Circuit Court for Howard County
Case No. 13-K-17-058160

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 150

September Term, 2018

AHLEYAH ROCKWELL

v.

STATE OF MARYLAND

Graeff,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 2, 2019

*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.

Appellant, Ahleyah Rockwell, was charged with two counts of robbery, three counts of second degree assault, and one count of theft. A jury in the Circuit Court for Howard County convicted her of two counts of second degree assault and acquitted her on the other charges. The court sentenced her to five years, all suspended but two years on the first assault count and ten years, all suspended, on the second assault count. In this appeal, appellant challenges the missing witness instruction given to the jury for her failure to call a "close" friend, whom she testified had observed the altercation. She asks:

Did the trial court abuse its discretion in giving a missing witness instruction over defense counsel's objection?

We answer "no" and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On August 5, 2017, Ms. Rockwell went to the Columbia Mall with her two-year-old daughter and a friend. The State presented testimonial evidence that Ms. Rockwell reached her hand into the cash register of the Island Carousel ticket booth before being restrained by carousel employees

Tabinda Mahmood testified that, while working at the carousel, she observed a woman, later identified as Ms. Rockwell, put her hand in the cash drawer. When she attempted to retrieve the money, Ms. Rockwell "softly" pushed her away. Ms. Mahmood alerted her manager to what happened and called mall security. She watched as her manager, Ellen Redgate, struggling with Ms. Rockwell, held on to her shirt to prevent her from fleeing. Ms. Rockwell bit Ms. Redgate and then left. She recalled that, during the

incident, Ms. Rockwell insisted that she did not have the money. And, in her statement to the police, Ms. Mahmood did not include anything about attempting to retrieve money from Ms. Rockwell.

Lila Orosco was working as a nanny that day. She testified that she accompanied her charge on the carousel and then played coin games located across from it. When she returned to the carousel ticket booth to get change, she "walked up on" an altercation between Ms. Redgate and Ms. Rockwell, which she recorded with her phone. During the struggle, Ms. Rockwell pulled Ms. Redgate down by her hair, and, when Ms. Orosco grabbed her by the arms to prevent her from leaving, Ms. Rockwell pushed her away and left.

Ellen Redgate testified that, while making sure everyone got off the carousel, she overheard Ms. Mahmood speaking (apparently about taking money) with a woman standing outside of the booth. Because nobody else was standing in the area, Ms. Redgate reasoned that Ms. Rockwell must have taken the money. She grabbed and restrained Ms. Rockwell because she did not want her to get away. Ms. Rockwell asked why she was touching her and, repeatedly denying taking any money, asked that she be released. But Ms. Redgate, even when Ms. Rockwell threatened to bite and hit her, refused to do so. Ms. Redgate pulled the woman down and did not let her go until someone else came to assist.

On cross-examination, Ms. Redgate admitted that she did not see any money in Ms. Rockwell's hands, and that she did not mention seeing anybody reaching into the

booth in her initial statement to the police. She also admitted that she was the first person to make physical contact in her altercation with Ms. Rockwell.

Officer Jose Marichal, who investigated the incident, developed Ms. Rockwell as a suspect. The counter area of the ticket booth was dusted for fingerprints by Jamie Miller, a crime scene technician, who testified that he lifted and submitted for examination four fingerprints. Catherine Johnson, latent fingerprint examiner for the Howard County Police Department, testified that the prints lifted were not a match to Ms. Rockwell.

Ms. Rockwell testified that she was at the mall with her daughter and a friend to pick up a birthday present. She went to the carousel ticket booth to inquire into the cost of a ride for her daughter when Ms. Redgate suddenly grabbed her. Ms. Redgate would not let her go and swung at her. After repeatedly requesting to be released, Ms. Rockwell grabbed Ms. Redgate and dragged her down by her hair. It was not until Ms. Orosco grabbed Ms. Rockwell that Ms. Redgate released her. When she looked up, she did not see her daughter. She panicked and immediately left to find her. She found her by the food court where she had arranged earlier to meet with her friend.

