Circuit Court for Baltimore City
Case No.: 120042013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1943

September Term, 2021

DAMON MILES

v.

STATE OF MARYLAND

Wells, C.J.,
Tang,
Meredith, Timothy E.,
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 2, 2022

Convicted by a jury, in the Circuit Court for Baltimore City, of second-degree murder and related firearm offenses, Damon Miles, appellant, presents two questions for our review:

> (1) Did the [trial] court err in permitting a witness, who was not present at the time, to identify [Miles] in surveillance footage taken from the scene of a shooting?
>
> (2) Did the [trial] court err in propounding a "flight" instruction?

We answer "no" to both questions and, for the following reasons, shall affirm.

BACKGROUND

The day after Christmas 2019, a Baltimore City bar's security camera recorded Miles arguing with several other patrons before leaving. One of those patrons was Michael Small, who followed Miles out of the bar. Outside the bar, a Citywatch camera recorded Miles abruptly turning around and shooting Small two times—once in the chest, once in the head. The footage then shows Miles running down the street until he rounds a corner and slows to a walk. After receiving an anonymous tip a week later, Baltimore City police monitored Miles's residence for several days, but he was never seen coming or going. Instead, three weeks after the shooting, the police eventually arrested Miles at his cousin's home on the other side of the city.

At trial, the State called Charles Horn to identify Miles as the shooter in the video using two still photographs taken from the bar's security footage. Horn had been Miles's landlord "[f]or a few years" at the time of trial and interacted with Miles "easily . . . once a month." He confirmed that Miles was the person in the video. At the close of evidence, the trial court included a "flight" instruction in its charge to the jury.

The jury convicted Miles of second-degree murder and related firearm offenses. He was later sentenced to an aggregate term of 60 years' incarceration. This appeal followed.

DISCUSSION

Miles asserts that the trial court should not have allowed Horn to identify him in the photographs because Horn lacked "substantial familiarity" with him. Miles also argues that the evidence did not warrant a "flight" instruction because the State was the only one at trial to describe him as "running" from the scene. The State first counters that neither issue was preserved for our review. They follow by arguing that Horn did not need "substantial familiarity" to identify Miles and that, regardless of the words used, the Citywatch footage shows Miles running from the scene. We will address the issues as they arose chronologically at trial.

I. Lay-Witness Identification

First, we determine whether Miles preserved his objection to Horn's identification testimony for review. We will not decide any issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Further, if a party states specific grounds when objecting to evidence at trial, they forfeit all other grounds for objection on appeal. *Perry v. State*, 229 Md. App. 687, 709 (2016).

At trial, Miles objected to Horn's testimony because "he was not there" the night of the shooting and his identification would take "it out of the purview of the jury to determine" whether it was indeed Miles in the video. The State attempts to distinguish this from Miles's argument on appeal that Horn was not sufficiently familiar with him to offer an opinion. We are unpersuaded. Miles's objected at trial based on the argument that a lay

witness who was not present at the crime scene, should not be permitted to identify a defendant in a video at trial. He argues the same on appeal. We therefore find his argument preserved.

Although we agree with Miles that he preserved his argument, we disagree with its merits. A lay witness may testify in the form of opinion or inferences that are (1) derived from first-hand knowledge; (2) rationally connected to the underlying facts; (3) helpful to the trier of fact; and (4) not barred by any other rule of evidence. *See Robinson v. State*, 348 Md. 104, 118 (1997); *see also* Md. Rule 5-701. Whether to admit lay opinion testimony "is vested within the sound discretion" of the trial court. *Warren v. State*, 164 Md. App. 153, 166 (2005). We will not disturb its ruling "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Moreland v. State*, 207 Md. App. 563, 568–69 (2012) (cleaned up).

When determining the admissibility of lay witness testimony identifying a defendant as the person depicted in a photograph or video, we apply the principles announced in *Moreland*. We permit such testimony "if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury." *Id.* at 572 (cleaned up). "[A] lay witness who has substantial familiarity with the defendant . . . may properly testify as to the identity of the defendant in a surveillance photograph." *Id.* (cleaned up). But, "although the witness must be in a better position than the jurors to determine whether the [photograph] is indeed that of the defendant, this requires neither the witness to be 'intimately familiar' with the defendant nor the defendant to have changed his appearance." *Id.* at 572–73 (cleaned up). Rather, "the intimacy level

of the witness'[s] familiarity with the defendant goes to the weight to be given the witness'[s] testimony," not its admissibility. *Id.* at 572 (cleaned up).

Here, Horn had previously encountered Miles on several occasions: he saw him at least once a month for several years. Horn's familiarity with Miles provided "some basis" for the trial court to conclude that he was more likely to be able to identify Miles from the surveillance video than was the jury. Moreover, Horn's identification was derived from his first-hand interactions with Miles. There was a rational connection between Horn's perception that Miles was the person in the surveillance video and his testimony identifying Miles. Finally, given Horn's prior encounters with Miles, there was sufficient factual support for his conclusion that Miles was the person depicted on the footage, and his opinion was therefore useful to the jury. We conclude that the trial court did not abuse its discretion in permitting Horn's testimony as to the identification.

