UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0392

September Term, 2014

MICHAEL DeLOATCH

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: January 21, 2015

The appellant, Michael DeLoatch, was convicted in the Circuit Court for Baltimore City by a jury, presided over by Judge Charles Peters, of first-degree assault and of carrying a weapon openly with the intent to injure. On this appeal, he raises two questions:

> "1. Did Judge Peters erroneously decline to receive in evidence a statement the appellant gave to the police in its entirety?
>
> "2. Did Judge Peters erroneously refuse a request from a juror to have a written copy of a witness's testimony?"

This case grew out of an argument between two members of an extended family group at approximately 1:30 a.m. on February 5, 2012 in an apartment at 1010 North Washington Street in Baltimore City. The apartment was leased by Annette Duke, a middle-aged woman who had been disabled by strokes and heart attacks and had lost parts of a limb due to diabetes. Of necessity, she relied on caretakers for assistance with personal hygiene and with household chores.

One of the caretakers was Michael DeLoatch, the appellant. He was the live-in "boyfriend" of Annette Duke. As of February 5, 2012, the appellant was 53 years of age and weighed 180 pounds. The other caretaker was Anthony Duke, the son of Annette Duke and the ultimate stabbing victim. The care-taking arrangement was that the appellant would care for Annette Duke on Monday through Friday from 8:00 a.m. to 4:00 p.m., and that Anthony Duke would care for his mother on Saturdays and Sundays from 8:00 a.m. to 10:00 p.m. They were both expected to perform housekeeping, cooking, bathing, laundry, and trash removal tasks. Anthony Duke was 30 years of age and weighed 250 pounds. On the early morning of February 5, 2012, both the appellant and Anthony Duke were present in the

apartment, along with Annette Duke. Also present were Anthony Duke's girlfriend, Anthony Duke's son by the girlfriend, and the mother of the girlfriend, Frances Flahardy.

The air was rife with controversy, occasioned in significant part by Anthony Duke's intoxication. In his testimony, Anthony Duke acknowledged that in the course of the evening he had consumed five beers and more than a half-pint of gin. He had also smoked marijuana. In any event, he had failed to finish doing the laundry or cleaning the bathroom during his shift. He was aware, moreover, that the appellant had complained to Annette Duke about his shoddy performance. He also acknowledged that in the course of the evening, his mother had fired him as a caretaker.

Frances Flahardy testified, initially about the escalating disagreement between Anthony Duke and his mother. She stated, "Well, Anthony was cooking dinner, and Annette told us she was going to get rid of Anthony, because he always got drunk, and all; she didn't like that. And, she tells us, he's slamming the doors." Anthony Duke, in turn, became "very upset" with his mother. It seemed to Frances Flahardy that Anthony Duke could have hurt his mother if, at that point, the appellant had not involved himself in the quarrel. According to her, the appellant stabbed Anthony Duke as Duke was sitting in a chair.

According the Anthony Duke himself, the final argument broke out when the appellant yelled at him about slamming the doors. The argument turned physical as, according to Anthony Duke, "we tusseled a little bit," engaging in a shoving match. Duke then testified that, when he was in the bedroom doing laundry, the appellant came in and

stabbed him in the stomach with a kitchen knife "all the way up to the handle." He went on, "And when he pulled it out, my insides was coming out." Anthony Duke also stated that he himself did not have a weapon. As a result of his injuries, Anthony Duke was hospitalized for about six weeks and underwent multiple surgeries.

The testimony of the appellant himself did not differ that significantly from that of the other two civilian witnesses. He also complained that Anthony Duke had been slamming closet doors within the apartment that evening. The appellant added that he had had to arrange for the replacement of doors previously broken by Anthony Duke. In the course of the evening, Annette Duke had told Anthony Duke to "stop slamming the doors." The appellant further testified, "So, when I came out there, I specified that I was unsatisfied with the way he was treating his mother." At that point, Anthony Duke balled his fists up and started swinging at the appellant. The appellant retreated into the bedroom. Anthony Duke, "came in the bedroom after me, and said that he was gonna mess me up." A knife was in the room.

For all intents and purposes, there is no significant legal dispute about the crime that unquestionably ensued. The appellant stabbed Anthony Duke with a knife. The jury acquitted the appellant of attempted first-degree murder and attempted second-degree murder, obviously finding that there was no intent to kill, premeditated or non-premeditated. Stabbing Anthony Duke with a kitchen knife, on the other hand, was a first-degree assault. That it may have been in the course of a mutual affray is without legal significance. It was

the appellant who, by using the knife, escalated a fight at the non-deadly level into a fight at the deadly level. The appellant offered no defense of self-defense and does not now argue that such a defense would have been available to him. He testified as to his reasons for stabbing Anthony Duke:

> "So, that's when I grabbed the knife, because I got afraid of (inaudible), because there was no way for me to get out. So, I panicked, and I got afraid that he may do some harm to me. So, that's when I stabbed him."

(Emphasis supplied).

The appellant seems obviously to have feared that in a fight at the non-deadly level, he would have lost badly because of the age differential and the weight differential in Anthony Duke's favor. That is not, without more, adequate justification for escalating a combat from the non-deadly level to the deadly level, and the appellant makes no claim in that regard.

When Baltimore City Police Officer Maria Ferges responded to the scene at 1010 North Washington Street at 1:30 a.m., she saw the appellant come out of one of the apartments and walk toward the back of the building. As she followed, she saw the appellant "place a plastic-bag in the hood and grill of a blue Volvo station wagon." She saw blood on the appellant's hands and detained him. As she touched the plastic bag, a knife fell out of it. It was "a large black-handled kitchen knife." In addition to the 22-year sentence the appellant received for the first-degree assault, he was sentenced to a concurrent term of three

years on the weapons charge. The appellant raises no issue about the recovery of the weapon.

