UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2280

September Term, 2014

THELONIOUS TOPP

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: August 18, 2016

At the conclusion of a jury trial in the Circuit Court for Harford County, Thelonious Topp, appellant, was convicted of robbery with a dangerous weapon, second degree assault, use of a firearm in the commission of a crime of violence, and possession of a regulated firearm. After being sentenced, he noted a timely appeal, and presents two questions for our review:

1. Did the trial court abuse its discretion when it permitted an officer to offer a lay opinion that Mr. Epps and Mr. Cannon did not appear to be under the influence of heroin when they spoke to him on the night of the incident?

2. Did the trial court err and /or abuse its discretion when it permitted the State to introduce photographs of the gun that was recovered from the closet of the room where Mr. Topp was found shortly before his arrest, when neither Mr. Cannon nor Mr. Epps identified it as the gun that Mr. Topp allegedly used?

For the reasons stated herein, we shall affirm.

FACTUAL BACKGROUND

Ivan Epps and Michael Cannon claimed they were robbed at gunpoint by appellant in the early morning hours of November 17, 2013. Topp, who testified at trial, admitted having contact with Epps and Cannon on the night in question, but Topp claimed that he robbed no one. He described the encounter that night as an exchange of money and electronics for heroin.

Epps's Testimony

Epps was self-employed as a tattoo artist. In November 2013, he was addicted to heroin and "shot-up" twice a day, unless it was a "partying day," in which case he shot-up more frequently. He regularly purchased heroin from appellant.

According to Epps, he had loaned his laptop computer to appellant in November 2013. Epps explained that he sometimes owed appellant money, and that he had given appellant collateral in exchange for drugs in the past. But Epps denied that he received anything in return for the laptop, and he denied lending appellant the laptop because he owed appellant money. At some point in November, Epps wanted his laptop back, and, in an effort to get it back, he remotely locked the computer so that it could not be used without entering a password.

On November 16, Cannon picked up Epps, and, at that point, it became a "partying day," and the two went to a strip club. Epps shot-up heroin before they arrived at the club, and, once there, he and Cannon began to drink alcohol. Epps estimated that he had four shots of Hennessy cognac and a beer. He agreed that his memory of the day was cloudy. He further agreed that he was "wasted," and that his judgement that night was "impaired, damaged by the drugs and the Hennessy and the beer and whatever else [he] imbibed."

In the early morning hours of November 17, while Epps and Cannon were at the strip club, Epps received text messages from two women inquiring about his laptop and its

password. Epps did not know the women, but he had seen them before with appellant. Epps and Cannon agreed to meet the women in a parking lot of a Wendy's restaurant.

The women arrived in a dark-colored minivan. Epps got in the van, and he rode with the women to a trailer park while Cannon followed them there in his car. The women were in the front seats, and Epps was in the middle row of seats. Epps was unaware that Topp was in the back seat of the minivan.

When they arrived at the trailer park, the women got out of the van, and appellant emerged from the back seat. Appellant put a gun to Epps's head and said, "Let me have the money." Appellant also patted down Epps's pockets. Topp took approximately $430 and Epps's cell phone. Epps testified that he "thought" the gun appellant had was silver, and he said it was "like a revolver." Appellant then got out of the van with the handgun, approached Cannon, and demanded Cannon's phone. Cannon gave appellant the phone. Appellant left the scene in the van with the laptop, the cash, and the phones.

Epps and Cannon drove around looking for appellant, but, when they could not find him, Cannon called the police. Epps and Cannon met the police at a nearby 7-Eleven store, and Epps explained to the police what had happened. The police followed Epps and Cannon to the trailer park, and they found Epps's hat still lying on the ground in the location where it had fallen earlier.

Epps testified that appellant did not hit him. Moreover, he explained that he did not want to testify against appellant and that he was only doing so because his probation agent

instructed him to. He said he did not want to call 911 on the night of the robbery but he did not stop Cannon from doing so. Epps also testified he was never ordered to remove his pants, but he admitted his pants had fallen down when he exited the minivan because they were unbuckled and he wore them loose "past [his] butt."

Cannon's Testimony

Cannon was a close friend of Epps. Like Epps, Cannon also occasionally purchased heroin from appellant. Cannon explained that, on November 16, he picked up Epps, and they went to a strip club around 11 or 11:30 p.m. They stayed at the club for about two hours. Cannon testified that he did not have any alcohol at the strip club because he was driving.