Ms. Rockwell testified that her "close" friend, who was "behind [her] with [her] daughter" during the altercation, had witnessed her being "choked" by Ms. Redgate and attacked by Ms. Orosco. When pressed by the prosecutor for the friend's name, she refused to identify him—exclaiming that she did not want him involved as he may be unfairly viewed as an accomplice. Only upon the command of the trial court did she reveal his name as "Hollis Walter." Mr. Walter was not called to testify.

Prior to the presentation of defense witnesses and during preliminary discussions of jury instructions in chambers[1], the prosecutor, believing that the defense was going to "generate[]" evidence "about a missing witness," requested a missing witness instruction. And, later, Ms. Rockwell testified about Mr. Walter. After the defense rested, the court issued instructions, including the following:

> You have heard testimony about Hollis Walter, who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was particularly[2] within the power of the Defense to produce, but was not called as a witness by the Defense and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the Defendant.

After the court completed giving its instructions to the jury, the following colloquy ensued:

> THE COURT: Any exceptions or objections to the instructions?
>
> [DEFENSE]: Yes, Your Honor. As for the Defense I would object to giving the flight instruction. And I would also object to giving the missing witness instruction.
>
> THE COURT: Okay, as I indicated back in chambers I believed the evidence has in fact been generated as to the flight as well as the missing witness instruction based on the testimony that's—that was presented in both the State as well as the Defense case[.]

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[1] According to the State, the discussion concerning the jury instruction "occurred in the judge's chambers and not on the record[.]"

[2] "Particularly" and "peculiarly" are synonymous, and appellant does not contend that the court's use of "particularly" is of consequence. *See* https://www.thesaurus.com/browse/peculiar (last visited July 30, 2019).

STANDARD OF REVIEW

A missing witness instruction permits the jury to infer that the testimony of the missing witness would be unfavorable to the side not calling the witness. *Harris v. State*, 458 Md. 379, 405 (2018). Because the instruction concerns "an inference to be drawn from evidence—or lack thereof—"it remains within the "discretion of the trial judge to grant or to refuse" to give the instruction. *Harris*, 458 Md. at 405-06; *see Robinson v. State*, 315 Md. 309, 318-19 (1989). But the trial judge has no discretion to grant a request for the instruction when "the facts do not support the inference." *Harris*, 458 Md. at 405. In other words, a trial court "abuses its discretion if it commits an error of law in granting or denying a request" and "we will reverse the decision if we find that the defendant's rights were not adequately protected." *Id.* at 406 (citing *Cost v. State*, 417 Md. 360, 368–69 (2010)).

DISCUSSION

The Missing Witness Rule

What is called the "missing witness rule" is not a rule; it is simply a "permissible inference that a factfinder may draw from the absence of a potential witness who might have knowledge of facts at issue in the case," when the witness is "peculiarly available" to the party not calling the witness. *Harris*, 458 Md. at 388. But only when the "necessary predicate," as consistently recognized in prior cases, is satisfied, may the trial court instruct the jury that the inference is permitted. *See Harris*, 458 Md at 405-06; *Davis*, 333 Md. at 52 (stating that "the *requirements* of the missing witness rule must be

more rigidly applied" when the trial court "instructs the jury on the operation and availability of the inference") (emphasis added); *Dansbury v. State*, 193 Md. App. 718, 742 (2010) ("[A]n adverse inference cannot be drawn when the witness is not available, or where his testimony is unimportant or cumulative, or where he is equally available to both sides.") (internal quotations and citations omitted).

