UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

CONSOLIDATED CASES

No. 1757
September Term, 2014

JAMIE HANCOCK

v.

STATE OF MARYLAND

No. 0607
September Term, 2014

KEVIN DI ANDRE WALLACE

v.

STATE OF MARYLAND

Zarnoch,
Leahy,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: June 15, 2015

*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.

On February 26, 2014, in the Circuit Court for Prince George's County, Kevin Wallace and Jamie Hancock, appellants, were convicted of robbery, theft, and conspiracy to commit robbery. Additionally, the jury convicted Hancock of second-degree assault.[1] The court sentenced Wallace to 15 years, with all but 5 years suspended, for robbery, 15 years suspended for conspiracy to commit robbery, and merged the theft conviction for purposes of sentencing, The court sentenced Hancock to 15 years, with all but 10 years suspended, for robbery, 15 years suspended for conspiracy to commit robbery, and merged the remaining two convictions for purposes of sentencing.

In this consolidated appeal, appellants present two questions for review, as follows:

1. Did the lower court err in failing to declare a mistrial after a police officer stated that the suspects in the robbery at issue at trial were within a vehicle that was associated with "committing all these robberies"?

2. Did the lower court err in permitting the State to introduce photographs of a vehicle into evidence without any foundation showing that the vehicle was in the same condition as when it came into police custody?

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

BACKGROUND

On July 23, 2013, around 1:30 in the afternoon, three men robbed the Livingston Woods Liquor store in Oxon Hill, Maryland. Rommel Saxena, the owner of the liquor store, testified that three individuals entered his store and took bottles of liquor and money from

[1] The jury found appellants not guilty of robbery with a deadly weapon, first-degree assault, use of a handgun in the commission of a crime of violence, carrying a dangerous weapon with the intent to injure, and conspiracy to commit robbery with a dangerous weapon. Additionally, the jury found Wallace not guilty of second-degree assault.

the cash register and lottery machine.[2] During the incident, which lasted five to seven minutes, Wallace pointed a gun at Saxena and said "cooperate or I shoot[,]" Hancock punched Saxena in the head 4 or 5 times, and the third man punched Saxena in his face. After the men left the store, Saxena called the police.

A witness waiting at a bus stop outside of the liquor store observed two men with white masks run across the front of the liquor store carrying a box. Then, he saw three men get into a gray SUV and drive north on Livingston road, he memorized the license plate of the vehicle, and reported the license plate number to police.

Shortly thereafter, police officers located and pursued the suspect vehicle in a high speed chase. All of a sudden, the vehicle came to an abrupt stop at an embankment, Detective Robert Layton pulled up along the driver's side, and observed three occupants exit from the passenger side and run in opposite directions. All three suspects were apprehended and Corporal Richard Reynolds identified Wallace and Hancock at trial as the two individuals that he arrested. Detective Layton and Corporal Reynolds both confirmed that they never lost sight of the vehicle or the individuals during the pursuit.

The vehicle was transported back to the police evidence bay where Corporal David Vastag, an evidence technician for the Prince George's County Police Department, took pictures and catalogued the contents of the vehicle. Corporal Vastag recovered 9 bottles of

[2] Saxena testified that stolen vodka was eventually returned to him in a plastic container several weeks later.

liquor inside a black plastic tub, $178 in cash, various items of clothing, latex gloves, and an Iphone.

Additional facts will be presented below, as they pertain to the questions presented.

DISCUSSION

I.

During Hancock's cross-examination of Detective Layton, the following question and answer led to counsel's request for a mistrial:

> [H'S COUNSEL]: Did you hear any calls regarding that there were four people involved in this robbery at any point?
>
> [WITNESS]: I can't recall. I just heard – all I heard was they were behind the vehicle that were committing all these robberies.

Hancock's counsel requested to approach the bench where the following conversation occurred:

> [H'S COUNSEL]: I'm going to ask for a mistrial at this point. The detective just testified all these robberies.
>
> In the discovery, there's commentary that this vehicle was involved in another robbery the previous day. I know my client's not charged in that robbery. It could be the one that Mr. Davis is charged in, but I'm going to ask for a mistrial for Mr. Hancock because it's now been interjected that there's another robbery.
>
> [W'S COUNSEL]: I would join in that motion, Your Honor.
>
> * * *
>
> [COURT]: What's the State's position with respect to the request for mistrial?

[STATE]: I think it can be corrected with the witness or cured somehow. I really don't know what he is referring to when he said all of these – this information. It's not revealing something that's truthful.

