UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1945

September Term, 2013

TRE WARNER

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: July 8, 2015

Following a jury trial, the Circuit Court for Harford County convicted Tre Warner, appellant, of robbery with a dangerous weapon, first degree assault, first degree burglary, theft of property valued between $1,000 and $10,000, use of a firearm in the commission of a felony, and possession of a regulated firearm by a person under 21 years of age. After merging the assault and theft convictions for sentencing purposes, the trial court sentenced appellant to a total of 65 years with all but 40 years suspended.

QUESTIONS PRESENTED

Appellant raises two questions:

> 1. Is the evidence legally insufficient to sustain Appellant's convictions?
>
> 2. Did the trial court err by denying Appellant's motion for a new trial?

The first question was not preserved for our review because trial counsel failed to particularize the reasons for his motions for acquittal. With respect to the second question, we conclude that the trial court did not abuse its discretion in denying appellant's motion for a new trial. Accordingly, we affirm the judgments of the circuit court.

FACTS AND LEGAL PROCEEDINGS

The State presented evidence that appellant and an accomplice forced their way into the apartment of Vernetta Lowery, held a gun to her head, stole cash and other property, and then threatened to kill her and her children if she called police. At trial, appellant presented an alibi witness as his defense.

Ms. Lowery testified that, at about 4:00 a.m. on March 28, 2013, someone knocked on her apartment door. When she opened the door just a crack, she saw two men, whom she recognized as "Y.G." and "Jim Jones." Both men pointed handguns at her and "asked where

[her] money was at." After pushing through the door, the two men "ransacked" the apartment, looking for cash and valuables. Lowery's four-year-old daughter and six-year-old son were in the apartment. During the robbery, the man she knew as Y.G. put his gun to her face and said, "if you call the police, [we will] come back and kill [you] and [your] kids." Ultimately, the robbers stole her television, Xbox game console and controller, Xbox games, phone, iPad, and about $40 in cash.

Ms. Lowery testified that she recognized Y.G. because, before the robbery, she had seen him walking around in her neighborhood, and he had once accompanied her brother when he came to her door. The day after the robbery, Ms. Lowery identified appellant from a photo as Y.G., "the person that threatened me and . . . put the gun up to my face in my house." At trial, she made a courtroom identification of appellant as the assailant she recognized as Y.G. She denied that appellant had ever previously been inside her apartment.

Detective Michael Pachkoski, of the Harford County Sheriff's Office, was accepted as an expert in fingerprint identification, and he testified that he recovered three latent fingerprints from a video game case that Ms. Lowery reported had been handled by one of the robbers. Det. Pachkoski then matched those prints to appellant's, through records stored in the Automated Fingerprint Identification System computer database.

Harford County Detective Christopher Sergeant conducted the photographic identification procedure during which Lowery identified appellant. After giving standard procedural instructions, Det. Sergeant showed Ms. Lowery a selection of six photographs

that had been compiled by Det. Pachkoski. As soon as Ms. Lowery looked at the second photo, she stated, "that's him," and she "did not look at the remaining photographs."

In the defendant's case at trial, appellant's girlfriend, Tonjalia Paige, testified that appellant arrived at her residence at around 11 p.m. on March 27, 2013, and did not leave until around 10 a.m. the next morning. On cross-examination, however, she admitted that she was asleep between the hours of three and eight o'clock a.m.

At the close of the prosecution's case, and again after the close of all evidence, counsel for appellant moved "for a verdict in favor of [his] client," without any further elaboration. In both instances, the motion was denied. After the trial, appellant filed a motion for new trial, and, after a hearing, the court denied the motion.

DISCUSSION

I. Sufficiency of evidence

Appellant contends that the evidence was insufficient to sustain his convictions. He nevertheless concedes that his trial counsel did not preserve a sufficiency challenge, acknowledging as he must that, when counsel moved for acquittal — both at the end of the State's case and at the close of evidence — he did so without particularizing specific grounds. *See* Maryland Rule 4-324(a) ("The defendant shall state with particularity all reasons why the motion should be granted."). The trial transcript confirms that defense counsel offered no particular reasons why the motion should be granted, and merely stated that he would "submit" with respect both motions. Consequently, this issue is not preserved for our review.

In his appellate brief, appellant "urges this Court" to "find that . . . trial counsel rendered ineffective assistance by failing to make a motion for judgment of acquittal as to all of the counts arguing that [his] criminal agency had not been proven." Conceding "there was no doubt that Ms. Lowery was the victim of a robbery," appellant maintains that there were "deficiencies in the prosecution's proof" that he was one of the two robbers, citing the following evidence:

1. "Appellant's girlfriend, Ms. Paige, testified that [a]ppellant was with her throughout the night of March 27, 2013, until mid-morning of March 28, 2013."

2. Although "Ms. Lowery testified that she recognized her assailants and knew their nicknames[,]" her identification of appellant from the photo array "may not have been reliable because" she "only looked at two of the six photographs presented to her during the identification procedure."

