "to a reasonable degree of medical certainty, he did not lack substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

Dr. Hanson testified that, on A.A.'s neck, she saw evidence of "hesitation marks." These marks were important to Dr. Hanson's opinion because they indicated to her the effort it would have taken to slash A.A.'s neck. Over objection, Dr. Hanson testified that "in reviewing the autopsy photos and the medical examiner's report, there were *hesitation marks* on the victim's neck." She concluded that the hesitation marks meant to her that "it took some effort and will power to get to that final slash that went horizontally across the little girl's throat. That requires some effort of will." When asked to clarify what hesitation marks were and why they were significant, she testified as follows:

> "So it's more commonly used in suicide attempts where an individual dies by cutting themselves. They may begin with superficial lacerations first before the final fatal cut. In this particular case, it indicates maybe possibly ambivalence or some requirement to kind of work up the courage to do what needs to be done."

As Dr. Hanson acknowledged these conclusions about the presence of hesitation marks were not ones she found in the medical examiner's report. The medical examiner made no conclusions about hesitation marks. Dr. Hanson's conclusion about hesitation marks was her "interpretation of the injuries as [she] saw them in the report."

In the State's closing argument, the State explained the law underlying a Not Criminally Responsible plea. In pleading Not Criminally Responsible, appellant bears the burden of proving he met the Not Criminally Responsible standard set forth by Section 3-109(a) of the Criminal Procedure Article:

> "A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or an intellectual disability, lacks substantial capacity to:
>
> (1) appreciate the criminality of that conduct; or
>
> (2) conform that conduct to the requirements of law."

The State argued to the jury that it needed to reach a unanimous verdict, and that it not only needed to conclude that appellant met the Not Criminally Responsible standard writ large, but to be unanimous as to each prong of the substantial capacity test, i.e., appreciating the criminality of his conduct and conforming his conduct to the requirements of law. In doing so, the State told the jury that it could not find appellant Not Criminally Responsible if its members were unanimous in the conclusion that appellant was Not Criminally Responsible

but some believed that he was Not Criminally Responsible because he could not appreciate the criminality of his conduct and some believed that he was Not Criminally Responsible because he could not conform his conduct to the requirements of the law. The State argued as follows:

> "[THE STATE:] This is the test that you have to use, this is the law, as to what determines whether somebody is criminally responsible, right.
>
> And it's sort of got parts, even though we write it like one really long strange sentence, it's got parts. You're not criminally responsive if, part 1, at the time of the crime. Right. That's the part that matters.
>
> Two, based on a mental disorder, that's the second part. And then three, based on what -- the defendant lacked substantial capacity, that's sort of the third part, you've got to figure out what substantial capacity means, and then part four is two parts. Either appreciating the criminality of the conduct or performing that conduct to the requirement of law, that's in four. Either one of those things, we usually call those two prongs.
>
> I don't know if you've heard people say that, but that's often how people describe these two things. [Appellant] has to prove to you, by a preponderance of the evidence each of those things unanimously. All of you has [sic] to find that it's more likely than not, every single one of those things is true, and one of these is true. *And you have to be unanimous, all 12 of you have to agree, including on which of these the –*
>
> [DEFENSE COUNSEL:] Objection.
>
> [THE COURT:] Overruled.
>
> [THE STATE:] *So six of you think this thing, six of you think this thing, that's not unanimous, you have to agree.*"

(Emphasis added). The jury found appellant criminally responsible. This timely appeal followed.

II.

Before this Court, appellant argues, first, that Dr. Hanson, as a psychiatrist, was not qualified as an expert to discuss "hesitation marks." He maintains that the presence, or lack of hesitation marks, is an appropriate subject for an expert in forensic pathology to discuss but not one that a purely psychiatric professional may discuss. Appellant notes that determination of hesitation marks requires examination of physical symptoms on the victim rather than mental ones in the perpetrator.