Cannon explained that he and Epps went to meet appellant's "girls" at a Wendy's restaurant to get Epps's laptop back. Cannon believed the girls to be prostitutes, and explained that they had sent a text message to Epps informing him they were going to give him his laptop back. According to Cannon, Epps had given the laptop to appellant as collateral for "dope."

The women arrived in a green minivan, Epps got in the van, and Cannon followed them in his car to a trailer park. When they arrived, the door of the van opened, Epps got "thrown out," and appellant came out with a gun in his hand, screaming: "You wanna fuck me over? [Epps,] you wanna screw me over? You gonna get this laptop without paying me?" Appellant hit Epps with the gun, ordered him to take his pants off, "shook out" the pants, and kicked him.

Appellant then approached Cannon, who was still sitting in his car. Appellant said: "Give me your phone." Cannon initially refused, but, after appellant said "[g]ive me the phone or I'm gonna blow your fucking head off," Cannon handed over his phone. Cannon explained that he was unsure of the variety of firearm that appellant brandished but he "believed" it was a shiny revolver.

Appellant got back in the van and drove away quickly. Cannon and Epps drove to Epps's girlfriend's house to call 911. Cannon explained that, although Epps called 911, Epps later regretted the decision because he did not want to be seen as a "snitch." Cannon and Epps met the police at the 7-Eleven, and told them about their encounter with Topp. The police accompanied Cannon and Epps to the trailer park, and they saw that Epps's hat was still lying where it had fallen. Epps and Cannon then led the police to the place they believed appellant had most recently lived, but appellant was not there.

The Police Investigation

Deputy Chris Tolliver, of the Harford County Sheriff's Office, responded to the 7-Eleven about 3:35 a.m. on November 17, and spoke to Epps and Cannon. Deputy Tolliver followed the men to the trailer park and saw the hat on the ground. He confirmed that they could not locate appellant that night. Deputy Tolliver testified that he received conflicting information from Epps and Cannon about the firearm. Epps told him that it was a silver revolver with a long barrel. Cannon said that it was a black 9 millimeter handgun. Although Deputy Tolliver had not been named as an expert, and appellant objected to him providing

expert opinion testimony, he testified that he knew the "indicators" attributed to a person under the influence of alcohol and other substances, and he saw no signs that led him to conclude that either Epps or Cannon were under the influence of alcohol or heroin at the time he interviewed them.

As the result of an unrelated 911 call in the early morning hours of November 18, Detective Brad Sives responded to a townhouse on Topview Drive in Edgewood for a reported medical emergency. Inside a bedroom of the townhouse, Detective Sives found appellant trying to help a woman who was unconscious. After Detective Sives ran a "check" on appellant's name, he contacted Deputy Tolliver. Deputy Tolliver later arrived at the Topview Drive address and arrested appellant for the alleged robbery of Epps and Cannon.

Detective Michael Berg obtained a search warrant for the Topview Drive townhouse and for a minivan parked outside the residence. When the detective executed the search, he discovered a phone that was registered to Epps, and a wallet with appellant's identification in it, on a table in the bedroom where appellant had earlier been found with the unconscious woman. From the closet of the bedroom, the detective recovered a black revolver wrapped in a towel. Detective Berg also observed a laptop computer, but he did not recover it because it had not been reported stolen. When Detective Berg searched the van, he recovered from the dashboard an envelope that had the word "Topp" written on it.

Appellant's Testimony

Appellant testified that, although he lived on Reider Court with his children, he also split much of his time between the townhouse on Topview Drive and a Best Western hotel. He said that "J-Rock," "Shannon," and "Ashley" lived at the Topview address, and they were members of the Bloods gang. Appellant explained that J-Rock sometimes bought drugs from him. Topp said that he and Ashley were having a sexual relationship. He sometimes spent time at the Best Western motel with two women (Rose and Dasia) who were a couple, and not prostitutes as Cannon had described them.

Appellant admitted that he was a heroin dealer and that, for the several years, he had socialized with, and provided heroin to, Epps on a daily basis. From time to time, appellant provided heroin to Epps on various terms of credit. He explained that, on some occasions, after Epps had finished a tattoo job, he would pay appellant what he owed, and sometimes Epps would give appellant a tattoo in exchange for heroin. In addition, on occasion, Epps would give appellant collateral — such as cell phones, laptops, iPads, iPods, and wireless earphones — in exchange for heroin. Appellant would sometimes hold the collateral until Epps paid, but he would sometimes keep or sell the item. On November 17, Epps owed appellant $450, and appellant was holding Epps's laptop as collateral.

Appellant testified that he sold heroin to Cannon three or four times a week, and that Cannon usually, but not always, had money to pay cash. Cannon owed appellant sixty dollars on November 17.

