

Circuit Court for Baltimore City
Case No. 120365005

UNREPORTED OPINION*

IN THE APPELLATE COURT**

OF MARYLAND

No. 1053

September Term, 2022

DATWAIN JACKSON

v.

STATE OF MARYLAND

Kehoe
Reed
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: May 8, 2023

*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.

** At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant Datwain Jackson was convicted in the Circuit Court for Baltimore City of three counts of illegal possession of a regulated firearm in violation of §5-133 of the Public Safety Article, two counts of wearing and transporting a handgun in violation of §4-203 of the Criminal Law Article, illegal possession of ammunition in violation of §5-133.1 of the Public Safety Article, resisting arrest, and driving without a license. He presents the following questions for our review:

1. “Did the trial court err when it permitted Sergeant Kostoplis to testify about the duties of his current job position?”
2. Did the trial court commit plain error when it permitted the prosecutor to discuss facts not in evidence during his rebuttal closing argument?”

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City in a twelve-count indictment charging, Count 1 possession with intent to distribute cocaine, Count 2 possession with intent to distribute oxycodone, Count 3 possession of a firearm after a felony drug conviction, Count 4 possession of a firearm under sufficient circumstances to constitute a nexus to a drug trafficking violation, Counts 5-7 illegal possession a regulated firearm, Counts 8 and 9 wearing, carrying, and transporting a handgun, Count 10, illegal possession of ammunition, Count 11 resisting arrest, and Count 12 driving without a license. Appellant was convicted of three counts of illegal possession of a regulated firearm in violation of §5-133, two counts of wearing and transporting a handgun in

violation of §4-203, illegal possession of ammunition in violation of §5-133.1, resisting arrest, and driving without a license.

The court imposed a term of incarceration of 15 years with all but 12 suspended for the regulated firearm, a concurrent three years for the wearing, carrying and transporting a handgun conviction, a concurrent one year for illegal possession of ammunition, and a concurrent 60 days for driving without a license, followed by 3 years' probation upon release. This timely appeal followed.

II.

On November 14, 2020, Baltimore City Police Sergeant Kostoplis observed a broken headlight on a Kia Minivan. He activated his emergency equipment and the minivan pulled over. Two occupants immediately exited the vehicle. Sergeant Kostoplis approached appellant, Datwain Jackson, who was in the driver's seat and inquired about his driver's license. Appellant responded that he did not have a license. Sergeant Kostoplis held onto appellant's arms to prevent his escape. Concurrently, the other passenger started to approach Sergeant Kostoplis and appellant. Sergeant Kostoplis and appellant began to struggle, and he heard a gun fall to the ground. Sergeant Kostoplis released appellant and drew his weapon. Appellant and the other passenger fled.

After a short and unsuccessful chase, Sergeant Kostoplis returned to the scene. Sergeant Michael Pusloskie and Officers Dale and Dundore arrived as backup officers. Sergeant Kostoplis picked up the gun which had fallen and spent about 22 minutes looking

for appellant. In front of the van, Sergeant Kostoplis found what he described as ten gold top vials and nine blue top vials. He searched the van and inside, he found 47 pink top vials, a bag of suspected oxycodone, one glass vial, a bag containing suspected marijuana, three debit cards in Mr. Jackson's name, and a wallet containing an ID that was not appellant's. The officers took the seized gun to run the serial numbers. At the police station, Sergeant Kostoplis gave the gun and suspected drugs to Officer Raoul Alvarez who submitted them into the evidence control unit. Sergeant Kostoplis testified that the gun was an operable Ruger Security 9mm handgun.

During his testimony, Sergeant Kostoplis was asked about his job role. The following exchange occurred:

“Sergeant Kostoplis: So, in this unit, what I'll do is all Level 2 Uses of Forces which they cannot be closed out of the district. They require a higher level of review. So, I'll review all of the –

Defense Counsel: Objection, Your Honor.

Court: Overruled. You can answer

Witness: I'll review all the uses of force. First, they get sent to me. I'll check them to make sure that they're in compliance with policy and law. And make sure there is no excessive force. If there is any excessive force, it is immediately documented and forwarded to Internal Affairs. Once I complete it, then it gets sent up my chain all the way up to the DOJ for review.”

