Circuit Court for Prince George's County
Case No. CT161034X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1086

September Term, 2017

MELVIN SAUNDERS

v.

STATE OF MARYLAND

Friedman,
Beachley,
Fader,

JJ.

Opinion by Beachley, J.

Filed: April 18, 2018

Melvin Saunders, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of crimes related to an armed robbery that occurred on December 7, 2014. The jury convicted appellant of armed robbery, robbery, conspiracy to commit armed robbery, conspiracy to commit robbery, second-degree assault, and theft of goods valued at less than $1,000. The jury acquitted appellant of the same crimes related to a second robbery that occurred on December 12, 2014. The court sentenced appellant to concurrent sentences of twenty years' imprisonment for armed robbery and conspiracy to commit armed robbery, suspending all but twelve years. The court merged appellant's remaining convictions. Appellant raises two questions on appeal:

I. Did the trial court err and/or abuse its discretion in admitting evidence of Saunders's attempted flight from the police where the court, but not the jury, knew of an alternative, equally reasonable explanation for the attempted flight that was unrelated to the charges for which Saunders was on trial?

II. Did the trial court err and/or abuse its discretion in issuing a body attachment for the State's witness, Martial Maforikan?

For the following reasons, we shall affirm the judgments.

FACTS

Appellant was charged with several offenses arising from two separate armed robberies at two different 7-Elevens located in Oxon Hill, Maryland. The first robbery occurred on December 7, 2014, at a store on Oxon Hill Road, and the second occurred five days later, on December 12, at a store on Livingston Road.

Evidence of the first robbery came from: Martial Maforikan, a 7-Eleven employee; a tape of Maforikan's 911 call to the police; video from the store's surveillance cameras;

and Detective Luis Cruz, the Prince George's Police Department officer who investigated the robbery. Evidence of the second robbery came from Donna Rainey, a 7-Eleven employee, and a tape of her 911 call to the police.

Around 5:00 a.m. on December 7, 2014, Maforikan was working the cash register at the 7-Eleven on Oxon Hill Road when he was robbed by two men. Maforikan testified that one of the men stood near the coffee/snack area while the other man came up behind him at the cash register with a gun. The man with the gun took money from the register and a couple packs of Newport cigarettes. Both men then left the store. Maforikan's 911 call was admitted into evidence and played for the jury. He did not identify appellant as one of the robbers.

Detective Cruz responded to the 911 call, spoke to Maforikan, and reviewed the 7-Eleven surveillance videos, which were admitted into evidence and played for the jury. In the videos, a white Hyundai pulled up to the store, a man wearing a distinctive, two-tone bright orange and dark jacket exited the passenger side of the car, and a man wearing a black jacket also emerged from the vicinity of the car. The orange-jacketed man entered the store with the other man following behind. While the orange-jacketed man stood at the coffee/snack station at the end of the cashier counter and in view of the front door, the black-jacketed man walked around the store. At some point, the two men conversed at the coffee station and, when one of the two 7-Eleven employees walked into a back room, the black-jacketed man quickly moved behind the front counter. Displaying a black handgun, the black-jacketed man robbed Maforikan. The orange-jacketed man walked out of the store and entered the driver's side of the white Hyundai. The black-jacketed man then

exited the store and entered the front passenger side of the car. The car then drove away. The detective testified that based on the robbers' interactions, he believed that the orange-jacketed man, whom he identified in court as appellant, was "acting as a lookout" while inside the store.

On December 12, 2014, Donna Rainey was robbed around 3:00 a.m. while working as a cashier for the 7-Eleven store on Livingston Road. She testified that a man came up behind her and, when she turned around, he was pointing a gun at her. He told her to open her register and hand him the money, which she did. The man with the gun also took four packs of Newport cigarettes. She noticed a second man come into the store behind the man with the gun, but she did not pay much attention to him. Rainey did note that the man with the gun placed the Newport cigarettes in a blue reusable Wal-Mart bag held by the second man. She was unable to identify either man.

Two days later, on December 14, Officer Stephen Price observed a white Hyundai Elantra speeding in the Oxon Hill and Livingston Roads area. He fell in behind the Hyundai and, after a car chase and crash, executed a traffic stop in Virginia. As the officer exited his car and approached the Hyundai, the driver and sole occupant exited the front passenger side of the Hyundai, climbed over the guardrail, and started to run. The officer apprehended the man, who was later identified as appellant. From the front passenger footwell of the Hyundai, the police recovered a black BB gun designed to look like a handgun, a two-toned bright orange and army green jacket, a black jacket, a reusable blue Wal-Mart bag, and a receipt with appellant's name on it.

Because appellant was acquitted of all charges related to the December 12 robbery, this appeal concerns only the convictions arising from the December 7 robbery.

