Circuit Court for Baltimore City
Case No. 1162771010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 212

September Term, 2017

KURT FLETCHER

v.

STATE OF MARYLAND

Leahy,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: June 8, 2018

*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.

This appeal arises from a jury's conviction of appellant Kurt Fletcher for first-degree assault, robbery, reckless endangerment, and theft of property with a value less than $1,000 in the Circuit Court for Baltimore City. Fletcher was sentenced to twenty years' imprisonment for the charge of first-degree assault and fifteen-years' incarceration to be served concurrently for robbery, with all other counts merged. Fletcher raises two issues on appeal, both of which concern the trial court's decisions whether to give certain instructions to the jury. We have reworded the issues slightly as follows:

1. Whether the circuit court abused its discretion by refusing to give a cross-racial identification jury instruction requested by Fletcher.
2. Whether the circuit court abused its discretion by giving the jury a "flight" instruction, over Fletcher's objection.

BACKGROUND

Between 1:00 and 1:30 A.M. on July 22, 2016, two roommates, Lauren Hayden and Jessica Velkey, were walking home after visiting with friends at a bar in the Federal Hill area of Baltimore City. Hayden, who was about five feet and ten inches tall, and Velkey, who was around five feet tall, lived together in the area. Hayden testified that she had five or fewer drinks, and Velkey testified that she had approximately three or four drinks, throughout the course of the night. Velkey stated that she stopped drinking around 11:00 P.M. They each testified at trial that they left the bar around 1:00 A.M. with a friend named Nick earlier than their other friends, because they both had to work the next day. Nick left Hayden and Velkey as the group approached his residence. Hayden and Velkey continued walking down Ann Street towards their home and turned onto Bank Street. Soon after,

they each heard someone running towards them from behind. Velkey testified that a man grabbed Hayden, who was walking on Velkey's right side nearest to the street. Velkey stated that Hayden was carrying a purse on her right arm and that the man grabbed Hayden's arm with both hands and began pulling her towards the street. Hayden testified that the man had also grabbed her purse and that the straps of her purse were wrapped around her wrist. Both Velkey and Hayden began screaming at the man, and both testified that they yelled at him to take the purse. Velkey stated that she attempted to hold on to Hayden by grabbing her around the waist as the attacker pulled her away, but he overpowered both women and swung Hayden's body into the street, hitting her head against the back bumper of a parked car. Velkey recalled that Hayden appeared badly injured at that point, but the man continued to drag Hayden across the street.

Velkey testified that she began yelling at the attacker, "You're killing her!" but he gave no response. She stated that the man continued to drag Hayden's body, causing her head to hit the pavement multiple times and the skin to be scraped from Hayden's knees. According to Velkey, the attacker then picked up Hayden's body and "slammed" her head down onto the pavement. He then took Hayden's purse and left. It is unclear how long the attack lasted, but Velkey estimated anywhere from ten seconds to two minutes. Velkey stated that the man never spoke during the attack and did not slow down or react to their screams. When the attack concluded, Velkey ran to assist Hayden, who was motionless, unresponsive, and badly bleeding. Several people who lived on the street came out of their homes and a paramedic who was passing by stopped to help. Soon after, an ambulance

arrived to take Hayden to the hospital, where she subsequently underwent brain surgery due to two fractures to her skull and bleeding on her brain. After surgery, Hayden endured a long recovery and was unable to return to work full-time for several months.

On the night of the attack, as paramedics prepared to leave with Hayden, the responding police officer asked Velkey for a description of the attacker in order to begin searching the area immediately. At that point, Velkey stated that the attacker was a black male in his twenties. The detective assigned to the case called Velkey the next day for a more detailed description, and soon after, the detective met with Velkey at her and Hayden's house to show her footage taken from street cameras near the scene of the crime. None of the street cameras caught the attack, itself; however, in one video, Velkey identified herself, Hayden, and their friend, Nick, walking on the sidewalk and Fletcher walking behind them prior to the attack. In another video, she identified Fletcher getting into a parked vehicle with Hayden's purse after the attack. A few days later, Velkey went to the police station and gave detectives a taped statement. During the interview with detectives, she described the attacker as being approximately five feet and eleven inches tall and 180 to 200 pounds, with short hair and a medium complexion.