The State argues that experts are permitted to rely upon and form conclusions about the facts and data presented to them, provided that the facts and data are of the type generally relied upon by the type of expert. In the State's view, Dr. Hanson was qualified to review the autopsy report and form conclusions about appellant's state of mind based upon the report. The State argues that one conclusion Dr. Hanson could draw was that the lacerations present on A.A.'s neck were indicative of an awareness of wrongdoing. Finally, the State argues that, attached to the autopsy report, and within the materials Dr. Hanson reviewed, was a statement from an investigator that there appeared to be hesitation marks.

Second, appellant argues that the State misinformed the jury as to the law on unanimity. Appellant argues that nothing in Section 3-109(a) of the Criminal Procedure Article requires unanimity as to whether a defendant is Not Criminally Responsible

because he could not appreciate the criminality of his conduct or Not Criminally Responsible because he could not conform his conduct to the requirements of the law. Appellant analogizes to criminal cases where a jury may be unanimous in its judgment even if a statute sets forth multiple modalities and the jury is not unanimous about any one particular modality. Appellant argues, that, in the same way, a jury may find appellant Not Criminally Responsible even where the jurors disagree about whether appellant could not conform his conduct to the requirements of law or whether he could not appreciate the criminality of his conduct.

The State does not contest that the prosecutor informed the jury that it must be unanimous as to each modality of Section 3-109(a). Rather, the State argues that the prosecutor's interpretation was a correct statement of the law. The State analogizes to situations in which the court must determine whether the jury must be unanimous as to various circumstances of a crime. The State notes that courts have drawn a distinction between the factors that identify the concept of a single crime committable in alternative ways from those that identify multiple crimes. *Rice v. State*, 311 Md. 116, 132 (1987). If a statute provides multiple alternatives, each of which is criminal, and there are substantial differences between the acts that constitute the crimes, the alternatives each constitute a separate crime. *Id.* at 135. The State argues by analogy that the inability to conform one's conduct to the law and the inability to appreciate criminality are sufficiently different alternatives that they constitute separate bases for a Not Criminally Responsible finding about which the jury must be unanimous.

III.

We begin by addressing the unanimity issue. Trial judges have broad discretion in determining the scope of closing argument. *Cagle v. State*, 462 Md. 67, 74 (2018). We review the trial court's ruling on which arguments to permit for abuse of discretion. *Id.* "To allow counsel to embellish the trial court's instructions is fraught with the danger that the trial judge's binding instructions will be manipulated by counsel, resulting in the jury applying law different than that given by the trial court." *White v. State*, 66 Md. App. 100, 118 (1986). Inappropriately allowing the State to redefine legal concepts for the jury is grounds for error, and where the State's concepts could mislead the jury, such error is reversible. *Id.* at 120-21. We turn to the interpretation of Section 3-109(a) to determine whether the State's interpretation for the jury was correct (and, therefore, not misleading) or incorrect (and, therefore, misleading, producing reversible error).

Both parties agree that Section 3-109(a) requires a defendant to prove three things: first, that the relevant conditions happened at the time of the crime, second that the defendant possessed a mental disorder (or intellectual disability), and, third, that the defendant *either* (a) lacked substantial capacity to appreciate the criminality of that conduct *or* (b) lacked substantial capacity to conform that conduct to the requirements of law. Both parties agree that the jury must be unanimous as to each of these elements. The question before us is whether the jury must be unanimous in finding that prongs (a) or (b) of the

third element were satisfied, or whether the jury need be unanimous only in deciding whether the third element was satisfied as a whole.

As both parties urge us to do, we analogize to the requirement that the jury be unanimous on each element of the defense's burden of proof in a criminal responsibility trial to the requirement that the jury be unanimous on each element of the State's burden in a criminal trial, absent the not criminally responsible component. In that context, courts have established rules to distinguish situations in which multiple crimes may be defined by one statute from those in which a statute enumerates multiple means of committing the same crime. *Rice*, 311 Md. at 132. Not every statute which sets forth alternative means of committing a crime creates multiple crimes. *Schad v. Arizona*, 501 U.S. 624, 635-36 (1991). Yet the State may not create one crime out of conceptually different ones simply by placing them under the same heading in the criminal code. *Id.* at 633 (noting that the State could not create one "crime" that was "so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction.").

