Circuit Court for Baltimore City
Case No. 119042002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 480

September Term, 2021

DELMEL JOHNSON

v.

STATE OF MARYLAND

Shaw,
Ripken,
Harrell, Glenn T.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw, J.

Filed: August 24, 2022

Appellant, Delmel Johnson, was indicted in the Circuit Court for Baltimore City on thirty counts arising from a shooting near Mondawmin Mall involving four victims. A jury convicted him of four counts each of second-degree attempted murder, use of a firearm in the commission of a crime of violence, and reckless endangerment. He was also convicted of attempted robbery; attempted robbery with a dangerous weapon; illegal wear, carry, and transport of a handgun; and illegal discharge of a firearm for each victim. Appellant was sentenced to seventy years imprisonment, suspending all but forty years, and five years of supervised probation upon his release. On appeal, he presents the following questions for our review:

1. Did Mr. Adkins' repeated exposures to suggestive images and information render his photo-array and in-court identifications too unreliable to satisfy due process?

2. Did the trial court deprive Mr. Johnson of his right to be present under Maryland Rule 4-231(b) and the Constitution by conducting an evidentiary hearing on his motion to suppress identifications when he was involuntarily absent?

3. Did the trial court commit reversible error by admitting the State's 911 call, police body camera footage and stills, and Adkins' medical records and photos where the evidence lacked probative value and was unfairly prejudicial and needlessly cumulative of witness testimony?

4. Did the trial court err in denying judgments of acquittal because the State failed to link Mr. Johnson to the shooting or prove that the gunman attempted to rob Mr. Adkins?

We answer yes to Question 2 and as a result, we decline to review the remaining questions. For reasons discussed below, we reverse the judgment of the circuit court.

BACKGROUND

On December 9, 2018, the Adkins family traveled to Mondawmin Mall in Baltimore City for Christmas shopping, where they purchased various items. Mr. Adkins was carrying a large amount of cash that he "pull[ed] . . . out of his pocket . . . [to] pa[y] for . . . items" at the mall. After shopping, the family ate at a Burger King located inside the mall, and then left the mall and began driving home. They drove several blocks before coming to a stop in the left lane of a two-lane road.

A white car pulled ahead and stopped in front of their car at the red light. A black car then pulled up next to the white car. As Mr. Adkins was looking down at his phone, a Black male in a jacket got out of the "passenger side of the black vehicle," "with a gun," and approached the driver's side window. Mr. Adkins heard his partner, Heather Johnson, say, "Oh my God, he got a gun[.]" Mr. Adkins looked up and saw the gunman standing at his window, pointing a gun at him, and telling him to "get out of the car" and to "open the car door." Mr. Adkins testified that he was "stunned" and before he could react, the gunman starting shooting. The gunman fired five to seven shots into the vehicle before running back to his car and both cars drove away.

Mr. Adkins was shot in the shoulder and cut in the face and eyes by shattered glass. His daughter was also shot, and she lost consciousness. Ms. Johnson called 911 while Mr. Adkins managed to drive the vehicle a short distance away to a residential area. Detective Michael Wood, Detective Akshay Banker, and other officers responded, located the family's car, and began rendering aid. Detective Banker briefly spoke to Ms. Johnson,

who was unable to give him a detailed description of the shooter. Paramedics arrived and took Mr. Adkins and his daughter to the hospital. At the hospital, Mr. Adkins described the suspect as a "Black male with dark clothing." He told Detective Banker that he had seen the shooter following him around at the Burger King. After he was released from the hospital, Mr. Adkins met with detectives to give a statement. He described the suspect as a "Black male, 5'8", skinny build, dark complexion, around 19 to 20 years old, with short hair, no facial hair, and wearing all black clothing."

On December 12, 2018, Detective Banker asked Mr. Adkins to view surveillance videos he had obtained from the Burger King. Mr. Adkins agreed and watched hours of video from several cameras angled throughout the store. Some of the footage showed a male walking by Mr. Adkins while he discarded trash. Mr. Adkins identified the man as the shooter. Video of Mr. Adkins watching the footage was recorded on Detective Banker's body worn camera. Using a photograph taken from a clip of the suspect in the surveillance video, Detective Banker made a seeking-to-identify flyer for distribution throughout the police department, but he received no response. He then disseminated a video clip of the suspect to the media.

