UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0583

September Term, 2014

KEVIN STEPHEN CARIBARDI

v.

STATE OF MARYLAND

Leahy,
Berger,
Nazarian,

JJ.

Opinion by Berger, J.

Filed: July 7, 2015

Following a trial in the Circuit Court for Howard County, a jury convicted appellant, Kevin Stephen Caribardi, of attempted second-degree burglary, one count of fourth-degree burglary (theft), and possession of marijuana.[1] The trial court sentenced appellant to seven years in prison, suspending all but 18 months, after which he timely noted this appeal.

Appellant presents the following questions for our consideration:

1. Did the trial court abuse its discretion when it ruled that Mr. Caribardi could be impeached with his theft convictions?

2. Was the evidence insufficient to sustain Mr. Caribardi's theft convictions?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

At approximately 11:30 p.m. on September 19, 2013, Christine Harvard, the office manager of the Sleep Inn on Washington Boulevard in Jessup, Howard County, exited the motel to perform her "nightly rounds." As she began her check of the perimeter of the motel property, she saw two men walk up to the side door of the Crazy Ray's auto salvage business next door, which, at the time, was closed for business. The men drew her attention when they "motion[ed] up around the sides of the door, the frame of the door, as if they wanted it open," although Harvard did not see or hear either man employ any object or tool as a pry bar.

[1] The jury acquitted appellant of a second count of fourth-degree burglary and trespass upon posted property.

After watching the men for two to three minutes, and ascertaining that they may be attempting to break into Crazy Ray's, Harvard dialed 911 on her cell phone. Although she had not seen either man's face, she described the men as short and possibly Hispanic, with one of them wearing a long-sleeved hooded sweatshirt and a beanie cap.[2]

Howard County Police Officers Shannon Cole and Ryan Thomas responded to Harvard's 911 call approximately two minutes later. As they pulled into the Crazy Ray's parking lot, their cruisers' headlights illuminated the two suspects still standing at the side door. The officers observed that both men were short and white, with one wearing a dark colored hoodie with the hood up, and the other having facial hair and wearing a dark-colored knit wool cap with a light-colored shirt and blue jeans.

When the men noticed the officers, they took off running. The man in the knit cap and light shirt–whom Cole identified in court as appellant–ran into the woods. The man in the hoodie initially hid behind a bulldozer and then ran toward a nearby trailer park. Cole gave chase to the man in the hoodie but was unable to catch him.

Additional officers responded to the scene, along with two K9 units and a helicopter equipped with a heat sensing camera. When the helicopter picked up a heat source in the woods, Officer Jamie Machiesky and his K9 dog Rik proceeded in that direction. Machiesky

[2] After having her recollection refreshed with the recording of her 911 call, Harvard amended her testimony to state that one man had been wearing the dark hoodie and the other man had been wearing the dark beanie.

warned the person that if he did not show himself, the dog would be released. He received no response.

A short time later, Rik engaged a suspect, identified by Machiesky in court as appellant, under some fallen trees. Machiesky observed "some type of blade," like a broken hedge trimmer, on the ground near appellant and recovered it so appellant could not use it to harm him or the dog. He also recovered a metal smoking device.[3]

Machiesky handcuffed appellant and took him into custody. Upon a search of his person, a baggie of suspected marijuana was recovered from his pants pocket.[4]

As appellant was brought out of the woods, Cole recognized him as one of the men he had seen run from the door of Crazy Ray's.[5] The second man was never caught or identified.

The officers spoke with James Thompson, the manager of Crazy Ray's, who had arrived at the scene when alerted by the business's alarm company that the burglar alarm had been triggered. Thompson examined the side door where the suspects had been seen and discerned "gouge marks" that had not been there prior to September 19, 2013. The door was still locked, however, and nothing appeared to have been taken from the business. Thompson

[3] Neither the blade nor the smoking device was processed for fingerprints.

[4] The substance was later confirmed to be .4 gram of marijuana.

[5] Appellant was identified by his Washington, D.C. driver's license.

confirmed the fact that appellant had not been granted permission to be on the property after business hours on September 19, 2013.

An officer asked Harvard to approach the scene and attempt to identify appellant in a one-on-one showup. She recognized appellant's clothing as similar to that of one of the men she had seen at the door to Crazy Ray's, but she could not identify him otherwise.

