

Circuit Court for Baltimore City
Case No. 118351021

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1889
September Term, 2019

JOSEPH JACKSON

v.

STATE OF MARYLAND

Reed,
Friedman,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: January 29, 2021

*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.

A jury in the Circuit Court for Baltimore City convicted appellant, Joseph Jackson, of armed carjacking, robbery with a dangerous weapon, and possession of cocaine. After the trial court sentenced him to 30 years in prison, Jackson filed a timely notice of appeal. He asks us to consider the following questions:

1. Did the trial judge abuse discretion by ruling that the prosecutor could use a prior conviction for carjacking to impeach Mr. Jackson?
2. Is the evidence legally insufficient to sustain the convictions for armed carjacking and robbery with a dangerous or deadly weapon?
3. Did the court below abuse discretion by denying the motion for a new trial?

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

BACKGROUND

On September 5, 2018, Hal Person was driving his white 2009 Nissan Quest minivan, working his side job as a sedan driver. A man flagged Person down in the 1300 block of Edison Highway and asked for a ride to a location on Madison Street, where he said he was to pick up his sister.

Person transported the man the several blocks to his destination, but when the sister did not appear after a few minutes, Person told the man he could no longer wait. The man then pointed a gun, which Person described as “a grey long pistol” with a cylinder, at his side and told him to empty his pockets. The man ordered Person out of the minivan and drove away in it, also taking Person’s wallet, two cell phones, a GPS unit, and some cash.

Person walked around the neighborhood looking for a police officer, came upon Officer Nathaniel McCullough, and reported the carjacking. After a neighborhood canvass

turned up no leads, Person was transported to the Citywide Robbery Unit, where detectives took over the investigation.

On September 7, 2018, Officers Shawn Yates and Juan Minaya were on foot patrol in the 400 block of South Highland Street when they observed a white Nissan Quest minivan parked outside a carry-out restaurant. Having seen a white Quest on a list of recently stolen vehicles, the officers ran the license plate. The plate was registered to a Mercedes Benz.

Officers Yates and Minaya surveilled the Quest until two men entered and started the vehicle. The officers stopped the vehicle and arrested Jackson—who was seated in the driver’s seat—and the other man. When the officers ran the Quest’s Vehicle Identification Number, it matched the vehicle stolen from Person two days before.

A search of Jackson’s person incident to his arrest revealed one “clear cone” containing white residue, three clear cones containing a white rocky substance suspected to be cocaine,¹ two white pills, and two razor blades with powder residue on them. A black BB gun was recovered from under the driver’s seat of the Quest.

Officers created a photo array containing a photo of Jackson and asked Person to return to the Citywide Robbery Unit to view the array on September 11, 2018. From the photo array, Person identified Jackson as the man who had robbed him. During Jackson’s trial, however, when asked if he saw the robber in the courtroom, Person answered, “No.”

¹ The substance was later confirmed to be .77 grams of cocaine.

DISCUSSION

I. IMPEACHMENT WITH PRIOR CONVICTION

Jackson first contends that the trial court abused its discretion in ruling that the State could impeach his credibility with a prior conviction for carjacking. Because the prior conviction was for the same offense for which he was on trial, he concludes, the unfair prejudice to him in admitting it outweighed its probative value, and the trial court’s ruling had a “chilling effect” on his decision of whether or not to testify.

The State counters that Jackson did not preserve this issue for our review because he elected not to testify, and this Court cannot weigh the prejudice and probative value of the prior conviction without knowing the nature of his testimony. In any event, the State continues, the trial court acted within its discretion in permitting impeachment by a prior carjacking conviction. Our case law is clear and compels our agreement with the State on this issue.

On the first day of trial, the State filed a written motion *in limine*, requesting permission to use Jackson’s 2013 conviction for carjacking to impeach him if he chose to take the stand.² The next day, the trial court ruled:

Okay. The Court is mindful of the fact that it is a similar offense. However, the Court is also mindful that it is a crime of moral t[ur]pitude, a crime of dishonesty. And in light of the fact that the State will have to prove what happened out there and credibility of witnesses is going to be of the utmost importance[,] I don’t think the officers, police officers were present at the time that the car was taken and that’s going to be dependent on the credibility of the victim witness. And for that reason[,] I will allow the

² The State also sought leave to use a 2006 first-degree burglary conviction for impeachment purposes. Jackson’s trial attorney did not contest the use of that conviction, and it is not pertinent to this appeal.

carjacking, as well as the burglary, both crimes of moral turpitude, crimes of dishonesty that do fall within the 15 years.