Around the time of her taped statement, Velkey saw a media release online, which included footage of a man in a Sunoco convenience store whom Velkey recognized as the attacker by his clothes and stature, although she noted that the video was blurry. The detective who obtained the footage from the Sunoco store testified that the footage was of a man who used Hayden's debit card on the night of the robbery. After one of the detectives

put together a flyer with images from the Sunoco store footage and sent it to other officers, an officer observed a man, who he subsequently identified as Fletcher, a few blocks away from the scene of the crime and noticed that he matched the description from the flyer, including that he was wearing a white T-shirt and had a goatee. The officer got Fletcher's name and took his photograph and sent it to the detective, who then put together an array of six photos for Velkey to examine. On September 23, 2016, another officer showed the photo array to Velkey, informing her that the suspect may or may not be in the array. Velkey identified Fletcher as the attacker and he was arrested and charged.

Hayden could not identify Fletcher as her attacker and stated at trial that she did not remember many details from the night of the attack after hitting her head. Hayden testified, however, that she recalled the attacker as being around her height and slender, "wearing a white shirt and camo shorts that that looked like they were probably gray camo, but it was dark." The jury found Fletcher guilty of first-degree assault, reckless endangerment, and theft under $1,000. This appeal followed.

DISCUSSION

I. The Circuit Court Did Not Abuse Its Discretion By Excluding Fletcher's Proposed Cross-Racial Identification Instruction.

Fletcher, who is African-American, argues on appeal that the circuit court abused its discretion by refusing to give his proposed cross-racial identification jury instruction. The Court of Appeals explained in *Smith v. State* that "a cross-racial identification occurs when an eyewitness of one race is asked to identify a particular individual of another race." 388 Md. 468, 478 (2005). Along with other factors, the "cross-race effect," as social

psychologists have termed it, is the phenomenon of reduced eyewitness identification accuracy among witnesses attempting to identify persons of a different race. *See id* at 478-79 (reviewing research findings published during a fifty-year period); *see also* Chad S. Dodson & David G. Dobolyi, *Confidence and Eyewitness Identifications: The Cross-Race Effect, Decision Time and Accuracy*, 30 APPLIED COGN. PSYCH. 113 (2016) (Citations omitted) (reviewing more recent socio-psychological research suggesting that "[i]ndividuals are worse at recognizing previously encountered cross-race than same-race faces").

The majority in *Smith* recognized that social scientists "disagree on the extent to which [cross-race] bias affects eyewitness identification due to variations in the statistical data showing a cross-race effect." 388 Md. at 483. However, the Court explained, "[o]verall, there is strong consensus among researchers conducting both laboratory and field studies on cross-racial identification that some witnesses are more likely to misidentify members of other races than their own." *Id.* at 482 (Citations omitted). The results of this research suggest that the overall impairment in cross-racial identifications is most prominent among white persons attempting to identify previously-encountered people of another race.[1] *Id.* at 481-82; *see also* John P. Wilson, Kurt Hugenberg & Michael J. Bernstein, *The Cross-Race Effect and Eyewitness Identification: How to Improve*

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[1] The Court in *Smith* noted that social scientists "have disagreed on whether cross-racial impairment affects all races," but that the results of at least four social and psychological studies have suggested that, generally, black persons have less difficulty "recognizing individuals from other races" than white persons. *Id.* at 480 (Citations omitted).

Recognition and Reduce Decision Errors in Eyewitness Situations, 7 SOC. ISSUES & POL. REV. 83 (2013) ("Though the strength of the effect shows some cross-group variability, the existence of the CRE itself is quite robust across participant populations."). Although the Court of Appeals in *Smith* provided an extensive review of the findings of research studying the existence of the cross-race effect preceding the opinion, the Court did not address the propriety of the trial court's inclusion of an instruction to the jury addressing potential impairments involved in cross-racial identifications. *See Smith*, 388 Md. at 470.