At the close of the State's case, appellant moved for judgment of acquittal, arguing generally that the evidence was insufficient to prove all the charged offenses. The trial court denied the motion.

Appellant chose to testify, relating that in the afternoon or early evening hours of September 19, 2013, he helped a friend move to an apartment in Laurel. On his way home to change clothes for a date, he stopped in his former neighborhood of Maple Park, the trailer park near Crazy Ray's, to see if any of his old friends were home.

He smoked marijuana and engaged in conversation with some friends at the trailer park, and then, at approximately 10:30 or 11:00 p.m., he walked to a nearby gas station to purchase cigarettes. As he walked back to his car alone, he observed a dark area near the side of the Sleep Inn, where he decided to "take a bowl hit" of the marijuana he had with him. About 15 or 20 minutes after smoking the marijuana, and admittedly very high, he saw the police arrive. Afraid, he ran into the woods.

Once in the heavy woods, he hid so the police would not find him. He panicked when he heard the police helicopter and K9 dogs; when the dog approached him, he threw up his

hands and gave up. He denied trying to break into Crazy Ray's on the night in question or seeing or meeting with anyone who had done so.

Upon cross-examination, appellant stated he was "[a]bout 5'4", 5'5"" tall and weighed approximately 145 pounds. All the friends he met with that evening, he said, were tall, he being the sole "short one." He said that on September 19, 2013 he had been wearing a gray tee shirt and jeans with a black beanie cap.

At the close of all the evidence, appellant renewed his motion for judgment of acquittal "with regard to insufficient evidence of attempted second degree robbery." The court, finding that appellant had admitted to possession of marijuana, and ruling that, as to the remaining counts, "it's an issue of credibility," denied the motion.

Additional relevant facts will be set forth as necessary.

DISCUSSION

I.

Appellant first contends that the trial court abused its discretion in permitting the State to impeach his credibility with two 2011 theft convictions. He avers that the two theft convictions, only months apart, prejudiced him in the eyes of the jurors, who likely concluded that he not only had a problem with truthfulness but that he was a repeat thief. Therefore, he concludes, only one theft offense should have been permitted as impeachment evidence.

Just prior to the start of trial, defense counsel asked the trial court to determine which of appellant's prior convictions would be admissible for impeachment purposes. The State advised the court that appellant had been convicted four times in 2011: twice for theft, once for unauthorized use of a motor vehicle, and once for unauthorized removal of property under the theft statute. The State sought to introduce all four convictions for their impeachment value.

Defense counsel argued that the court should not permit the introduction of evidence relating to the convictions for unauthorized use of a motor vehicle and unauthorized removal of property, as those offenses do not "rise to the level of moral turpitude and dishonesty in and of [themselves]." As to the two theft convictions, counsel contended that, given the timing of the offenses—both within a two-month period—the introduction of both convictions would prejudice appellant by permitting the jury to conclude that "he is a repeat offender . . . of a theft nature." As such, counsel argued that only one theft conviction should be admissible for impeachment purposes.

The court considered the criteria for determining whether to permit impeachment with appellant's prior convictions, as set forth in *Jackson v. State*, 340 Md. 705 (1995). The court first ascertained that the two convictions for unauthorized use were not crimes relevant to appellant's credibility and excluded them as impeachable offenses.

With regard to the two theft offenses, the court had "no doubt" that they were crimes of moral turpitude, "about as bedrock as you can get." Having occurred in 2011, the court also found the two convictions to be less than 15 years old.

In weighing the prejudice to appellant versus the probative value of the offenses as impeachment, the court determined that, if he were to testify, appellant would likely say that he had not attempted to break into Crazy Ray's on the night in question. Instead, he would testify that he simply chose the wrong woods in which to hide after smoking marijuana. As such, the court found that "clearly credibility is going to be a significant factor" and that appellant's two theft convictions "have significant probative value, which in this case is not outweighed by the prejudice to the defense." It ruled that the two theft convictions would be admissible for impeachment, unless the evidence actually introduced at trial was other than predicted.