I do find that the probative value outweighs any prejudicial effect because it only comes into play if the Defendant chooses to take the stand. He can be asked about it, not the details of it, but merely “isn’t it a fact that you were convicted of a crime of moral turpitude when you were—after your 18th birthday and represented by counsel or waived your right to counsel” the proper question. All right.

And so [,] over your objection [,] the Court will allow it. You will only be permitted to ask it though if you have a certified copy of those convictions in your possession.

Later, advising Jackson of his Fifth Amendment right against self-incrimination, the trial court reminded him, “You will also know that if you do take the witness stand the State will be able to ask you questions specifically about your prior record. Those two crimes of moral turpitude that we talked about, the carjacking and the burglary.” Jackson elected not to testify, and neither of the two referenced prior convictions were admitted into evidence.

We agree with the State that Jackson did not preserve his challenge to the trial court’s *in limine* ruling because he did not notify the court of “his desire to testify and of the sole reason for his refusal to testify.” *Passamichali v. State*, 81 Md. App. 731, 741 (1990). As this Court explained in *Lancaster v. State*, “a reviewing court cannot very well weigh the probative value of a prior conviction against the prejudicial effect to the defendant without knowing ‘the precise nature of the defendant’s testimony, which is unknowable when, as here, the defendant does not testify.’” 86 Md. App. 74, 96 (1991) (quoting *Luce v. United States*, 469 U.S. 38, 41 (1984)). Upon these facts, we are bound by precedent to conclude that this issue was waived.

Although it is possible that the trial court’s ruling on the State’s motion *in limine* motivated Jackson not to testify, it is also possible that he had no intention of testifying, regardless of the court’s ruling on the motion. It is also possible that the State might have changed its position and not used the conviction to impeach Jackson. Because we do not rule on hypotheticals, the issue of whether Jackson’s prior conviction for carjacking could properly have been used to impeach him if he had testified was not preserved for appellate review. *See Offutt v. State*, 44 Md. App. 670, 677 (1980).³

³ Although not necessary to our decision, we observe that even had Jackson preserved the issue by testifying or noting his reason for not testifying, he would not prevail. The use of prior convictions to impeach a witness is permitted under both statute and rule. CJP §10-905(a)(1); MD. RULE 5-609.

Maryland courts apply a three-part test in “determining whether a witness may be impeached with evidence of a prior conviction” under CJP §10-905(a)(1). *King v. State*, 407 Md. 682, 698 (2009). *First*, the trial court must determine, “as a matter of law,” whether the conviction is for an offense that qualifies, either as an “infamous crime” or as another crime relevant to the witness’s credibility. *Id.* at 698-99. *Second*, if the conviction is eligible, the proponent must “establish that the conviction was not more than 15 years old, that it was not reversed on appeal, and that it was not the subject of a pardon or a pending appeal.” *Id.* at 699. *Finally*, if these conditions are satisfied, the trial court, “must determine that the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party.” *Id.* Similarly, courts apply a five-part, non-exclusive test to determine whether a trial court has appropriately exercised its discretion under Rule 5-609:

- (1) the impeachment value of the prior crime; (2) the time that has elapsed since the conviction and the witness’s history subsequent to the conviction;
- (3) the similarity between the prior crime and the conduct at issue in the instant case; (4) the importance of the witness’s testimony; and (5) the centrality of the witness’s credibility.

Id. at 700-01 (citing *Jackson v. State*, 340 Md. 705, 717 (1995)). We have no doubt that the trial court did not abuse its discretion using either test or both. Here, the State sought to impeach Jackson with a six-year old conviction for carjacking. There is no doubt that

II. SUFFICIENCY OF THE EVIDENCE AND MOTION FOR NEW TRIAL

Jackson also asserts that the circumstantial evidence was insufficient to support his convictions of armed carjacking and robbery with a dangerous weapon because Person did not make an in-court identification of him as the perpetrator of those crimes and because Person’s description of the gun used in the crimes did not match the BB gun found under the driver’s seat of the Nissan Quest.⁴ Jackson similarly claims that the trial court erred in denying his motion for a new trial because the evidence presented at trial was insufficient. Because both issues turn on the sufficiency of the evidence, we consider them together.

