

Circuit Court for Anne Arundel County  
Case No. C-02-CR-16-001281

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 742

September Term, 2017

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KELVIN JOHNSON

v.

STATE OF MARYLAND

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Wright,  
Kehoe,  
Harrell, Glenn T., Jr.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Kehoe, J.

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Filed: March 20, 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.

Appellant, Kelvin Johnson, was charged in a forty-count indictment in the Circuit Court for Anne Arundel County for multiple offenses relating to armed robberies, kidnappings, false imprisonment, and carjacking at three fast-food restaurants: Checkers, Arby's, and Popeye's. Prior to trial, appellant moved to sever the indictment as to each robbery. The court granted the motion in part, and severed all charges related to the Checkers robbery from the charges related to the Arby's and Popeye's robberies. Following the motions hearings, the State *nolle prossed* the charges against appellant pertaining to the armed robbery of the Checkers restaurant, as well as the armed robbery and armed carjacking charges related to the Arby's incident.

At trial, the court granted appellant's motion for acquittal on the charge of carrying a knife with intent to injure. The jury convicted appellant of the remaining charges. After merging several lesser included offenses, the circuit court sentenced appellant to a total of 115 years' imprisonment, the first 25 years to be served without the possibility of parole.<sup>1</sup>

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<sup>1</sup> More specifically, the court sentenced appellant on the charges relating to the Arby's robbery as follows:

Carjacking of Ms. Jackson: 25 years without the possibility of parole;  
Robbery: 15 years concurrent;  
False imprisonment: 15 years concurrent;  
Malicious destruction of Arby's property: 60 days concurrent.

As to the Popeye's robbery, the court sentenced appellant as follows:

As to the convictions involving Mr. Lizama:  
Kidnapping of 30 years consecutive to the carjacking sentence;  
Armed robbery: 20 years concurrent;  
False imprisonment: 20 years concurrent.  
As to the convictions involving Ms. Alvergna:

Continued . . .

On appeal, appellant argues that the circuit court erred in denying his motion for severance of charges related to the separate incidents.

For the reasons set forth below, we shall affirm the judgments of the circuit court.

### **Background**

#### **Facts Pertaining to the Arby's Robbery on May 1, 2016**

On May 1, 2016 at approximately 1:45 a.m., April Jackson, an assistant manager at the Arby's restaurant located on Ritchie Highway in Pasadena, closed the restaurant and set the alarm. As Ms. Jackson was leaving through the front door of the restaurant, a suspect grabbed the front door, trying to push it open and kicking through the glass, as Ms. Jackson struggled unsuccessfully to keep the door shut. Ms. Jackson described the suspect as a "pretty tall" black male, wearing a mask, a black sweatshirt, black pants, and gloves. Once inside the restaurant, the suspect motioned in the direction of the safe and handed Ms. Jackson a black plastic bag. She emptied the contents of the safe and cash

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Kidnapping: 30 years consecutive to the sentence for kidnapping Mr. Lizama;  
Armed robbery: 20 years concurrent;  
False imprisonment: 20 years concurrent.

As to the convictions involving Mr. Duque:

Kidnapping: 30 years consecutive to the sentence for kidnapping Ms. Alvergna;  
Armed robbery: 20 years concurrent;  
False imprisonment: 20 years concurrent.

As to the convictions regarding Ms. Chatlani:

Theft of property: 18 months concurrent with the carjacking sentence;  
Carrying a knife with intent to injure: 3 years concurrent with the carjacking sentence.

Miscellaneous:

Malicious destruction of Popeye's property: 60 days concurrent with the carjacking sentence.

registers into the bag, for a total of approximately \$1,700. The suspect then took her cell phone and instructed her to go to her car. The suspect got in the backseat of the car and directed her to drive to an unfamiliar area in Glen Burnie. After the suspect exited the car, she approached a stop sign where she recognized Freetown Road, as this was an area where she had previously dropped off another employee. Ms. Jackson then drove to a gas station and called police.

