Circuit Court for Baltimore City
Case No. 115204001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 291

September Term, 2020

KEYON JACKSON

v.

STATE OF MARYLAND

Friedman,
Ripken,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: November 1, 2021

In April 2016, a jury in the Circuit Court for Baltimore City convicted appellant, Keyon Jackson, of first-degree murder, second-degree murder, conspiracy to commit murder, and use of a firearm in the commission of a crime of violence.[1] The trial court sentenced Jackson to a total of life plus 20 years in prison, the first five years without the possibility of parole, after which he filed a notice of appeal.

By mandate issued March 1, 2018, this Court dismissed Jackson's appeal for failure to file a brief. *See Jackson v. State*, No. 1371, September Term, 2017. In October 2018, Jackson filed a petition for post-conviction relief. The circuit court granted the petition and permitted Jackson to file a belated appeal by June 1, 2020. Jackson timely filed his notice of appeal on April 9, 2020.

Jackson asks us to consider whether the trial court erred by instructing the jury on flight. For the reasons that follow, we affirm the trial court's judgments.

FACTS AND LEGAL PROCEEDINGS

On the afternoon of July 2, 2015, Bernadette Tanzymore was in her home in the 2700 block of Auchentoroly Terrace, Baltimore City, when her dog started barking incessantly. As Tanzymore looked out her window to see what might be causing the dog to bark, she observed a Black man wearing a short-sleeved white shirt and black pants kneeling behind a large pile of dirt and stones in a construction zone in Druid Hill Park, directly across the street from her house. When someone exited the public works building

[1] Jackson was tried with co-defendant Davon Vennie. At the close of the State's case-in-chief, the trial court granted Vennie's motion for judgment of acquittal as to all charges.

at the corner of Fulton Street and Druid Hill Avenue and walked toward him, the man left the construction site and entered the rear driver's side of a white sedan that was parked on Auchentoroly Terrace. Although she was unsure how many people were already in the car, Tanzymore saw someone in the driver's seat.

Approximately 15 to 20 minutes later, Tanzymore's dog again started barking, so Tanzymore returned to her window to see that the same man had returned to his kneeling position behind the dirt pile at the construction site. She then saw the man walk over to a construction worker who was operating a Bobcat—later identified as Nathaniel Wheeler, Jr.—and shoot him.[2] The shooter returned to the white car, and it drove off.

The other construction workers on Wheeler's team—Ted Wood, Richard Charney, and Maurice Clark—heard and/or witnessed the shooting and saw the shooter, whom they described as a Black man wearing a white shirt and dark pants, run and enter a white car a few feet away; none of the men saw the shooter's face.[3] The getaway car left the scene heading southbound on Auchentoroly Terrace.

Coincidentally, Baltimore City Police Sergeant Hillary Davis was near the scene at the time of the shooting. From her marked patrol vehicle, Davis heard the gunshots and called for backup. As she turned her car around seconds later, she observed a white Acura sedan with "very, very, dark tinted windows" speeding away from Auchentoroly Terrace

[2] Wheeler was pronounced dead at the scene. The assistant medical examiner determined that he had been shot six times.

[3] Clark testified that the shooter was wearing a "dark baseball cap with a team on it," possibly blue in color with white lettering. No other witness mentioned a cap.

so fast it nearly collided with her at a stop sign. The Acura entered Interstate 83, the Jones Falls Expressway ("I-83"), heading northbound. Multiple police units undertook a high-speed chase of the Acura, including the Baltimore City Police Foxtrot helicopter, which only lost sight of the Acura for seconds as the car crossed under overpasses.

As Detective William Nickels joined the chase of the white Acura, he observed a red Washington Nationals hat and a blue Cowboys cap with white lettering on the I-83 exit ramp to Falls Road. Told by Sergeant Davis that they may have some significance in the shooting, Williams photographed and recovered the caps.

From the Foxtrot helicopter, Agent Patrick Wheeler[4] observed two Black males jump out the passenger side of the Acura near the intersection of Ash Street and Union Avenue in the Hampden neighborhood of Baltimore City and flee the scene on foot. A short time later, Foxtrot pilot Floyd Werner observed a third suspect exit the driver's side of the Acura and walk to a nearby house.