During the early evening of November 16, appellant was with Rose and Dasia at the Best Western hotel. Because Epps had taken so long to repay the $450 debt, Topp decided that he would have J-Rock sell Epps's laptop. But J-Rock reported to appellant that the laptop was frozen and he gave the laptop back to appellant. Appellant spoke with Epps and asked him "why did he freeze [the laptop] up?" When Epps said he wanted the laptop back, appellant refused, and told Epps he had to pay the money he owed.

A meeting was arranged. Appellant, Dasia, and Rose rode in the minivan to meet Epps at a Wendy's restaurant. Sometime around 2:30 a.m., they arrived at the Wendy's, and Epps got in the van. They then drove to the trailer park because they wanted to conduct their drug transaction in a less public place. Epps wanted his laptop back, and also wanted to obtain some heroin. Appellant wanted Epps to "unfreeze" the laptop. Epps gave appellant $100 as partial repayment of the $450 debt, and also gave him a cell phone in exchange for two small baggies of heroin. Appellant kept the laptop.

Epps then got out of the minivan. Appellant drove back to the Best Western, and later went to the Topview address. He spent most of November 18 partying with Ashley and J-Rock at Topview Drive. Later, when appellant was unable to waken Ashley, someone called 911.

Appellant denied that he had a gun during the November 17 meeting with Epps. Appellant further denied that he pistol whipped Epps, that he took Cannon's phone, and that the pistol found in the closet at the Topview address was his.

DISCUSSION

I.

Appellant argues that the trial court erred "when it permitted an officer, who was not qualified as an expert witness, to offer an opinion that Mr. Epps and Mr. Cannon did not appear to be under the influence of heroin when they spoke to him on the night [of] the incident." The record discloses that no objection was asserted with respect to any question that the officer answered. Consequently, the argument was not preserved. But, regardless, we conclude that the officer did not express any opinion that required him to be accepted as an expert witness.

During the State's direct examination of Deputy Chris Tolliver the following transpired:

> Q. [PROSECUTOR] As a police officer, have you had opportunity and had training detecting the odor of alcoholic beverage coming from a person?
>
> A. [DEPUTY TOLLIVER] I have.
>
> Q. And did you notice or detect the odor of any type of alcoholic beverage coming from Mr. Epps?
>
> A. No.
>
> Q. No, you did not?
>
> A. I did not.
>
> Q. Now [as to] Mr. Cannon, same questions. Did you notice any signs or indication that Mr. Cannon was under the influence of alcohol when you had contact with him?

A. No, I did not.

Q. And did you detect an odor of alcoholic beverage coming from his breath or person at all?

A. No, I did not.

Q. As a Harford County Sheriff's deputy, have you also had experience and occasion to see persons who are under the influence of heroin?

A. I have.

Q. And what signs does a person - what signs do you look for to determine whether or not a person is under the influence of heroin?

[DEFENSE COUNSEL]: Objection

THE COURT: Approach.

(Counsel and the defendant approached the bench and the following ensued out of the presence of the jury.)

THE COURT: Basis.

[DEFENSE COUNSEL]: I don't think there is any – I would say it's distinct from alcohol this ability of a police officer to be able to detect whether or not a person is under the influence of opioid or this goes into DRE[1] stuff. If it was DRE we have to have that disclosed to us, and Ragland[2] requires, Ragland, R-A-G-L-A-N-D, requires such testimony be disclosed, such expert testimony which I would characterize it as, disclosed to us in advance. I don't believe this deputy was disclosed as an expert.

[1]"DRE" is an acronym for "Drug Recognition Expert." *See Bailey v. State*, 412 Md. 349, 359 n.l (2010).

[2]*Ragland v. State*, 385 Md. 706 (2005).

[PROSECUTOR]: He was not. He's not being – he's not an expert. Just laying a foundation for asking whether he noticed whether either one of them exhibited signs or a person under the influence of heroin.

THE COURT: I think a better question, a more appropriate question would be: What signs would indicate to you that someone was under – based on your experience as a police officer, what signs would indicate to you, and then did you see any such signs. So **I don't think this deputy is qualified to say whether anybody is under the influence or not under the influence of heroin, but I think he is able to testify as a fact witness to what he saw**. And what the significance was.

[PROSECUTOR]: That is what I'm trying to do.

THE COURT: Overruled.

(Counsel and the defendant returned to trial table and the proceedings resumed in open court.)

BY [PROSECUTOR]:

Q. [PROSECUTOR] Deputy, let me see if I can do this better. In your eight years as a Harford County sheriffs deputy, have you had occasions to see persons who are under the influence of heroin?