During trial, it was defense counsel who raised the issue of the prior convictions, asking appellant, upon direct examination, "In 2011, were you twice convicted of misdemeanor theft?" Appellant responded in the affirmative.[6] Upon cross-examination,

[6] Prior to the Court of Appeals' decision in *Cure v. State*, 421 Md. 300 (2011), a defendant was deemed to have waived his objection to a trial court's grant of a motion *in limine* permitting the State to introduce evidence of prior convictions for impeachment purposes if the defendant himself admitted to the prior convictions upon direct examination. In *Cure*, however, the Court overruled precedent, holding that "by 'drawing the sting out' of a conviction by testifying about the conviction on direct examination during the defense case, knowing that the court will admit the prior conviction for the limited use of impeachment, a defendant does not waive his or her right to appellate review of the admissibility ruling on (continued...)

appellant denied any awareness of what may have been happening in the area where he stopped to smoke marijuana, providing as a reason for his inattention, "[G]iven my past, I tend not to like try to put myself in a predicament where I'm by myself when everybody can see." The prosecutor asked, "And when you say past, are you referring to the two prior theft convictions. . . that your attorney asked you about?" Appellant responded, "Yes."

Md. Rule 5-609 governs the admissibility of prior convictions to impeach a witness and provides, in pertinent part:

> (a) **Generally**. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) **Time limit**. Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.

The Rule creates a three-part test for determining whether a prior conviction is admissible for impeachment purposes. First, the conviction must fall within the eligible universe of crimes to be admissible, either infamous crimes or other crimes related to the witness's credibility. Second, if the crime falls within one of those categories, the proponent

[6] (...continued)
the use of that conviction for impeachment purposes." *Id.* at 321-22.

must establish that the conviction is less than 15 years old. Finally, the trial court must weigh the probative value of the impeaching crime against the danger of unfair prejudice to the defendant. *Jackson*, 340 Md. at 712-13.

In this matter, appellant does not appear to dispute the fact that his two theft convictions comprised crimes relevant to his credibility or that they were less than 15 years old.[7] He limits his argument to a claim of unfair prejudice in the court's permitting the use of two convictions within two months for the same general crimes for which he was on trial.

In *Jackson*, the Court of Appeals identified five factors that trial courts should consider when weighing the probative value of prior convictions against their prejudicial effects: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent criminal history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony, and; (5) the centrality of the defendant's credibility. 340 Md. at 717. The trial court is not required, however, to detail every step of its logic on the record. *Id.*

A determination of whether the probative value of the impeachment evidence outweighs its prejudice is a matter within the trial court's discretion. *Summers v. State*, 152

[7] Indeed, theft offenses fall within "the eligible universe of admissible crimes because [they are] the 'embodiment of deceitfulness.'" *Jackson*, 340 Md. at 713 (quoting *Beales v. State*, 329 Md. 263, 270 (1994)). In addition, appellant was convicted in 2011, only two years prior to the 2013 trial.

Md. App. 362, 370 (2003). And, when the trial court exercises its discretion, we give great deference to the court's determination. *Id.*

In *Jackson*, the Court of Appeals pointed out that "[w]here credibility is the central issue, the probative value of the impeachment is great, and thus weighs heavily against the danger of *unfair* prejudice." 340 Md. at 721 (emphasis in original). In *Facon v. State*, 144 Md. App. 1, 48 (2002), *rev'd on other grounds*, 375 Md. 435 (2003), this Court concluded that the trial court had not abused its discretion in admitting evidence of two prior convictions for armed robbery in Facon's trial for the same offense. In doing so, we noted:

> [A]ppellant's credibility was of particular importance to this case. He wanted the jury to believe his version of the incident, *i.e.*, that he was high on drugs at the time of the robbery, did not use a real handgun, and did not intend to steal cigarettes. The State obviously had a different theory.

Id.

Here, appellant certainly wanted the jury to believe his version of events, that he happened to be walking by Crazy Ray's on the night in question, stopping to smoke marijuana near the neighboring Sleep Inn and then running into the woods when he saw the police officers arrive in response to Harvard's 911 call, but never attempting to break into Crazy Ray's. The police officers obviously had a different theory, having observed a man of the same approximate short stature—and wearing the same clothes—as appellant fumbling at the side door of Crazy Ray's before running off and hiding in the woods, to be engaged by a K9 dog after an exhaustive search of the area.