Ms. Jackson met police at Arby's and gave them a description of the suspect. She then drove with the police officers to show them the intersection where the suspect had exited her vehicle. When she returned to Arby's, she told the police that she believed that appellant was the suspect based on his height, posture, how he "walk[ed]," and the fact that he sounded as if he was trying to "change his voice" when he spoke. Ms. Jackson knew appellant because he had worked at the Arby's restaurant "towards the end of 2015" until approximately "February of 2016." Ms. Jackson had worked with appellant "a couple nights a week" during that time, and she recalled that appellant had driven a red pickup truck.

Detective Nicholas Klapaska of the Anne Arundel County Police commercial robbery unit responded to the robbery of the Arby's restaurant on May 1, 2016. Detective Klapaska reviewed appellant's employment application at Arby's, in which appellant provided his cell phone number and identified his address as 7855 Freetown Road, Glen Burnie. Appellant was employed by the Arby's restaurant from November 2015 through March 2016. Detective Klapaska obtained a search warrant for the cell

phone records associated with appellant's phone number. The detective also interviewed Ms. Jackson, who again indicated that although she never saw the robber's face, she believed that appellant was the robber based on his mannerisms, posture, height, build, and his voice, which she had "recognized slightly."

### **Facts Pertaining to the Popeye's Robbery on May 10, 2016**

On May 10, 2016, Judith Miguel Alvergna, Jose Pedro Lizama, and Boris Duque were working at the Popeye's restaurant located at 8700 Fort Smallwood Road in Pasadena when, at 11:10 p.m., a tall black male wearing a heavy jacket and gloves with his face covered entered through the back door of the Popeye's restaurant "armed with a big knife." The suspect grabbed Mr. Lizama by the neck, and instructed Ms. Alvergna to "turn over all the money." Ms. Alvergna gave the suspect approximately \$400 from the top safe, but informed him that she did not have a key to open the locked safe box.

The suspect attempted to lock Ms. Alvergna, Mr. Lizama, and Mr. Duque first in the walk-in cooler, and then in the freezer, but was unsuccessful. He then brought the three employees to the office in the back of the restaurant, where he took their cell phones and cut the telephone lines. The suspect also stole the cell phone of the restaurant manager, Damayanti Chatlani. When the suspect was unable to lock the three employees in the office, he walked them outside into the woods behind the restaurant, while holding the knife to Ms. Alvergna's neck. They walked for about 25 minutes to North East High School whereupon the suspect forced the three employees to remove their shirts, pants,

and shoes, which he then threw into the woods before fleeing. Mr. Lizama’s stolen cell phone was never recovered.

### **Facts Pertaining to the Investigations of the Robberies**

On May 11, 2016, Anne Arundel County Police Detective Mark Zukowski, the lead investigator of the Popeye’s armed robbery, obtained tracking information for Mr. Lizama’s cell phone from the service provider. Cell site data indicated that Mr. Lizama’s cell phone used the cell site “that is closest to the Popeye’s address” in the late evening of May 10, 2016. Cell site data also indicated that on the day following the Popeye’s robbery, Mr. Lizama’s stolen cell phone used the cell phone site in the vicinity of 7855 Freetown Road.

Detective Zukowski also reviewed “ping” data<sup>2</sup> which tracked the relative location information for Mr. Lizama’s phone. The ping data also confirmed that, on the evening of May 11, 2016, the stolen phone was located in the vicinity of 7855 Freetown Road. On May 11 and 12, 2016, additional ping data indicated that Mr. Lizama’s cell phone was located in the vicinity of the AutoZone store located at 2707 Mountain Road in Pasadena.