In determining whether a statute creates separate crimes or simply multiple modalities of the same crime, we look to distinctions in mental state, result, attendant circumstances, and conduct between the various acts criminalized by the statute. *Rice*, 311 Md. at 135. Where there are substantial differences, we have held that the crimes are separate and must be distinguished by the verdict. *Id.*

In *Rice*, the Maryland Supreme Court examined the difference between theft and possession of stolen property under Md. Code Ann. Art. 27 § 342 (recodified at Md. Code Ann. Crim. Law § 7-104 (2002)). *Id.* at 118-19. Section 342(a) prohibited a person from "willfully or knowingly obtain[ing] or exert[ing] unauthorized control over property." Section 342(c) prohibited "possess[ing] stolen personal property knowing that it has been stolen." The trial court did not require the jury to be unanimous as to whether the defendant had violated § 342(a) or § 342(c). *Rice*, 311 Md. at 118. The Supreme Court reasoned as follows:

> "Whatever variance there may be between the elements of (a) and (c), it is clear that violation of either leads to the same result. In either case the defendant has appropriated the property of another person without that person's consent. It is this that imparts to (a) and (c) their wrongful character, and, we think, imparts to them the same wrongful character. We know of no constitutional constraints flowing from the jury unanimity clause that require a focus on the specific mechanics of a wrongful appropriation at the expense of the result of the appropriation. To the contrary, we think this identity of result is properly accorded great weight in resolving the question whether (a) and (c) are one crime."

Id. at 136. Similarly, in *Kouadio v. State*, 235 Md. App. 621, 632-33 (2018) we concluded as follows:

> "So long as all jurors find all of the elements of any one of those alternatives to have been proved beyond a reasonable doubt, a guilty verdict of second-degree murder will stand, notwithstanding that some jurors may have found an intent to kill while others found an intent to commit grievous bodily harm or the elements of depraved heart murder."

The State interprets these cases as holding that unanimity is not required on means or modes of commission but is required for each of the enumerated elements. Thus, the State argues that unanimity is not required as to what precise mental disorder appellant presented with, but unanimity was required for each of the two modalities set forth in the definition of Not Criminally Responsible. We do not read our precedent so narrowly.

The *Rice* Court did not merely hold that theft committed with one set of tools is the same as theft committed with another. The *Rice* Court held that theft committed by stealing the goods is part and parcel of the same crime as theft committed by possession of the goods obtained by another because the wrongful character of the crimes was identical and the legislature had seen fit to criminalize them under the same heading. *Rice*, 311 Md. at 136. The Court reached this holding despite acknowledging that "[a]s we earlier observed, courses of conduct different from and inconsistent with each other may come within the proscriptive ambit of these subsections. Rice could not have both stolen the Resnick property and possessed it as stolen property, a fact which deserves significant weight" *Id.* at 135. In short, where the wrongful character of the actions is the same and the legislature chooses to group the actions, we treat the actions as the same crime. The same principle holds where the distinction in statutory alternatives is one of mental state rather than action. *Kouadio*, 235 Md. App. at 632-33.

We return, then, to the issue of unanimity when applied to § 3-109(a) of the Criminal Procedure Article. It strikes us that the character of a defense asserting Md. Code Ann. Crim. Proc. § 3-109(a)(1) (*i.e.*, that at the time of the crime, because of a mental disorder,

he lacked substantial capacity to appreciate the criminality of that conduct) is same as the character of the defense put forward by a defendant asserting Md. Code Ann. Crim. Proc. § 3-109(a)(2) (i.e., that at the time of the crime, because of a mental disorder, he lacked substantial capacity to conform that conduct to the requirements of law). In either case, the defendant is asserting that, because of a mental disorder, he was unable to behave in a law-abiding manner in the way we expect of those without such a disorder on his own (either because he did not appreciate his own deviations from the law or because he could not regulate his behavior). Section 3-109(a) sets out two modalities of the same defense, not two separate defenses.