Citing *Smith* as support, Fletcher's counsel proposed the following jury instruction on cross-racial identification:

> In this case, the identifying witness is of a different race than the defendant. In the experience of many, it is more difficult to identify members of a different race than members of one's own. Psychological studies support this impression. In addition, laboratory studies reveal that even people with no prejudice against other races and substantial contact with persons of other races still experience difficulty in accurately identifying members [of] a different race. Quite often people do not recognize this difficulty in themselves. You should consider these facts in evaluating the witness's testimony, but you must also consider whether there are other factors present in this case that overcome any such difficulty of identification.

We review the trial court's decision to exclude an instruction requested by a party under an abuse of discretion standard. *See Cost v. State*, 417 Md. 360, 369 (2010) (Citation omitted); *see also Gunning v. State*, 347 Md. 332, 348 (1997) (recognizing that "a[] [general] identification instruction may be appropriate and necessary in certain instances, but the matter is addressed to the sound discretion of the trial judge"). As we have

previously explained, "[t]he general rule regarding jury instructions is that the trial judge 'has a duty, upon request in a criminal case, to instruct the jury on the applicable law.'" *Janey v. State*, 166 Md. App. 645, 654 (2006), *cert. denied*, 392 Md. 725 (2006), (quoting *Gunning*, 347 Md. at 347). Maryland Rule 4-325, governing the trial court's instructions to the jury, provides, in relevant part, the following:

> (b) The parties may file written requests for instructions at or before the close of the evidence and shall do so at any time fixed by the court.
>
> (c) The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. [. . .] The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.
>
> (d) In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.

Md. Rule 4-325(b)-(d).

Pursuant to subsection (c), the trial court must grant a party's request to give a particular instruction when it satisfies three criteria: The content of the instruction is (1) a correct statement of law; (2) applicable to the facts of the case as generated by the evidence; and (3) not fairly covered by other instructions actually given. *See Dickey v. State*, 404 Md. 187, 197-98 (2008). To be applicable to the facts, there must be "some evidence" that the instruction is warranted. *See State v. Martin*, 329 Md. 351, 358 (1993). The Court of Appeals in *Fleming v. State* explained:

> The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights and adequately covered the theory of the defense.

373 Md. 426, 433 (2003).

In support of his argument that the trial court abused its discretion in refusing to give Fletcher's proposed instruction, he cites primarily three opinions in which our appellate courts have discussed or addressed the issue of cross-racial identification instructions. In the first case, we held that the trial court did not abuse its discretion in refusing to give a cross-racial identification instruction where the defendant presented no evidence at trial "that race played a part in the identification." *Smith and Mack v. State*, 158 Md. App. 673, 704 (2004). The Court of Appeals, however, reversed our decision on separate grounds, holding that "the trial court erred in refusing to allow defense counsel to comment on cross-racial identification in closing argument." *Smith*, *supra*, 388 Md. at 489. The Court in *Smith* did not reach the issue of whether the trial court abused its discretion by refusing to give the instruction, however. *See id.* at 478 ("Because we hold that under the circumstances of this case, the trial judge erred in precluding the defendants from discussing cross-racial identification in their closing arguments and reverse the defendants' convictions, we do not reach the jury instruction question.").

In *Smith*, the defendant and the eyewitness were of two different races and, importantly, the eyewitness's testimony "was anchored in her enhanced ability to identify

faces." *Id.* at 488-89. Under these circumstances, and because the eyewitness's testimony was the only significant evidence put forth by the State, the Court held that "defense counsel should have been allowed to argue the difficulties of cross-racial identification in closing argument" and "that her identification should not be accorded the weight that she credited to her own ability to identify them." *Id.* at 488-89.[2] Rather than require trial courts to give a cross-racial identification instruction under any particular set of circumstances, the holding in *Smith* reiterated the well-established principle that

> during closing argument, counsel may "state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence," *Henry v. State*, 324 Md. 204, 230, 596 A.2d 1024, 1037 (1991), [and] argue matters of common knowledge . . . .

Smith, 388 Md. at 488 (Citation omitted).

