UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1956

September Term, 2013

MARCUS REID

v.

STATE OF MARYLAND

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*Zarnoch,
Arthur,
Sonner, Andrew L.
(Retired, Specially Assigned),

JJ.

Opinion by Sonner, J.

Filed: March 16, 2016

*Zarnoch, Robert A., J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

A jury in the Circuit Court for Prince George's County convicted Marcus Reid, appellant, of second degree murder in the shooting death of Ishmael Boakye.[1] Appellant, who was sentenced to thirty years, raises two questions for our review:

> 1. Did the trial court abuse its discretion in admitting, over defense objection, forty-three (43) ammunition shells?
>
> 2. Did the trial court abuse its discretion by giving a flight instruction, over defense objection?

Because we conclude that the trial court did not err or abuse its discretion in admitting the challenged ammunition evidence or in giving the challenged flight instruction, we shall affirm his conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On August 7, 2012, appellant shot Ishmael Boakye five times, twice in the chest at close range. At trial, the issue was whether the homicide was in self-defense. It was undisputed that the shooting occurred during a meeting at which appellant was to sell marijuana to the victim. Appellant claimed that Mr. Boakye jumped him with a gun, setting off a struggle during which appellant obtained the weapon and shot in self-defense.

Erika Pryor testified that she met Mr. Boakye the week before he was killed, then introduced him to appellant on the day of the shooting. After arrangements were made for Mr. Boakye to purchase $350-$400 of "weed," appellant picked up Ms. Pryor in his white vehicle, then parked on a residential street that intersected with Woodlawn Boulevard. Ms.

[1] Appellant was acquitted on first degree murder charges, under both premeditated and felony murder theories.

Pryor stayed with appellant's vehicle while he approached Mr. Boakye's vehicle, which was parked in front of houses on Woodlawn. Ms. Pryor heard "a yell, a shot and then four more shots." Appellant "ran up the hill" to his car, saying, "I made my shit hot." As appellant "was running back to the car," Ms. Pryor ran from the vehicle.

Two residents of Woodlawn Boulevard testified that after hearing gunshots, they saw appellant run, get into the driver's seat of his white vehicle, and speed away. After hearing four to five gunshots, Ambra Britt looked out her window and "saw a man running across the line into a white four-door car and got [sic] in the driver's seat." The man "had a gun in his hand." Sherrie Britt watched as a white car with "very distinctive lights" went "speeding away."

Police responded to "a call for a shooting," finding Mr. Boakye's body lying in the middle of the street and his car nearby, with doors open and the radio playing. From the scene, police recovered circumstantial evidence linking appellant to the shooting. The victim was clutching one of appellant's dreadlocks. On the ground near his body were seven Winchester brand .45 caliber fired cartridge casings. During a warrant search of appellant's apartment two days after the shooting, police found a box of unfired Winchester .45 caliber cartridges. Missing from that box, which holds a total of fifty, is the same number of Winchester .45 fired cartridge casings found next to Mr. Boakye's body – seven.

Appellant testified that he agreed to sell Mr. Boakye marijuana but insisted that he did not bring the murder weapon with him. He claimed that when he approached, Mr. Boakye jumped out of his car with the gun. After struggling with Mr. Boakye, appellant obtained control of the weapon. When Mr. Boakye ran toward him, appellant "started shooting[,]" without intending to kill him. As Mr. Boakye "grabbed" appellant's dreadlock, appellant "was still shooting." After Mr. Boakye "calmed down," appellant fired one more shot.

Appellant "ran" back to his car with the gun and said "something to the effect that I made my shit hot." According to appellant, it was only after the shooting that he obtained from a friend the .45 caliber ammunition later found at his home. When police interviewed him about the shooting, he did not tell them that the victim brought the gun, because he did not trust police.

We shall add facts in our discussion of the issues raised by appellant.

DISCUSSION

I. Admission of Ammunition Evidence

Over defense objections that the evidence was not relevant and unduly prejudicial, the trial court admitted the evidence that two days after the shooting, police conducting a search warrant at appellant's residence recovered a box of ammunition containing forty-three unfired .45 caliber cartridges. In his brief to this Court, appellant argues this was an abuse

of discretion because the evidence "did not establish that the spent ammunition, found at the scene of the alleged crime, came from the box of ammunition in question." In appellant's view, moreover, "the probative value of the presence of the box of ammunition in the defendant's premises was outweighed by the prejudice arising therefrom, as the number (7) of spent ammunition found at the scene matched the number (7) of rounds missing from the box."

Trial courts have broad discretion in determining the relevancy of proffered evidence. Subject to particularized exceptions not pertinent here, "all relevant evidence is admissible. Evidence that is not relevant is not admissible." Md. Rule 5-402. Evidence is relevant if it has "any 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." Md. Rule 5-401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403.

