UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1934

September Term, 2014

KELLY GROSS

v.

STATE OF MARYLAND

Meredith,
Graeff,
Nazarian,

JJ.

Opinion by Meredith, J.

Filed: August 4, 2016

At the conclusion of a jury trial in the Circuit Court for Baltimore City, Kelly Gross, appellant, was convicted of attempted robbery with a deadly weapon, conspiracy to commit robbery with a deadly weapon, first-degree assault, use of a handgun in the commission of a felony or crime of violence, and possession of a regulated firearm after having been convicted of a disqualifying crime. After sentencing, this timely appeal followed.

QUESTIONS PRESENTED

Gross presents the following three questions for our consideration:

> I. Did the trial court err in allowing Detective McGarry's testimony as extrinsic evidence of Proctor's prior inconsistent oral statement?
>
> II. Did the trial court err in allowing Officer Ross's testimony on his opinion that the suspect in the video was carrying a silver handgun?
>
> III. Should the conviction for first-degree assault have merged with the conviction for attempted robbery with a deadly weapon for purposes of sentencing?

For the reasons set forth below, we shall hold that the conviction for first-degree assault should have merged with the conviction for attempted robbery with a deadly weapon, but we affirm in all other respects.

FACTUAL BACKGROUND

This case arises out of the attempted robbery of Brian Madison, who was, by his own admission, a drug dealer at the time. One of the participants in the robbery was a juvenile, Tylee P. The second participant was an adult known to Tylee as "Roano," whom the State alleged is Kelly Gross.

Pursuant to a plea agreement, Tylee testified as a witness during the State's case at appellant's trial. Tylee indicated he never knew the shooter's true name, but had always

referred to him by a street name of "Roano." Roano was several years older than Tylee. On the day of the incident that led to the charges against appellant, Tylee and Roano had met Madison at a McDonald's restaurant, and there had been communications about Madison being able to sell them some marijuana. Later that day, Roano called Madison and arranged a meeting to purchase 3.5 grams of marijuana from Madison.

Tylee accompanied Roano to the designated meeting point on Annabel Street to purchase the marijuana from Madison. Tylee and Roano walked to the location. Madison arrived in a white Volvo that he was driving. After instructing Tylee to stand by the driver's door of the Volvo, Roano entered the rear seat of the vehicle. Roano ordered Madison to give him the "weed" and the keys to the Volvo, and Madison did so. Roano instructed Tylee to check Madison's pockets, and Tylee did so, finding nothing. At about that point in time, both Tylee and Madison realized that Roano was pointing a silver handgun at Madison. Madison attempted to grab the gun, but Roano fired multiple times and wounded Madison with life-threatening injuries. Tylee and Roano both fled.

When first responders arrived, they transported Madison to Shock Trauma. He survived his gunshot wounds, and was able to testify at appellant's trial.

Police recovered video surveillance recordings from The Stock Market bar and from Wilson's Auto Body Shop, which was across the street from the place where the shooting occurred. On June 5, 2012, Tylee viewed a photographic array and identified Roano as the person who shot the driver of the Volvo. Police officers recovered cell phones and part of

a filter from a cigarette butt from the crime scene. DNA testing established that Gross was a "major contributor" to the mixed DNA sample recovered from the cigarette filter.

As noted, appellant was charged with several offenses arising from the attempted robbery and shooting of Brian Madison.

DISCUSSION

I.

The first issue raised by appellant relates to Tylee's apparent inability to make an in-court identification of appellant as the shooter even though Tylee had previously identified appellant from a photographic array. Approximately a month after the robbery, when investigators showed Tylee a photo array containing appellant's photo, Tylee selected one of the photos as a photo depicting Roano. He signed his name on the back of the picture, and wrote: "My home boy Roano, he was the one that shot the driver." At appellant's trial, Tylee confirmed that he had made that photographic identification of the person he knew as Roano.