Defense counsel objected on the grounds of relevancy. The trial court overruled the objection.

Sergeant Kostoplis' body worn camera recorded the stop and ensuing events. The footage was submitted into evidence and portions were shown to the jury. Sergeant

Pusloskie’s body camera footage was also submitted into evidence. Neither Officer Dale’s nor Dundore’s body camera footage was submitted into evidence. Sergeant Kostoplis testified that one still photo from the footage, State’s Exhibit 9B, showed a handgun “located between [appellant’s] legs on the side.” A central point of the defense’s closing argument was the implication that the body camera footage of Officers Dale and Dundore would differ from Sergeant Kostoplis’ footage. In rebuttal, the prosecution argued that officer Dale’s and Dundore’s body cameras would show the same sequence of events as seen on Sergeant Kostoplis’ body cameras, *i.e.*, that the drugs recovered at the scene were the same drugs received into evidence. Defense counsel did not object to this rebuttal argument. At the conclusion of the trial, appellant was acquitted of the drug charges and convicted of the gun charges.

III.

Appellant’s first argument is that the trial court erred in permitting Sergeant Kostoplis to testify about his work on the Use of Force Assessment Unit because it was not relevant. Appellant asserts that Sergeant Kostoplis’ testimony was critical to the State because he was the only witness to testify that the gun in evidence was the gun recovered from the scene. Appellant argues that this information was not logically related to the jury’s determination of whether the gun recovered from the scene belonged to appellant, or whether it was the same gun submitted to evidence control and admitted at trial. Appellant asserts that this error was not harmless because there was no forensic evidence

in the case and other evidence left open the possibility that the gun may have been owned by the companion of appellant.

Appellant's second argument is that the trial court committed plain error when it permitted the prosecutor to argue facts not in evidence during the rebuttal closing argument. Appellant argues that when the prosecutor stated that Officer Dale's and Dundore's body cameras would show the same thing as Sergeant Kostoplis' and Pusloskie's, he commented directly on facts not in evidence. Appellant argues that this was done to undermine the defense argument that the gun admitted at trial was not the gun found at the scene. Appellant concedes that defense counsel did not object at trial and the issue is not preserved for our review; but he argues that it was plain error because the prosecutor jeopardized appellant's right to be tried only by the evidence presented to the jury.

The State argues that the trial court exercised its discretion properly by allowing Sergeant Kostoplis to testify about the duties of his current job position. The State asserts that, to show a witness' credibility, the trial court has discretion to allow background evidence that may not be relevant to the litigated issue. The State argues that Sergeant Kostoplis gave limited background information to give the jury a more complete perspective when considering his testimony. Alternatively, if we find that the testimony was irrelevant and inadmissible, the State urges us to find that it was harmless error.

As to the closing argument, the State argues first that because defense counsel did not object to the closing argument, the issue is not preserved for our review. Plain error

review, in the State’s view, is not merited here. On the merits, the State argues that the prosecutor’s closing argument was proper and was based upon reasonable inferences from the evidence. The State contends that the prosecutor’s statement that the other officer’s body cameras would show similar footage was a reasonable inference from the fact that all three officers stayed with the car while Officer Kostoplis canvassed the area.

IV.

We address first appellant’s argument that the trial court abused its discretion by allowing Sergeant Kostoplis to testify about his current job duties. Maryland Rule 5-402 governs the admissibility of evidence, stating 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.”

We apply a two-pronged analysis when reviewing the admission of evidence. *Washington Metropolitan Area Transit Authority v. Washington*, 210 Md. App. 439, 451 (2013). First, we engage in a *de novo* review to ascertain whether the evidence was legally relevant. *State v. Simms*, 420 Md. 705, 724 (2011). If deemed legally relevant, we determine whether the trial court abused its discretion by admitting evidence that, although relevant, should have been excluded because its “probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403.” *Id* at 725. We will reverse the trial court’s decision only if there has been a clear showing of abuse of discretion. *Malik v. State*, 152 Md. App. 305, 324 (2003).