"The trial court's relevancy determination, as well as its decision to admit relevant evidence over an objection that the evidence is unfairly prejudicial, will not be reversed absent an abuse of discretion." *Collins v. State*, 164 Md. App. 582, 609 (2005). *See Merzbacher v. State*, 346 Md. 391, 404-05 (1997). Evidence is not impermissibly prejudicial simply because it significantly undermines a defense contention. Rather, "evidence is considered unfairly prejudicial when 'it might influence the jury to *disregard the evidence*

or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (emphasis added). Accordingly, "[t]he more probative the evidence" is with respect to the charged crime, "the less likely it is that the evidence will be unfairly prejudicial." *Id.*

Appellant has tacitly conceded defeat on this assignment of error. After briefs were filed, counsel for the State and appellant filed a written stipulation that "both the ammunition found at the scene of the murder and the bullets found in Appellant's residence were of the same type and brand, namely, 'Winchester 45 auto.'" In arguing that the fact that "the spent ammunition found at the scene matched the number (7) of rounds missing from the box" was so prejudicial that it should have been excluded, appellant recognizes that such matching ammunition was highly relevant because his possession of it made it more likely that the fired cartridge casings of the same caliber, brand, and number that were found at the murder scene had been taken out of that box. In turn, that inference made it more likely that the murder weapon belonged to appellant before the shooting, more likely that appellant brought the weapon to the drug transaction, more likely that he lied about being "jumped" by the victim, and more likely that he did not shoot in self-defense.

Because the challenged evidence was highly relevant to the charged crime, it did not unfairly prejudice appellant by distracting the jury from the charges and evidence against appellant. *Id.* Accordingly, the trial court did not err or abuse its discretion in admitting it.

II. Flight Instruction

Over defense objection, the trial court gave the following pattern instruction on flight:

> A person's flight immediately after the commission of a crime . . . is not enough, by itself, to establish guilt, but it is a fact that may be considered by you as evidence of guilt.
>
> Flight or concealment under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

See Md. Pattern Jury Instr.– Cr. 3:24.

Appellant argues that "[t]he trial court abused its discretion in instructing the jury as to flight because the evidence failed to generate such instruction." In appellant's view, "[t]he simple fact that [he] left the scene at some point was not tantamount to evidence of flight[.]" Citing *Thompson v. State*, 393 Md. 291, 312 (2006), and *Hoerauf v. State*, 178 Md. App. 292 (2008), appellant contends that "there was no evidence that police were looking for him or that he was actually being pursued by police," so that "[n]o inference of guilt may be drawn from the mere fact that he departed the area."

Maryland Rule 4-325(c) provides that a trial "court may, and at the request of any party shall, instruct the jury as to the applicable law," but "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Under this rule, trial courts

> are required to give jury instructions requested by a party when a three-part test is met. The instruction must correctly state the law, the instruction must apply to the facts of the case (*e.g.*, be generated by some evidence), and the content of the jury instruction must not be covered fairly in a given instruction.

Preston v. State, 444 Md. 67, 81 (2015).

In evaluating whether there is sufficient evidence to generate a requested instruction, "we view the record in the light most favorable to the accused," *General v. State*, 367 Md. 475, 487 (2002), to determine whether the proponent of the instruction "'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.'" *Bazzle v. State,* 426 Md. 541, 550 (2012) (citation omitted). This has been characterized as the "some evidence" standard because "the threshold is low, as [the proponent] needs only to produce 'some evidence' that supports the requested instruction." *Id.* at 551. "Some evidence" simply means any evidence, regardless of source, that, if believed, would support the [proponent's] contention. *Id.*

With respect to flight instructions, the Court of Appeals has

> consistently held that although "[f]light by itself is not sufficient to establish the guilt of the defendant," it "is a factor that may be considered in determining guilt." Moreover, we have noted that flight may be indicative of a consciousness of guilt by the defendant. Concomitantly, we have recognized that a defendant's flight may be motivated by reasons unconnected to the

> offense at issue in the case and that the determination as to the motivation for flight is properly entrusted to the jury.

Thompson, 393 Md. at 305 (citations omitted).

The *Thompson* Court summarized the factors governing whether to give a flight instruction, as follows:

> [F]or an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Id. at 312.

In *Hoerauf*, this Court, addressing flight instructions given in the factual context of the accused leaving the scene of the alleged crime, distinguished between "flight" and mere "departure" as follows:

> Flight is defined as an "act or instance of fleeing, esp. to evade arrest or prosecution . . . . Also termed flight from prosecution; flee from justice." Professor Wigmore employs the term "flight from justice":
>
> > Flight from justice and its analogous conduct, have always been deemed indicative of a consciousness of guilt. "The wicked flee, even when no man pursueth; but the righteous are bold as a lion.". . .
> >
> > It is universally conceded today that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct,

> are admissible as evidence of consciousness of guilt, and thus of guilt itself[.]
>
> "At its most basic, 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." This additional proof of other than normal human movement also must reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt. **In the context of leaving the scene of a crime, the classic case of flight is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking, or is driving a speeding motor vehicle.** On the other hand, merely walking away from the scene of a crime ordinarily does not constitute flight. . . .
>
> [W]e hold that an accused's departure from the scene of a crime, without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not constitute "flight," and thus does not warrant the giving of a flight instruction.