We examined the Court of Appeals' holding in *Smith* one year later in *Janey*. *See* 166 Md. App. at 659-667. There, the eyewitness "candidly admitted that he was not good at identifying African Americans." *Id.* at 664. We concluded that the Court of Appeals' opinion in *Smith* "did not impose any new duty upon trial judges to give jury instructions addressing cross-racial identification." *Id* at 662-63. In *Janey*, therefore, we reaffirmed that the decision whether to give a proposed cross-racial identification jury

[2] Although the Court in *Smith* did not address cross-racial identification jury instructions, specifically, we note that there is a significant difference between the "wide latitude" afforded to counsel during closing argument to "explain or attack all the evidence in the case," *see id* at 488 (quoting *Trimble v. State*, 300 Md. 387, 405 (1984)), and a trial court's duty to ensure each instruction to the jury is "a correct statement of the law." *See Dickey*, *supra*, 404 Md. at 197-98.

instruction remains within the trial court's discretion, and that the court's decision should be based on the facts and circumstances of the particular case. *see id.* at 661. We plainly stated in *Janey* that our decision "should not be interpreted as holding that it is never appropriate to give such an instruction." *Id.* at 667.[3] Our conclusion in *Janey* that a cross-racial identification instruction may be appropriate in some circumstances, however, did not render a cross-racial identification instruction mandatory under other circumstances.

Finally, in *Tucker v. State*, 407 Md. 368, 382 (2009), the Court of Appeals addressed the issue of the particular language used in a cross-racial identification instruction actually given. The decision in *Tucker* was based on only one issue, which was whether a particular statement included in the instruction -- "There is no particular reason to think that cross-racial identification applies to eyewitnesses in actual criminal cases" -- was a correct statement of law. *Id.* at 380. The State argued that it was a correct statement of law, based on *Smith*, 388 Md. at 484. The State's reliance on *Smith* apparently referred to the following portion of the opinion, in which the Court discussed research findings related to the cross-race effect:

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[3] Indeed, in a concurring opinion, Judge Davis opined:

> [U]ntil such time as the Court of Appeals speaks to the issue, in the rare case where there is a confluence of the difficulty in identifying persons of another race and where the eyewitness identification is the only evidence of criminal agency, I believe an instruction, as well as leave to present closing argument on the issue, is appropriate.

Id. at 670-71 (Davis, J. concurring).

> Proponents of the studies argue that there is "no particular reason to think that the other-race effect . . . does not apply [to] eyewitnesses in actual criminal cases,". . . whereas others contend that studies on cross-racial identification "bear little resemblance to real-life crimes."

Id. at 484 (quoting Deborah Bartolomey, *Cross-Racial Identification Testimony and What Not To Do About It*, 7 PSYCH. PUB. POL'Y & LAW 247, 249 (March 2001)). [4]

Contrary to the *Smith* Court's thorough survey of research on cross-racial identifications, the language incorporated into the instruction implied that no scientific studies supported the conclusion that cross-racial bias may have an adverse effect on the accuracy of identification advocacy. As the Court in *Tucker* recognized, the last sentence of the quote from *Smith* "suggest[ed] that there are two sides to the issue of cross-race effect when real crimes, as opposed to laboratory situations, are involved." *Tucker*, 407 Md. at 381-82. Further, the Court noted that "[w]hen the State offered the sentence, . . . it was only providing one part, one hypothesis, from the dichotomy of theories that were explained." *Id.* at 382. The Court held, therefore, that "[t]he proffer was an inaccurate statement of the law, and, as a result, . . . it was error for the trial judge to have given the instruction requested by the State." *Id.* The Court in *Tucker* did not, however, address "whether the facts of the trial generated the need for a cross-racial identification jury

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[4] The Court in *Tucker* emphasized the difference between the *Smith* Court's discussion of the research and the line added by the trial court to its instruction seemingly quoting from *Smith* by italicizing and underlining the significant distinction: "*Proponents of the studies argue that there is "no particular reason to think that the other-race effect . . . <u>does not</u> apply [to] eyewitnesses in actual criminal cases . . . .*" *Tucker*, 407 Md. at 381 (quoting *Smith*, 388 Md. at 484).

instruction" or whether any particular circumstances require the trial court to give some version of a cross-racial identification instruction. *See id.* at 378.