Still, Miles argues that in *Moreland*, the witness was substantially more familiar with the defendant than is the case here, and therefore Horn did not meet *Moreland*'s threshold requirement of "substantial familiarity." Though we agree with Miles that the witness in *Moreland* was more familiar with the defendant than is the case here, we disagree with his interpretation of the holding. Although we noted in *Moreland* that a majority of jurisdictions agree that "substantial familiarity" with a defendant would be *sufficient* to permit testimony, we did not hold that such familiarity was *required*. In fact, we explained that a witness is not required to be "intimately familiar," but rather the rule permits such testimony provided there is "some basis" to conclude that the witness was more likely to correctly identify the defendant than the jury. *Moreland*, 207 Md. App. at

572–73. When there is some factual basis, the witness is permitted to identify the defendant, and the jury determines the weight to be given to that testimony depending on the level of familiarity. *Id.* So too here. The trial court thus did not abuse its discretion in permitting Horn's testimony.

II. Flight Instruction

We next address the State's contention that Miles's argument regarding the trial court issuing a "flight" instruction was not preserved. Rule 4-325(f) requires a party to object "on the record promptly after the court instructs the jury[.]" The purpose of the rule is to correct any error while there is an opportunity to do so. But substantial compliance with the rule can suffice when an objection is clearly stated on the record in open court, and the court, after ample opportunity to consider the request, unequivocally denies it with such an explanation that it is clear that renewal of the objection after instructing the jury would be futile. *See Gore v. State*, 309 Md. 203, 208–09 (1987); *Horton v. State*, 226 Md. App. 382, 414 (2016).

Here, Miles made his objection in open court, and the trial court clearly understood what was being requested. The court denied the request and explained why it did. The following day, the court acknowledged Miles's prior objection and reiterated that it believed the flight instruction was "appropriate." The instructions were given shortly thereafter. Under these circumstances, we are persuaded that Miles had every reason to believe that renewal of the objection would be futile, that there was substantial compliance, and that appellate review has been adequately preserved in this case.

But again, though we agree that Miles preserved his argument, we disagree with its merits. We review a trial court's decision to give a particular jury instruction for abuse of discretion. *Taylor v. State*, 473 Md. 205, 230 (2021). A trial court abuses its discretion if it commits an error of law in giving an instruction. *Id.*

A court is required to give a requested instruction if: (1) it is a correct statement of the law; (2) it is applicable under the facts of the case; and (3) its content was not fairly covered in another instruction. *Ware v. State*, 348 Md. 19, 58 (1997). Miles disputes only the second prong.

An instruction is applicable "if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State*, 426 Md. 541, 550 (2012). This preliminary determination "is a question of law for the judge[,]" and on appellate review, we must determine whether the requesting party "produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Id.* (cleaned up). This threshold is low, in that the requesting party must only produce "some evidence" to support the requested instruction. *Id.* at 551. Upon our review of whether there was "some evidence," we view the facts in the light most favorable to the requesting party, here being the State. *Hoerauf v. State*, 178 Md. App. 292, 326 (2008).

The instruction at issue here is the pattern "flight" instruction. This instruction is warranted when four inferences may reasonably be drawn from the evidence: "[1] that the behavior of the defendant suggests flight; [2] that the flight suggests a consciousness of guilt; [3] that the consciousness of guilt is related to the crime charged or a closely related

crime; and [4] that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime." *Id.* at 321–22 (cleaned up). Miles's arguments speak to the first and second inferences.

As to the first inference, "evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." *Id.* at 323 (cleaned up). As to the second inference, the movement also "must reasonably justify an inference that it was done with a consciousness of guilt and [in] an effort to avoid apprehension or prosecution based on that guilt." *Id.* at 324. To this end, there is a distinction between mere departure from the crime scene and actual flight. Mere departure, without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and in an effort to avoid apprehension or prosecution based on that guilt, is not "flight," and thus does not warrant the giving of a flight instruction. *Id.* at 325–26.

Miles analogizes this case to *Hoerauf*, where we held that a flight instruction was not warranted. But the facts before us are distinguishable. In *Hoerauf*, the defendant simply walked away from the crime scene with a group of individuals who had just committed robberies. When he left the scene, the police had not arrived, nor was their arrival imminent. There was also no evidence that the defendant attempted to flee the neighborhood or to secrete himself from public view to avoid apprehension.

In contrast, the evidence here included surveillance footage showing that Miles ran, not walked, away immediately after the shooting. Regardless of the words Miles or the trial

court used, the footage clearly shows this. Moreover, although the police had not arrived when Miles began running away, it would be fair to presume that authorities would be arriving to the scene shortly, given the number of gunshots fired in a public place. Indeed, the evidence reflected that the bar was occupied, and the police arrived within minutes. In addition, Miles did not remain in the public eye as in *Hoerauf*; he did not even stay at his own home for long—if he stayed there at all—after the shooting. He was instead arrested at a relative's home across the city, indicating that he sought to avoid public view.

We have recognized that one of the "classic" instances of flight "is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking[.]" *Hoerauf*, 178 Md. App. at 324. That is what the evidence reflected here. It therefore supported a finding of all four inferences articulated above. Consequently, when viewing the facts in the light most favorable to the State, we conclude that there was "some evidence" that Miles's departure from the scene was accompanied with attendant circumstances that could reasonably justify an inference of a consciousness of guilt and an effort to avoid apprehension based on that guilt. The trial court thus did not err in delivering the instruction.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.