The two passengers—later identified as Jackson and Vennie—were apprehended by the police, Jackson in the back yard of a neighborhood house, and Vennie as he walked on the sidewalk on Union Avenue.[5] Both men were wearing white shirts and dark pants. Sergeant Wheeler observed that Vennie was "incredibly clean," with no dirt on him or on his white shoes, which "[l]ook[ed] like they just came out of a box." Jackson, on the other

[4] By the time of trial, Sergeant Hillary Davis and Agent Patrick Wheeler had married, and Sergeant Davis was known as Sergeant Wheeler. Neither officer was related to the victim.

[5] The driver of the Acura, who was described as a Black male wearing a gray tee shirt and black pants or shorts, was not apprehended or identified.

hand, had a "large smudge of dirt on his white shirt," and the soles of his shoes showed dirt and stones.

Crime lab technician Jennifer Anderson processed the crime scene on Auchentoroly Terrace and described it as "[m]uddy. . .just piles of dirt." Anderson recovered nine fired .40 caliber cartridge cases, along with one additional projectile and four additional metal fragments. She also collected soil samples from the construction site.

On July 3, 2015, a loaded .40 caliber Glock 23 firearm was recovered from the asphalt in front of an abandoned pumping station located at 901 Wyman Park Drive, right by the entrance ramp to northbound I-83, along the path of the car chase the day before. The gun had some damage to it, as if it had "fall[en] from a great distance." The State's firearms expert concluded that all nine fired cartridge cases recovered from the Auchentoroly Terrace crime scene had been fired from that firearm.

The State's geologic materials expert examined the Acura's rear driver's side floor mat (the only mat with dirt on it) and the shoes Jackson was wearing when he was arrested on July 2, 2015, to compare soil found thereon to soil samples obtained from the construction site at the scene of the shooting. The soil embedded in Jackson's shoes "was indistinguishable" from the soil collected from the 2700 block of Auchentoroly Terrace, so the expert could not "eliminate the 2700 block as being a potential source of this material." The material on the car's floor mat was mixed, so the expert was not able to make a scientific determination of the source of the material.

The State's theory of the case was that Jackson was the shooter and that he had conspired with Vennie and/or the driver of the Acura to commit the murder of Wheeler.

The defense focused on the lack of direct evidence of Jackson's involvement and sought to create reasonable doubt by suggesting that one of at least two other men who were known to have been in the Acura in the weeks preceding Wheeler's murder may have been the shooter but bailed out of the car, unseen by the police, during the chase on I-83.

DISCUSSION

Jackson contends that the trial court erred in instructing the jury, over defense objection, that his flight from the scene of the shooting could be considered as evidence of his guilt. Because the sole issue in dispute was the identification of the shooter, Jackson continues, the trial court should not have given the instruction, as the State had not adduced evidence that he was anything other than "a mere passenger" in the Acura when it left Auchentoroly Terrace.

Although Jackson acknowledges that "there was no dispute that the shooter committed murder[,] any consciousness of guilt on the part of the shooter, as evidenced by the shooter fleeing the scene, was irrelevant to whether the shooter was Appellant." Conceding that this Court recently held, in *Wright v. State*, 247 Md. App. 216, *cert. granted*, 471 Md. 265 (2020) ("*Wright I*"), that it was not error to give a flight instruction when the sole issue in dispute was the identification of the fleeing offender, Jackson nonetheless urges us to reverse, or at least to hold the matter in abeyance until the Court of Appeals issues its decision in *Wright*.

After Jackson and the State filed their briefs, the Court of Appeals issued its opinion in *Wright v. State*, 474 Md. 467 (2021) ("*Wright II*"), which affirmed our decision in *Wright I*. The State withdrew "those parts of its brief that relied on this Court's earlier decision in

Wright v. State, 247 Md. App. 216 (2020)" but "otherwise maintain[ed] that this Court should affirm the judgment[s]." We consider Jackson's claim in light of the Court of Appeals' decision in *Wright II* and affirm.

Here, in discussing the inclusion of the flight instruction with regard to Jackson, the prosecutor argued that "once the car is stopped, Mr. Jackson's subsequent actions of running into another yard with testimony being he went into a yard, up on a deck, near a pool…could constitute flight sufficient to that instruction." The trial court added that "if the State is able to have the trier of fact believe that it was Mr. Jackson who was the shooter, jump in the car and then car sped off [sic], then part of that is flight."