But, when Tylee was initially asked at trial, "[d]o you see the person you know as Roano in the courtroom?," he replied: "No." That portion of Tylee's direct examination was as follows:

> Q [Prosecutor] And you keep saying Roano, you keep saying Roano. Do you see the person that you know as Roano in the courtroom?
>
> A [Tylee] No.
>
> Q You don't see him?
>
> A No.

Q Did you see him then?

A Yes.

Q What did he look like?

A He had dreads.

Q Did you make an identification to police officers?

A Yes.

Q Do you know Roano's name?

A No.

Q Do you know him by any other name?

A No.

The direct examination of Tylee was not completed the first day he testified. Based upon the comments of counsel the following morning, it appears that the prosecutors had had a conversation with Tylee the previous morning that the prosecutors believed to be inconsistent with Tylee's statement about not seeing Roano in court. Defense counsel reported to the trial judge:

> [Defense Counsel]: . . . Your Honor, I got an email at 9:34 p.m. last night saying that [Tylee] made a statement in the State's Attorney's office yesterday that he did recognize Mr. Gross, and so I'm assuming from that email that they want to now try to bring that up in direct. Looking at [Maryland Rule] 5-802.1, I don't believe they're entitled to do that.
>
> * * *
>
> [Prosecutor]: Your Honor, the statement . . . was made yesterday prior to trial in the State's Attorney's office. The State would think it had an obligation to disclose the oral statement as it was a prior inconsistent oral statement . . . .

> But because the witness made a prior inconsistent statement than the testimony that was provided yesterday, . . . I had to disclose it because it became inconsistent when he said that Mr. Gross was not the person that he recognized as [Roano] . . .
>
> Yesterday during witness preparation the State asked [Tylee], "So do you recall being in motions hearing? Is the person that you saw during the motions hearing the same person you referred to as [Roano]?" [Tylee's] answer was, "Yes." "Is he different? Does he appear any different?" "Yes, he cut his hair and he has on glasses."

After defense counsel protested that the issue of Tylee's ability to make an in-court identification had been "asked and answered," the court ruled that the trial preparation statement would be admissible for impeachment purposes as a prior inconsistent statement. The prosecutor volunteered: "We will not argue that that was a second identification." The court ruled that, "[a]s long as the other requisites of [Maryland Rule 5-]613 are followed," evidence regarding Tylee's trial preparation statement could come in.

When the direct examination of Tylee resumed, the prosecutor questioned him about his identification of Roano:

> [Prosecutor]: . . . Now, yesterday I asked you if you recognized the person that you know as [Roano] in the courtroom; is that right?
>
> [Tylee]: Yes.
>
> Q And you said you did not recognize him; is that right?
>
> A Yes.
>
> Q Okay. And do you recall having a conversation with me earlier yesterday where you — and you indicated that you recognized him, but that his hair —
>
> [Defense Counsel]: Objection. . . .

* * *

[Prosecutor]: . . . [D]o you recall meeting with me in my office along with Detective Lieutenant McGarry yesterday?

[Tylee]: Yes.

Q And do you recall us asking whether or not you — whether or not the person you saw in a prior hearing was the same person that you saw in court — I'm sorry, was the same person that you recognized as [Roano]?

[Defense Counsel]: Objection.

THE COURT: Overruled. You can answer.

[Tylee]: Yes.

* * *

[Prosecutor]: [D]o you recall telling us how he looked? How he was different?

[Tylee]: Yes.

Q And what did you say?

A His hair looked — is cut short.

Q And do you recall what, if anything, else you said?

A No.

During the direct examination of Tylee, he was shown surveillance video that captured portions of the robbery. He identified himself and the person he knew as Roano in the video. Tylee also identified himself and Roano in surveillance video from The Stock Market bar where they had spent time on the day of the robbery.

On cross-examination, Tylee was twice asked about Roano's presence in the courtroom. The first brief exchange was as follows:

Q [Defense Counsel] And you testified you don't see [Roano] here today?

A [Tylee] Yes.