In this case, prior to instructing the jury, the court engaged in a lengthy discussion with the parties regarding Fletcher's proposed instruction. Fletcher's counsel pointed to *Smith* as support for her argument that the cross-racial instruction should be given. The trial court responded with the following rationale:

> Well, let's clear *Smith* right away. [. . .] I've read [*Janey*] and I've read *Tucker*. Okay. So you're correct that the Court didn't get to whether the judge should have given the instruction because it already decided that the Court had erred in not letting the defense argue cross-racial identification in closing. That is my intent in this case. The way I see it, there's no evidence. You didn't ask Ms. Velkey any questions concerning her ability to make cross-racial identifications as is -- as was done in the Tucker case.
>
> This is more or less just an inference that the jury may be able to conclude, as I find it, from her testimony of that she -- well, she testified at the trial that he was less than two feet from her. She . . . wrote on the array that he was within one foot from her during the attack. She put a lot of emphasis on his face. Although there were times when she said she wasn't looking at his face. But she put enough emphasis on the face, specifically the eyes.
>
> Now, she said, when she wrote on the photographic array, that immediately when she . . . looked at the eyes she knew it was him. She testified at trial that when she saw the picture, you know, which would include his eyes, that she felt it in her chest that it was him.
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> So like in *Smith*, the Court ruled the way it did because that victim, again, focused, put a lot of emphasis on the face. And [said] that she was very good with faces. She looked for distinctive features and was good with posture. So the way I

> read the case law, of the instruction, had you asked her any questions like in *Tucker*, about her ability to make identifications based on race, cross-racial identification. In *Tucker*, . . . [t]he question was "How confident are you in your ability to make identifications of members of other races, and specifically how many African Americans lived in your neighborhood?" [. . .]
>
> So you didn't get into any of that with her . . . [a]nd you very well could have. Had you done that I might have been . . . more inclined to give the instruction. But as in *Smith*, I think there is enough based on her testimony about how close she was to the person and the video . . . [a]nd you should be allowed to argue it in closing.

Fletcher challenges the trial court's ruling by arguing that "such an instruction is appropriate when, as here, the only identifying witness is of a different race than the defendant, no other evidence sufficiently corroborates the identification, *and* identity is the *sole issue* at trial." The Court in *Tucker* held that, when such an instruction is given, it is inaccurate to indicate to the jury that findings from controlled studies suggesting a lower accuracy among cross-racial identifications do not apply to actual criminal cases, because that assertion did not accurately reflect the debate among social researchers.[5] *See Tucker*, 407 Md. at 382. In *Janey*, we held that the trial court was not required to give a cross-racial identification instruction, even though there may be instances in which it is "appropriate to give such an instruction." 166 Md. App. at 667. Our case law, however,

[5] Indeed, even by the time of the decision in *Smith*, field studies had produced results mirroring those of controlled laboratory studies. *See Smith*, *supra*, 388 Md. at 482.

does not establish any particular circumstances in which a trial court must give a cross-racial identification instruction.

Even so, the instruction proffered by Fletcher stated that "laboratory studies reveal that even people with no prejudice against other races . . . still experience difficulty in accurately identifying members [of] a different race." The *Smith* opinion, and the research the Court reviewed therein, however, never insinuated such a definitive assertion. Moreover, similar to the instruction in *Tucker*, Fletcher's instruction included, inaccurately, only one side of the debate among researchers regarding the certainty of the implications that may be drawn from studies in controlled laboratory studies. *See Tucker*, *supra*, 407 Md. at 382. ("[The State] was only providing one part, one hypothesis, from the dichotomy of theories that were explained."). For that reason, the proposed instruction was not an accurate statement of the law in this area.

Additionally, as the trial court emphasized in its reasoning for denying the instruction, the cross-race effect on the accuracy of the witness identification was not raised until Fletcher's counsel requested the cross-racial identification instruction. *See Dickey*, 404 Md. at 197-198 (interpreting Md. Rule 4-325(c) as requiring the trial court to give a requested instruction to the jury when the proposed instruction is "applicable to the facts of the case"). As we explained above, to be applicable to the facts, there must be "some evidence" that the instruction is warranted. *See Martin*, *supra*, 329 Md. at 358; *see also Fleming*, 373 Md. at 433 ("Reversal is not required where the jury instructions, taken as a

whole, sufficiently protect the defendant's rights and *adequately covered the theory of the defense*.") (Emphasis added).