Defense counsel countered:

> Is it argument that the difference in those case (sic) that I've had where it's actually flight, whether it's person [sic] selling drugs and runs from the police, isn't—he's identified as that person. We do not have in any of this case the identity of Mr. Jackson whatever being said by any of the witnesses. It is a circumstantial identification based upon a very general identification[.]

The trial court, referring to *Thompson v. State*, 393 Md. 291 (2006), explained:

> "For instruction on flight to be properly given," actually "be given properly," "the following four inferences must reasonably be able to be drawn from the facts of the case and ultimately instructed."
>
> So that the behavior of the defendant suggests flight—(indiscernible – 5:52:32)—"that the flight suggests a consciousness of guilt." Who can argue that if you're running after committing a crime, you're aware what you're doing? Again, if you did it. "That the consciousness of guilt is related to the crime charged or closely related crime." The crime in this case is the murder, and then a "consciousness of guilt of the crime charged suggest actual guilt of the crime charged or a closely related crime."
>
> So what we have here is a shooting that had the (indiscernible 5:53:19). We have the vehicle moving. We have, I think, the individual with

> a white shirt getting into the vehicle. We have your client getting out of vehicle [sic] with a black shirt [sic] and black pants.

The trial court then told defense counsel that unless "you can give me something tomorrow," "I'm inclined to put it" in. The next day, the court confirmed that it would give the flight instruction, over defense counsel's continued objection.

The trial court later instructed the jury, in accordance with Maryland Pattern Jury Instructions-Criminal ("MPJI-Cr.") 3:24:

> A person's flight immediately after the commission of a crime or after being 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 then you must decide whether this flight shows a consciousness of guilt.

"Other than the previous objection" to the instructions, defense counsel voiced no further objection.

Pursuant to Maryland Rule 4-325(c), the trial court, upon a party's request, "shall[ ] instruct the jury as to the applicable law[.]" In general, a court must give a requested instruction if "(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 v. State*, 404 Md. 187, 197-98 (2008). Jackson does not appear to dispute that the flight instruction as given was a correct statement of law and was not covered by other instructions; instead, his argument centers on its inapplicability to the facts of his case.

We typically review a trial court's decision to give a jury instruction for an abuse of discretion. *Carter v. State*, 236 Md. App. 456, 475 (2018). We will not reverse unless we determine that the given instruction was "ambiguous, misleading, or confusing" or did not "fairly cover[ ]" the applicable law. *Smith v. State*, 403 Md. 659, 663 (2008).

Maryland courts have consistently upheld the propriety of a flight instruction and have approved the pattern jury instruction on flight. *See Thompson*, 393 Md. at 303-04 (and cases cited therein). As the trial court noted, a flight instruction should be given only if the jury may reasonably draw the following inferences from the evidence adduced at trial:

> that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Id. at 312.

In *Wright I* and *II*, our appellate courts considered the propriety of the flight instruction when the sole issue was the identity of the fleeing offender. In *Wright*, a dollar store's security video system captured footage of Eric Tate arguing with, and then punching, a man wearing a red baseball cap. After the punch, the cap fell off the man's head, and he ran from the scene without it. Approximately one minute later, two men approached Tate on foot; one of the men chased Tate and shot him and then immediately ran away. Police did not recover a weapon, gun residue, or fingerprints from the scene. 247 Md. App. at 220-21.

Video taken from a nearby restaurant approximately one hour before the shooting showed a man wearing a red baseball cap and clothes similar to those of the shooter. Police believed that the man in the restaurant video and Tate's shooter were the same person. The day after the shooting, a detective viewed a flyer containing still photos from the restaurant video and believed the man therein to be Wright, whom the detective knew as "Lo" or "Cruddy Lo," based on at least two prior in-person interactions the detective had had with him. *Id*. at 221-23; *Wright II*, 474 Md. at 475-76. Wright was indicted, and at his trial, Tate testified that, prior to being shot, he had gotten into a fight with a man he knew as "Lo," said that "Lo" had shot him, and identified Wright in the courtroom as "Lo." *Id*. at 476-78.