DISCUSSION

I.

Appellant first argues that the trial court committed reversible error when it allowed the State to elicit testimony during trial that he fled from the car following the crash. Citing *Thompson v. State*, 393 Md. 291 (2006), appellant argues that his flight was inadmissible consciousness of guilt evidence because there was another equally reasonable explanation for his flight – he had allegedly stolen the car. The State responds that appellant failed to preserve his argument for our review because he did not make it below. The State further argues that even if preserved, the evidence was admissible, but even if it were inadmissible, the flight evidence was harmless. We agree that appellant's argument is not preserved.

The Motion *in Limine*

At appellant's trial, prior to jury selection, defense counsel made an oral motion *in limine* to exclude any reference "to a car chase, to any criminal activity or plea or anything as a result of that car crash in Virginia that began in Prince George's County." Specifically, defense counsel argued:

> That car crash resulted in the arrest of [appellant] who is around there. And as a result of that car crash and that car, I think the State's going to argue that they were able to link the contents of that car to [appellant], and that's what sort of put them -- [appellant] on their radar.
>
> The request that I'm going to make to the [c]ourt is initially I was going to ask if there would be no reference to any car in Virginia. *But I believe that the appropriate request would be to not have any reference to a car chase, to any criminal activity or plea or anything as a result of that car*

> *crash in Virginia that began in Prince George's County*. It started two days after the robbery and ended that night.
>
> Your Honor, apart from the fact that it is prejudicial, I think the [c]ourt would be justified in allowing some reference to the vehicle. And the fact that the vehicle produced the items that may have linked [appellant] to the robberies or one of the robberies. However, I think any reference to anything else would be prejudicial.
>
> On top of that, he was -- [appellant] was charged in Prince George's County for a motor vehicle theft and theft under a hundred thousand as result of that and that car. And he was acquitted. We had a jury trial and one count was dismissed for motion of judgment of acquittal and the other count, he was found not guilty.
>
> So, I think any reference to the Virginia crash and the chase or anything would be unduly prejudicial to the jury and basically is irrelevant.
>
> So, I would ask the [c]ourt to limit the State in their request, for example, to any reference to any activity around that car.

(Emphasis added). The State responded that the car chase and ensuing crash linked appellant to the car, which in turn linked appellant to the items found in the car that were related to the robberies. The State then added:

> Lastly, Your Honor, it also shows consciousness of guilt, Your Honor, defendant being -- evading the police officers. Again, and the chase and Officer Price will testify to that [sic] the reason where the chase occurred, because that vehicle that they were in was actually a stolen vehicle. It has -- a tag reader got a hit for a stolen vehicle, and that's when he attempted to conduct the stop, and that's why the chase occurred, Your Honor.

Defense counsel replied that Officer Price could testify that "he did arrest [appellant] at the bottom of that hill where that crash occurred" but argued that:

> *I think anything that happens before that,* anything that happens suggesting that there was a car, now we're talking about, I imagine, they are going to talk about a carjacking that happened in D.C. as well.
>
> Your Honor, that is exactly why any reference to anything other than we were properly processing this car. We found these items in the car. We

> say this car is the car in the robbery, and therefore, that's how we got to [appellant]. I think that's proper.

The court granted the motion in part and denied it in part, stating:

> [T]here will be no testimony as to a carjacking or crash. However, the fact that [the officer] saw the car, got a hit on the car, at some point was able to speak to an individual that he believed had been driving the car, that's all fine.
>
> *Just no carjacking, no chase, no crash. The rest is [] okay.*

(Emphasis added). Notably, neither appellant nor the trial court mentioned appellant's flight after the crash. Furthermore, the State's argument on the motion *in limine* concerned consciousness of guilt related to the car chase, not appellant's flight from the car.

Appellant's Objection at Trial

During the trial, appellant argued that Officer Price's testimony regarding his flight should have been precluded based on the court's ruling on the motion *in limine*. On direct examination, Officer Price testified about stopping a Hyundai Elantra. He explained that he observed the car speeding in a 35 mile per hour zone in the area of Oxon Hill and Livingston Roads, and that the sole occupant was the driver. Officer Price stated that he ultimately completed a traffic stop of the vehicle in Virginia, and upon exiting his car and approaching the Hyundai, he observed "a person getting out of the right-hand side of the vehicle, and they climbed over a guardrail attempting to flee from the car." Defense counsel objected. At the ensuing bench conference, the court asked defense counsel the basis for his objection and defense counsel stated: "Your Honor, the whole thing, -- the traffic stop is fine. I mean, I understand that." The following colloquy then occurred:

> [DEFENSE COUNSEL]: [But n]ow he's talking about jumping out of a car and fleeing from officers.
>
> THE COURT: That's what he observed. As long as he said attempted to flee.
>
> [STATE'S ATTORNEY]: The chase --
>
> THE COURT: Carjacking and chase.
>
> [STATE'S ATTORNEY]: Carjacking and chase and crash, and I've not spoken --
>
> THE COURT: And [the] rest is okay.
>
> [STATE'S ATTORNEY]: The rest is okay.
>
> THE COURT: Verbatim. Overruled, Counsel. Overruled.

