UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 7

September Term, 2016

WENDELL CLAY

v.

STATE OF MARYLAND

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: December 23, 2016

A jury in the Circuit Court for Somerset County convicted Wendell Clay, appellant, of indecent exposure. Clay was sentenced to a term of one year and one day imprisonment. In this appeal, he presents the following questions for our review:

1. Did the trial court err in precluding Clay from testifying in his own defense?

2. Was the evidence sufficient to support Clay's conviction?

For reasons to follow, we answer the first question in the negative and the second question in the affirmative. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

On May 22, 2015, Officer Mariah Utz, a correctional officer at the Eastern Correctional Institution, was making her "rounds" when she came upon the cell of an inmate, later identified as Clay. While looking through a window in the door of Clay's cell, Officer Utz observed him "standing at the window" "stroking his erect penis." At the time, Clay was "naked" and "looking directly at [Officer Utz]." The encounter lasted "a few minutes," after which Officer Utz informed a superior officer that Clay would be receiving "an infraction." Clay was eventually charged with indecent exposure.

At trial, the State called Officer Utz, as its sole witness. She testified that while she was conducting a routine check of the inmates' cells, she observed Clay looking directly at her while masturbating. Officer Utz indicated that she conducted these checks every 30 minutes and that, prior to conducting the checks, she would usually "jingle" her keys to let the inmates know she was "headed in that direction so they can be properly dressed." She

also testified that, prior to her encounter with Clay, which occurred at approximately 2:00 p.m., she had conducted routine checks at 12:30 p.m., 1:00 p.m., and 1:30 p.m.

Following her testimony, the State rested its case, the trial court excused the jury, and defense counsel made a motion for judgment of acquittal. Thereafter, Clay was advised of his right to testify and asked whether he wanted to exercise his right. Clay, in response, stated "I don't need to testify." The court then relayed to Clay that it would give him the option to testify if he changed his mind later. Defense counsel's motion for judgment of acquittal was then argued and denied, the jury was called back into the courtroom, and the trial resumed.

Defense counsel called two witnesses, Miketta Mills, the officer in charge of the housing unit where the incident occurred, and Bruce Merritt, a correctional officer who responded to Clay's cell after Officer Utz reported the incident. Among other things, Officer Mills established that she had previously testified at an administrative hearing following the incident. Officer Merritt, on the other hand, indicated that he never testified at any such hearing.

When the officers' testimony ended, the court again asked Clay if he wished to testify, and the following colloquy ensued:

> CLAY: I have an objection to be made because there was a hearing at [Eastern Correctional Institute] on this matter and they were all sworn and I called them for witnesses.
>
> THE COURT: You're not here for that. You're here – that matter has been resolved. The question is whether or not you want to testify. You want to talk to him again?
>
> [DEFENSE]: I can talk to him again.

CLAY: Yeah, I want to talk to him.

(Thereupon there was a pause in the proceedings.)

[DEFENSE]: He's indicating he doesn't want to testify.

THE COURT: You don't wish to testify?

CLAY: No.

Defense counsel then renewed his motion for judgment of acquittal and asked that the jury be excused while the motion was argued. The court instructed the jury that "both the State and the Defense have rested" and that the jury would be excused so that the court could "hear some procedural matters" and discuss jury instructions with the attorneys. The court informed the jury that it would be called back into the courtroom to hear instructions and closing arguments, after which the jury would begin deliberations.

After the jury was excused, Clay stated, "I got a question for the Court." The court cautioned Clay that he should "go through [his] attorney" because it did not want him "to say something that will get [him] in trouble." The proceedings were paused and subsequently, defense counsel went forward with his argument for judgment of acquittal, which was ultimately denied.

The court then called for an adjournment so that the parties could "go in and go over the instructions." Following the recess, defense counsel requested a bench conference, and the following colloquy ensued:

[DEFENSE]: Your Honor, my client is indicating that he does wish to testify.

[STATE]: We're done.

THE COURT: It's over now. It's too late.

CLAY: Well, I want to put on the record that I do wish to testify.