A. [DEPUTY TOLLIVER] I have.

Q. And have you also had — strike that question. **So what is an indicator to you that a person is under the influence of heroin?**

A. **Well, under the influence of a substance, slurred speech, swaying back and forth, can't walk, dizzy, stares off into space.**

Q. And did either Mr. Epps or Mr. Cannon exhibit any signs or indicators that morning that would lead you to conclude that either one or both was under the influence of heroin?

A. They did not.

As the transcript reflects, appellant lodged only one objection during this portion of Deputy Tolliver's testimony, and the question that was objected to — "And what signs does a person - what signs do you look for to determine whether or not a person is under the influence of heroin?" — was not answered by the deputy. Appellant did not request a continuing objection, and was obligated to object again if the prosecutor asked another question deemed objectionable. The transcript reflects, after appellant's counsel stated the single objection, the next question answered by the witness was: "In your eight years as a Harford County sheriffs deputy, have you had occasions to see persons who are under the influence of heroin?" That question does not call for an expert opinion, and there was no objection asserted.

The followup question was: "So what is an indicator to you that a person is under the influence of heroin?" Whether this question inquired into an area that required specialized skill, knowledge or training is a closer call. But we need not resolve that issue because: (a) the witness addressed a different question in his response; and (b) there was no objection to this question in any event. When the deputy responded to this question (without objection), he did not limit his response to indicators that a person is "under the influence of heroin." Instead, the deputy responded that indicators that a person is "under the influence of *a substance*" (emphasis added) include the following: "slurred speech, swaying back and forth, can't walk, dizzy, stares off into space." It requires no expertise to know that such behavior is indicative that a person is under the influence of a substance. *Cf. Prince v. State*, 216 Md.

App. 178, 201 ("The mere fact that a witness is a law enforcement officer does not automatically transform his testimony into expert testimony." Officer was not required to be designated as an expert to testify about placement of trajectory rods.), *cert. denied*, 438 Md. 731 (2014); *In re: Ondrel M.*, 173 Md. App. 223, 244 (2007) ("the testimony of a police officer, who is capable of identifying marijuana by smell through past experience, that he or she smelled the odor of marijuana, is lay opinion testimony within the meaning of Maryland Rule 5–701").

Moreover, the deputy was not asked to offer an opinion that either Cannon or Epps was in fact under the influence of heroin. The ultimate question that Deputy Tolliver answered (without objection) was limited to his observations of the men: "[D]id either Mr. Epps or Mr. Cannon exhibit any signs or indicators that morning that would lead you to conclude that either one or both was under the influence of heroin?"

Under the circumstances, even if appellant had asserted a timely objection to the questions that were answered by Deputy Tolliver, we would find no abuse of discretion in the trial court admitting the answers as lay opinion testimony pursuant to Maryland Rule 5-701. The answers were rationally based upon observations personally made by the witness, and the observations were helpful to preempt a potential argument that Epps and Cannon lacked the capacity to accurately testify about their encounter with appellant.

II.

Appellant contends that the revolver found on the shelf in the closet at the Topview address was irrelevant and therefore, photographs of the revolver were inadmissible, because no one ever positively identified the handgun as being the firearm he allegedly wielded in the trailer park. Moreover, appellant asserts that, even if the firearm was somehow relevant, its prejudicial effect outweighed its probative value. We perceive neither error nor abuse of discretion in the trial court's admission of photographs of the revolver recovered from the bedroom where appellant was arrested.

> Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, 39 A.3d 105 cert. denied, 429 Md. 306, 55 A.3d 908 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724–25, 25 A.3d 144 (2011). A trial court abuses its discretion only when " 'no reasonable person would take the view adopted by the [trial] court,' " or "when the court acts 'without reference to any guiding rules or principles.' " *King v. State*, 407 Md. 682, 697, 967 A.2d 790 (2009) (quoting *North v. North*, 102 Md.App. 1, 13, 648 A.2d 1025 (1994)).

Donati v. State, 215 Md. App. 686, 708-09, *cert. denied*, 438 Md. 143 (2014).

Maryland Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Maryland Rule 5-402 provides that, generally, "relevant evidence is admissible," and "[e]vidence that is not relevant is not admissible." Nevertheless, "[a]lthough relevant, evidence may be excluded

if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Maryland Rule 5-403.