3. The two robbers were described by Ms. Lowery as having a similar appearance. Whereas she recognized "Y.G." as "light brown skin, tall, slim build" and in his early to mid-twenties, she also "described 'Jim Jones' as brown-skinned, tall, and with a slim build."

4. "The fingerprint evidence did not conclusively establish [a]ppellant's presence at the time of the robbery" because "Detective Pachkowski could not determine when the fingerprints belonging to [a]ppellant may have been placed on the Xbox game case" and "the possibility exists that [a]ppellant could have handled the Xbox game case at some time prior to the robbery through his acquaintance with Ms. Lowery's brother."

5. "[N]o weapons and no possessions belonging to the victim were found in [a]ppellant's possession."

In urging us to convert his sufficiency of evidence claim into an ineffective assistance of counsel claim, appellant relies on *Testerman v. State*, 170 Md. App. 324 (2006), a case

in which we considered an ineffective assistance of counsel claim on direct appeal. But, in contrast to *Testerman*, most ineffective assistance claims require further evidentiary proceedings to explore whether trial counsel's representation was prejudicially deficient. "Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). Consequently, we decline to consider on direct appeal appellant's argument that his counsel provided ineffective assistance.

Moreover, as the Court of Appeals held in *Walters v. State*, 242 Md. 235, 237-38 (1966):

> Identification by the victim is ample evidence to sustain a conviction. *Davis v. Warden*, 235 Md. 637, 201 A.2d 672 (1964); *Rakes v. State*, 227 Md. 172, 175 A.2d 579 (1961) and cases cited therein. The testimony of a victim, unlike that of an accomplice, needs no corroboration. *Gregoire v. State*, 211 Md. 514, 128 A.2d 243 (1957); *Basoff v. State*, 208 Md. 643, 119 A.2d 917 (1956). The testimony of [the victim] was legally sufficient to convict.

Accord Reeves v. State, 192 Md. App. 277, 306 (2010).

The jury was free to believe Ms. Lowery's repeated identifications of appellant, to credit the State's corroborative fingerprint evidence, and to reject appellant's purported alibi. *See generally Sifrit v. State*, 383 Md. 116,135 (2004) ("The jury was free to believe some, all, or none of the evidence presented"); *McNeil v. State*, 227 Md. 298, 300 (1961) ("finger print evidence found at the scene of a crime" may be tied to the crime by "circumstances tending to reasonably exclude the hypothesis that the print was impressed" at another time).

Because the evidence was legally sufficient for the jury to find that appellant was one of the robbers, defense counsel's failure to particularize his motions for acquittal did not prejudice appellant, and that failure does not support a claim that appellant was denied his right to effective assistance of counsel.

II. Motion for a new trial

Appellant contends that the trial court erred or abused its discretion in denying his motion for a new trial. The motion complained of the State's last-minute notice of its intent to present photos of the fingerprints, and the State's failure to disclose that the victim's brother knew appellant and had met him "at the victim's residence on a prior occasion." We are not persuaded that the court erred in declining to grant a new trial on either ground.

A party seeking a new trial has the burden of proof. *See Jackson v. State*, 164 Md. App. 679, 686 (2005). In reviewing the denial of a new trial motion, we respect "the opportunity the trial judge has to feel the pulse of the trial, and to rely on his or her own impression in determining the questions of fairness and justice." *Argyrou v. State*, 349 Md. 587, 600 (2000). The court's "discretion to grant or deny a new trial . . . will expand or contract depending on the nature of the factors being considered." *Id.*

Citing the trial court's failure to explain its denial of appellant's motion for a new trial, appellant maintains that "there is no indication that the trial court exercised discretion in making the ruling on [t]he motion for new trial." We disagree.

Trial judges are presumed to know the law and apply it correctly. *State v. Chaney*, 375 Md. 168, 179 (2003). In the absence of a rule or precedent expressly requiring the trial

judge to make specific findings on the record, a trial judge is not required to "spell out every step in weighing the considerations that culminate in a ruling." *Wisneski v. State*, 169 Md. App. 527, 555-56 (2006), *aff'd*, 398 Md. 578 (2007). Here, the trial court considered written and oral arguments presented by the parties, and we presume its ruling denying a new trial was made with full awareness that the court had discretion to rule otherwise.

A. Late Disclosure Regarding Fingerprint Evidence

The discovery rules require the State to provide the accused an "opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment or comparison[.]" Maryland Rule 4-263(d)(8)(B). Appellant argues "that the photographic images of his fingerprints, which were used by Detective Pachkoski in making a fingerprint comparison, should have been made available to defense counsel prior to trial."

Three months before trial, the State disclosed to appellant Det. Pachkoski's expert report, which contained copies of the fingerprints. But the State did not notify defense counsel of its intent to offer into evidence photos of the fingerprints until counsel met with the court in chambers immediately before trial began. The State admits that it failed to make a timely disclosure of its intent to offer the photos, but argues that the prosecutor cured that oversight before trial, to the satisfaction of appellant's trial counsel, who did not object either when the prosecutor made the belated disclosure or when the evidence was presented at trial.