What is clear from the Court of Appeals' holding in *Smith* is that "it is reversible error for a trial court to prevent a defendant from attacking the prosecution's evidence during closing argument." *Janey*, 166 Md. App. at 663. Although Fletcher's counsel never directly raised the potential influence of race on the accuracy of the identification at trial, the trial court expressly permitted Fletcher's counsel to argue during closing argument that the identification may have been impaired in this way because of the witness's confidence in her ability to recall the attacker's face. Under these circumstances, we hold that the trial court did not abuse its discretion by refusing to give Fletcher's requested instruction.

II. The Trial Court's Error in Including the Pattern "Flight" Instruction Was Harmless Error.

When the court discussed with the parties its instructions to the jury, Fletcher's counsel objected to the inclusion of a pattern "flight" instruction in the following exchange:

> [DEFENSE COUNSEL]: Yes, Your Honor. I would object to the flight instruction. I don't see how that's relevant here.
>
> THE COURT: Well, there was testimony that immediately, from Ms. Velkey and the video showed it, that after whoever, whomever had stole the purse, they immediately got into a car and left the scene.
>
> [DEFENSE COUNSEL]: But the whole issue is who did it? It's not --
>
> THE COURT: Well, that's the whole point. But that doesn't excuse the fact that there was flight.

> [DEFENSE COUNSEL]: All right. Well, note my objection to that instruction.
>
> THE COURT: Okay.

Over Fletcher's counsel's objection, the court included the following "flight instruction":

> A person's flight immediately after the commission of a crime or after having been accused of committing a crime is not enough by itself to establish guilt. But it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

As we have already explained, the content of the trial court's instructions to the jury must be applicable to the facts of the case as generated by the evidence. *See Dickey*, *supra*, 404 Md. at 197-98. The purpose of giving a flight instruction is to prevent the jury from attributing too much weight to evidence implying flight, and therefore, the instruction must "attempt[] to insure that the jury does not imbue evidence of flight with more weight than it deserves." *Thompson v. State*, 393 Md. 291, 307 (2006). A minority of states do not permit the giving of a flight instruction. *See id.* at 309-10 (reviewing case law from a number of states barring flight instructions); *see also Thomas v. State*, 372 Md. 342, 353 (2002) (Citations omitted) ("Although evidence of consciousness of guilt has long been allowed . . . , courts [around the country] have nonetheless recognized the danger with respect to this category of evidence and increasingly have become cautious in evaluating it."). Maryland, however, permits the use of a flight instruction in appropriate

circumstances. *See Thompson*, 393 Md. at 310. One such instance in which it is "particularly appropriate [is] in circumstances where a defendant places *his or her* mental status at the time that the crime was committed in issue." *Id.* at 308 (Emphasis added).

We review the trial court's decision to include a flight instruction for abuse of discretion. *See Hallowell v. State*, 235 Md. App. 484, 510 (2018) (citing *Thompson*, 393 Md. at 311). In Maryland, a court may give a flight instruction only when certain inferences may reasonably be reached. As the Court in *Thompson* explained,

> In *Thomas v. State,* 372 Md. 342, 812 A.2d 1050 (2002), we adopted the four-prong test set forth by the United States Court of Appeals for the Fifth Circuit in *United States v. Myers,* 550 F.2d 1036 (5th Cir. 1977), with respect to the probative value of evidence indicating consciousness of guilt and the rubric for assessing the propriety of jury instructions based on such evidence.