On January 22, 2019, Officer Ashleigh Tarrant of the Maryland Transit Administration ("MTA") contacted Detective Banker and told him that he recognized the individual in the flyer. He provided Appellant's name, date of birth, and address to the detective. At the time of the shooting, Officer Tarrant was assigned to the MTA Northern District, which included Mondawmin Metro. Detective Banker obtained a photo of Appellant from MTA headquarters. He then compiled a photo array using Appellant's

photo and five other photos. Mr. Adkins was shown the array and identified Appellant as his assailant. Appellant was arrested and indicted on charges relating to the shooting.

Prior to trial, the court heard arguments on the State's motion in limine to admit Ms. Johnson's 911 call and Appellant's motion to suppress the photo array identification procedures. The judge held a pretrial hearing beginning on December 2, 2019. The judge granted the State's motion to admit Ms. Johnson's 911 call and told the parties that he would consider defense counsel's motion to suppress the photo array the next morning. The judge stated:

> So we may have an issue just in terms of the logistics of – I don't know what time jurors show up, sometimes jurors come really early so we'll have to work that out, we'll probably try and block the hallways or something, unless well, it is a legal motion, it's a legal issue. So a legal issue, the defendant does not have a right to be there on legal questions, . . . you know, at the bench or otherwise if motions are being argued.

He then asked defense counsel, "Would you particularly want him to be there?" Defense counsel answered, "I do believe the defendant wants to be here." The judge responded that he was "concerned about logistics" and "manag[ing] to do this while avoiding a mistrial."

On the morning of December 3, 2019, the judge noted that Appellant was not present and stated, it had "some concerns about the logistics in this courtroom. Jurors are going to start coming, I'm not sure when, I told them to be here at 11:00. So there is no back entrance into this courtroom so I'm not sure what we would do about that." The judge explained that he did not "believe that [Appellant's] . . . presence [was] required under Maryland Rule 4-231(b). It specifically says right to present exceptions and one of the

exceptions is at a conference or argument on a question of law." The judge stated that he "understand[s] th[at] defense [counsel] had requested" Appellant's presence. Ultimately, the judge conducted the hearing without Appellant being present.

During the hearing, two witnesses testified, Detective Banker and Mr. Adkins. The court also watched Detective Banker's body worn camera footage of the photo array shown to Mr. Adkins. Detective Banker testified that he was the primary detective and that he had initially received a description of the suspect from Mr. Adkins. He also testified that he recovered and watched surveillance footage from the Burger King in the mall. While watching the footage, he saw "numerous males . . . walk[] by while the family was eating[,]" but "couldn't distinctly say who the suspect was" because he "didn't know what he looked like." He asked Mr. Adkins to come in and Mr. Adkins "observe[d] the entire footage and at one point [Mr. Adkins] . . . advised" him of the individual that did the shooting.

Detective Banker further testified that he showed Mr. Adkins a photo array on January 24, 2019. He testified that he was trained in accordance with the general orders of the Baltimore Police Department's ("BPD") double-blind sequential photo array procedures, and he described the two ways an array can be administered. He stated that for Mr. Adkins' array, he "went over" to the family home and "conducted the photo array at their house" because Mr. Adkins "didn't feel comfortable coming down to the station[;]" "his daughter had just got out of the hospital." The two had a conversation, prior to the array, where Detective Banker told Mr. Adkins that "MTA police came . . . to [him], . . . sa[ying] they may know who did this, [and] who this kid is." He then conducted the photo

array "us[ing] the shuffle method." He testified that he made attempts to contact other detectives from other units to conduct the array, but he was unsuccessful.

Detective Banker's body worn camera recorded the identification procedure and the video was played for the court. Mr. Adkins is shown looking at each of the first five pictures, pausing and looking at three of them including the fifth, which was a photo of Appellant labeled "number two." He identified him as the shooter. Mr. Adkins was the only family member who was shown the photo array.

Mr. Adkins' testimony regarding the photo array was similar. Mr. Adkins recalled being administered the photo array and identifying Appellant as the suspect who "shot [him] and [his] daughter." Following arguments of counsel, the judge denied the motion to suppress, stating:

> It seems to me that a lot of those points . . . may very well be valid, but they really go to the weight that the finder of fact is to give or may choose to give to the photo array. The test is unduly suggestive, it's so impermissibly suggestive as would give rise to a very substantial likelihood of irreparable misidentification. Short of that, it's for the jury to weigh.
>
> As I said, I think that a lot of the points that were brought out go to the weight as opposed to the admissibility of the array itself. So I am going to . . . deny the motion.