THE COURT: I've given you two opportunities and both times you said you didn't want to. We've rested. We've rested –

CLAY: This is the situation. My attorney told me evidence could be admitted that's now not being allowed to be admitted which was the focal point of the whole case. You've got witnesses that's got on the stand that's deviated from what they were sworn in and testified before. So now I feel that it's imperative that I speak about what took place. The whole situation is –

THE COURT: Here's the problem, Mr. Clay. I've already told the jurors. The jurors are out and we've gone through the instructions. I've told them that both the State and the Defense have rested and the only thing left to be done was to be giving the instructions and then the attorneys would go to them with their closing arguments.

So the request is not made by your attorney. There is case law that says that there has to be one captain of the ship. If that's your request it's denied. It hasn't come from your attorney, but it's denied. It's too late, it's too late.

DISCUSSION

I.

Clay first argues that the trial court erred in refusing his request to testify. We disagree.

"The right of a criminal defendant to take the witness stand and testify in his own defense is fundamental, and its existence cannot be doubted." *Passamichali v. State,* 81 Md. App. 731, 741 (1990). If, on the other hand, "a defendant elects to remain silent, he

or she waives the constitutional right to testify on his or her own behalf." *Morales v. State*, 325 Md. 330, 335-36 (1992). An election to testify by a defendant "must be exercised in compliance with the established rules of procedure which govern a criminal prosecution." *McCloud v. State,* 77 Md. App. 528, 535 (1989), *rev'd on other grounds,* 317 Md. 360 (1989). "Accordingly, a request by an accused, who has elected not to testify and closed his case, to re-open his case for the purpose of giving testimony in his own defense may be denied by the court in a sound exercise of its discretion." *Id.* at 535-36.

Here, Clay was advised of his right to testify on two separate occasions, and both times Clay informed the court that he did not want to testify. After his second waiver, the jury was told that "both the State and the Defense have rested" and they were then excused so that the parties could prepare jury instructions. Thereafter, the court heard and denied defense counsel's motion for judgment of acquittal, called for a recess, and met with counsel to finalize jury instructions. After the court resumed the proceedings and was preparing to instruct the jury, Clay rescinded his waiver and informed the court that he wished to testify because certain "evidence" had not been admitted and because "witnesses…deviated from what they…testified before." The court denied Clay's request, stating that the request was tardy given the procedural posture of the case.

Under these circumstances, we hold that the trial court did not abuse its discretion in refusing to allow Clay to re-open his case and testify. As we see it, the court was well within its right to deny Clay's request to reopen rather than disrupt the orderly flow of the trial. *See Hunt v. State,* 321 Md. 387, 405-06 (1990) (trial court's denial of defendant's request to testify after the close of evidence was not an abuse of discretion, in part because

"[b]oth the State and defendant had rested" and "[t]he trial had already reached the instructions phase."); *see also Passamichali*, 81 Md. App. at 742 ("The right of an accused to present his own testimony…is not unrestricted…[and] 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'") (internal citations omitted).

Moreover, when Clay informed the court that he wanted to testify, he explained that he wanted to "speak about what took place" because certain evidence had not been presented to the jury.[1] However, Clay was present throughout his entire trial and, thus, he was fully aware of the evidence that had and had not been presented. When he asserted his right not to testify for the second time, both the State and defense witnesses had testified. Thus, not only was Clay's request to testify belated, his reasons for wanting to reopen his case were also inadequate, given that there was no additional testimony or information provided to the jury following his second invocation.

Nevertheless, Clay argues that the trial judge's denial was an abuse of discretion and that his case is comparable to the facts of *Mayfield v. State*. *Mayfield v. State*, 77 Md. App. 528 (1989).[2] There, the defendant, Sylvester Mayfield, waived his right to testify based on the assumption that his only other witness, his mother, would be permitted to testify. *Id.* at 545. Before Mayfield's mother could testify, however, the State objected because Mayfield's mother had not been sequestered during the State's case-in-chief. *Id.*

[1] Although Clay made a vague reference to "evidence" not being admitted and "witnesses" deviating from previous testimony, the record is far from clear as to the precise nature of this evidence.

[2] In setting forth his argument, Clay relies almost exclusively on this case.

