

Circuit Court for Wicomico County  
Case No. C-22-CR-22-000225

UNREPORTED  
IN THE APPELLATE COURT  
OF MARYLAND

No. 46

September Term, 2023

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KENDAL LEE SMILEY

v.

STATE OF MARYLAND

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Graeff,  
Arthur,  
Eyler, James R.  
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: May 10, 2024

\*This is a per curiam opinion. Consistent with Rule 1-104, the opinion is not precedent within the rule of stare decisis, nor may it be cited as persuasive authority.

Convicted by a jury in the Circuit Court for Wicomico County of armed robbery of Anwar Ahmed and related offenses, first degree assault of Saqab Ishtiaq and related offenses, and theft of property with a value of less than \$100 from a business known as Pizza City, Kendal Lee Smiley, appellant (hereinafter “Mr. Smiley”), presents for our review two issues: whether the court erred in permitting certain testimony by Mr. Smiley’s father, and whether the conviction for theft of property with a value of less than \$100 from Pizza City must be vacated. For the reasons that follow, we shall remand the case with instructions to vacate the conviction for theft of property with a value of less than \$100 from Pizza City. We shall otherwise affirm the judgments of the circuit court.

At trial, the State produced evidence that at approximately 12:15 p.m. on March 13, 2022, Mr. Ahmed and Mr. Ishtiaq were working at Pizza City when an African-American man wearing a red plastic mask, a gray hooded sweatshirt that read “USA,” and red sweatpants entered the business, pointed a handgun at the employees, and asked for money. Mr. Ahmed gave the gunman approximately ninety to one hundred dollars, and the gunman departed. Mr. Ahmed called 911 and gave a description of the gunman. The employees subsequently told Salisbury Police Officer Carissa Martin that the gunman was “a black male wearing a gray sweatshirt, red pants, gray sneakers, and a red mask,” and “[a]pproximately 20 to 35 years of age.” The State played for the jury video recordings of the robbery taken by Pizza City’s “CCTV” surveillance system.

Salisbury Police Officer Earl Buffa subsequently observed Mr. Smiley walking on railroad tracks “in [the] proximity of” Pizza City. When Officer Buffa and another officer attempted to make contact with Mr. Smiley, he fled. Police pursued and apprehended Mr.

Smiley and asked him “where he was going and what he was doing.” Mr. Smiley replied that he was “coming from his parents’ house,” which is located within one hundred yards of Pizza City, “to his hotel room at the Days Inn.” Police subsequently released Mr. Smiley “[b]ecause he didn’t match the clothing description . . . provided at the time.”

At approximately 12:30 p.m., Mr. Smiley’s father, Michael Smiley, Sr. (hereinafter “Mr. Smiley Sr.”), returned to his residence from church and discovered that his chrome-plated .32 automatic handgun, which he kept in a closet, had been stolen. Mr. Smiley Sr. called 911 and reported the theft. When police responded to the residence, they discovered, “in a trash can at the rear of the residence,” a “hooded sweatshirt with a USA logo, a pair of red sweatpants with a stripe down the side, a pair of gray Nike shoes, and a red-in-color mask.” At trial, Mr. Ishtiaq and Mr. Ahmed identified the mask, sweatshirt, and sweatpants as those worn by the gunman. The State produced evidence that DNA obtained from the mask and sweatshirt was determined to match Mr. Smiley’s DNA, and that Mr. Smiley was determined to be the major male contributor of DNA discovered on the sweatpants.

The State also called Mohammad Zeeshan, who worked at the front desk of the Days Inn on Salisbury Boulevard in Salisbury. Mr. Zeeshan testified that at the time of the robbery of the Pizza City, Mr. Smiley, whom Mr. Zeeshan identified in court, was staying at the Days Inn in a room under the name of Mr. Smiley’s brother Michael Smiley, Jr. At approximately 10:00 a.m. on the day of the robbery, Mr. Zeeshan told Mr. Smiley that he needed to pay his bill, which was approximately sixty to seventy dollars, by 11:00 a.m. Mr. Smiley later told Mr. Zeeshan that he would have the money by 1:00-1:30 p.m. Sometime after 1:30 p.m., Mr. Smiley paid the bill in cash.

Mr. Smiley first contends that the court “erred in allowing [Mr. Smiley Sr.] to offer his lay opinion that [Mr. Smiley] took his handgun.” During Mr. Smiley Sr.’s testimony, the following colloquy occurred:

[PROSECUTOR:] Were you aware on March 13th when you called the police that [Mr. Smiley] had come to your home while you were gone at church?

[MR. SMILEY SR.:] No, I wouldn’t even expect, you know, for him to even do that.

[PROSECUTOR:] Do you recall telling police that he had come home when you were gone?

[MR. SMILEY SR.:] I did have that conversation with them, I said I think he came –

[PROSECUTOR:] Okay, so you did tell the police that?

[MR. SMILEY SR.:] I mean, you don’t want to think the worst, you know, but –

[PROSECUTOR:] Of course. Of course.

. . . Your Honor, may we approach briefly?

([Defense counsel and Mr. Smiley] approached the bench and the following occurred:)

[PROSECUTOR]: So originally, Your Honor, one of the disputes that [defense counsel] and I had was, there’s a statement on the 911 where [Mr. Smiley Sr.] indicates that he believes his son had taken the gun. Based on now [Mr. Smiley Sr.’s] statement that he didn’t think that his gun – or his son would do that, I believe it’s admissible as impeachment evidence. And so, before I play it I would ask Your Honor for a ruling on that issue.

