UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0192

September Term, 2015

ANTONIO EVANS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Berger,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: March 10, 2016

Appellant, Antonio Evans, was convicted of robbery and related crimes at the end of a jury trial in the Circuit Court for Baltimore City. The evidence admitted against him consisted mainly of two eye-witness identifications, video surveillance compact discs (CDs), and still images made from those recordings from the crime scene on the night of the robbery. Although the videos and still images did not convey any particularly distinguishing features of the perpetrator, the two eye-witnesses provided narration of the demonstrative evidence (as it was shown to the jury) supporting the conclusion that Evans was the man who committed the robbery. His appeal asks this Court to determine whether the circuit court admitted improperly the narration by the eye-witnesses regarding the videos and still images. We conclude that the circuit court did not abuse its discretion in allowing the witnesses at trial to narrate the video surveillance CDs, as well as identify Evans from the still images.

FACTS AND LEGAL PROCEEDINGS

On 30 June 2013, a Royal Farms convenience store on West Cold Spring Lane in Baltimore was the scene of a robbery at gunpoint. Video surveillance CDs from the store security equipment showed the gunman to be an African American male with short, dark hair, and wearing a white T-shirt. The video images began by showing the individual entering the store and picking up some merchandise. He then approached the check-out counter and brandished a gun. The gunman demanded money and cigarettes from the cashier. The entire robbery was captured on the store's video surveillance system, which employed six stationary cameras.

The Baltimore City Police Department, on 5 November 2013, identified Antonio Evans as a suspect. On 7 November 2013, the police arrested Evans. He was indicted on 3 December 2013 by a Baltimore Grand Jury on the following counts: robbery with a dangerous weapon, robbery, assault in the first degree, assault in the second degree, theft, reckless endangerment, use of a firearm in commission of a crime of violence, wearing/carrying a handgun on his person and in a vehicle, and possession of a firearm after having been convicted of a disqualifying crime.

Evans's trial commenced on 6 February 2015. The only employees present on the sales floor of the Royal Farms during the robbery, Ms. Nancy Smith and Ms. Janie Summerville Holloway, were called to testify by the State.[1] Both women identified initially Evans in-court (before being asked to speak to the demonstrative surveillance evidence) as the man who robbed the store.

Ms. Smith testified that she was sitting in the back parking lot of the Royal Farms on a break at 10:30 p.m. on the evening of the robbery when she observed a man approach the store. She sensed something may be "amiss."[2] She re-entered the store and

[1] A third employee was present in the store during the robbery, but remained in a back room. This person was not called to testify.

[2] Her testimony at trial revealed this sentiment, when asked what happened on the night of the robbery:

> A: Um, the gentleman over there [pointing to Evans seated at the defense table], I was sitting out on the lot because I was sick. He got – came up in a car and pulled – there's a synagogue behind. He pulled into the lot there,

(Continued…)

the man followed her. He proceeded to move about the store, picking up items before approaching the check-out register and producing a handgun. Ms. Smith testified that the man demanded money, cigarettes, and especially quarters. She stated that he threatened to kill them because there were no quarters in the register drawer.[3] Following this testimony, the State presented its demonstrative evidence, the store surveillance CDs and still images taken from the CDs.

The State played the CDs for the jury, while Ms. Smith narrated, recounting her recollection of the events at the Royal Farms as they unfolded on the screen. She identified on multiple occasions Evans as the individual depicted in the CDs robbing the

(…continued)

> came down out of the car. And, I spoke to him. I said: hello. And, he spoke back to me. I immediately got up and started heading into the store. I went into the deli and I told the girl [Ms. Holloway] to come out, because I wanted her to see him because I said: Something is going to happen.

[3] Ms. Smith's testimony at trial stated:

> Q: Could you tell us what happened next?
>
> A: Um, we – told us it was a holdup; and told us to hurry. And, Janie [Holloway] couldn't figure out how to open the drawer. It was her second night on the job. I asked him if I can – if I could come over and help her get the drawer open; and that there was an employee in the back room. . . I handed him all the money, the green stuff; and he got really upset because I didn't have any quarters in the drawer. . . And he kept asking for quarters. I told him that I didn't have any quarters in the drawer. And, he said: Where are the f'ing quarters? I said: I don't have any. He – then he started to say that he was going to hurt us; that he was going to shoot and kill us and, at which point, he had said at several times that he was going to kill us.

store. During the State's direct examination of Ms. Smith and her narration of the recordings and the still images Evans was identified six times as the robber.[4] Some of the image angles, however, did not show the man's face.