Thompson, 393 Md. at 311. The evidence must be "sufficient to furnish reasonable support for all four of the necessary inferences." *Id.* at 312 (quoting *Myers*, 550 F.2d at 1050). These four inferences are:

> [1] [T]hat the behavior *of the defendant* suggests flight; [2] that the flight suggests a consciousness of guilt; [3] that the consciousness of guilt is related to the crime charged or a closely related crime; and [4] that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Id. at 312 (quoting *Myers*, 550 F.2d at 1049) (Emphasis added) (Internal quotation marks omitted); *see also Page v. State*, 222 Md. App. 648, 669 (2015) (Citation omitted) (reiterating that "a flight instruction is properly warranted when four inferences may reasonably be drawn from the evidence"). We view the evidence in the light most favorable

to the State to determine whether there was evidence sufficient to support all four inferences. *See Page*, 222 Md. App. at 668-69 (citing *Hoerauf v. State*, 178 Md. App. 292, 326 (2008)). As we have said, "[t]he proper inquiry is whether the evidence could support an inference that *the defendant's* conduct demonstrates a consciousness of guilt." *Jones v. State*, 213 Md. App. 483, 509 (2013) (Emphasis added) (quoting *Thomas v. State,* 168 Md. App. 682, 712 (2006), *aff'd,* 397 Md. 557 (2007)).

Fletcher argues on appeal that the trial court abused its discretion by giving the flight instruction, because the identity of the attacker was the sole issue before the jury. The State argues that the instruction was proper because "a requested instruction must be given if it is a correct statement of law, it is applicable to the case, and its contents are not fairly covered elsewhere in the instructions given."[6] Whether there was substantial evidence to support each of the four inferences outlined in *Thomas*, however, is the basis of our determination of whether the flight instruction was "applicable to the case." Although the State points out Fletcher's failure to address the four prong test adopted in *Thomas*, neither

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[6] The State cites to *Dickey* for this assertion, which we assume refers to the Court's note that

> Rule 4–325(c) has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.

Dickey, 404 Md. at 197–98.

does the State provide any support for its argument that the evidence presented at trial satisfied the four necessary inferences for a flight instruction to be applicable.

The sole issue at trial was the identity of Hayden's attacker, who subsequently left the scene when the attack was over. The sole identifying witness testified that the attacker departed the scene of the crime immediately after the attack. Critically, any evidence presented at trial that would tend to support the first of the four necessary inferences -- that Fletcher's behavior suggested "flight" – was dependent on the jury believing Velkey's testimony that Fletcher was the attacker. The defense did not dispute at trial that the attacker was the same person who fled the scene of the crime immediately after the attack.

Our prior opinions on this topic typically address circumstances in which the defendant did not dispute his or her departure from the scene, and instead, argued that the behavior did not constitute "flight." *See Hallowell*, 235 Md. App. at 512 (discussing whether the evidence supported an inference that the defendant's conduct constituted "flight" where he told firefighters someone needed help, did not identify himself or lead them to the injured victim in a parked vehicle, and "did not remain at the scene to find out whether his companion would survive his injuries"); *Page*, 222 Md. App. at 667 (holding the trial court did not abuse its discretion by giving a flight instruction where appellant's argument of error was that the evidence established only that his departure from the scene was "unremarkable"); *Jones*, 213 Md. App. at 513 (holding the trial court's flight instruction was appropriate where the officer testified that, when he attempted to apprehend

appellant on a street away from the scene of the crime, appellant pointed a gun at the officer and ran away, and other witnesses corroborated his testimony).

We cannot find any case law in Maryland addressing the propriety of a flight instruction where the sole issue at trial is the identity of the perpetrator of the crime and there is no dispute that the perpetrator is the same person who allegedly departed the scene immediately after the crime. The Supreme Court of Massachusetts, however, in *Commonwealth v. Groce*, 517 N.E.2d 1297 (1988) and *Commonwealth v. Pina*, 717 N.E.2d 1005 (1999), addressed similar situations. In *Groce*, "the robber fled from the scene of the crime after obtaining possession of [the victim's] handbag." 517 N.E.2d at 1300. The Court explained that, "[t]ypically, the issue of the appropriateness of such an instruction arises in the context of evidence of conduct[] *unquestionably attributable to the defendant on trial* . . . ." *Id.* (Emphasis added). The Court in *Groce* emphasized that there was "no dispute that the same individual committed the offense and fled from the scene." *Id.* Because the only issue at trial was the robber's identity, "[t]he evidence of the assailant's flight with the fruits of the robbery did not shed any light on the issue of identification; it did not give rise to a reasonable inference that the defendant was the assailant." *Id.* Similarly, in *Pina*, the perpetrator shot the victim four times at close range and immediately fled the scene. 717 N.E.2d at 1011. The defense was misidentification by the Commonwealth's eyewitnesses, who were bystanders at the scene of the shooting. There, the Court reiterated that "there is no rationale for a consciousness of guilt instruction where the only contested issue is identification and there is no dispute that the person fleeing the scene of the crime