Hoerauf, 178 Md. App. at 323-24, 326 (footnote and citations omitted; emphasis added).

In both *Thompson* and *Hoerauf*, the trial courts erred in giving a flight instruction because the evidence did not support all of the necessary inferences. In *Thompson*, when police sought to question the accused about a robbery and shooting earlier that evening, he fled because was carrying 86 vials of crack cocaine. *Id.* at 313-14. The Court of Appeals concluded that

> this fact, which was known to all parties involved although not revealed to the jury, undermines the confidence by which the inference could be drawn that Mr. Thompson's flight was motivated by a consciousness of guilt with respect to the crimes for which he was on trial in the present case; it provides a foundation for the alternate, and equally reasonable, inference that Mr.

> Thompson fled due to the cocaine in his possession, an action a person in his position may have taken irrespective of whether he also shot and attempted to rob [the victim]. Mr. Thompson thus was placed in a difficult situation where he must either not object to the highly prejudicial evidence concerning his possession of a significant amount of cocaine being introduced to the jury to explain his flight (or perhaps forced to make a Hobson's choice to introduce such evidence himself), or decline to explain his flight and risk that the jury would not infer an alternative explanation for his flight.

Id. at 314.

In *Hoerauf*, the prosecution failed to present evidence from which the jury could infer that flight occurred. The accused accompanied a group whose other members, after threatening the victims, took their bicycles and personal property. We concluded that there was no evidence of flight:

> In the instant case, taking the evidence in a light most favorable to the State, appellant simply walked away from the scene of the crime with the group of individuals who had just perpetrated the robberies. When appellant left the scene, the police had not arrived, nor was their arrival imminent. There was no evidence that appellant attempted to flee the neighborhood or to secrete himself from public view to avoid apprehension. Indeed, only 10-15 minutes after the crime, the police stopped appellant in a nearby neighborhood with three of the other perpetrators, one of whom possessed some of the stolen property. Under the facts of this case, we conclude that there were no circumstances attendant to appellant's departure from the scene of the crime that would reasonably justify the inference of a consciousness of guilt. Accordingly, appellant's behavior did not constitute flight, and the trial court erred in giving the flight instruction.

Id. at 326 (footnote omitted).

Appellant argues that this case "fails to satisfy even one of the four inferences" and that "[f]or the same reasons as in *Hoerauf*, the flight instruction should not have been

given." In support, he maintains that "[t]here was no evidence adduced at trial that [a]ppellant knew the police were looking for him or that he was actually being pursued by the police," so that "[n]o inference of guilt may be drawn from the mere fact that he departed the area."

We disagree. This case is easily distinguished from *Hoerauf* because there was ample evidence that appellant's hurried leave-taking from the scene of the shooting qualified as flight rather than mere departure. Appellant admitted shooting Mr. Boakye and running from the scene. In the altercation, multiple shots were fired, five of them hitting the victim, who fell in plain view in the middle of a residential street a short distance from a busy intersection. Witnesses testified that they heard the gunfire and saw appellant running on foot and speeding away by car. Because the shooting occurred within sight and earshot of many potential witnesses, leaving a bullet-riddled body where any person traveling or looking at that road would see it, the jury could reasonably infer that appellant anticipated the imminent arrival of police or other emergency responders. Indeed, police were immediately dispatched to investigate the shooting.

In turn, the jury could reasonably infer that appellant's behavior constituted a "classic case" of flight evidencing consciousness of guilt. This evidence painted a scenario that was the polar opposite of the casual departure in *Hoerauf*, in that appellant admitted shooting the victim then left the scene when the arrival of police was imminent, running on foot and

speeding away by car. He did not call police to assert his claim of self-defense, but instead returned home with the murder weapon, which he later dumped "in the park." This evidence of appellant's flight from the scene was admissible to impeach appellant's claim of self-defense.

We acknowledge that, as in *Thompson*, appellant may have possessed contraband at the time of his flight, raising the possibility that he ran to avoid being apprehended in possession of the marijuana he had arranged to sell to Mr. Boakye. What distinguishes appellant's case from *Thompson* is that this jury was aware that appellant was meeting with Mr. Boakye to conduct a marijuana transaction. Unlike the accused in *Thompson*, where the drug evidence was suppressed, appellant was free to argue that instead of staying to assert his claim of self-defense, he fled to avoid being arrested while in possession of contraband. Because there was some evidence to support differing inferences as to why appellant fled, it was up the jury to decide whether his flight showed a consciousness of guilt in the shooting or a consciousness of guilt in his possession of marijuana with the intent to distribute it.

Based on this record, the trial court did not err or abuse its discretion in giving the pattern flight instruction.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.