Trial

The matter proceeded to trial before a jury and at the close of the State's case, Appellant moved for judgments of acquittal, which were granted for the charges of first and second-degree assault on Mr. Adkins' son. The State entered *nolle prosequi* to the charges of illegal possession of a regulated firearm and illegal possession of ammunition. On December 11, 2019, following deliberations, the jury found Appellant not guilty of

attempted first-degree murder of Mr. Adkins' daughter, son, and Ms. Johnson. He was convicted on all other counts. On May 3, 2021, he was sentenced to a total of seventy years in prison, suspending all but forty years, with five years of supervised probation upon his release. He timely appealed on May 27, 2021.

DISCUSSION

The Right to be Present at a Suppression Hearing

Appellant argues the trial court erred in conducting an evidentiary hearing when he was involuntarily absent, and the court deprived him of his right to confront the witnesses who testified against him. Appellant contends that the suppression hearing implicated his right to be present at every stage of trial as guaranteed by the Maryland Declaration of Rights, Maryland Rule 4-231(b), and the U.S. Constitution.

The State concedes that a defendant is entitled to be present during a suppression hearing. However, the State argues there was no prejudice, and any error was harmless. The State contends that the issue regarding the admissibility of the identification was purely legal, meeting the exception of Md. Rule 4-231(b). The State further argues that Appellant's attorney fully represented his interests, Appellant had no personal knowledge of the facts underlying the photo array issue, and he was present at trial when the witnesses testified.

"Maryland has long recognized the right of a criminal defendant to be present at every stage of the trial." *Tweedy v. State*, 380 Md. 475, 490 (2004). The right to be present at trial "is rooted largely in the right to confront witnesses" and "implicates a panoply of rights" ensuring fairness and enabling a defendant to assist counsel. *Pinkney v. State*, 350

Md. 201, 209 (1998). The right of confrontation is preserved by the Sixth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment. *See id*. It is also provided for in Article 21 of the Maryland Declaration of Rights and implemented through Maryland Rule 4-231, which provides, in part:

> **(a) When Presence Required.** A defendant shall be present *at all times* when required by the court. A corporation may be present by counsel.
>
> **(b) Right to Be Present--Exceptions.** A defendant is entitled to be physically present in person *at a preliminary hearing and every stage of the trial*, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248.

(emphasis added).

This Court examined in *Redman v. State*, 26 Md. App. 241, 242 (1975), whether co-defendants Redman and Johnson had a right to "be present when testimony [was] taken at a pretrial suppression hearing." In that case, immediately prior to the selection of a jury, a hearing was held on appellants' motion to suppress physical evidence and an in-court identification. *Id*. at 244. The State produced seven witnesses, including law enforcement officers and an identification witness who conversed with the suspects prior to the crime. *Id*. at 244-46. The appellants were not present at the beginning of the proceedings, and it was noted in the transcript that they arrived during the testimony of the sixth witness who identified them. *Id*. at 245-46.

On appeal, we held that a suppression hearing is "definitely a stage of the trial." *Id*. at 247. We further held:

> The right of the accused to be present as a procedural safeguard at the trial is absolute. Expediency may not dictate procedural changes so as to take from a defendant the right to be present at the taking of testimony, even at a pretrial suppression hearing. At such a hearing the facts of the search and seizure are established for the purposes of the trial and the ruling of the hearing Judge is determinative of the issue of the legality of the search. For this reason the right of a defendant to be present at this hearing is collateral and analogous to his right to be present at trial.

Id. at 249 (internal quotations omitted). We stated that "[t]he defendant alone may be able to inform his attorney of inconsistencies, errors and falsities in the testimony of the officers [or] . . . other witnesses" and "to hold that his presence is not essential is to deprive him of the opportunity to defend-a denial of due process-since the determination of the motion to suppress often determines the ultimate question of guilt." *Id*. We reversed the judgment and remanded the case for a new trial based on the absence of the appellants. *Id*. at 250.

In the present case, at the outset, the judge stated that he was concerned about "logistics" and that he did not "believe that [Appellant's] presence [was] required under Md. Rule 4-231(b)" because of the exception for "a conference or argument on a question of law." The judge then conducted the suppression hearing where the State presented two witnesses, Detective Banker, who conducted the photo array and Mr. Adkins, who identified Appellant as the assailant.