The Court of Appeals in *Harris* provided a Maryland history of the missing witness rule and "derived" from prior cases the following "principles" and "prerequisites:"

> • Basic prerequisites:
>
> (1) There is a witness
> (2) Who is peculiarly available to one side because of a relationship of interest or affection
> (3) Whose testimony is important and non-cumulative
> (4) Who is not called to testify
>
> • Whether a Witness is Peculiarly Available:
>
> An accomplice-defendant relationship does not necessarily mean that the accomplice is "peculiarly available" to the defendant given the possibility that the accomplice would assert the privilege against self-incrimination. A witness who will assert the privilege against self-incrimination is not "available" and cannot be the subject of a missing witness instruction. If a "missing" witness claims his or her privilege against self-incrimination, that claim may be tested outside the jury's presence. *Christensen* [*v. State*, 274 Md. 133 (1975);] *Robinson* [*v. State*, 315 Md. 309 (1989)].
>
> • Missing Witness Argument versus Missing Witness Instruction:
>
> In cases in which it may be appropriate for the prosecutor to ask the jury to draw a missing witness inference adverse to the defendant, the trial court should not necessarily give a missing witness instruction. A trial court should be "especially cautious" in considering whether to give a

> missing witness instruction adverse to a defendant in a criminal case. *Davis* [*v. State*, 333 Md. 27 (1993)].

- Procedure:

> When a party intends to ask the trial court to give a missing witness instruction, the party should give advance notice to the opposing party and raise the issue at a time when the opposing party has an opportunity to call the allegedly missing witness or provide proof that the witness is not peculiarly available to that party. *Christensen*[;] *Bereano* [*v. State Ethics Comm'n*, 403 Md. 716 (2008)].

- No–Inference Instruction:

> In some circumstances in which a defendant has not called a witness that might be thought to be favorable to the defendant, the trial court may not give a missing witness instruction and, indeed, could be required to give, at the defendant's request, an instruction that no adverse inference should be drawn by the jury against the defendant. *Christensen*.

458 Md. at 404-05.

Contentions

Ms. Rockwell contends that the trial court erred in issuing a missing witness instruction in this case and that the error was not harmless. As she sees it, *Harris* "unambiguously disfavors *ever* issuing a missing witness instruction," because it is "in tension with the principle that the prosecution must prove each element of a charged criminal offense beyond a reasonable doubt." In addition, she argues that *Harris* found the rationale for the rule suspect because there are many innocent reasons not to call a witness at trial even when the witness's testimony would be favorable. For that reason, she asserts that the "instruction should rarely, if ever, be given," and that this case was not one of those rare occasions. *See Harris*, 458 Md. at 413.

Ms. Rockwell also contends that Mr. Walter was not "peculiarly available" to her. She argues that *Harris* clearly established that a close relationship, standing alone, is insufficient to satisfy the "peculiarly available" requirement and that there are not any other factors in evidence—such as "whether the witness and defendant shared common financial interests or residence"—that would establish that he is "peculiarly within [her] power to produce."

And, in addition, the State's failure to provide adequate notice of its intent to request the instruction precluded its application in this case. She argues that *Harris* drew the boundaries of what is adequate—notice at a pretrial conference—and what is inadequate—notice after "trial had begun and after the parties had rested." Because the prosecutor did not request the instruction until the last day of trial and after the State had rested, she argues the notice in this case was inadequate.

Conceding that *Harris* established a "high standard" for granting a request for a missing witness instruction, the State asserts that "the trial court did not have the benefit of the *Harris* decision," because it was decided after Ms. Rockwell's trial. Therefore, it contends that the trial court's decision should "not be judged against [it]." The State maintains that Mr. Walter was "peculiarly available" to Ms. Rockwell and distinguishes the timing of the request for the missing witness instruction in this case from the timing in *Harris* by noting that the request in *Harris* was after both parties had rested, but, in this case, it was after Ms. Rockwell elected to testify and before the defense rested.

Analysis

I. <u>Whether Harris Applies</u>

The State recognizes that "the perquisites for consideration of a missing witness instruction are not new" but it argues that the "requirement" of giving advanced notice is. In short, the State argues that, until *Harris*, advanced notice was only a "preferred procedure," and, therefore, *Harris* should have little to no application in our analysis. We do not agree.