The trial court sustained the objection and excluded the mother's testimony, and Mayfield rested without calling any witnesses. *Id.* The court then excused the jury for the day. *Id.* The following morning, Mayfield informed the court that he wished to testify because the court had excluded the testimony of his only witness. *Id.* The court denied the request, and Mayfield was convicted. *Id.* at 546-47.

Mayfield appealed, and this Court reversed, holding that the trial court abused its discretion in denying Mayfield's request to testify. *Id.* at 560. We noted that, although Mayfield initially waived his right to testify, this decision came prior to the trial court's exclusion of his mother's testimony. *Id.* at 561. We concluded, therefore, that "this development altered [Mayfield's] decision not to testify" and that, at the time of his waiver, Mayfield was "unaware of the consequences of his decision[.]" *Id.* at 558-59. We further noted that, unlike cases in which a defendant withdraws a waiver in an apparent attempt to "spar" with the trial court, in Mayfield's case, the withdrawal was motivated by an honest attempt "to modify his defense strategy in light of the trial court's decision to prevent his mother's testimony." *Id.* at 559-60. In short, Mayfield could "justifiably explain his delay in asserting his desire to testify." *Id.* at 560.

In the present case, we are not faced with a defendant being surprised by a trial court's ruling or waiving his right to testify based on assumptions that later became invalid. To the contrary, Clay was well aware of the evidence presented and not presented, during the state's case and his case-in-chief. Based on these circumstances and conversations with his attorney, Clay made a conscious decision not to testify. Unlike in *Mayfield,* there were no unforeseen developments that would have affected Clay's decision not to testify, and

Clay provided no reasonable explanation for his change of heart. As we explained in *Mayfield*, a trial judge need not "blindly adhere to the whims of a fickle defendant." *Id.* at 561. Rather, the trial court must assess the sincerity of the defendant's recantation and, based on the circumstances of the particular case, "consider the effects on both the defendant and the State to the end that justice may be served." *Id.* at 561. The trial court in the instant case did just that, and we see no reason to disturb the court's ruling.

II.

Clay next argues that the evidence was insufficient to sustain his conviction. Specifically, Clay maintains that the State failed to establish that he was acting with the requisite intent when he committed the crime. We disagree.

"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 Md. App. 686, 718 (2014), *cert. denied* 438 Md. 143 (2014) (internal citations omitted). "The test 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.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (internal citations omitted). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (internal citations omitted). "Further, we do not 'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the

basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Id.*

Section 8-803(b) of the Correctional Services Article of the Maryland Code provides that "[a]n inmate may not, with intent to annoy, abuse, torment, harass, or embarrass a correctional officer or authorized personnel, lewdly, lasciviously, and indecently expose private parts of the inmate's body in the presence of the correctional officer or authorized personnel." *Id.* When, as is the case here, a statute requires a specific intent, the State must establish that a defendant exhibited "not simply the intent to do an immediate act, but the 'additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result.'" *Harris v. State*, 353 Md. 596, 603 (1999) (internal citations omitted).

Thus, in the present case, the State needed to present evidence that Clay not only intended to expose himself, but that he did so with the specific intent to annoy, abuse, torment, harass, or embarrass Officer Utz. Such evidence need not be direct; rather, because "intent is subjective and, without the cooperation of the accused, cannot be directly and objectively proven, its presence must be shown by established facts which permit a proper inference of its existence." *State v. Smith*, 374 Md. 527, 536 (2003).

Officer Utz testified that she conducted checks of inmates' cells every 30 minutes and that, in the hours leading up to her encounter with Clay, she had maintained this same schedule and had conducted several prior checks. She also testified that she had a habit of jingling her keys to alert inmates as to her presence during the checks. Despite these general warnings, when Officer Utz approached Clay's cell, he was facing the cell's

window, completely naked, and masturbating. Then, rather than cover himself up or stop masturbating, all reasonable reactions by someone who is acting in a clandestine manner, Clay made direct eye contact with the officer and continued masturbating for "a few minutes." Given these circumstances, sufficient evidence existed from which a juror could reasonably infer that Clay acted with the specific intent to annoy, abuse, torment, harass, or embarrass Officer Utz.

We, therefore, affirm the judgment of the circuit court.

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