In our review, we found no cases finding exceptions to Rule 4-321 proper where the hearing involved witness testimony and the admission of evidence. In *Brown v. State*, the Court of Appeals consolidated and examined two cases, *Brown* and *Moses* and *Smith*, to determine the limited question "of whether the petitioners had been denied their

constitutional rights to be present during every stage of their respective trials." 272 Md. 450, 456 (1974). The Court held that conferences between counsel and the judge on the admissibility of the evidence were not a part of the trial. *Id*. at 463. Therefore, "the absence of the defendants from [these] . . . proceedings . . . did not deprive defendants of their rights to . . . be present at every stage of the trial." *Id*. at 450.

In *Brown*, the Court noted that "when the trial . . . is temporarily suspended in order that the judge may investigate legal questions presented . . ., this is no part of that trial before a jury at which the presence of the accused is necessary." *Id*. at 459. "[W]hen the trial court recessed to chambers with counsel[,] it was confronted with an issue on the admissibility of the photograph." *Id*. at 476. "No evidence was elicited from any witness; hence there was no involvement of the appellant's right to confrontation and to assist in cross-examination." *Id*. The brief dialogue between the court and counsel at the bench and chambers conferences involved solely the reception of legal arguments as to the admissibility of the exhibit. *Id*. at 477.

In *Moses* and *Smith*, the Court of Appeals found that an inquiry conducted by the trial court involved a question of law as to whether or not the testimony of the witness would remain admissible or excluded. *Id*. at 478. The Court of Appeals explained that "[a]lthough the court received testimony . . . out of the presence of appellants, such evidence was unrelated to the issue of their guilt or innocence and completely collateral thereto." *Id*. It further noted that the witness' sister was not a witness in the trial and the court's examination of her in chambers did not deprive appellants of any right of confrontation or defeat any right of cross-examination. *Id*.

In *Sewell v. State,* appellant was not present during an in-chambers conference on the State's motion in limine requesting that the identity of an informant not be disclosed. 34 Md. App. 691, 698 (1977). No testimony was taken in this conference. *Id*. We held that this conference "was exclusively a discussion of law" and "was not a critical stage of trial . . . [that] required the presence of the appellant." *Id*.

Contrary to the trial court's interpretation of Rule 4-231(b), the suppression hearing did not fit the "conference or argument on a question of law" exception. Rather the hearing was a full evidentiary proceeding where witnesses were examined and subjected to cross examination, followed by arguments of counsel. In accordance with *Redman*, we hold the court erred in conducting the hearing without Appellant's presence.

To the extent that Appellant's right to be present was violated, the State argues that any error was harmless as there was no prejudice. The State asserts that Appellant could not have assisted his attorney because he had no personal knowledge of the facts elicited at the hearing and he was present during trial when the witnesses testified.

When examining a violation of an appellant's right to be present during a stage of the trial, we apply the harmless error analysis. *See State v. Hart*, 449 Md. 246, 262 (2016).

Harmless error occurs:

> [W]hen an appellant, in a criminal case, establishes error, [and where] . . . 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[.] [If] such [an] error cannot be deemed harmless[,] . . . a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Id. at 262-63 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)) (internal quotations and footnote omitted).

As noted by this Court in *Redman*, the "denial of a motion to suppress evidence is a crucial step in a criminal prosecution." 26 Md. App. at 249. Further, "the determination of the motion to suppress often determines the ultimate question of guilt." *Id*. Here, the State seeks to limit the holding of *Redman* by contending that because Appellant had no personal knowledge of the "facts underlying the photo array," he could not have assisted his attorney and thus, there was no prejudice. The State's assertion, however, that Appellant would have been unable to assist his attorney is mere speculation. We also found nothing in the record to support the notion that the judge's determination would have been the same if Appellant had been accorded the opportunity to be present and to assist his attorney. This also is speculation.

As to the State's contention that Appellant was present when the witnesses testified at trial, in *Redman*, we found "persuasive" the opinion of *People v. Anderson*, where the Court of Appeals of New York stated, "[t]here is no justification for distinguishing between the defendant's right to be present in connection with testimony elicited at a trial on the propriety of a search and seizure and this same right in connection with testimony taken at a suppression hearing." *Redman*, 26 Md. App. at 248 (quoting *People v. Anderson*, 213 N.E.2d 445, 447 (N.Y. 1965)).

In the case at bar, we are unable to conclude "beyond a reasonable doubt that the error in no way influenced the verdict." Thus, we hold it was not harmless error to conduct the suppression hearing without the presence of Appellant.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; COSTS TO BE PAID BY APPELLEE.