[H'S COUNSEL]: That actually makes it worse, Your Honor, true or not. He's now suggesting that this car is involved in other robberies. So I would renew – it may or may not be the case, but there's at least one other robbery.

COURT: Are you willing to enter into a stipulation–

[STATE]: I am.

COURT: – that there's no evidence of any other robberies at play here and that the allegations that there was more than one robbery at issue is misinformation.

[STATE]: That's exactly how I feel, yes.

COURT: Assuming that the Court denies your motion for mistrial, would you be willing to agree to that stipulation?

[H'S COUNSEL]: Had this issue –

COURT: Preserving–

[H'S COUNSEL]: I just had this come up on an appellate argument last week. I want to be very clear on this point.

I am requesting a mistrial. The language the Court has formulated for the stipulation, I object to the giving of the stipulation as opposed to a mistrial. If the Court is going to proceed by way of a stipulation, I have no objection to the language of the stipulation.

COURT: Fair enough.

[W'S COUNSEL]: I agree with what he just said, Your Honor. I adopt his argument.

COURT: All right. The Court is going to find that there's not a manifest necessity for a mistrial in this matter. I believe the issue can be cured by other

> means. The Court is going to give the stipulation to the jury that was just indicated. . . .
>
> The trial court then gave the following curative instruction to the jurors:
>
> > Ladies and gentlemen of the jury, we have a stipulation that's been agreed to by all of the parties. The stipulation as I just alluded to is an agreement. You may assume that it is a fact in this case and is not at issue.
> >
> > That stipulation is that there are no – there's no evidence of multiple robberies at issue in this matter. There is only one robbery at issue for you to consider, and any information that's been presented to you that there were multiple robberies at play here is misinformation.

Appellants argue that the court erred in failing to declare a mistrial because they "were unfairly and impermissibly branded with the taint of other criminal behavior at trial[, n]o curative instruction could have dissipated that prejudice, and the specific curative instruction used at trial surely failed to ameliorate that prejudice." The State responds that "[t]he trial court did not abuse its discretion in electing to issue a curative instruction rather than declaring the extreme sanction of a mistrial." Further, the State points out that because appellants "agreed at trial to the substance of the curative instruction proposed by the trial court if the court were to decline to declare a mistrial, their appellate claim with respect to sufficiency is either not preserved for review or has been waived."

"'[A] mistrial is generally an extraordinary remedy and . . . under most circumstances, the trial judge has considerable discretion regarding when to invoke it.'" *Whack v. State*, 433 Md. 728, 751-52 (2013) (quoting *Powell v. State*, 406 Md. 679, 694 (2008)). "Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of

prejudice to the accused, and [i]n order to warrant a mistrial, the prejudice to the accused must be real and substantial." *Wagner v. State,* 213 Md. App. 419, 462 (2013) (quoting *Washington v. State*, 191 Md. App. 48, 99 (2010)) (internal quotation marks omitted). "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

"When a party makes or introduces an improper statement at trial, '[t]he trial judge must assess the prejudicial impact of the inadmissible evidence and assess whether the prejudice can be cured. If not, a mistrial must be granted. If a curative instruction is given, the instruction must be timely, accurate, and effective.'" *Simmons v. State*, 436 Md. 202, 219 (2013) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). "Whether a curative instruction is a reasonable alternative to a mistrial depends on whether the prejudice was so substantial as to deprive a party of the right to a fair trial and therefore warrant a mistrial." *Id.* "'[T]he trial judge is in the best position to determine whether his instructions achieved the desired curative effect on the jury.'" *Id.* at 222 (quoting *Owens-Illinois, Inc. v. Gianotti,* 148 Md. App. 457, 476 (2002)) (citations and quotations omitted).

Here, the curative instruction was given right after the improper statement and informed the jury that "any information that's been presented to you that there were multiple robberies at play here is misinformation." Jurors are presumed to follow the instructions given to them by the trial judge. *See Jones v. State*, 217 Md. App. 676, 697-98 (2014)

(quoting *Spain v. State*, 386 Md. 145, 160 (2005)) ("'Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary.'"). In light of the curative instruction given and based on the record before us, the prejudice to appellants was not so substantial as to deprive them of a fair trial and, therefore, the court did not abuse its discretion by denying the motion for mistrial.[3]

II.

Corporal David Vastag, an evidence technician for the Prince George's County Police Department, testified that he photographed the interior and exterior of the suspect vehicle at the police evidence facility. Corporal Vastag testified that State's Exhibit 18, the pictures of the interior of the vehicle, had not been altered and that the pictures fairly and accurately represented the condition of the car at the evidence facility. Thereafter the State offered the exhibit into evidence, Wallace's counsel objected, and the following colloquy occurred at the bench:

COURT: What's the basis?