We have upheld the admission of evidence of criminal defendants' possession of guns where the evidence suggested that the gun possessed was, or could have been, the gun used in the commission of the crime for which the defendant was tried. In *Graham v. State*, 13 Md. App. 171 (1971), the defendant was charged with murder and robbery with a deadly weapon. *Id*. at 172-73. The defense and State stipulated that the weapon used in the commission of the crime was a .38 caliber handgun that was never recovered. The trial court permitted testimony from a State's witness and owner of a .38 caliber handgun that the defendant had access to his gun at the time of the crime and he discovered it missing a week after the time of the crime. *Id*. at 164.

Similarly, in *Van Meter v. State*, 30 Md. App. 406 (1976), the defendant was charged with, among other things, murder and unlawful use of a handgun. *Id*. at 407. The trial court permitted testimony from a service mechanic that he witnessed a pistol, similar to that used in the commission of the crime, in the trunk of the defendant's vehicle. *Id*. at 420. In both *Graham* and *Van Meter*, we affirmed the trial courts' admission of the evidence. In *Van Meter*, we stated: "The testimony made the inference of guilt more probable than it otherwise would have been and was therefore relevant and admissible." *Id*.

In the present case, in finding the photographs of the revolver relevant and admissible, the trial court explained in detail its reasoning:

In this case, we have a description of the weapon which was used, which in the Court's view is, supported by the physical features of the handgun which was found in the closet of the bedroom. This weapon is a revolver. It . . . was described by Mr. Cannon as being a 9mm, but it has a black barrel. And it is, does have these shiny parts of it. The barrel is black, but the area around the cylinder is, in fact, steel colored, light colored of something that would reflect and catch the light and appear to be shiny.

It's correct that Mr. Cannon in his initial description to Deputy Tolliver referred to a 9mm handgun, but it's also correct that Mr. Cannon was very clear that he did not have a good look at the entire part – didn't have a good look at the whole handgun, but the part that had his attention, and the part that he saw clearly was the barrel, the opening of the barrel where the bullet comes out. And in this case, that portion of the gun is, in fact, black as he described it.

We have a lot of evidence in terms of what Deputy Berg has already said, and the other deputy said that this was a bedroom that was occupied by Mr. Topp. Mr. Topp was physically found in the bedroom. The woman who has now been identified as his girlfriend was having some medical issue in the early morning hours, I believe it was the early morning hours, in that bedroom. Mr. Topp was there attempting to assist and comfort her.

His personal affects were in the room. His wallet and identification were found within inches of one of the stolen cell phones. The vehicle, which has been identified as being similar to the one that was driven by the female associates of Mr. Topp and in which this crime was alleged to have happened in part was parked at this home, and the envelope with Mr. Topp's name on it was found in the van which further establishes that this is a location where he lives or visits in which he kept his affects [sic]. And, in fact, the closet where this gun was found is the closet to the bedroom where Mr. Topp had physically been located and actually asked to leave it while the deputies remained in custody of it awaiting the search warrant.

So, from the Court's point of view, the handgun is absolutely relevant to the facts of this case. The fact that it may also be relevant to the facts of some other case I don't believe results in the handgun not being admissible in this case. **In significant aspects, it meets the description which was given not only by the witnesses on the stand, but by the description which was**

> **given to the first deputy on the scene, and its proximity to both Mr. Topp and also to his identification cards, his wallet, and to another item which was stolen during the course of this event I think all are in favor of relevance.**
>
> **Certainly [defense counsel] is welcome to make his arguments about the discrepancies** as he characterized them between what Mr. Cannon said to Deputy Tolliver and the actual features of this handgun. In the Court's view, given all the other evidence that argues in favor of admissibility, I believe that **that is a matter of weight and not a matter of admissibility**. So the Court is going the overrule the objection.

(Emphasis added.)

As the trial court noted, the firearm in the photograph was similar in various respects to the firearm that both Epps and Cannon described at trial — notwithstanding the fact that Cannon described a different sort of pistol to Deputy Tolliver. But the discrepancies in the testimony go to weight, not relevance. Moreover, the firearm was in appellant's actual or constructive possession when located in a closet in a room at the Topview address where (1) appellant was located, (2) appellant had stayed overnight more than once, (3) appellant's personal effects, including his wallet and identification, were found, (4) the cell phone stolen from Epps was found, and (5) the minivan was located outside.

The firearm evidence was relevant because it bore sufficient similarities to the descriptions given by the victims for the jury to have found that it was the weapon used by the appellant in robbing Epps and Cannon. Moreover, appellant was being tried for, among other things, illegal possession of a regulated firearm, and the firearm was certainly highly

relevant and probative of his guilt for that. We perceive no unfair prejudice. As a result, we see no abuse of discretion in admitting the evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.