But, at another point during the cross-examination, Tylee gave this testimony:

Q [Defense Counsel] Do you know my client here, Mr. P[.]?

A [Tylee] Excuse me?

Q Do you know my client?

A Yes.

When Lt. McGarry testified, he identified the photo array that had been admitted during Tylee's examination, and explained that the photo that Tylee had identified as depicting Roano was, in fact, a photograph of the appellant, Kelly Gross. Lt. McGarry was asked:

Q [Prosecutor] And who is the person that Mr. P[.] identified?

A [McGarry] Kelly Gross.

Q And how do you know that the person that Mr. P[.] identified on that document is Kelly Gross?

A The photograph in the document was provided by the Anne Arundel County Police Department. There is a photo number above that. The photo comes back to the individual, Kelly Gross, . . . with the date of birth of 6/1/1989. That individual comes back in our database as being connected to a government identification number as 3135903, which is connected to the fingerprints of Kelly Gross.

Prior to asking Lt. McGarry about his trial preparation conversation with Tylee regarding the identification of appellant as Roano, the court and counsel revisited the admissibility of such testimony. Defense counsel's principal objection was that the issue had

been adequately covered with Tylee. Counsel stated: "They've covered that with Tyl[ee] . . . ." "They've already got it in evidence. They've covered it – " The court concluded that the testimony was admissible under Rule 5-613(b), for impeachment purposes only, as extrinsic evidence of a prior inconsistent statement, *i.e.*, inconsistent with Tylee's testimony in court. On this point, Lt. McGarry testified as follows:

> [Prosecutor]: And Lieutenant McGarry, do you recall meeting with Mr. P[.] and - Mr. P[.] and myself on Tuesday, July the 29th, I believe?
>
> [McGarry]: Yes, I do.
>
> [Defense Counsel]: And just note our continuing objection to –
>
> THE COURT: It is –
>
> [Defense Counsel]: - this line, Your Honor.
>
> THE COURT: It is noted for the record. Thank you.
>
> * * *
>
> THE COURT: Detective, were you present for a statement given by Mr. P[.] after a hearing before this Court?
>
> [McGarry]: Yes, Your Honor.
>
> THE COURT: And what, if anything, did Mr. P[.] say regarding that hearing?
>
> [McGarry]: He stated he saw the Defendant - he saw the person he ID'ed in the courtroom.
>
> THE COURT: Okay. Thank you.
>
> [Prosecutor]: Did he say - did he say whether or not he was different?
>
> [McGarry]: Yes, he did.
>
> [Prosecutor]: And –

[Defense Counsel]: Objection.

THE COURT: I'll allow it.

[Prosecutor]: And how did he say he was different?

[McGarry]: He stated that his hair was cut and he was wearing glasses.

Gross argues that the trial court erred in admitting Detective McGarry's testimony because, when Tylee had been confronted with the ostensibly inconsistent prior statement, Tylee admitted to having made the prior statement. Under Rule 5-613(b)(1), extrinsic evidence of a prior inconsistent statement of a witness is not admissible unless the witness has been confronted with the statement in accordance with Rule 5-613(a) "*and* the witness has failed to admit having made the statement." (Emphasis added.) Consequently, appellant argues that Lt. McGarry's testimony constituted impeachment by extrinsic evidence of a prior inconsistent statement in a manner that did not comply with Maryland Rules 5-616(a) and (b) and 5-613(b).[1]

[1] Maryland Rule 5-616(a) and (b) provide:

> (a) **Impeachment by Inquiry of the Witness**. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> (1) Proving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony;
> (2) Proving that the facts are not as testified to by the witness;
> (3) Proving that an opinion expressed by the witness is not held by the witness or is otherwise not worthy of belief;
> (4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely;

(continued...)