The State resumed questioning and asked the officer to explain what he meant by "attempting to flee." Officer Price testified, without objection, that after he blocked the Hyundai's driver's side door with his vehicle, the driver exited out "of the right-hand side of the car, at which time [he] climbed over the guardrail and started to run into the woodline[.]" Officer Price testified that he apprehended the driver, having never lost sight of him. He identified appellant as the driver.

Preservation

Md. Rule 4–323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Moreover, "when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011)

("[W]hen an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified."). Although an appellant may present an appellate court with a more detailed version of an argument made at trial, the Court of Appeals has refused to require trial courts "to imagine all reasonable offshoots of the argument actually presented." *Starr v. State*, 405 Md. 293, 304 (2008); *cf. Sifrit v. State*, 383 Md. 116, 136 (2004) (finding unpreserved a trial court's refusal to admit evidence where the defendant's theory of relevance on appeal was different from the theory he presented to the trial court).

On appeal, appellant argues that the trial court erred in admitting evidence of his flight from the car after the crash. Appellant argues that the evidence was "irrelevant to the charges in this case and, even assuming it had some minimal relevance, its probative value was far outweighed by the danger of unfair prejudice to the defense." Appellant cites *Thomas v. State*, 372 Md. 342 (2002) and *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), which discuss the four inferences that must be found before admitting flight as consciousness of guilt evidence: "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Thomas*, 372 Md. at 352 (quoting *Myers*, 550 F.2d at 1049). Appellant then cites *Thompson*, *supra*, where the Court of Appeals held that the third *Myers* inference is not met where it is unknown whether the defendant's flight was motivated by consciousness of guilt as to the crimes for which the defendant was on trial, or by consciousness of guilt as to some other crime the defendant had committed. 393

Md. at 315. Appellant argues that based on *Thompson*, evidence that he fled from the car was inadmissible because "it is impossible to know whether [his] attempted flight was motivated by consciousness of guilt with respect to the robberies for which he was on trial or by consciousness of guilt with respect to the stolen car that he was driving." He argues that in admitting the evidence he was forced to make a "*Hobson's choice*"[1] between letting the jury infer that he fled from the car because of his consciousness of guilt regarding the robbery or introducing evidence that he fled from the car because it was stolen.

In determining whether appellant's argument is preserved for appellate review, we must compare the arguments appellant made to the trial court during trial with the arguments appellant now raises on appeal. At trial, appellant argued that the evidence of flight should have been precluded based on the court's ruling on the motion *in limine*. During the bench conference at trial wherein appellant lodged his objection, the colloquy makes clear that all parties believed the issue to be whether the flight evidence was precluded by the court's ruling on the motion *in limine*.

[1] The Court of Appeals recently described a "Hobson's choice" as follows:

> "Hobson's choice" refers to the paradox of an apparently free choice when in reality there is no alternative. The phrase originated from the practice of Thomas Hobson, circa 1630s, an English liveryman, to require every customer who wanted to buy a horse to take the horse nearest to the door.

Simpson v. State, 442 Md. 446, 464 n.8 (2015) (citing *The New Lexicon Webster's Encyclopedic Dictionary of the English Language* 460 (Bernard S. Cayne ed., Lexicon Publications, Inc., 1990)).

> [DEFENSE COUNSEL]: [But n]ow he's talking about jumping out of a car and fleeing from officers.
>
> THE COURT: That's what he observed. As long as he said attempted to flee.
>
> [STATE'S ATTORNEY]: The chase --
>
> THE COURT: *Carjacking and chase*.
>
> [STATE'S ATTORNEY]: *Carjacking and chase and crash*, and I've not spoken --
>
> THE COURT: *And [the] rest is okay.*
>
> [STATE'S ATTORNEY]: *The rest is okay.*
>
> THE COURT: *Verbatim*. Overruled, Counsel. Overruled.

(Emphasis added).