Our reading of § 3-109(a) is bolstered by the legislative history of the statute. Section 3-109(a) is based directly on, and intended to mirror in effect, § 4.01 of the Model Penal Code. *Conn v. State*, 41 Md. App. 238, 244 n.11 (1979), *rev'd on other grounds* 286 Md. 406 (1979). That section states a single combined test rather than two separate tests: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01.

Further, the rationale for the development of that test was to expand the previously prevailing *M'Naghten* right-wrong test for "insanity" to align with new developments in psychiatry, not to create two separate tests. *Conn*, 41 Md. App. at 244; *see also Durham v. United States*, 214 F.2d 862, 869-76 (D.C. Cir. 1954) (summarizing the development of

tests like that in § 3-109(a) out of the "right-wrong test" based on psychiatric information). It seems counter to the will of the legislature to create two separate defenses out of a single test merely because the legislature chose to enumerate the parts of the test.

Because § 3-109(a) does not set out two separate defenses, unanimity is not required as to which modality of the defense the defendant has proved. The jury is being asked to measure the extent to which the defendant's mental processes were impaired at the time of the unlawful conduct. So long as the jury agrees unanimously that he suffered from a mental disorder and that the mental disorder resulted in a substantial impairment at the time of his unlawful conduct, the reason (whether the impairment was in his ability to appreciate the wrongfulness of his conduct or his ability control his conduct) does not need to be unanimous. Provided that the jury is unanimous that the defendant either "lacked substantial capacity to appreciate the criminality of that conduct or lacked substantial capacity to conform that conduct to the requirements of law," the jury need not be unanimous as to which capacity the defendant lacked.

The State redefining the burden of proof for criminal responsibility is reversible error, even in a case where, arguably, the jury rejected appellant's criminal responsibility defense overall. The jury should have been instructed as to the proper unanimity standard. Because the court did not correct the prosecutor's misstatement, that is reversible error. *Carrero-Vasquez v.* State, 210 Md. App. 504, 512-13 (2013) ("Where no such [curative] action [is] taken by the trial court the prejudice . . . [is] grounds for reversal). Coupled with

our holding in the next section, we cannot say the error was harmless beyond a reasonable doubt.

IV.

Because the issue seems likely to reoccur, we address appellant's arguments that the State's expert should not have been permitted to discuss "hesitation marks." Here too, the court committed reversible error. We consider the circuit court's decisions on the admissibility of expert testimony on an abuse of discretion basis. *Devincentz v. State*, 460 Md. 518, 550 (2018). We reverse only when the decision to admit the expert testimony "appears to have been made on untenable grounds." *Id.* We do not find an abuse of discretion simply because we would have decided otherwise. *Id.*

Rule 5-702 sets the scope of permissible expert testimony:

> "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
>
> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
>
> (2) the appropriateness of the expert testimony on the particular subject, and
>
> (3) whether a sufficient factual basis exists to support the expert testimony."

Although courts have broad discretion to admit expert testimony, it is error to permit experts to testify outside the field appropriate to the expert's qualifications. *Tapscott v. State*, 106 Md. App. 109, 132 (1995). An expert may testify only in the fields in which she

has been qualified and accepted, and where the expert strays beyond those areas, issues of admissibility arise. *In re Yve S.*, 373 Md. 551, 613 (2003).

Maryland Courts recognize that, within the field of medicine, there are specialties, and a doctor qualified to testify as to one subfield of medicine may not be qualified to testify as to another. *T-Up, Inc. v. Consumer Prot. Div.*, 145 Md. App. 27, 59 (2002) (holding that Maryland law "does not give a holder of a medical degree *carte blanche* to opine on any subject having a medical context."). A court must, instead, inquire into whether the doctor in question has gained experience in a particular subfield, whether through education, research, and treatment of patients or some other means. *Id.*