The State called next Ms. Holloway, the store attendant on duty during the robbery. Ms. Holloway testified to a similar recollection of the robbery as Ms. Smith. She recollected also that she had trouble opening the register, out of fear that the man would shoot her regardless. During her testimony, the State used two still images from the video surveillance and asked her to identify the man in the images. She identified Evans as the man in the still images. She was asked also about any distinguishing features that she recalled about the man who robbed her:

> Q: During the period of time that the Defendant was behind the counter, did you have an opportunity to look at his face?
> A: Yes.
> Q: And, what if any distinguishing characteristics or marks did you notice about the Defendant's face?
> A: I remember he had something pink on his lip.
> The Court: Something what?
> The Witness: Pink on his lip.
> The Court: Pink on his lip?
> Q: Do you remember whether or not that was the top or the bottom lip?
> A: Bottom.
> Q: Was there anything else that you remember about the Defendant at that particular time?
> A: Just that he was brown; dark brown skinned and had a low-cut haircut.

[4] This was done seemingly to account for the six different angles of the Royal Farms' stationary security cameras.

This particular facial feature was not visible in the videos played for the jury or the still images shown to Ms. Holloway during her testimony.

On cross-examination, Ms. Holloway acknowledged discussing with the prosecutor the unremarkable premise that a person's appearance can change over time:

> Q: And, did you have any opportunity to look at the video, or just the still photos?
> A: The video.
> Q: And, did [the Assistant State's Attorney] discuss with you people's appearance changing, or anything of that sort?
> A: Yes.
> Q: And, when did you have that discussion with him?
> A: On Friday [prior to trial].

On redirect examination, the State inquired about any changes in Evans' appearance since the date of the robbery:

> Q: In terms of the gentleman who you've identified in the courtroom today, the Defendant, does he appear today as he did back on June 30, 2013.
> [Objection, which was overruled]
> A: Yes – I mean; no, he doesn't.
> Q: How has his appearance changed since that time?
> [Objection, which was overruled]
> A: His – his facial hair.
> Q: Okay; what about his facial hair?
> A: It is – he is gray now, and he has hair on his face. . . . He has gray hair now and he has more hair.
> Q: In spite of these differences, are you still sure this is the same person?
> A: Yes, because I remember facial features.

Next, the State called Detective Lamacairoise Taylor, the lead police officer who responded to the crime scene and investigated the robbery. He testified that, after arriving at the Royal Farms, he reviewed the store's relevant surveillance recordings, spoke with both Ms. Smith and Ms. Holloway, and called for the Crime Lab to

investigate. The Crime Lab sent a technician to the Royal Farms to process the scene, which involved processing items for fingerprints. The results of testing for fingerprints were not received ultimately into evidence.[5]

At the close of the State's case, Evans moved for a judgment of acquittal on all counts. The circuit court granted the motion as to the two counts of reckless endangerment, but denied the motion as to all other counts. The jury returned a verdict of guilty of the robbery with a deadly weapon.[6] Evans was also found guilty of multiple handgun violations including: wearing, carrying, or transporting a handgun on his person; use of a handgun in the commission of a felony or crime of violence; and possession of a firearm after being convicted of a disqualifying crime. The jury acquitted Evans of the count of wearing, carrying, or transporting a handgun in a vehicle. On 25 March 2015, the circuit court sentenced Evans to 15 years of incarceration for the conviction of robbery with a deadly weapon and the handgun violations, the first five years to be served

[5] As noted in Appellant's brief, the issue of the fingerprints is not before this Court on appeal. Consequently, we do not include facts relating to the testimony of the State's final witness, Ms. Lorraine Lansey, a fingerprint analyst, who worked for a Baltimore City laboratory.

[6] The verdict sheet indicated that if the jury found Evans guilty of robbery with a dangerous weapon, no verdict need be entered on the crimes of robbery, assault in the first degree, assault in the second degree, and theft, which we presume was because those counts were lesser included crimes.

without the possibility of parole.[7] On 30 March 2015, Evans appealed timely to this Court.

QUESTION PRESENTED

Appellant presents one question, with two subparts, for our consideration[8], which we condense into the following unified question:

[7] Specifically, Evans was sentenced to:

- 15 years for robbery with a deadly weapon
- 10 years for handgun violation – use
- 10 years for handgun violation – possession
- 5 years for possession of a regulated firearm after conviction of a disqualifying crime

The sentences were to be served concurrently, resulting in a total sentence of 15 years. The handgun violations for use and possession merged but added the requirement that the first 5 years were to be served without parole.