The trial court proposed it would give the flight instruction. Defense counsel objected, arguing that the instruction was improper and prejudicial because the sole issue was the identity of the assailant, and the instruction implied necessarily that Wright was the assailant and had run from the scene. *Wright I*, 247 Md. App. at 223. The trial court overruled the objection. *Id*. at 223-24. In his closing argument, defense counsel averred that the State had failed to prove beyond a reasonable doubt that Wright was the person who was shown on video shooting Tate. *Wright II*, 474 Md. at 479. The jury convicted Wright of attempted first-degree murder and related crimes. *Id.* at 480.

Upon appeal to this Court, Wright argued, among other issues, that the trial court abused its discretion in propounding the flight instruction "where the sole contested issue was the identity of the person who committed the crime and fled the scene[.]" *Wright I*, 247 Md. App. at 220. Relying on *Thompson*, we approved the pattern jury instruction on

flight and went on to explain that, "[a]lthough the particular issue of identity as the sole issue in the case was not before the *Thompson* court, the Court's reasoning is applicable. *Thompson* does not stand for the proposition that a flight instruction, when identity is the sole issue, is categorically impermissible; if the Court thought that to be the case, it could have said so, and it did not." *Id*. at 230.

We concluded that "[i]t is not the law in Maryland that a flight instruction is categorically impermissible when identity is the sole issue at trial." *Id*. at 233. Examining the flight instruction in the context of the jury instructions as a whole, we held that the trial court did not abuse its discretion in giving the instruction because it referred to the flight of "a defendant" and not "the defendant" and did not imply to the jury that the court believed that Wright was the shooter. *Id*. We agreed with the State that "if the jury had concluded that [Wright] was *not* the person in the surveillance video, it would not have then concluded that he must be guilty because *someone* fled the scene" of the shooting. *Id*. (emphasis in original).

The Court of Appeals granted Wright's petition for *certiorari* seeking review of the question, "Did the trial court err in giving a flight instruction where the sole contested issue in the case was the identity of the person who committed the crime and fled the scene?" *Wright II*, 474 Md. at 481. Before the Court of Appeals, Wright disputed that he was the person who fled the scene of the crime and argued that, when the sole issue in dispute in a criminal trial is the identity of the fleeing offender, it is error to give the flight instruction.

"[I]n general," the Court agreed with Wright on that point and held that

> it is error to give the flight instruction where the defense does not contest that whoever fled the scene is guilty of the charged offense, and instead contends only that the State failed to prove that the defendant was the fleeing offender. In such a case, whether the assailant demonstrated consciousness of guilt is irrelevant to the jury's determination. All the jury must decide is whether the defendant on trial was the fleeing offender.

Id. at 486.

The Court went on the state, however, that

> "[i]mportantly,. . .a trial judge should not be left to guess or speculate whether the sole issue in dispute at trial is the identity of the fleeing offender. In order for the limitation on the flight instruction we adopt here to be applicable, defense counsel must expressly and unambiguously state—prior to the jury charge—that the defense solely contests the identity of the defendant as the fleeing offender. One way to do this would be for the parties to enter into a stipulation which says, in effect, that: (1) the parties agree the State has proven that the person who fled the scene is guilty of the charged offense(s); (2) the defendant disputes that the defendant is the person who committed the offense(s) and fled the scene; and (3) it is the State's burden to prove beyond a reasonable doubt that the defendant is the person who committed the offense(s) and fled the scene. Alternatively, if defense counsel tells the trial court prior to the jury charge that, in closing argument, the defense will not contest any issue other than the identity of the defendant as the fleeing offender, that will ordinarily suffice to make clear that it is the sole issue in dispute. Without a stipulation or a timely and unequivocal statement by defense counsel that narrows the issue before the jury to the identity of the defendant as the fleeing offender, a trial court retains discretion to instruct the jury on flight if the evidence adduced at trial creates the chain of four inferences discussed in *Thompson*.

Id. at 486-87 (footnotes omitted).