Before proceeding to the AutoZone for further investigation, Detective Zukowski consulted with Detective Klapaska, who was investigating the Arby’s robbery. Detective Klapaska provided Detective Zukowski with information of his investigation of the 7855 Freetown Road address. Based on that information, Detective Zukowski obtained a

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<sup>2</sup> “Ping” data provides the “real-time” location of a cell phone in fifteen minute increments.

photograph of appellant, which he and Detective Klapaska brought to the AutoZone store in Pasadena on May 12, 2016. Brian Cavey, a clerk at the AutoZone, reviewed the photograph of appellant and informed the detectives that appellant had been at the AutoZone on the previous evening, and that he had ordered some parts for a Ford truck. Mr. Cavey provided Detective Zukowski with the receipt for the order that appellant had placed. During the execution of a search warrant at 7855 Freetown Road, police found mail addressed to appellant and a resume with appellant's name on it. Police also established that appellant had attended North East High School.

As indicated earlier, appellant was convicted of offenses related to both the Arby's robbery and the Popeye's armed robbery.

### **Analysis**

At the pre-trial hearing on the motion for severance of the charges, defense counsel argued that the evidence relied on by the State to prove each robbery would not be mutually admissible if the offenses were tried separately, and that the prejudice to appellant from a joint trial for the robberies far outweighed any judicial economies that would result from merger. The prosecutor argued that the evidence of the Arby's and Popeye's robberies was mutually admissible to establish appellant's identity and modus operandi. Specifically, the prosecutor explained the State's evidence as follows:

Well, how do you know it's the [appellant]? One, because it's the same M.O. But two, because these investigations are overlapping. And so there's a lot that – [appellant] is developed as a suspect by the combination of evidence they received from Ms. Jackson at Arby's and from the stolen cell phone at Popeye's. It's the combination of all those facts that ultimately

leads them to [appellant], to believe that they have the right person. And how do they know it's the right person? Well, they know because he's doing the same thing in both of these robberies.

The motions court explained its decision to deny the motion to sever the Popeye's and Arby's charges as follows:

[T]he Court is confident that there is good reason to leave all counts relating to the Popeye's and the Arby's joined. The cases that the Court has read this week, many of which point out applying the first prong, which is mutual admissibility, they point out that the MIMIC prong is not exhaustive; that there are many other things that the Court can consider in deciding that prong of the analysis. But that is the mutual admissibility prong, and one of which is absence of mistake; another is to complete the narrative. And then the one, of course, that I mentioned that does fall within the MIMIC mnemonic is identity.

And the Court . . . concludes that it would be virtually impossible for the State to describe not only the investigation that took place but also to fashion instructions, redact the testimony, whatever you want to call it that would allow the fact-finder—that is, the jury at some future date—to understand how the narrative would be completed. That is, how in fact the police officers were led from an identification, [based on] someone says, because I worked with someone for a long period, because their height, their build, their manner of speech, all of these things led Ms. Jackson, according to the police report, which is all that the Court has to go on for this purpose, suggested to her that it as in fact [appellant] who had robbed her.

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[T]hese two cases are very interwoven, not only from an investigative standpoint but also from an identity standpoint. Because one—one prong of the Arby's points [to] the identity at Popeye's, and one prong at Popeye's points to the identity at Arby's. They ride together, because identity is mutually admissible. The—the other factors that the State more squarely does raise in their motion, as I said earlier, is just more icing on the cake. The fact that there is a taking of persons away from the location, and that just serves to fortify sort of the mutual admissibility analysis, as well as all the commonalities that are pointed out that, of course, have been mentioned and raised at various points last week and this week.



Now, we move on to the judicial economy analysis, having determined that those two are mutually admissible for completing the narrative; absence of mistake, identity, and other reasons. You have to then figure out whether judicial economy compared to any undue prejudice that might happen, and—and as the State readily points out, evidence brought to bear in the case-in-chief is inherently prejudicial; it always is. The question is, is it so prejudicial that it would cut against the grain of the other reasons to join, which are the reasons raised, which are judicial economy.