The question of whether particular wounds constitute "hesitation marks" is an appropriate subject for a doctor qualified in forensic pathology or a similar field. *See e.g.*, *Harper v. State*, 357 S.E.2d 117, 120 (Ga. Ct. App. 1987) (holding that an expert in forensic pathology who had conducted the autopsy could testify about "hesitation marks"); *Williams v. State*, 53 So. 3d 761, 777 (Miss. Ct. App. 2009) (same). Based on Dr. Hanson's testimony, the identification of "hesitation marks" appears to involve a determination of which lacerations were inflicted in which order ("hesitation marks" being shallow lacerations inflicted *before* the final, fatal cut). Our record contains no information about how a doctor would identify hesitation marks as opposed to any other type of shallow or superficial laceration (perhaps because no expert qualified to speak on the subject was called), but presumably one needs some sort of training to make that identification. *State v. Prewitt*, 575 S.W. 3d 701, 703 (Mo. Ct. App. 2019) (noting that hesitation marks have

"a unique parallel pattern to them."). In order for a witness to testify that a particular set of wounds are "hesitation marks," that witness needs to have some demonstrated expertise in the examination of wounds.

The record here demonstrates no such expertise on the part of Dr. Hanson. She testified that she was a forensic psychiatrist, that her training was in forensic psychiatry, that she had trained others in forensic psychiatry, that she helps review changes to the Diagnostic and Statistical Manual in psychiatry, that she has published in psychiatry, that she has received awards in psychiatry, that she is a member of several professional organizations devoted to psychiatry, that she has conducted hundreds of psychological evaluations, and that she has been a consulting psychiatrist for the Maryland Division of Prisons. In other words, she was well qualified to discuss mental disorders and their identification, but the record does not demonstrate that she had any experience in forensic *pathology or wound identification*.

The State urges us to find that, while Dr. Hanson might not have been able to form expert conclusions in forensic pathology, she was able to form psychological conclusions based on the report of the medical examiner under Rule 5-703. Rule 5-703 provides as follows:

> "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."

Based on this Rule, according to the State, Dr. Hanson could form conclusions based on the report of the medical examiner.

But Rule 5-703 does not give an expert leeway to circumvent the strictures of Rule 5-702 and testify outside the subject matter of her qualifications. Thus, Dr. Hanson could form psychiatric conclusions based upon the medical examiner's report. But she could not form conclusions appropriate to another medical subfield simply because she had the report of the medical examiner in front of her. If, for example, the medical report had concluded that there were hesitation marks on A.A.'s body, Dr. Hanson could form conclusions about the implications of that hesitation for appellant's psychiatric diagnosis. But she could not substitute her own judgment on forensic pathology for that of the medical examiner.

Finally, the State notes that, attached to the medical examiner's report is a statement from an "investigator" who notes "Sharp Force Object: Unknown, hesitation marks." The issue with this argument is that this comment was manifestly not the basis for Dr. Hanson's conclusion as evidenced by the following interaction:

> "[DEFENSE COUNSEL]: Yes. Now, yesterday when you were testifying about the autopsy you said that there were hesitation wounds that indicated he was building up the encourage to inflict damage, correct?
>
> [DR. HANSON]: Yes. There was a mention of several injuries to the neck. There were 21 stabbing and cutting wounds as well as the primary fatal wound, which was a large slash horizontally across the neck.
>
> [DEFENSE COUNSEL]: And when you read the autopsy it, in fact, does not say that there were hesitation wounds; is that correct?

> [DR. HANSON]: That's correct. The medical examiner did not characterize them as hesitation wounds. That was my interpretation of the injuries as I saw them in the report.
>
> [DEFENSE COUNSEL]: Okay. And that was actually what the — and even the investigator just said that they were possibly hesitation wounds, Mr. Meehan, right?
>
> [DR. HANSON]: I don't recall seeing that aspect of it."

Even if this portion of the report was something Dr. Hanson had relied upon, it is not clear whether this portion of the report asserts that there were hesitation marks from an unknown object or that it was unclear whether there were hesitation marks. And even if it had asserted that there were hesitation marks and Dr. Hanson had relied upon that assertion, the record does not reflect the qualifications of this investigator. One unqualified expert relying on the conclusions of another unqualified expert does not resolve the Rule 5-702 problem.

Without further foundation as to Dr. Hanson's qualifications in identifying the nature of various wounds, it was error for the court to permit Dr. Hanson to identify the "hesitation marks" on A.A.'s body and to opine about the significance of those marks. The court erred and abused its discretion in so doing.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.