The Partial Use of the Appellant's Statement

In both of his contentions, dealing with inconsequential procedural calls entrusted to the broad discretion of the trial judge, the appellant is just going through the motions.

Shortly after his arrest, the appellant gave a transcribed and recorded statement to the police that was approximately thirty (30) pages in length. The State agreed not to offer it in evidence and the defense agreed not to refer to it. During the cross-examination of the appellant, however, a part of that earlier statement took on unexpected significance. The appellant testified that when he picked up the knife to stab Anthony Duke, the knife was lying in front of him in the bedroom. The State sought to contradict that statement by asking him whether he had not in his earlier statement said that he went to the kitchen to get the knife. The appellant denied having earlier said that. The State then sought the permission of the court to introduce a brief excerpt of the recorded statement for the purpose of contradicting the trial testimony. The appellant's position was that the court should receive the whole statement or nothing.

Judge Peters' position was that the use of a short fragment of the longer statement as a prior inconsistent statement for purpose of contradiction did not "open the door to a 30 page statement." He so ruled. The segment came in and consisted simply of:

> "Question: Where did you get the knife from?
> "Answer: Out the kitchen."

The appellant's challenge is not to the impeaching use of the excerpt, but to the non-use of the other 29 ½ pages. The actual impeachment use, perfectly proper, may still have had some utility when the charges of attempted first-degree and second-degree murder were still in the case. The length of time it took to go into the kitchen and the thoughts that could occur while going to the kitchen might have had some bearing as to the mens rea of an intent to kill, premeditated or non-premeditated. The appellant, of course, was acquitted on both charges. His conviction of assault, on the other hand, was based on his escalation of the conflict from the non-deadly level to the deadly level, and that would have been the same whether he chanced upon the knife in the bedroom or deliberately went to the kitchen to get it. In any event, the use of the excerpt is not being challenged. The only thing before us is the non-use of the rest of the statement.

The appellant deploys an impressive array of caselaw and academic authority to support the doctrine of verbal completeness. See Conyers v. State, 345 Md. 525, 693 A.2d 781 (1997); Churchfield v. State, 137 Md. App. 668, 769 A.2d 313 (2001); Maryland Rule 5-106. The deployment, however, is simply as an abstraction. Nowhere does the appellant remotely suggest what there might have been in the rest of the appellant's interview that could have helped him in any way. He does not suggest that it might have shed interpretive light on his going to the kitchen for the knife. When asked by Judge Peters to make a proffer of what the rest of the statement might show, counsel's response was a masterpiece of uncertainty:

> "Your Honor, I can't say with any certainty – and I'm not (inaudible) [the prosecutor] – I don't know if there's any portion of the statement which specifically confirms or denies that he got the knife from the kitchen. I don't recall that off the top of my head."

The necessity of a proffer was made very clear by this Court in Muhammad v. State, 177 Md. App. 188, 281, 934 A.2d 1059 (2007), cert. denied, 403 Md. 614 (2008).

> "A claim that the exclusion of evidence constitutes reversible error is generally not preserved for appellate review absent a formal proffer of the contents and materiality of the excluded testimony. Maryland Rule 5-103(a)(2); Merzbacher v. State, 346 Md. 391, 416, 697 A.2d 432 (1997) (objection to exclusion of evidence unpreserved where appellate court is in no position to discern what the evidence may have been); Ratchford v. State, 141 Md. App. 354, 368, 785 A.2d 826 (20010, cert. denied, 368 Md. 241, 792 A.2d 1178 (2002) (failure to proffer contents of excluded testimony is "absolutely foreclosing" as to claims). This impediment to appellate review effectively moots any consideration, as an alternate holding, of harmless error."

The conduct of a trial is entrusted to the wide discretion of the trial judge. Thomas v. State, 397 Md. 557, 579, 919 A.2d 49 (2007). That Judge Peters decided not to waste 20 to 30 minutes of the jury's time without having been given a plausible reason to do so was not an abuse of discretion.

Replaying a Witness's Testimony

In the course of the jury's deliberation, the jury sent out a note, reading "May we have a copy of Frances Flahardy's testimony?" Judge Peters suggested to counsel a response of "You must rely on your recollection of the evidence." The State agreed. Even defense counsel did not strongly disagree, saying only, "Normally that is the appropriate response," but nevertheless suggesting that the court play a recording of the witness's testimony.

Responding to such a request is quintessentially the sort of thing entrusted to the broad discretion of the trial judge. Veney v. State, 251 Md. 159, 172-73, 246 A.2d 608 (1968). Judge Peters exercised his discretion:

> "It's a discretionary call on my part. I mean, I mean – you know, if this were a six-week long trial, or even a two-week long trial, or it was ten days ago – I mean, literally she testified, I think, yesterday afternoon.

(Emphasis supplied). He denied the jury request and advised the jurors to rely on their recollections.

The appellant's argument as to why that ruling was an abuse of discretion is very brief and without citation to any authority:

> "There is no suggestion in the record that doing so would have caused any delay or inconvenience (such as could occur if a transcription was needed). Appellant asks this court to find an abuse of discretion and reversible error."

The appellant seems to suggest that if Judge Peters had granted his motion, that grant would not have been an abuse of discretion. The appellant is right. It would not have been. That is the very nature of discretion. Discretion to grant a motion, however, implies discretion to deny the motion. Except on rare, rare occasions at the far extremes of discretion's bell-shaped curve, the appellate court will affirm an exercise of discretion whichever way it goes. It is not for us to second-guess. On this occasion, we are in that happy middle ground where the judgment call on the field can't go wrong.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.