Maryland Rules 5-616(a) and (b) permit the use of extrinsic evidence of a prior inconsistent statement for impeachment in accordance with Rule 5-613, which provides:

> **(a) Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

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[1](...continued)

(5) Proving lack of personal knowledge or weaknesses in the capacity of the witness to perceive, remember, or communicate; or

(6) Proving the character of the witness for untruthfulness by (i) establishing prior bad acts as permitted under Rule 5-608(b) or (ii) establishing prior convictions as permitted under Rule 5-609.

(b) **Extrinsic impeaching evidence**. (1) Extrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 5-613(b).

(2) Other extrinsic evidence contradicting a witness's testimony ordinarily may be admitted only on non-collateral matters. In the court's discretion, however, extrinsic evidence may be admitted on collateral matters.

(3) Extrinsic evidence of bias, prejudice, interest, or other motive to testify falsely may be admitted whether or not the witness has been examined about the impeaching fact and has failed to admit it.

(4) Extrinsic evidence of a witness's lack of personal knowledge or weaknesses in the capacity of the witness to perceive, remember, or communicate may be admitted if the witness has been examined about the impeaching fact and has failed to admit it, or as otherwise required by the interests of justice.

(5) Extrinsic evidence of the character of a witness for untruthfulness may be admitted as provided in Rule 5-608.

(6) Extrinsic evidence of prior convictions may be admitted as provided by Rule 5-609.

(7) Extrinsic evidence may be admitted to show that prior consistent statements offered under subsection (c)(2) of this Rule were made.

> **(b) Extrinsic evidence of prior inconsistent statement of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

Gross points out, correctly, that, when Tylee was asked about his pre-trial statements regarding Roano, he had admitted making those pre-trial statements. Consequently, the trial court's decision to admit Lt. McGarry's testimony to impeach Tylee about his prior inconsistent statement was legal error.

But, even though Gross is correct that Lt. McGarry's testimony was not admissible as extrinsic evidence of a prior inconsistent statement, we view that error in legal analysis as being harmless because the testimony was admissible as substantive evidence under another rule, namely, Maryland Rule 5-802.1(c). *Cf. Holmes v. State*, 350 Md. 412, 425 (1998) ("Although Md. Rule 5–802.1(b) does not provide a basis for admitting Thompson's prior consistent statement, the Court of Special Appeals was correct in concluding that the trial court properly admitted Thompson's consistent statement because, as we shall explain, Thompson's consistent statement was admissible for the limited purpose of rehabilitation under a different Maryland rule."). In Maryland, an appellate court will generally affirm when the trial court reaches the right result for the wrong reason. *Peterson v. State*, 444 Md. 105, 161-62 (2015); *Robeson v. State*, 285 Md. 498, 502 (1979), *cert. denied*, 444 U.S. 1021 (1980); *Gerald v. State*, 137 Md. App. 295, 305 (2001); *Pope v. Board of Sch. Comm'rs*, 106 Md. App. 578, 591 (1995).

Lt. McGarry's testimony about prior conversations in which Tylee identified appellant as Roano fell within the hearsay exception for statements "of identification of a person made after perceiving the person" set forth in Rule 5-802.1(c), which provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *
>
> (c) A statement that is one of identification of a person made after perceiving the person[.]

Professor Lynn McLain explains that the prior identification may be proved by extrinsic evidence:

> The statement of prior identification may be proved by extrinsic evidence, as long as the declarant is present at trial and may be cross-examined. The prior identification is admissible as substantive evidence under these circumstances, even if the person who made the identification cannot make an identification or recants at trial.

6A LYNN MCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL § 801(3):1 *b* (3d ed. 2013). *See also Nance v. State*, 331 Md. 549, 573-74 (1993) (witness's out-of-court statements to a detective identifying the defendants were admissible at trial).

Here, although the trial court erroneously admitted the extrinsic evidence of Tylee's prior inconsistent statement for impeachment purposes, because the evidence was, in fact, admissible as a prior identification under Rule 5-802.1(c), there was no reversible error.

II.

Gross next contends that the trial court committed reversible error in allowing Baltimore City Police Detective Robert Ross to testify that, based upon his viewing of the

surveillance video recording, he believed the item in the hand of one of the suspects seen running from the Volvo was a "silver handgun." Gross argues that the court erred in permitting the detective to express that opinion.