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination more probably or less probably than it would be without the evidence.” Rule 5-401. In the *City of Baltimore v. Zell*, 279 Md. 23 (1977), the Supreme Court of Maryland discussed permissible background testimony, explaining as follows:

“It is a routine practice in trials for an attorney to ask his witness certain preliminary questions which may not be relevant to the issues being litigated, which may go beyond mere identification and which are designed to show that the witness will be somewhat credible or not biased in favor of the side calling him. For example, the educational background or professional status or employment position of a non-expert witness may be asked, or the witness's lack of prior contact with the side who has called him may be brought out. These questions give the jury some knowledge of the individual and a more complete perspective in considering his testimony.

We agree that such questions, within reasonable limits, serve the useful function of informing the jury about the witness, and therefore they may be allowed. The extent to which such questions are permitted must, in our view, remain in the sound discretion of the trial judge. In the absence of a clear abuse of discretion in a particular case, the action of the trial judge in permitting or not permitting them will be upheld.”

Id at 28.

The background testimony of Sergeant Kostoplis fits well into the *Zell* analysis. The testimony provided the jury with the witness’s background merely to give the jury some knowledge of the witnesses professional background and a more complete perspective in considering his testimony.

Was the probative value of the evidence outweighed by unfair prejudice, confusion, etc.? Rule 5-403 provides that “[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.” Appellant argues that Sergeant Kostoplis’ statement about working in the Use of Force Assessment Unit was unfairly prejudicial because it would influence the jury to give greater weight to his testimony.

We hold that the trial court did not abuse its discretion in admitting the background testimony of Sergeant Kostoplis. “Evidence is prejudicial when it tends to have some adverse effect... beyond tending to prove the fact or issue that justified its admission.” *Smith v. State*, 218 Md. App. 689, 705 (2014) (internal quotations omitted). The background evidence showed the officer’s experience and duties and the fact that he was a member of the Use of Force Assessment Unit had no prejudicial or adverse effect.

V.

We turn to appellant’s argument that the trial court committed plain error by permitting the prosecutor to argue facts not in evidence. Appellant concedes that there was no objection below to the argument and recognizes that plain error analysis is his only hope here. “Plain error is error which vitally affects a defendant’s right to a fair and impartial trial.” *Diggs v. State*, 409 Md. 260, 286 (2009) (internal quotations omitted). We have oft stated that plain error is invoked only in cases which are compelling, extraordinary, exceptional, or fundamental to a fair trial. *Lawson v. State*, 389 Md. 570, 604 (2005). Appellant asserts that the theme of his defense counsel’s closing argument was that it was

dubious whether the drugs recovered by Sergeant Kostoplis at the scene were the same drugs submitted to evidence control and introduced at trial. In appellant's closing argument, his trial counsel argued that the State should have shown the body camera footage from Officers Dale and Dunmore, implying that the State had something to hide. In response, the prosecution argued that the other officer's body cameras would show the same sequence of events as seen on Sergeant Kostoplis' body cameras. The prosecutor was referring to the footage which occurred when Sergeant Kostoplis left the scene to search for appellant and Sergeant Pusloskie was left at the vehicle with Officers Dale and Dunmore. The prosecutor was asserting that the footage from Officers Dale and Dunmore would be similar to that of Sergeant Pusloskie. According to appellant, the error is that the body camera footage of the other officers was not received into evidence.

We decline to review appellant's argument for plain error. Appellant's challenge does not meet this high bar for several reasons. First this challenge is not clear and obvious, but subject to reasonable dispute. Since the officers were all at the scene together it is reasonable to assume that their body camera footage would be similar. It would be unreasonable to assert that this statement affected the appellant's substantial rights. There was no indication that the drugs submitted into evidence were different from those recovered on the scene. Sergeant Kostoplis testimony was credible on its own. Lastly, this argument did not seriously affect the integrity of the judicial proceeding. Since none of these factors are satisfied, this alleged violation does not meet the requirements for plain error review.

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