UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1102

September Term, 2014

TERRELL P. CONWAY, SR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 20, 2015

Terrell P. Conway, Sr., appellant, was convicted in the Circuit Court for Wicomico County of theft of property valued at less than $1,000. Appellant presents the following question for our review:

> "Did the court abuse its discretion in refusing to give a cross-racial identification jury instruction?"

We shall hold that the circuit court did not abuse its discretion and affirm.

I.

Appellant was charged by criminal information in the District Court for Wicomico County with theft of property valued at less than $1,000 and conspiracy to commit theft of property valued at less than $1,000. Appellant requested a jury trial, and his case was transferred to the Circuit Court for Wicomico County. The jury convicted appellant of theft of property valued at less than $1,000.[1] The court sentenced appellant to a term of incarceration of five years. The following evidence was presented at trial.

On July 12, 2013, A. Blair Phillips was working as an Assistant Manager at a Food Lion store on Nanticoke Road when he noticed appellant and a woman walking through the store, with "a cart full of meat" and a few other products, "acting a little bit suspicious." He decided to follow them. Appellant and the woman walked down one of the aisles. Once in the aisle, appellant and the woman took meat from the cart. Appellant "put the meat down his pants" and the woman put meat into her purse. Mr. Phillips phoned the police

[1] The State *nolle prossed* the conspiracy to commit theft of property valued at less than $1,000 charge.

immediately to inform them that there was a shoplifting attempt in progress. Appellant and the woman went through the cash registers and "might have paid for some other product," but kept the meat concealed. They exited the building without paying or attempting to pay for the meat. After appellant had exited the building, Mr. Phillips decided to confront him. He "let them know, hey, if you guys took something give it back to me now." At that point, appellant removed the meat from his pants and returned it to Mr. Phillips and the woman did the same with the meat in her purse. Mr. Phillips testified that the total value of the meat was $136.25 and that it was not in "re sellable condition" after being "returned from the pants."

Appellant and the woman left the area before police arrived. Mr. Phillips wrote down their license plate number, however, and gave it to police. He described the vehicle as an older-model white vehicle with the front, driver's side window covered by a garbage bag. He testified at trial that appellant and the woman left together and that appellant was wearing a blue shirt. Officer Donnamarie Dubas with the Salisbury City Police testified that she was *en route* to the Food Lion when she was informed that the suspects had fled the scene. She pulled over a vehicle matching Mr. Phillips' description and arrested appellant. When Officer Dubas pulled them over, appellant was traveling with a woman and wearing a blue shirt.

At trial, Mr. Phillips testified for the State and identified appellant as the man who had taken the meat from the Food Lion. He testified that he had never seen appellant before witnessing the theft and had not seen or identified appellant since the incident, except for

when they "went to court" on the day of the theft. Although approximately one year had passed since he had last seen appellant, Mr. Phillips testified that he remembered the day clearly. After appellant rested his case, defense counsel asked to approach the bench and requested a jury instruction as follows:

> "[DEFENSE COUNSEL]: I realized today that Mr. Phillips was a different race and we're asking for the cross race identification instruction.
>
> THE COURT: Do you have any case law?
>
> [DEFENSE COUNSEL]: May I go back to my table?
>
> * * *
>
> [DEFENSE COUNSEL]: Your Honor, the only thing that I have at this point is I believe *Smith v. State* but that was decided against giving the instruction, but under certain circumstances they believe that it is necessary. And in this case I believe that the instruction is necessary since the witness did not have a length of time to observe my client, he didn't say how long he had observed him, how much contact he actually had with his face. There was no showup given where the alleged defendant or where the defendant was taken back to Food Lion to confirm the identity at that time. Your Honor, we are requesting that you give that instruction.
>
> THE COURT: There's no — I'm familiar with the *Tucker* case, 407 Md. 368, a 2009 case.[2] No appellate decision to my knowledge mandates that the Court give that instruction; however, you are free to argue it.

[2] In *Tucker v. State*, 407 Md. 368, 380 (2009), the trial court instructed the jury, as part of a cross-racial identification instruction, that "[t]here is no particular reason to think that cross-racial identification applies to eyewitnesses in actual criminal cases." The Court of Appeals held that this was an inaccurate statement of the law. *Id.* at 382.

[DEFENSE COUNSEL]: Yes, Your Honor, thank you."

The Court instructed the jury, in part, as follows:

> "You have heard evidence concerning the identification of the Defendant as the person who committed the crime. In this connection you should consider the witness's opportunity, I believe in this case it was Mr. Phillips, to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind and any other circumstances surrounding the event. You should consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility, as well as any other factor surrounding the identification. It is for you to determine the reliability of identification and give it the weight you believe it deserves.
>
> The identification of the Defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the Defendant, but you must examine the identification of the Defendant with great care."