The court's use of the word "verbatim" is significant. In ruling on the motion *in limine*, the trial court stated, "Just no carjacking, no chase, no crash. The rest is [] okay." In other words, the court's motion *in limine* ruling precluded the State from adducing evidence of a carjacking as well as the resulting car chase and crash. In response to defense counsel's objection at trial, the prosecutor, in arguing that Officer Price's testimony was admissible, mirrored the language used by the court in its *in limine* ruling, which only precluded evidence of the "carjacking and chase and crash." The court acknowledged that the prosecutor had accurately interpreted its ruling, confirming compliance by uttering the word "verbatim," and therefore determining that evidence of flight from the car was not precluded by its *in limine* ruling. Defense counsel failed to articulate at trial any of the arguments appellant makes on appeal, specifically: that the flight evidence was irrelevant, that the prerequisite inferences for consciousness of guilt were not present, or that

admission of the evidence forced him to make a Hobson's choice. Instead, the trial record demonstrates that the State, appellant, and the trial court discussed whether Officer Price's testimony should have been precluded based on the court's ruling *in limine*. The court correctly determined that evidence of appellant's flight from the car was not covered by its ruling on the motion *in limine*. Accordingly, appellant's distinct appellate arguments—made for the first time on appeal—are not preserved for our review. *Klauenberg*, 355 Md. at 541.

II.

Appellant also argues that the trial court committed reversible error when it issued a body attachment for Maforikan because the State failed to satisfy the prerequisites of Md. Rule 4-267, which governs body attachments for material witnesses. The State responds that appellant's argument is meritless for two reasons: appellant has no standing to challenge the body attachment issued for Maforikan, and the argument is moot because the trial court recalled the body attachment.

Md. Rule 4-267, governing body attachment of material witnesses, provides in pertinent part:

> (b) **By order of court.** Upon application *filed* by a party in accordance with this Rule, the court may order the issuance of a body attachment of a witness and require the witness *to post a bond in an amount fixed by the court* to ensure attendance if the court is satisfied that (1) the testimony of the witness is material in a criminal proceeding, and (2) *it may become impracticable to secure the witness' attendance by subpoena*.
>
> * * *

> (e) **Content of application.** An application for continued detention under section (a) of this Rule or for a body attachment under section (b) of this Rule shall be *verified* and shall contain the following:
>
> (1) The name and present address of the witness;
>
> (2) The designation of the action for which the testimony of the witness is required;
>
> (3) A summary of the information or testimony of which the moving party believes the witness has knowledge;
>
> (4) The materiality of the expected testimony of the witness; [and]
>
> (5) The reason for requiring a bond or incarceration to ensure the attendance of the witness.

(Emphasis added).

On the first day of trial, the prosecutor moved for a continuance, advising the trial court that the victim in the first robbery, Maforikan, might be unavailable. The prosecutor explained that she had spoken to Maforikan that morning and he had indicated that he was "at the hospital" and that his availability would "depend on the doctor." The trial court directed the State to find out if Maforikan had been admitted to the hospital. Following a recess, Detective Cruz advised the court that he was able to contact Maforikan by telephone and that Maforikan said he was en route to the hospital. The State renewed its request for a continuance, which the court denied. Following a lunch recess, the State advised the trial court that, contrary to Detective Cruz's directive, Maforikan had still not confirmed that he was at a hospital. The State therefore requested a body attachment for Maforikan. Defense counsel objected. The court granted the State's request.

Maforikan appeared in court the next day, even though the body attachment was never served. The State asked the trial court to recall the body attachment so that there was

no risk that Maforikan would be "in the system for him to get picked up on another day." The trial court agreed and recalled the body attachment.

On appeal, appellant argues that the trial court violated Md. Rule 4-267 when it issued the body attachment for Maforikan because: 1) the State did not file a body attachment application nor was any application verified, 2) the body attachment issued by the trial court did not set a bond, and 3) there was no evidence presented before issuance of the body attachment that it was impracticable to secure the witness' attendance by subpoena. Appellant cites *Broadway v. State*, 202 Md. App. 464 (2011), in support of his argument.

The State argues that appellant has no standing to challenge a body attachment issued for Maforikan. We agree. In *Broadway*, the case upon which appellant relies, it was the *witness* for whom the body attachment was issued who challenged the validity of the body attachment and who had the right to appeal. *Id*. at 468-71. We are unaware of any case law or rule that gives a *defendant* standing to challenge a body attachment for a witness. Additionally, appellant's body attachment argument is moot because the trial court recalled the body attachment before it was served on Maforikan. "A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Attorney Gen. v. Anne Arundel Cty. Sch. Bus Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979). Appellant fails to argue that any of the limited exceptions to the mootness doctrine apply, and we see no basis in this record to support application of any exception to the doctrine. *See Hamot v. Telos Corp.*, 185 Md. App. 352, 364-67 (2009) (discussing the

limited exceptions to the mootness doctrine, which include issues "capable of repetition, yet evading review" as well as issues of "important public concern"). Accordingly, for the reasons stated above, we shall affirm.

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