It is clear that appellant's credibility was central to the case and that the jury's verdict would depend on whether it believed appellant or the police officers and Christine Harvard. Therefore, we cannot say that the trial court abused its discretion when it cogently considered the issue and determined that appellant's theft convictions were relevant to his credibility and that their probative value outweighed the potential for unfair prejudice to appellant. Moreover, the trial court instructed the jury that it could consider the evidence of appellant's prior convictions "in deciding whether the defendant is telling the truth but for no other purposes. You must not consider the conviction as evidence that the defendant committed the crime charged in this case."

And, we discern no abuse of discretion in the trial court's decision not to limit the State's impeachment evidence of appellant to only one of his two prior theft convictions. As mentioned above, in *Facon*, 144 Md. App. at 48, we held that so long as the trial court properly undertook the balancing of probative value versus prejudice of the prior convictions, the admission of two prior convictions, both for the same crime then being litigated, was within the discretion of the court. We hold similarly here.

II.

Appellant also avers that the evidence presented by the State was insufficient to sustain his convictions of fourth-degree burglary and attempted second-degree burglary, on

the ground that the State failed to proved beyond a reasonable doubt that he was one of the two men Harvard saw at the door of Crazy Ray's.[8]

We agree with the State that appellant has failed to preserve this issue for appellate review. When a jury is the trier of fact, appellate review of the sufficiency of the evidence is available "'only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking.'" *Walker v. State*, 144 Md. App. 505, 545 (2002) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)), *rev'd on other grounds*, 373 Md. 360 (2003). A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to "'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (quoting *State v. Lyles*, 308 Md. 129, 135-36 (1986)). The language of the rule is mandatory. *Whiting v. State*, 160 Md. App. 285, 308 (2004), *aff'd*, 389 Md. 334 (2005). Therefore, sufficiency arguments that were not presented to the trial court that are then presented to this Court are rejected as waived. *Starr,* 405 Md. at 303.

At the close of the State's case-in-chief, appellant made a general motion for judgment of acquittal:

> I'll make a motion for judgment of acquittal. I don't think the State with regard to information that is in a light most favorable

[8] Appellant does not dispute the sufficiency of the evidence to support the conviction for possession of marijuana.

> to the State at this time. I'm asking you to find the evidence is insufficient as to the charge of attempted burglary in the second degree. I'm asking you to find the evidence be insufficient to the charge of burglary in the fourth degree. I'm asking that you find the evidence insufficient for the charge of trespass on posted property. I'm asking that you find the evidence insufficient for the charge of possession of marijuana.

The court denied the motion.

At the close of all the evidence, which included appellant's testimony, he renewed his motion for judgment of acquittal, stating only:

> At this time, we would like to make the motion for judgment of acquittal with regard to insufficient evidence of attempted second degree robbery (several words inaudible).[9]

The court, finding that appellant admitted to possessing marijuana, ruled that "as to the rest of the counts, it's an issue of credibility" and denied the motion.[10]

[9] Appellant was not charged with attempted second-degree robbery. The proper argument would have related to attempted second-degree burglary.

[10] The State is correct, of course, in pointing out that by presenting evidence, appellant withdrew the motion for judgment of acquittal he made at the close of the State's case. *See* Rule 4-324(c). We set forth the particulars of the initial motion only to show that even had appellant incorporated his initial arguments into his renewed motion for judgment of acquittal, the renewed motion still would have lacked the required specificity to preserve it for our review.

We acknowledge that a portion of the renewed motion was inaudible, but, even giving appellant the benefit of the doubt and assuming further argument in the inaudible words, we find it unlikely the inaudible "several words" encompassed sufficient argument on two charges to support a finding of preservation.

It is clear that appellant never stated with specificity any grounds in support of his motions for judgment of acquittal. As such, he has failed to preserve the issue of sufficiency of the evidence for appellate review.

Appellant concedes that his general motion for judgment of acquittal may not have preserved the issue for our review, but he asks us to exercise our discretion to address the issue of the court's ruling of sufficiency for plain error. As the State again points out, however, "'no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered.'" *Claybourne v. State*, 209 Md. App. 706, 750 (2013) (quoting *McIntyre v. State*, 168 Md. App. 504, 528 (2006)). We perceive no reason to deviate from that precedent in this matter, and we therefore decline appellant's invitation to review his unpreserved sufficiency challenge for plain error.[11]

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

[11] In any event, appellant's sole argument, that the State failed adequately to prove it was he the witnesses observed at the door of Crazy Ray's, goes to the weight of the evidence, for the jury to determine, not its sufficiency.