As a general rule, where "a decision has applied settled precedent to new and different factual situations, [it] always applies retroactively[.]" *Denisyuk v. State*, 422 Md. 462, 478 (2011); *see also State v. Daughtry*, 419 Md. 35, 77 (2011) ("[I]n the overwhelming majority of cases, a judicial decision sets forth and applies the rule of law that existed both before and after the date of the decision[.]") (internal quotation marks omitted). It is only when a decision "constitutes a clear break with the past" that a question of prospective application arises. *Denisyuk*, 422 Md. at 478. More particularly, there is a "clear break from the past" when a court "explicitly overrule[s] a past precedent," disapproves "a practice [the court] arguably sanctioned in prior cases, or overrule[s] a longstanding practice that lower courts had uniformly approved." *Griffith v. Kentucky*, 479 U.S. 314, 325 (1987). Clarifications of previous holdings are never clear breaks. *See Allen*, 204 Md. App. at 722 (citing *Potts v. State*, 300 Md. 567, 577 (1984)) (internal quotation marks omitted).

We have recognized part of the problem with "prospective" or "retrospective" application is that appellate courts have used the terms "to mean different things." *Allen*

v. State, 204 Md. App. 701, 714 (2012). For example, "the Supreme Court [has used] the term 'retroactive' to apply an announced principle to cases pending on direct review," but not necessarily to final convictions, where appeals are exhausted, and the period to petition for certiorari has expired, and the Court of Appeals has used "prospective" in the same way. *Id.* at 715-16. In Maryland, a retroactive application in a criminal case typically means applying the rule to final convictions. *See id.* at 719-21 (quoting *American Trucking Ass'ns. v. Goldstein*, 312 Md. 583, 541 (1988)) ("Generally, in these cases, a 'prospective application' of a new interpretation of a rule, has included the case before us and all other pending cases where the relevant question has been preserved for appellate review.").

And, were we persuaded that *Harris* announced a new rule or principle, it would apply to this case because it is on direct appeal, and the issue was preserved. That said, we are not persuaded that *Harris* announced a new rule. Although perhaps not articulated as strongly as in *Harris*, skepticism towards giving the missing witness instruction is not new. *See Davis v. State*, 333 Md. 27, 52 (1993) (stating that when a trial judge issues a missing witness instruction it creates "the danger that the jury may give the inference undue weight" and, as such, a trial court "should be especially cautious" in using it); *Bereano v. State Ethics Commission*, 403 Md. 716, 751-55 (2008) (finding "limited" justification for the missing witness inference and that it should be invoked "prudently").

More specifically, the need for advanced notice before giving the instruction was established prior to *Harris*. *See Christensen*, 274 Md. at 135 n. 1 (maintaining that a party seeking a missing witness instruction should advise the opposing party of its intention to request the instruction at a time when the opposing party could then call the missing witness); *Davis*, 333 Md. at 52 (stating that a trial court "should closely abide by the *requirements* set out in *Christensen"*) (emphasis added); *Dansbury*, 193 Md. App. at 742 ("Before deciding whether to propound a missing witness instruction, there is a 'preferred procedure' that the trial court *should* follow.") (citing *Christensen*, 274 Md. at 135) (emphasis added).

The State contends that before *Harris* "advanced notice" was a "preferred procedure" and not a "requirement," making *Harris* a "clear break from the past." But evolution from a "preferred procedure" to a "requirement" is, at most, an expansion of the previous concept or principle; it certainly does not overrule precedent and is hardly a "clear break" from the past. For example, *Harris* itself presumed that "a trial court that knew and understood the law [would] follow the 'preferred procedure' set in Christensen." *Harris*, 458 Md. at 412; *see also Davis*, 333 Md. at 52 (referring to "the requirements set out in *Christensen*"). In short, *Harris* applies.

II. Was Mr. Walter "peculiarly available" to Ms. Rockwell?

Ms. Rockwell asserts that there was no evidence that Mr. Walter was present in the court when the missing witness issue arose, or that they "shared financial interests," lived together, or that he was anything other than a friend who happened to accompany

her to the mall. The State, citing *Medley v. State*, 386 Md. 3, 7-8 (2005), responds that, although there was no discussion on the record, we "may presume that the trial court knew and applied the law applicable at the time," and, by Ms. Rockwell not revealing his identity,[3] Mr. Walter was not available to the State.