Events surrounding the shooting of Madison were recorded on security cameras located at Wilson's Auto Body Shop and The Stock Market bar. Detective Ross and his partner responded to the crime scene and eventually made contact with the manager of Wilson's Auto Body Shop who showed them video footage from a security camera. At trial, Detective Ross gave the following testimony in which he described obtaining surveillance video recordings of the attempted robbery:

> Q [Prosecutor] . . . [C]an you describe the video footage that you saw that was on the system from Wilson's Auto Body, can you describe that video footage?
>
> [Detective Ross]: Absolutely. We looked at the multiple cameras that were around the building and what we could tell, based on the time frame of the call that we had gotten, was that we could determine when the victim's vehicle arrived on Annabel. . . . The vehicle goes up, turns around, . . . and comes to park in the location that we had come to find the vehicle.
>
> Shortly after that, we noticed several people that had approached the vehicle. There were two African-American males that approached the vehicle from the front and another African-American male that had approached the vehicle from the rear.
>
> * * *
>
> [A]bout six or seven minutes after the fact, after we saw these folks arriving on the video, we see them all running down the alley, which is right off of Annabel Street and goes behind the Wilson's Auto Body. And there were two African-American males, the two that were in the front of the vehicle, they ran past the camera. And then you see the third African-American male that approached from the rear, you see him running as well after those two gentlemen had left the frame of the video camera, and **you**

could see in his right hand that he was carrying what looked like a silver handgun.

[Defense Counsel]: Objection.

THE COURT: Overruled.

(Emphasis added.)

At a bench conference, the following colloquy occurred:

[Defense Counsel]: I had a motion in limine that I thought was going to apply to Detective Corrigan that I wanted to have ruled upon, that I didn't want the Detectives testifying about whether there may be a gun in this one person's hand. I was given the video in discovery, I have looked at it. I think it's very difficult to tell what, if anything, is in that person's hand. I think it's highly prejudicial that he's going to sit here and keep saying, oh, it looks like a gun in the hand. I mean, that weight should go to the jury. I think they're going to get the video in, but I don't think he should - any of these folks, based on the quality of the video, should be giving this interpretation of what they think it is.

[Prosecutor]: Well, Your Honor, the State would like to admit it to the observations that the Detective and Officers make out on the street, that they do speak about the characteristics of an armed person and therefore are allowed to determine as to whether or not they believe someone is armed. Detective Ross did testify that (indiscernible) the State will further develop that if the Detective can say (indiscernible) the opinion is already out, the cat is already out of the bag, but -

THE COURT: But -

[Prosecutor]: - for future - for the future, the State will kind of have to (indiscernible) see why we have to do that when he was able to make the determination. The jury can still determine whether or not they believe (indiscernible).

THE COURT: I understand. And **I think this is in the province of - proper province of opinion testimony**, assuming that the proper foundation has been laid. The jurors can accept, as I will instruct them, opinion testimony or the weight they feel it deserves, or form their own opinion about what in fact is

> in the hand of the individual depicted in the video. **So once and if that foundation is laid, then I will allow him to testify in that regard**.

(Emphasis added.)

Thereafter, Detective Ross testified that, prior to becoming a police officer he served as a United States Marine for eight years and had extensive training to identify people with weapons in order to help identify enemy combatants. In addition, since becoming a police officer, he had received yearly training from the police department. He explained some of the characteristics that might lead him to believe a person was armed, including seeing a weapon, the presence or lack of hand movements, abnormal bulges, the swinging of only one arm as a result of wearing a shoulder holster, reaching for a waistband or dip area to perform a "security" check, and holding a weapon high while running so as not to accidentally discharge it.