And the Court finds that there is prospectively overlapping testimony both of Ms. Jackson, as I indicated, and also the Court is taking as—as given, based on the representations of the State, that there’s overlapping cell phone testimony, and certainly there’s overlapping testimony of detectives explaining how they learned of Mr. Johnson and then the follow-on steps that happened, whether it was traveling to Auto Zone or traveling to follow-up interviews in other homes, or other residences related to the initial residence where the phone pinged, which is the Freetown residence.

Appellant argues on appeal that the trial court erred in denying his motion for severance because the evidence of each alleged robbery was not mutually admissible to establish *modus operandi*, absence of mistake, or to complete the narrative. Specifically, he contends that a “common investigation” is not enough to create mutual admissibility, and that any potential overlap of evidence was not mutual; it was one-directional because evidence from the Popeye’s robbery would not be admissible to prove the Arby’s robbery. Moreover, assuming that the evidence was mutually admissible, appellant argues that he was substantially prejudiced by the joint trial of the charges.

For its part, the State argues that the evidence was mutually admissible because the shared evidence established and confirmed appellant’s identity as the suspect in each robbery and his *modus operandi*, and that it would be “virtually impossible,” as the circuit court found, for the State to complete the narrative of each offense without a

discussion of the other offense. The State submits that any prejudice to appellant from the joinder of the offenses was outweighed by judicial economy.

Maryland Rule 4-253 states in part:

(c) **Prejudicial joinder.** If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

As a general rule, “a defendant charged with similar but unrelated offenses is entitled to a severance where he establishes that the evidence as to each individual offense would not be mutually admissible at separate trials.” *McKnight v. State*, 280 Md. 604, 612 (1977). The Court of Appeals has created a two-step test for the analysis of joinder issues:

In sum, the analysis of jury trial joinder issues may be reduced to a test that encompasses two questions: (1) is evidence concerning the offenses or defendants mutually admissible; and (2) does the interest in judicial economy outweigh any other arguments favoring severance? If the answer to both questions is yes, then joinder of offenses or defendants is appropriate. In order to resolve question number one, a court must apply the first step of the “other crimes” analysis announced in [*State v. Faulkner*, 314 Md. 630 (1989)]. If question number one is answered in the negative, then there is no need to address question number two; *McKnight* mandates severance as a matter of law.

*Conyers v. State*, 345 Md. 525, 553 (1997).

The first step of the analysis, determining mutual admissibility based on other crimes evidence, is a legal determination, which we review *de novo*. *Id.* *Accord Cortez v. State*, 220 Md. App. 688, 694-95 (2014), *cert. denied*, 442 Md. 516 (2015). Generally,

evidence of other crimes is not admissible to prove a defendant's guilt based on his propensity to commit crime or his criminal character. Rule 404(b); *Faulkner*, 314 Md. at 633. Nevertheless, evidence of "other crimes" may be admitted if it is "substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *Faulkner*, 314 Md. at 634 (1989) (citation omitted). Specifically, other crimes evidence may be admissible if introduced to establish motive; intent; absence of mistake; identity; or common scheme or plan. *Solomon v. State*, 101 Md. App. 331, 353-54 (1994) (citations omitted); *see also* Rule 5-404(b). An additional exception has also been recognized in circumstances where "the several offenses are so connected in point of time or circumstances that one cannot be fully shown without proving the other[.]" *Solomon*, 101 Md. App. at 354; *Ross v. State*, 276 Md. 664, 670 (1976) (citation omitted). "As long as the evidence bearing directly on one charge also has some relevance in proving the other charge, the evidence is, by definition, mutually admissible." *Wieland v. State*, 101 Md. App. 1, 15 (1994).

This Court has recognized that evidence of other criminal episodes is admissible where the evidence helps to "solidify the proof of identity or criminal agency" with respect to other offenses. *See Solomon*, 101 Md. App. at 370. In other words, was the evidence of one crime probative of the identity of the perpetrator in another crime? *See Hamwright v. State*, 142 Md. App. 17, 34-35 (2001) (permitting joinder of offenses in one trial for several incidents where proof that appellant and others had robbed two

convenience stores was probative as to the identity of the persons who had committed another robbery, carjacking, and sexual assault).