The record supports the State's contention that no timely objection was made. At the hearing on appellant's motion for a new trial, the prosecutor proffered:

> Regarding . . . the State's alleged failure to provide the fingerprints, Your Honor, I sent [defense counsel] the fingerprint examiner's report with the initial discovery packet in this case on May 29th, 2013. That was a full . . . three months before trial. This trial started on August 20th, Your Honor. So, basically **three months before trial I advised [defense counsel] that fingerprint evidence existed, that we had fingerprints**, that we had compared fingerprints **and that those fingerprints were a match to the Defendant. That was all in the fingerprint examiner's report which he received within a few days of May 29th** which is when I mailed it to him. If [defense counsel] thought it necessary to examine those fingerprints himself, he had three months to make that request of my office and I gladly would have obtained copies of the actual fingerprints and given them to him upon his request. He did not make that request.
>
> Your Honor, the State's – I'll call it a mistake. It was a mistake. **On the discovery form where the State is supposed to list the items of physical evidence that it intends to use at trial, I neglected to put fingerprints in that list. I caught that error immediately before trial.** It was in your chambers – not your chambers, your antechambers where the attorneys wait. **I told him, [defense counsel], I forgot to put fingerprints in that list.** However, I adviced [sic] him that we had fingerprints by way of the fingerprint examiner's report, will you object if I use the fingerprints. **I showed them to him right then and there.** The purpose of my doing that before this case was called for trial is because if he objected I would have to ask for a postponement to give him the adequate time to make that examination. **I asked him specifically if he would object to those fingerprints before this case was called for trial.** I will admit, I grant you, it was within a couple of hours before this case was called for trial, but nonetheless it was before this case was called for trial. I gave him plenty of opportunity to make me request a postponement. It would not even have been a defense postponement request.
>
> The point is, Your Honor, those fingerprints or the existence of the fingerprints was made known to [defense counsel] three months before trial, the actual fingerprints were presented to him before trial was called, and **he said that he had no objection**. So, we proceeded with the trial. The fact that [defense counsel] now after the fact thinks maybe he should have more closely analyzed those fingerprints, that is a judgment call that he made at the time.

> It's a decision that he made fully aware of all of the circumstances of this case. It is not a decision that he made at the trial table under the pressure of having to deal with everything that is going on at the trial table. It is a decision that he made back in your antechambers when he had all the time in the world to look at those fingerprints and to think about what he was doing. At that time, Your Honor, **he told me that he had no objection** and so I proceeded as I proceeded.
>
> Your Honor, I certainly don't think there is any error there on the State's part. Frankly, I don't think there was any error on [defense counsel's] part. Frankly he looked at the fingerprints and saw to the untrained eye they looked the same, the expert told him they were the same, and he had no reason to disagree. I think he made a conscious and, quite frankly, a competent decision not to object to the fingerprints and I don't think there is any reason to object to them now.

(Emphasis added.)

Prior to verdict, appellant sought no remedy for the State's late disclosure. Defense counsel was aware of the fingerprint expert's report approximately three months before trial, and he failed to request an opportunity to inspect the prints or to obtain an independent expert examination. Moreover, when the prosecutor showed counsel the photos of fingerprints just before trial, defense counsel did not seek a continuance or otherwise object. During trial, when the fingerprint evidence was presented, defense counsel remained silent.

Under these circumstances, we are not persuaded that the trial court abused its discretion in declining to order a new trial.

B. Non-disclosure of Appellant's Link to Victim's Brother

As alternative grounds for a new trial, appellant complained to the trial court in his motion for new trial that "the State did not disclose that the victim's relative [*i.e.*, Ms.

Lowery's brother] . . . knew the Defendant and had met the Defendant at the victim's residence on a prior occasion." At trial, appellant's counsel elicited the following testimony:

> [Defense Counsel]: Now, Ms. Lowery, you indicated that Y.G. was at your door before?
>
> [Vernetta Lowery]: Yes.
>
> Q: I was going to ask you why he was at your door before?
>
> A: My brother knows of him.
>
> Q: Your brother?
>
> Q: What is your brother's name?
>
> A: Wardell Walton. . . .
>
> Q: Was Y.G. at your door to see Mr. Walton?
>
> A: My brother had came with him.
>
> Q: Would there be any time when Mr. Walton might be at your apartment without you there?
>
> A: No.

In this Court, appellant "acknowledges that his defense counsel elicited the information linking him to a family member of the victim," but, without citing any authority, "asserts that, if the prosecutor had been aware of this relationship, then she should have disclosed it prior to trial." Maryland Rule 4-263(d)(5) requires the State to disclose "[a]ll material or information . . . that tends to exculpate the defendant or negate or mitigate the defendant's guilt. . . ." Appellant fails to explain why the acquaintance with the victim's brother would have been in any way exculpatory. Appellant further fails to explain how he

was prejudiced by the State's lack of pretrial disclosure of the information. Moreover, as the State points out, there is no indication in the record that the prosecutor was aware of any link between appellant and the victim's brother. Under these circumstances, we are satisfied that the trial court did not abuse its discretion in denying appellant's motion for a new trial.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.