“The test of appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Donati v. State*, 215

carjacking is an “infamous crime,” has impeachment value, and was sufficiently recent to be used. Both the prior and current crimes are carjacking, and while a prior conviction for the same offense weighs against admission, it is not “*per se* inadmissible.” *Id.* at 714. The trial court found that Jackson’s credibility would be of the “utmost importance” if he testified because, in the absence of any other witness, it would be his word against that of the victim. Because “[Jackson’s] credibility clearly was central to this case ... it was important for the State to be able to present evidence bearing on credibility.” *Id.* at 721-22. When “credibility is the central issue, the probative value of the impeachment is great.” *Id.* at 721. Given all that, if the issue had not been waived, we do not think the trial court would have abused its discretion had it allowed Jackson to be impeached with his prior convictions.

⁴ Jackson makes no evidentiary insufficiency claim in relation to the drug possession conviction. Jackson also made no argument during his motions for judgment of acquittal that the evidence was insufficient because the gun found at the time of Jackson’s arrest did not match the description given of the weapon used during the carjacking. Consequently, that argument is not preserved for appellate review. *See Peters v. State*, 224 Md. App. 306, 353 (2015) (“[R]eview of a claim of insufficiency is available only for the reasons given by the defendant in his motion for judgment of acquittal.” (cleaned up)). In any event, it was up to the jury to weigh and resolve any alleged conflict in the evidence.

Md. App. 686, 718 (2014) (cleaned up). “The same review standard applies to all criminal cases, including those resting upon circumstantial evidence, [because] generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitnesses accounts.” *Neal v. State*, 191 Md. App. 297, 314 (2010).

Moreover, “the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.” *Darling v. State*, 232 Md. App. 430, 465 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004)) (emphasis in original). In making that determination, we give deference to all of the reasonable inferences made by the jury, regardless of whether we would have chosen a different reasonable inference. *Donati*, 215 Md. App. at 718 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). We also defer to the jury’s “opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]” *Neal*, 191 Md. App. at 314 (quoting *Sparkman v. State*, 184 Md. App. 716, 740 (2009)).

Jackson’s claim of evidentiary insufficiency rests predominantly on the fact that the carjacking victim did not make an in-court identification of him as the perpetrator. Jackson appears, however, to ignore the fact that Person identified him as the carjacker from a photo array presented to Person less than a week after the carjacking.

The Court of Appeals has explained that, in the absence of any claim of impropriety in the photographic identification,

an extrajudicial photographic identification of an accused is sufficient evidence of ... criminal agency to support a conviction, notwithstanding the fact that the victim may be unable to identify [the defendant] at the time of

trial. We are of the view that a rational trier of fact could conclude from such evidence that the person identified is the culprit.

Bedford v. State, 293 Md. 172, 185 (1982); *see also Nance v. State*, 93 Md. App. 475, 498 (1992) (“An extrajudicial photographic identification is sufficient evidence of a defendant’s criminal agency, even if the identifying witness fails to repeat the identification in court.”).

Person’s positive identification of Jackson as the carjacker from a photo array, after Jackson was found in possession of the vehicle that was stolen during the carjacking, was sufficient evidence of Jackson’s criminal agency. Person’s failure to identify Jackson in the courtroom affected the weight of the evidence, but it did not render the evidence insufficient to sustain the convictions. *See, e.g., Belton v. State*, 152 Md. App. 623, 639 (2003) (holding that the identification of suspect in photo array, and subsequent retraction of the identification was sufficient to sustain conviction).

Because we conclude that the evidence that the State presented at Jackson’s trial was sufficient to sustain the convictions for armed carjacking and robbery with a dangerous weapon, we also conclude that the trial court did not abuse its discretion in denying Jackson’s motion for a new trial, which was based on the same claim of evidentiary insufficiency.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED;
COSTS ASSESSED TO APPELLANT.**