Defense counsel declined the opportunity to voir dire Detective Ross and, thereafter, the court instructed the jury as follows:

> Ladies and gentlemen of the jury, I just wanted to alert you, this is a province of what's called opinion evidence. Just like all other evidence that you hear before you, you have to make your own decision on whether it's accurate or not. You just don't accept opinion evidence whatever the basis is, you have to put it under your own scrutiny as to whether you feel it's worthy of attention - or worthy of giving it any weight or not. Just because somebody comes up and indicates some expertise in some field doesn't mean you have to swallow it wholesale, you have to examine it for what you feel it's worth.

Detective Ross testified that he believed one of the people in the video was holding what appeared to be a weapon in his right hand while using his other hand to hold up his pants. According to Detective Ross, the person was holding the weapon "in a manner that

would be about as safe as you could be when running with a weapon, a loaded weapon. And it would be pointing down toward the ground . . . ."

Our review of the record as a whole persuades us that the court did not err in admitting Detective Ross's opinion testimony. Defense counsel objected to Detective Ross's testimony on the ground that the State had failed to lay a foundation "about his training in gun observation or anything." The trial judge responded by requesting the State to "get into [Detective Ross's] expertise." After further questioning of the detective, the prosecutor advised the court that she believed she had "adequately laid a foundation as to the basis and foundation about his training and to the characteristics of an armed person," and requested to be allowed to have Detective Ross "explain further" his opinion that the man in the video was carrying a weapon. This additional training, skill and specialized knowledge would have been sufficient to qualify the detective to testify as an expert witness pursuant to Maryland Rule 5-702, in accordance with the principles announced in *Ragland v. State*, 385 Md. 706, 725 (2005).

In the trial judge's cautionary instruction to the jury, the judge referred to the nature of "opinion evidence," with the caveat that, "[j]ust because somebody comes up and indicates some expertise in some field," the jury did not have to accept it. Although the prosecutor did not explicitly ask the court to accept Detective Ross as an expert witness, the record persuades us that, once the appropriate foundation was laid, the court implicitly ruled that Detective Ross was qualified to testify as an expert witness. No objection was raised

with respect to any discovery issue regarding the designation of the officer as an expert witness.

There is a second reason we decline to find reversible error in the trial court's admission of the opinion testimony of Detective Ross. Subsequent to Detective Ross's testimony, Lt. McGarry testified, without objection, that the suspect in the video recording was "running down the alley and appears to have a weapon in his hand." Consequently, even if Detective Ross's testimony had been erroneously admitted, the subsequent testimony of Lt. McGarry, which was admitted without objection, rendered any error harmless. *Robeson, supra*, 285 Md. at 507; *Yates v. State*, 202 Md. App. 700, 709 (2011).

III.

Gross's final contention is that his conviction for first-degree assault should have merged into his conviction for attempted robbery with a dangerous or deadly weapon for purposes of sentencing. The State agrees and so do we.

Gross was convicted of both the first-degree assault of Madison and the attempted robbery of Madison with a dangerous or deadly weapon. He was sentenced to incarceration for a term of twenty years for the first-degree assault, and a consecutive term of twenty years for the attempted robbery with a dangerous or deadly weapon. Both crimes arose from the same transaction, and the first-degree assault conviction was based on the conduct underlying the conviction for attempted robbery with a dangerous or deadly weapon.

Under similar circumstances, we held in *Morris v. State*, 192 Md. App. 1, 44 (2010), that, because there was no indication in the record "that the charges of assault were based

upon separate and distinct acts from those upon which the robbery charges were based . . . [the conviction for] first degree assault . . . merged into the attempted armed robbery conviction, and the sentence imposed for the first degree assault must be vacated." The State argues in its brief for a similar result in this case, stating: "This Court should vacate Gross's sentence for first-degree assault." Accordingly, we shall vacate Gross's sentence for first-degree assault.

SENTENCE FOR FIRST-DEGREE ASSAULT VACATED; OTHERWISE, ALL JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID ONE-THIRD BY THE MAYOR AND CITY COUNCIL OF BALTIMORE AND TWO-THIRDS BY APPELLANT.