[8] Evans's question asked:

> 1. Did the trial court err when it allowed lay witnesses who lacked substantial familiarity to repeatedly identify Mr. Evans from video surveillance footage and camera stills that did not show any distinguishing features?
>
> A. Did the trial court err when it allowed two lay witnesses who lacked substantial familiarity to identify Mr. Evans as the man in surveillance videos and photographs when the jurors were equally able to draw their own conclusions?
>
> B. Did the trial court err when it allowed the State to improperly bolster key eyewitness testimony through repeated identifications of Mr. Evans as the man in surveillance videos and photographs, even when the video surveillance and photographs did not show any distinguishing features?

> Did the circuit court abuse its discretion when it allowed lay witnesses to testify and identify Evans from video surveillance computer discs and still images that did not show any particularly distinguishing features of the man depicted there?

For the following reasons, we hold that the Circuit Court for Baltimore City did not abuse its discretion in allowing the testimony and, thus, we affirm its judgment.

STANDARD OF REVIEW

Maryland Rule 5-104(a) allows a court to, "in the interest of justice, decline to require strict application of the rules of evidence, except those relating to privilege and competency of witnesses." Md. Rule 5-104(a). A challenge to a trial judge's decision to admit evidence is reviewed by an appellate court ordinarily for an abuse of discretion. *Moreland v. State*, 207 Md. App. 563, 569, 53 A.3d 449, 453 (2012). Once the circuit court has ruled that the evidence is relevant, "we are generally loath to reverse the trial court 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." *Decker v. State*, 408 Md. 631, 649, 971 A.2d 268, 279 (2009)(citation and internal quotation marks omitted).

We will reverse a circuit court if "[t]he decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Dehn v. Edgecombe*, 384 Md. 606, 628, 865 A.2d 603, 616 (2005) (citation omitted). As to the admission of lay witness opinion testimony, "[a] trial court should, within the sound exercise of its discretion, admit lay opinion testimony if such testimony is derived from first-hand knowledge; is rationally connected to the underlying facts; is helpful to the trier of fact; and is not barred by any

other rule of evidence." *Robinson v. State*, 348 Md. 104, 118, 702 A.2d 741, 747-48 (1997).

DISCUSSION

I. Contentions

Evans contends that the circuit court abused its discretion when it allowed the two store attendants to identify him repeatedly from video surveillance evidence which itself failed to show any particularly distinguishing features of the man depicted therein. He contends further that this testimony was improper lay opinion because both eye-witnesses lacked substantial prior or contemporaneous familiarity with him. Evans concludes that the repeated identifications made by Ms. Smith and Ms. Holloway, in the course of their narration related to the demonstrative evidence, prejudiced unfairly his trial and led to improper bolstering in the eyes of the jury of those witnesses' credibility.

The State responds that it was within the circuit court's discretion to allow this testimony because the CDs and still images were evidence of the *actus reus* and were relevant to the case. Additionally, the State responds that the evidence was admissible and necessary because of the changes in Evans's appearance between the time of the robbery and his trial.

II. Lay Opinion Testimony in the Form of Eye-Witness Identification

a. Relevant Maryland Law

A threshold issue for the admissibility of any evidence is relevancy, which measures the "tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence." *Decker*, 408 Md. at 639, 971 A.2d at 273 (citing Maryland Rule 5–401). It is apparent that the testimony of two eye-witnesses to the robbery would be relevant to the case. The remaining inquiry is whether its admission as lay opinion testimony was proper.

Lay opinion testimony is addressed by Maryland Rule 5-701, which requires:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

The "rationale for the standard set by Rule 5–701 is two-fold: the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge of the witness." *State v. Payne*, 440 Md. 680, 698, 104 A.3d 142, 153 (2014) (citation and footnote omitted). In Maryland, the "law requires a witness to have personal knowledge sufficient to form a basis for the formation of rational opinion." *Robinson*, 348 Md. at 123, 702 A.2d at 750 (internal quotation marks omitted).

Accordingly, lay opinion testimony must be "rationally based on the perception of the witness," but does not require specialized knowledge. *Ragland v. State*, 385 Md. 706, 717, 870 A.2d 609, 615 (2005). In fact, a lay witness's testimony cannot be based upon any "specialized knowledge, skill, experience, training or education." *Ragland*, 385 Md. at 725, 870 A.2d at 620. That form of testimony would require designation as an expert witness under the Rules of Evidence, *id.*, a complaint not mounted by Evans.

An opinion that is "rationally-based" on a witness's perception may include testimony that

> relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences . . . Other examples of this type of quintessential Rule 701 testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the value of one's property.