Because Wright did not unambiguously make identity the only contested issue prior to the jury charge, and did not tell the court that the mental state elements of the charged crimes were not in dispute, the Court of Appeals held that the trial court did not abuse its discretion in giving the flight instruction in Wright's case. *Id*. at 487-88. Despite telling the court, during the jury instruction conference, that "the whole crux of the case was that

Mr. Wright did the shooting," defense counsel did not say that Wright's identity as the fleeing offender was the only issue in the case, that the sole defense argument would be about identity, or that he would concede in his closing argument that the State had proved all the other elements of the charged offenses, including the mental state elements. *Id*. at 489-90. The Court therefore concluded that "[i]f defense counsel believed the flight instruction was unnecessary and inappropriate because the defense was going to solely contest identity in closing argument, it was incumbent upon defense counsel to explain that to the trial court. Wright's counsel did not do so." *Id*.[6]

In addition, the Court of Appeals cited with approval *People v. Rhodes*, 209 Cal.App.3d 1471, 258 Cal. Rptr. 71 (1989), in which the California Court of Appeal held that a flight instruction was proper when, although the defendant contested his identity as an arsonist, there was evidence that a witness saw the defendant running away from the burning building. *Wright II*, 474 Md. at 490. The *Rhodes* Court explained that "where there is independent evidence of flight as to which defendant's identity as the fleer is not in dispute," it is not error to give a flight instruction. *Id*. Our Court of Appeals agreed that *Rhodes* "stands for the unremarkable proposition that, even where the sole contested issue at trial is the defendant's identity as the person who committed the offense, if there is an

[6] Moreover, the Court concluded there was "independent evidence" that Wright committed the offense, aside from the dollar store video that showed the shooter fleeing the scene: Tate testified that "Lo" shot him; the detective identified Wright as the person in the red cap from the restaurant video taken less than an hour before, and just around the corner from, the shooting, and; Tate and the detective identified Wright in the courtroom as "Lo." *Id*. at 491. Therefore, the jury reasonably could have found that Wright was the assailant. *Id*.

identification of the defendant as fleeing the scene that reasonably can be perceived as demonstrating consciousness of guilt, the trial court may give a flight instruction." *Id*. at 491.

Here, we hold that the trial court did not abuse its discretion in giving the flight instruction for two reasons.

First, as in *Wright*, Jackson's counsel, prior to the jury charge, "did not make a timely, express, and unequivocal statement that the sole contested issue in [Jackson's] trial was his identity as the person who shot [Wheeler] and fled." *Id*. at 495. And, as the State points out in its brief, it was required to prove elements relating to Jackson's mental state, so identity was not the only contested issue. Therefore, pursuant to the Court of Appeals' holding in *Wright*, the trial court in this matter "had discretion to instruct the jury on flight." *Id*.

Second, as in *Rhodes* (but unlike in *Wright*), it was undisputed that Jackson was the fleer, as he was observed bailing out of the Acura after the uninterrupted high-speed chase from the scene of the shooting, which lasted only minutes and was monitored continuously by the Foxtrot helicopter. And, when he and Vennie were apprehended, only Jackson's clothes and shoes contained dirt consistent with the dirt from the construction site from which the assailant fled.

Therefore, the sole contested issue was Jackson's identity as the *shooter*, but not as the *fleer*. His flight from the scene of the shooting, and his flight from the car after it stopped, reasonably could have been perceived as demonstrating consciousness of guilt.

In light of the independent evidence that it was Jackson who was the fleeing offender, the trial court did not abuse its discretion in giving the jury a flight instruction.[7]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ASSESSED TO APPELLANT.

[7] Even were we to find error in the flight instruction, any such error would be harmless. Aside from Jackson's flight, there was independent, if circumstantial, evidence that he was the shooter. The shooter, a Black male wearing a white shirt and dark pants, was observed kneeling behind a large dirt pile at the muddy crime scene. After shooting Wheeler, the assailant was seen entering the getaway car, which drove away at a high rate of speed, ultimately leading the police on a high-speed chase that ended moments later when two suspects wearing white shirts and dark pants bailed out of the car. When apprehended, only one of those suspects—Jackson—exhibited any dirt consistent with the crime scene on his clothes and shoes. Based on the circumstantial evidence, the jury reasonably could have found that Jackson was the shooter who had concealed himself at the muddy construction site before killing Wheeler.