Before a missing witness instruction may be given, it must be "demonstrated that the missing witness was peculiarly within the adversary's power to produce by showing either that the witness is physically available only to the opponent or that the witness has the type of relationship with the opposing party that pragmatically renders his [or her] testimony unavailable to [the other party]." *Dansbury*, 193 Md. App. at 746 (quoting *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th

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[3] [Prosecutor]: And--you testified that you took the bus with your--it's a male friend, who is this person?
[Ms. Rockwell]: He's a friend of mine.
[Prosecutor]: What's his name.
[Ms. Rockwell]: I cannot say. I cannot say.
[Prosecutor]: You cannot say? Okay can you tell--why is that?
[Ms. Rockwell]: I don't want him involved in this, he had nothing to do with this.
[Prosecutor]: Well he just witnessed this whole attack, right?
[Ms. Rockwell]: Yes.
[Prosecutor]: But he--you won't say his name?
[Ms. Rockwell]: No.
[Prosecutor]: I'm going to ask you again, what is this individual's name?
[Defense counsel]: Objection.
[The Court]: Overruled. What is his name?
[Ms. Rockwell]: Hollis Walter.

* * *

[Prosecutor]: And why are you so reluctant to share his name?
[Ms. Rockwell]: Because he had--he didn't have anything to do with this and just like I'm being blamed I don't want him to be blamed for anything or trying to be an accomplice to anything.

Cir.1983)) (internal quotation marks omitted). Relationships of "interest or affection"—such as a mother-son relationship—may suggest that a witness is "presumptively interested in the outcome" of the trial, but they do not necessarily render a witness "peculiarly available." *See Harris*, 458 Md. at 407; *see also Bereano*, 403 Md. at 744 ("The mere possibility that a witness personally may favor one side over the other does not make that witness peculiarly unavailable to the other side."); *Dansbury*, 193 Md. App. at 748 (finding the defendant's mother not peculiarly available when she was outside the courtroom during trial).

In *Harris*, the trial court had "relied *solely* on the fact that [the missing witness] was the mother of Mr. Harris" to find that she was peculiarly available to him. *Harris*, 458 Md. at 407 (emphasis added). In affirming the trial court, we had noted three additional facts to support that finding, but the Court of Appeals concluded that these additional facts either added little to the fact that the witness "was his mother" or were irrelevant because they were not known to the jury, and that some facts—such as the mother's willingness to cooperate with the police and consent to a search of her home—suggested that she "might *not* be peculiarly available to Mr. Harris." *Id.* at 408-09 (emphasis in original).

Here, Ms. Rockwell testified that Mr. Walter was her "close" friend, and that he had witnessed her being "choked" by Ms. Redgate and attacked by Ms. Orosco. But that was not the only evidence supporting a finding that he was peculiarly available to her.

As described above, she had refused to reveal his identity, and, until the trial, it appears that the State did not know his name.[4]

Unlike *Harris,* there is no evidence positively indicating that Mr. Walter (or Walton) was available to the State. Indeed, if Ms. Rockwell refused to disclose his name until required to do so during her testimony in the defense case, he was effectively "physically available only to [her]." *See Dansbury*, 193 Md. App. at 746; *see also Haas v. Kasnot*, 371 Pa. 580, 584-85 (Pa. 1952) (suggesting that where the defendant was capable of providing a witness and the plaintiff "had no knowledge whatever of any such person," the witness was peculiarly available to the defendant). We are persuaded that, without some further showing of why this witness, who, prior to trial, was known only to her, was not available to her, Mr. Walter was "peculiarly available" to Ms. Rockwell.

III. Advance Notice

To guard against "an erroneous inference being drawn," there must be "early notice from a party intending to make a missing witness argument or intending to request such an instruction." *Harris*, 458 Md. at 403 (quoting *Bereano*, 403 Md. at 752) (internal quotation marks omitted). The notice must be early enough to give the party against whom the inference would be drawn "an opportunity to call the allegedly missing witness or provide proof that the witness is not peculiarly available to that party." *Id.* at 405.