Moreland, 207 Md. App. at 570, 53 A.3d at 454 (explaining Federal Rule of Evidence 701[9]). The testimony must be based on personal knowledge and believed to be helpful to the trier of fact. *Rosenberg v. State*, 129 Md. App. 221, 256, 741 A.2d 533, 551 (1999) (citing *Robinson,* 348 Md. at 118, 702 A.2d at 747-48).

Testimony that may be helpful to a jury must have "incremental probative value beyond that of the underlying facts." *Robinson*, 348 Md. at 119, 702 A.2d at 748 (citation and footnote omitted). This sort of testimony is divided into two main categories:

> The first category is lay opinion testimony where it is impossible, difficult, or inefficient to verbalize or communicate the underlying data observed by the witness. . . . The second broad category of lay opinion testimony is where "the lay trier of fact lacks the knowledge or skill to draw the proper inferences from the underlying data." With this category of lay opinion

[9] As stated by the Court of Appeals, "Federal Rule of Evidence 701[, aside from a few] minor stylistic differences, is identical to Maryland Rule 5–701," which governs the admission of lay witness opinion testimony. *Moreland v. State*, 207 Md. App. 563, 570, 53 A.3d 449, 453 (2012) (citing *Ragland v. State,* 385 Md. 706, 717, 870 A.2d 609, 615 (2005)).

> testimony, to determine admissibility, the trial court properly focuses on the relative knowledge and experience of the witness versus the trier of fact.

Robinson, 348 Md. at 119-20, 702 A.2d at 748 (internal citations omitted). As made clear previously, eye-witness identification falls within the scope of lay opinion testimony.

Sorting this out in the first instance falls squarely within the discretion of the trial court because the credibility of eye-witnesses' consistent testimony is best gauged at the trial level. Evans was given the opportunity to cross-examine the eye-witnesses. The trial transcript shows that his counsel attempted to discredit the eye-witnesses' identifications. Evans argues that the witnesses "drew a conclusion based on the assumption that Evans was the man in the videos and photographs because they were testifying in his trial and had been prepared by the State to look at the physical evidence and identify Mr. Evans."

Admittedly, neither Ms. Smith nor Ms. Holloway were asked by authorities to undertake an out-of-court identification, such as a physical lineup or the selection of a photo from an array. Ms. Smith and Ms. Holloway, however, were testifying from personal knowledge about their recollection of the robbery. The jury, as the finder of fact, was able to observe the witnesses and hear the testimony given before the court. Credibility of witnesses is best judged in the first instance by the trial judge and ultimately by the finder-of-fact, who is able to observe first-hand whether the testimony appeared coached, as Evans contends, or sincere. We cannot hold that the circuit court's

decision to allow this testimony was so far "off-the-center mark" that it would be considered an abuse of discretion.

b. Substantial Familiarity Requirement

An additional question related to whether the testimony was impermissible involves the issue of substantial familiarity with the defendant, as the two store attendants did not claim any prior encounters or experience with Evans, but identified him repeatedly as the individual who robbed the Royal Farms.

When a lay witness is asked to identify a defendant from surveillance video recordings and still images, courts have required that the witness exhibit a "substantial familiarity" with the defendant. *See Moreland*, 207 Md. App. at 572, 53 A.3d at 455. Citing in *Moreland*, with favor, a Colorado case, we explained that "a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury." *Moreland*, 207 Md. App. at 572, 53 A.3d at 455 (citing *Robinson v. Colorado,* 927 P.2d 381 (Colo. 1996) (hereinafter "*Robinson I*")). The Court "explained that the intimacy level of the witness' familiarity with the defendant goes to the weight to be given the witness' testimony, not the admissibility of such testimony." *Moreland*, 207 Md. App. at 572, 53 A.3d at 455 (citing *Robinson I,* 927 P.2d at 384).

Continuing to rely on the Colorado case, we noted in *Moreland* that "a change in the defendant's appearance between the time of the photograph and the time of trial was

[not] necessary for the admission of the lay opinion identification testimony." *Moreland*, 207 Md. App. at 572, 53 A.3d at 455 (citing *Robinson I,* 927 P.2d at 384). Although perhaps not necessary in a minimalist understanding of the substantial familiarity requirement, a change in appearance of the defendant by the time of trial would likely make more desirable hearing the witness's perception of whether the defendant as he appeared at trial was nonetheless the perpetrator depicted in the images. Because the standard requires only that "the witness must be in a better position than the jurors to determine whether the image captured by the camera 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." *Moreland*, 207 Md. App. at 572-73, 53 A.3d at 455 (citing *Robinson I,* 927 P.2d at 384).