Appellant's closing argument focused on Mr. Phillips' testimony, including the reliability of his eyewitness identification. Appellant did not discuss the reliability of cross-racial identifications in closing.

The jury convicted appellant of theft of property valued at less than $1,000. The court sentenced appellant to a term of incarceration of five years. This timely appeal followed.

II.

Appellant argues that the circuit court abused its discretion when it refused to instruct the jury on the increased difficulties that some eyewitnesses face when identifying members

of a race other than their own ("cross-racial identification instruction"). According to appellant, the State's entire case rested on Mr. Phillips' identification. He contends that the Court of Appeals has recognized that there is scientific evidence that some witnesses are better able to identify members of their own race. In this case, where the State's entire case rested on a cross-racial eyewitness identification, he concludes that the jury should have been instructed on the difficulties that some witnesses face in identifying members of another race accurately.

The State argues that the circuit court did not abuse its discretion when it declined to instruct the jury on cross-racial identifications. The State alleges that Maryland has neither adopted nor approved such an instruction and that nothing in our case law would require the court to instruct the jury on the difficulties of cross-racial identification.

III.

We review a trial court's decision regarding whether to give the jury a particular instruction for an abuse of discretion. *Cost v. State*, 417 Md. 360, 369 (2010). The Court of Appeals has summarized our analysis of jury instructions as follows:

> "On appeal, instructions are reviewed in their entirety to determine if reversal is required. The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the

> defendant's rights and adequately covered the theory of the defense."

Fleming v. State, 373 Md. 426, 433 (2003). A trial court must give a requested jury instruction as to the law where "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions given." *Dickey v. State*, 404 Md. 187, 197-98 (2008). *See also* Maryland Rule 4-325(c). A party requesting an instruction must present "some evidence" that the instruction is warranted. *See State v. Martin*, 329 Md. 351, 358 (1993) (holding that a defendant need not prove beyond a reasonable doubt, by clear and convincing evidence or by a preponderance of the evidence that a self-defense instruction was warranted in a homicide case, but must produce "some evidence" that the instruction was appropriate).

The Court of Special Appeals examined the possibility of mandating a cross-racial eyewitness identification instruction twice in the past, and both times we concluded that the decision to give the instruction rested with the sound discretion of the trial judge. We reaffirm that position today.

First, in *Smith v. State*, 158 Md. App. 673, 704 (2004), we held that a cross-racial identification instruction was not required where there was no evidence that the witness lacked familiarity with the defendant's race and "nothing to suggest that race played a part in the identification." The Court of Appeals reversed on other grounds, holding that the trial court must permit a defendant to argue cross-racial identification issues in closing when

applicable, but declining to reach the question of cross-racial identification instructions. *Smith v. State*, 388 Md. 468, 470 (2005).

Second, we examined the impact of *Smith* in *Janey v. State*, 166 Md. App. 645 (2006). We held as follows:

> "We conclude that the holding of the Court of Appeals in *Smith and Mack*, which focused on a defendant's right to counsel and the right to make closing arguments, did not impose any new duty upon trial judges to give jury instructions addressing cross-racial identification. The underpinning of the Court's ruling in *Smith and Mack* was that it is reversible error for a trial court to prevent a defendant from attacking the prosecution's evidence during closing argument. *That holding does not support the conclusion that a trial court commits reversible error if it declines to give the jury an instruction on cross-racial identification*."

Id. at 662-63 (emphasis added). We concluded there is no obligation upon the trial court to give a cross-racial jury instruction, and it remains within the trial court's discretion to determine whether the instruction is appropriate. *Id*. at 666.

Appellant notes that in *Janey*, we stated also as follows:

> "Accordingly, our holding in this case — that the trial judge did not abuse his discretion in refusing to give the requested instruction on cross-racial identification — should not be interpreted as holding that it is never appropriate to give such an instruction."

Id. at 667. We do not deny that the instruction *may be appropriate* in some cases. An instruction may be appropriate without being mandatory, so long as it is within the universe of instructions from which the trial court may select in the exercise of its sound discretion.

In this case, the trial court exercised its discretion and decided against giving the instruction. The court did not abuse its discretion.

The State argues that a cross-racial eyewitness identification instruction was not generated. Inasmuch as we have found that the decision to give an instruction lies within the sound discretion of the trial court, we need not consider how the issue of cross-racial identification may need to be generated. In some cases, it may be crystal clear that race is an issue. In other cases, it might be blurred and ambiguous and that disparity in race may not be so apparent. Here, it appears that race was raised explicitly only at the end of the case by defense counsel in his request. Even were we so inclined to consider the issues, this record is insufficient.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.