Here, appellant was identified as a suspect in the Arby's robbery based on Ms. Jackson's impression that he resembled a former employee. But because the robber's face was covered and the robber seemed to be trying to "change his voice," Ms. Jackson was not entirely certain that the robber was appellant. It was the evidence from the Popeye's robbery linking Mr. Lizama's stolen phone to 7855 Freetown Road, and then to the AutoZone in Pasadena, that helped to prove appellant's identity as the Arby's robber. Moreover, the AutoZone clerk's identification of appellant, and the AutoZone receipt showing that appellant had ordered parts for a Ford pick-up truck, helped to bolster Ms. Jackson's identification of appellant, as she believed that appellant had driven a red pick-up truck.

In a similar manner, evidence of appellant's identity as the Arby's robber also confirmed his identity as the Popeye's robber. Ms. Jackson stated that she let her carjacker out of her care near Freetown Road. Although Detective Zukowski had obtained cell phone evidence tracking the stolen phone from the Popeye's robbery to 7855 Freetown Road and AutoZone, he did not identify appellant as a suspect until he learned of appellant's identity as a suspect in the Arby's robbery from Detective Klapaska. Based on that information, Detective Zukowski was able to identify 7855 Freetown Road as appellant's address and provide a photo of appellant to the clerk at AutoZone to identify him. The suspect ordered parts for a Ford truck; Ms. Jackson

recalled that appellant had owed a truck when he worked for Arby's. Here, proof that appellant had robbed one restaurant was probative of his identity as the person who had robbed the other restaurant.

While the two crimes are not identical, there were significant similarities:

- The crimes involved the robberies of fast food restaurants located in Pasadena;
- The robberies occurred late at night;
- There was one person involved in each robbery and descriptions provided by the witnesses were very similar;
- The suspect wore a mask or covered his face in each robbery;
- The suspect demanded money from the safe in each instance;
- The suspect falsely imprisoned Ms. Jackson after the Arby's robbery, and falsely imprisoned the three employees at Popeye's by making them walk to a point 25 minutes away.

The suspect also stole cellphones from employees at both the Arby's and the Popeye's, although that is not a particularly distinctive aspect of the crimes.

We agree with the circuit court that it would be “virtually impossible” to complete the narrative in each robbery without evidence from the other robbery. We therefore perceive no error in the circuit court's determination that the evidence of each robbery was mutually admissible.

We next weigh any prejudice caused by the joinder against the interests of judicial economy. *Solomon*, 101 Md. App. at 347; *Ogonowski v. State*, 87 Md. App. 173, 186 (1991). The balancing of prejudice and judicial economy is subject to the abuse of discretion standard, and any judicial economy will suffice to permit joinder. *Conyers*,

345 Md. at 556. Joinder of the offenses in this case resulted in a saving of time and money by avoiding a second trial and the duplication of witness testimony. Although appellant characterized the prejudice to him as “overwhelming,” his conclusion is based on his contention that the evidence of the two crimes was not mutually admissible, a premise with which we disagree. Otherwise, prejudice to appellant does not include “legitimate damage to a defendant’s cause that is incurred when *admissible* evidence is received against him.” *Solomon*, 101 Md. App. at 348 (emphasis in original).

Accordingly, we conclude that the trial court did not abuse its discretion in determining that judicial economy outweighed the risk of any prejudice to appellant resulting from the admission of evidence of both robberies in a joint trial.

Finally, appellant argues that “the [trial] court abused its discretion in not crafting a redaction that would have limited the other crimes evidence as requested by defense counsel.” Appellant does not cite to the transcript to support this contention and we will not consider it further. *See Konover Prop. Trust, Inc. v. WHE Associates, Inc.*, 142 Md. App. 476, 494 (2002) (“We will not rummage in a dark cellar for coal that isn’t there.”).

**THE JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY ARE AFFIRMED.**

**COSTS TO BE PAID BY APPELLANT.**