[3] Any argument regarding the language of the curative instruction was waived when counsel stated: "If the Court is going to proceed by way of a stipulation, I have no objection to the language of the stipulation." *See Molter v. State*, 201 Md. App. 155, 178 (2011) (quoting *Drake & Charles v. State*, 186 Md. App. 570, 588-89 (2009)) (stating that the issue was waived pursuant to rule 4-325(e), when no party objected to the language of the curative instruction after it was given to the jury).

> [W'S COUNSEL]: I think – I was listening closely that time, Your Honor – that he photographed the car at the evidence bay. There's no testimony as to – last we heard about, the car was at Jasper Street.
>
> No one testified as to what was in the car at Jasper Street, and now it's at the evidence bay at 2100 hours and the car was stopped maybe at 1400 hours, 2:00, and so all kinds of stuff could have happened between now – between those two time periods. But there's no chain of custody that's been established and there's nobody to testify that what he looked at at 2100 at the evidence bay and took photos of was the same thing that they found at Jasper Street.
>
> [STATE]: They weren't searching the vehicle on Jasper Street.
>
> [COURT]: Anything from you, [H's Counsel]?
>
> [H'S COUNSEL]: (Shaking head from side to side.)
>
> COURT: All right. I'm sure all of that will be fleshed out in your cross-examination, but I don't believe this matter precludes admission of the photographs. As such, over the objection of counsel, I will admit State's Exhibit Number 18.

During cross-examination, Corporal Vastag admitted that he did not respond to the robbery location or the location where the vehicle was recovered and testified that the first time he saw the vehicle was around 9:00 pm on the day of the robbery in the police evidence bay. Accordingly, Corporal Vastag confirmed that there was no documentation of what was inside the vehicle when the vehicle was stopped.

Appellants argue that the court erred in admitting photographs of the interior of the vehicle that were taken at the evidence facility because "the State failed to show that they accurately depicted the contents of the vehicle when it first came into the custody of the police. As such, appellants contend that the State "failed to establish a foundation that the

photographs were what the State purported them to be[.]" The State responds that this issue is not preserved as to Hancock, but that even if the issue were preserved as to both appellants, the trial court did not abuse its discretion in admitting the photographs.

Preliminarily, we note that this issue is not preserved as to Hancock. Hancock's counsel did not object, did not join in Wallace's objection, and indicated, by shaking his head from side to side, that he did not have anything to say regarding the admissibility of the photographs. *See Evans v. State*, 174 Md. App. 549, 566 (2007) ("[A] bedrock principle of Maryland law is that a defendant may not rely on an objection made by a codefendant for the purpose of raising an appeal as to that issue. . . . Accordingly, appellant's failure to raise such issue in the trial court precludes us from such consideration on appeal."). Even if, however, this issue were preserved as to both appellants, we would still conclude that the trial court did not abuse its discretion in admitting the photographs.

"'We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard.'" *Gordon v. State*, 431 Md. 527, 535 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 7-8 (2005)). "Typically, photographs are admissible to illustrate testimony of a witness when that witness testifies from first-hand knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time." *Washington v. State*, 406 Md. 642, 652 (2008) (quotation marks omitted).

Here, Corporal Vastag testified that he began processing the suspect vehicle at the police evidence facility around 9:00 pm on the day of the robbery. Corporal Vastag

confirmed that he took the photos of the interior of the vehicle in State's Exhibit 18, that the pictures fairly and accurately represented the condition of the vehicle when he saw it, and that the photos had not been altered in any way. This is all that was required to properly authenticate the photographs. *See* Md. Rule 5-901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

At the time the photographs were offered into evidence, the State did not represent that the vehicle was in the same condition as when it was first stopped earlier that afternoon and did not attempt to admit any of the items recovered from the vehicle into evidence. The State, therefore, was only required to show that the photographs were in the same condition as when they were taken and was not required to establish a chain of custody for the vehicle and its contents. *See Jones v. State*, 172 Md. App. 444, 462 (2007) (citations and quotation marks omitted) (a chain of custody "in most instances is established . . . by responsible parties who can negate a possibility of tampering . . . and thus preclude a likelihood that the thing's condition was changed."). Any argument that the State failed to document the condition of the vehicle when it first came into police custody goes to the weight of the evidence and not to the admissibility of the photographs. Accordingly, the court did not abuse its discretion in admitting the photographs into evidence.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.