[DEFENSE COUNSEL]: Your Honor, a person’s speculation about whether or not someone did something is not, is not evidence.

THE COURT: Was it an excited utterance?

[DEFENSE COUNSEL]: I don't believe so. But I don't know if Madam State wants to make that argument.

[PROSECUTOR]: I think it more, I originally wasn't intending to admit that statement, Your Honor. But now that [Mr. Smiley Sr.] has said he doesn't think that, I think it really falls under –

THE COURT: Well, I think he can be impeached now.

[PROSECUTOR]: It's a prior inconsistent statement.

THE COURT: So if you want to impeach him, or try to impeach him, go ahead.

[DEFENSE COUNSEL]: And I would just indicate that I object.

THE COURT: Okay.

([Defense counsel and Mr. Smiley] returned to trial tables and the following occurred in open court:)

[PROSECUTOR: D]o you recall telling law enforcement who you think may have taken the gun?

[MR. SMILEY SR.:] Yes, I do.

[PROSECUTOR:] What do you recall telling law enforcement about that?

[MR. SMILEY SR.:] I said I think my son may have took my pistol.

[DEFENSE COUNSEL]: I object. Ask for continuing objection on the subject.

THE COURT: It's noted.

Mr. Smiley contends that Mr. Smiley Sr.'s testimony "constituted impermissible lay opinion," and "was more unfairly prejudicial than probative." The State counters that the contention "has not been preserved for appellate review," because Mr. Smiley "never made these arguments below." Alternatively, the State contends that the "court properly

exercised its discretion in admitting the testimony as impeachment evidence,” and “the probative value of the impeachment evidence was not substantially outweighed by the danger of unfair prejudice.” The State further contends that “[t]o the extent that the court erred in admitting the testimony, any error was harmless.”

We disagree with the State as to whether Mr. Smiley’s contention is preserved for our review. Rule 5-701 states that if a “witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are . . . rationally based on the perception of the witness[.]” Here, in arguing that Mr. Smiley Sr.’s testimony constituted “speculation about whether or not” Mr. Smiley entered Mr. Smiley Sr.’s residence while he was at church, defense counsel effectively objected to the testimony on the ground that Mr. Smiley Sr.’s opinion or inference was not rationally based on his perception. Hence, the contention is preserved for our review.

Nevertheless, we agree with the State that the testimony was admissible. The Supreme Court of Maryland has stated that “[a]s a general rule, prior statements by a witness that are inconsistent with the witness’s in-court testimony are admissible to impeach the credibility of the witness.” *Stewart v. State*, 342 Md. 230, 236 (1996) (citations omitted). Here, Mr. Smiley Sr. initially testified that he “wouldn’t even expect . . . for” Mr. Smiley to enter Mr. Smiley Sr.’s residence while he was at church. Mr. Smiley Sr.’s statement to police that he thought Mr. Smiley “may have” taken Mr. Smiley Sr.’s gun was inconsistent with his prior testimony, and hence, the statement was admissible to impeach his credibility. Also, as the State notes, Mr. Smiley Sr. testified only that he had told law enforcement that he believed that Mr. Smiley might have taken the gun, not that

he knew that Mr. Smiley had taken it. The probative value of the testimony was not substantially outweighed by the danger of unfair prejudice, and hence, the court did not abuse its discretion in admitting the testimony.

Even if the court had abused its discretion in admitting the testimony, we would conclude that the admission was harmless. The State produced evidence that when police first attempted to make contact with Mr. Smiley, who was walking in the proximity of Pizza City, he fled. Mr. Smiley subsequently told police that he was going from his parents' residence, which is also in the proximity of Pizza City, to the Days Inn. Around this time, Mr. Smiley Sr. discovered that his gun had been stolen from his residence. Mr. Ahmed and Mr. Ishtiaq identified a mask, sweatshirt, and sweatpants discovered behind the residence as that which was worn by the gunman who robbed Pizza City. DNA obtained from the mask and sweatshirt was determined to match Mr. Smiley's DNA, and Mr. Smiley was determined to be the major male contributor of DNA discovered on the sweatpants. Finally, at the time of the robbery, Mr. Smiley, who was staying at the Days Inn with his brother, was in need of money to pay his bill at the hotel. In light of this evidence, we are "satisfied that there is no reasonable possibility that the evidence complained of . . . may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976) (footnote omitted).

Mr. Smiley next contends that the "conviction for theft under \$100 must be vacated because it is illegal." Mr. Smiley was initially charged with theft of property with a value of at least \$100 but less than \$1,500, in violation of Md. Code (2002, 2021 Repl. Vol.), § 7-104 of the Criminal Law Article ("CR"). Following Mr. Smiley's motion for judgment

of acquittal as to the offense, the court ordered that the verdict sheet be amended “to say under one hundred.”

Mr. Smiley contends that the court erred in so amending the offense, because CR § 7-108(d) states that “[u]nless specifically charged by the State, theft of property . . . with a value of less than \$100 . . . may not be considered a lesser included crime of any other crime.” The State agrees, as do we. Accordingly, we remand the case with instructions to vacate the conviction for theft of property with a value of less than \$100 from Pizza City.

**CASE REMANDED WITH  
INSTRUCTIONS TO VACATE  
CONVICTION FOR THEFT OF  
PROPERTY WITH A VALUE OF LESS  
THAN \$100 FROM PIZZA CITY.  
JUDGMENTS OF THE CIRCUIT COURT  
FOR WICOMICO COUNTY OTHERWISE  
AFFIRMED. COSTS TO BE PAID ONE-  
HALF BY APPELLANT AND ONE-HALF  
BY WICOMICO COUNTY.**