By the same token, this Court explained recently, agreeing with a Kentucky case, "[w]hile a witness may proffer narrative testimony within the permissible confines of the rules of evidence, we have held he [or she] may not 'interpret' audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence." *Paige v. State*, 226 Md. App. 93, 129, 126 A.3d 793, 814 (2015) (citing *Cuzick v. Commonwealth,* 276 S.W.3d 260, 265-66 (Ky. 2009)).

Evans argues that the substantial familiarity requirement goes unmet here because these two women were only in the presence of the robber for "three minutes, 19 months prior to trial." Without substantial familiarity on the witnesses' part, the jury, as the

argument goes, would be in the same position to view the surveillance videos and still images in arriving at a conclusion about identity as would Ms. Smith and Ms. Holloway.

Evans looked, however, noticeably different at trial than the robber did at the time of the robbery, which put the jury at a distinct disadvantage in terms of comparing 19 month old videos to the defendant in the courtroom. Additionally, because the surveillance videos were not of the greatest quality, the jury was not in the same position as the eye-witnesses, who were in the store at the time of the robbery, to determine the robber's identity from the demonstrative evidence alone. Further, Ms. Smith and Ms. Holloway offered, through direct court-room identifications of Evans, as well as their narrations of the demonstrative evidence, first-hand observations based on their recollection of the robbery and their contemporaneous perceptions of the images. Because the "substantial familiarity" standard goes to the weight of a witness's testimony, not its admissibility, this call is judged best by the trial judge during the proceedings. Allowing Ms. Smith and Ms. Holloway to offer a narrative overlay to the showing of the surveillance video and still images was not an abuse of discretion.

c. Bolstering

At trial, Evans's counsel objected to the repeated viewings of the surveillance videos and the identifications provided by the two witnesses:

> [Assistant State's Attorney]: Because the sole issue in this case is identification.
> The Court: No, but –
> [Defense Counsel]: But, we're seeing the same things in here. I'm sorry.

> The Court: You have a right to – to object. The question becomes as to whether or not you're wasting my time. That's really what I'm telling you. You do have to prove identity. You do not have to prove DNA.
> [Assistant State's Attorney]: The reason why the angles are important, Your Honor, is because each angle offers a different perspective and it allows us to identify the defendant.

There is no dispute that a robbery occurred; the dispute is limited to the identification of Evans as the malefactor.

Maryland law allows relevant evidence to "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . or needless presentation of cumulative evidence." *See* Maryland Rule 5-403. The evidence presented by the State in the form of the video surveillance CDs and the still images, however, was not cumulative or unfairly prejudicial. As this Court has noted, "[t]he jury saw the tape, and could judge for itself what it showed and whether [the witness's] identifications were accurate." *Tobias v. State*, 37 Md. App. 605, 617, 378 A.2d 698, 705 (1977).

Evans cites to *Walker v. State*, 373 Md. 360, 818 A.2d 1078 (2003) and *Curry v. State*, 54 Md. App. 250, 458 A.2d 474 (1983), to support his argument that the repeated identifications bolstered improperly the two eye-witnesses' prior initial in-court identifications of him. These cases do not persuade us because they involved "improper remarks" by the prosecutor, which had the effect of bolstering the credibility of a witness, resulting in prejudice to the defendant. *See Walker*, 373 Md. at 398-99, 818 A.2d at 1100 (explaining that the Court of Appeals has "determined that prosecutorial remarks are improper if they have prejudiced unfairly the defendant by misleading or influencing the jury"); *Curry*, 54 Md. App. at 258, 458 A.2d at 479 (holding that the "characterization of

the two witnesses as having lived 'exemplary' lives was a gross misstatement of fact designed to evince the trustworthiness of the witnesses and thus bolster the State's circumstantial case"). We perceive no indicia of this type of improper bolstering present here. The viewings of the surveillance videos and still images, coupled with the narration by both Ms. Smith and Ms. Holloway, did not prejudice improperly Evans.

III. Conclusion

There is "[n]o doubt the video tape was prejudicial to appellant's defense, as he claims; but we find nothing in the record to indicate that it was improperly so." *Tobias*, 37 Md. App. at 616, 378 A.2d at 705. That conclusion could be applied with equal vigor in the present case. The repeated identifications by the two witnesses did not overbear or render moot the jury's right to determine whether Evans was the man in the video, which they viewed as well. Allowing the two eye-witnesses to narrate the video surveillance evidence and identify Evans, based on this record, was within the discretion of the trial court. We affirm.

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