[4] In fact, at sentencing, the trial judge expressed skepticism that she had been truthful about his name: "You claimed you were concerned for your daughter who was with somebody that you referred to as Hollis Walter who I suspect is actually Hollis Walton who I know because I sentenced him for a matter."

Making a request for a missing witness instruction during a "jury instruction conference after both parties [have] rested" is obviously not sufficient. *Id.* at 407. On the other hand, a request during a pretrial conference may be adequate. *See id.* at 406. But there is no bright line between adequate and inadequate notice. *See State v. Malave*, 250 Conn. 722, 740, 737 A.2d 442, 452 (Conn. 1999);[5] *People v. Boyajian*, 539 N.Y.S.2d 683, 685 (N.Y. App. Div. 1989);[6] *but see Thomas v. United States*, 447 A.2d 52, 58 (D.C. 1982);[7] *State v. Francis*, 669 S.W.2d 85, 90 (Tenn. 1984).[8] It depends on the facts of each case.

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[5] In *Malave*, the Connecticut Supreme Court abandoned the missing witness rule in criminal cases but allowed counsel to make certain comments about the absence of a witness in closing argument. "Fairness, however, dictates that a party who intends to comment on the opposing party's failure to call a certain witness must so notify the court and the opposing party *in advance of closing arguments*." (Emphasis added).

[6] "[B]y waiting to raise the matter of the alleged 'missing' saleswoman until after both the trial and the charge were completed, [the defendant] failed to make his application in timely fashion[.]"

[7] "The risks inherent in missing witness argument also justify procedural safeguards designed to ensure that the foundational issues are addressed before possibly improper inferences are suggested to the jury. The onus is not on the party against whom an inference is made to object after the fact. Rather, it is the responsibility of the party proposing the inference to seek and obtain *advance permission* from the court. This process should not only require the moving party to substantiate the factual basis for the inference, but provide the opposing party a timely opportunity to counter the proponent's showing of elucidation and/or peculiar availability. *The court should then articulate the findings underlying the ruling.*" (Cleaned up). (Emphasis added).

In this case, the trial court ruled that "the evidence has been generated as to . . . the missing witness instruction based on the testimony that was presented in both the State as well as the Defense case."

[8] "[W]hen a party intends to argue the missing witness inference, they should inform the court at the *earliest opportunity* so that an evidentiary hearing, if necessary, can be held

Here, the prosecutor first requested the missing witness instruction before the start of the defense's case. In response, and even with an opportunity to do so, Ms. Rockwell neither called Mr. Walter, asked for a continuance to produce him, nor explained why he was not peculiarly available to her. Perhaps, there were good reasons not to call Mr. Walter,[9] but Ms. Rockwell's explanation that "she did not want him implicated" did not adequately explain why he was not available to her. *See Harris*, 458 Md. at 405. Based on her explanation for not calling him, we are persuaded that the notice requirement, as explicated in *Harris*, was satisfied.

CONCLUSION

Ms. Rockwell sees the missing witness rule as "in tension with the principle that the prosecution must prove each element of a charged offense beyond a reasonable doubt" by requiring a defendant to provide evidence or "suffer adverse consequences," in addition to undermining a defendant's right to confrontation under the Sixth Amendment of the United States Constitution. These are serious concerns. She recognizes, however, that *Harris* does not hold that a missing witness instruction in a criminal case is never

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(…continued)
to establish whether the requirements for laying a proper foundation . . . have been met." (Emphasis added).

[9] For example, a witness who will invoke a Fifth Amendment right not to incriminate himself is not peculiarly available to a party. *Harris*, 458 Md. at 404. The trial court's observation, in footnote 4, that he may have sentenced the missing witness may suggest serious impeachment issues. Or, perhaps, Ms. Rockwell simply had no knowledge of where the missing witness was.

permitted. We are persuaded that, on the facts of this case, granting the missing witness instruction was neither error nor an abuse of discretion.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.