was the same as the assailant." *Id.* For that reason, the court concluded that "[i]t would have been best had the judge not given the consciousness of guilt charge." *Id.*

In this case, there was no dispute that the identities of the attacker and the person fleeing the scene were one in the same. The identity of the person fleeing immediately after the attack, however, remained as uncertain as the identity of the attacker. Both conclusions depended on the jury's evaluation of an eyewitness's identification of Fletcher as the attacker. In other words, the inference that Fletcher's behavior indicated "flight" required a tautological inference that Fletcher was the attacker, which was the sole issue at trial. The trial court's flight instruction, therefore, was not helpful to the jury's determination of whether Fletcher was the attacker. When viewed in a light most favorable to the State, the facts did not satisfy the first necessary inference, which inherently assumes that the behavior evidencing flight was "of the defendant." *Thompson*, 393 Md. at 312. For these reasons, we hold that a flight instruction was not appropriate in this case. Our next question, therefore, is whether the trial court's error in giving the flight instruction was harmless.

An error is harmless "if a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *State v. Logan*, 394 Md. 378, 388 (2006) (quoting *Dorsey v. State,* 276 Md. 638, 659, 350 A.2d 665, 678 (1976)) (internal quotation marks omitted). Our appellate courts "will not overturn a judgment, even where error is found, unless it is

likely that the proponent of the error was injured." *Ingram v. State*, 427 Md. 717, 733 (2012) (citing *Grandison v. State*, 341 Md. 175, 225 (1995)).

In this case, immediately after providing the flight instruction, the court instructed the jury that "[t]he burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the Defendant was the person who committed it." Evidence of the attacker's flight presented at trial included the street cameras that captured a man following Hayden and Velkey prior to the attack and potentially the same man getting into a parked vehicle with what may have been Velkey's purse, as well as a convenience store video in which a man used Hayden's debit card soon after the attack. Velkey's testimony regarding the attack and the video evidence would support the finding that the attacker's flight was part of a continuous course of conduct following the attack. The jury's consideration of evidence of the attacker's flight, therefore, would have been harmless, because the guilt of the attacker was certain and video evidence supported Velkey's testimony that the attacker fled the scene after the attack. It was clear throughout the trial, however, that the identity of the attacker was in question and the ultimate issue the jury was asked to decide.

Additionally, here, the court's flight instruction followed the pattern instruction,[7] informing the jury that "[a] person's flight immediately after the commission of a crime . .

[7] The trial court's flight instruction followed the pattern flight instruction in the Maryland Criminal Pattern Jury Instructions ("MPJI-Cr"). *See* MPJI-Cr 3:24 – *Flight or Concealment of Defendant* (2017).

. may be considered . . . as evidence of guilt." The court proceeded to instruct the jury on several factors it should consider in determining the credibility of the eyewitness's identification. Unlike in *Pina*, where the Massachusetts court found the trial court's error reversible, the language of the instruction in this case referred only to "[a] person's flight," rather than "the defendant's." The trial court's instructions made clear that the jury's foremost task was to determine whether Fletcher was the attacker, and the flight instruction was not unduly suggestive that Fletcher, himself, fled the scene of the crime. Most importantly, the trial court made clear that the jury's task was to determine the identity of the attacker in Velkey's account of the robbery, the street camera footage near the scene, and the convenience store video in which a person is recorded using Velkey's debit card. Without finding that Fletcher was the attacker, the jury could not have reached the issue of flight as evidence of Fletcher's consciousness of guilt. Based on these circumstances, any influence the flight instruction could have had on the jury's determination was, therefore, harmless. Accordingly, we decline to reverse Fletcher's conviction.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.