UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2479

September Term, 2014

KEITH LAVELLE QUEEN

V.

STATE OF MARYLAND

Kehoe,
Leahy,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: March 9, 2016

After a jury trial in the Circuit Court for Prince George's County, appellant, Keith Lavell Queen, was found guilty by a jury of armed carjacking, second-degree assault, and motor vehicle theft. He received a sentence of thirty year's imprisonment for the armed carjacking conviction. The Court merged the sentences for the remaining convictions.

On appeal, appellant presents the following questions which we have consolidated and re-phrased[1]:

I. Did the trial court abuse its discretion in permitting two police officers to identify appellant as the assailant in a gas station surveillance video that both officers watched on the day of the offense but was not available to be played at trial?

II. Did the trial court abuse its discretion in declining to instruct the jury on missing evidence?

We will affirm the convictions.

Background

No one disputes that Thomas Oliver was robbed at knife point while purchasing fuel at a Valero gas station early on an icy January morning in 2014. The assailant

[1] Appellant stated his questions as follows:

1. Did the trial court abuse its discretion by allowing two witnesses to give lay opinion identification testimony from a missing video because the evidence was speculative and did not help the jury?

2. Did the admission of the Officer Huntley's opinions based on a missing video violate Mr. Queen's right to due process?

3. Did the trial court abuse its discretion by allowing Officers Huntley and Hartmann to identify Mr. Queen when neither officer had substantial familiarity with his appearance?

4. Did the trial court err by refusing to give a missing evidence instruction where the State did not produce a key piece of evidence at trial?

displayed a knife, threatened Oliver, got into his car, and drove away. The question before the jury was whether appellant was the culprit.

Immediately after the incident, Oliver called 9-1-1. The police responded promptly. Oliver spoke to the responding officers and, at around 4 p.m. on that day, he went to the police station to meet with investigating officers and to review photographic arrays. Oliver circled appellant's photograph and said "[t]hat looks like him. Really not sure because he had . . . a hat and hoodie." An officer wrote that statement on the array. Oliver also identified a photograph of a knife that "definitely look[ed] like" the knife the carjacker displayed. Oliver was, however, unable to identify appellant in court.

Chanel Crews-Dickerson, a Lieutenant with the Metropolitan Police Department, lived about six blocks from the Valero station. At about 7:40 am, she was awakened by a loud noise in her driveway. She looked out of her window and saw that a tan automobile, which later turned out to be Oliver's, had crashed into her own car. She saw a man standing next to the car before he walked away. The man was wearing a black, puffy jacket with a hood over his head. At trial, Lieutenant Crews-Dickerson identified appellant as the man who had been standing next to her car. She admitted on cross-examination that she did not write a statement in this case until several months after the events. She also admitted that she never made any identification of appellant before trial.

Officer Jason Huntley of the Prince George's County Police Department responded to the Valero gas station at 7:41 a.m. The gas station had security cameras and

Huntley watched the footage pertaining to the incident on a computer monitor. He testified that he saw Oliver pumping gas, that an individual approached and talked to him, and that the individual then pulled something out of his pocket and "lunged toward" Oliver. He said that the individual then got into Oliver's car and drove away.

Huntley watched the video two or three times. He testified over objection that he recognized appellant from having seen him at least five times in the two months before this incident, standing with other people in front of a liquor store across the street from the Valero. He did not know his name at the time, and testified that he was able to recognize appellant because the puffy jacket he was wearing was something he had seen before.

At 1:30 p.m. on the date of the incident, Huntley drove past the liquor store looking for appellant. He saw appellant, called for Officer Kenneth Hartmann to meet him, and pulled into the parking lot. Appellant began to walk away but halted when Huntley exited his car and ordered appellant to stop. Huntley asked appellant if he was carrying any weapons; appellant replied "a blade," and Huntley found a 3-inch, black, folding knife in appellant's pants pocket.

The two officers then drove across the street to the Valero. Huntley watched the video recording several more times and testified that he was "one hundred percent sure" that appellant was the carjacker. Hartmann also reviewed the security video on the afternoon of the incident. At trial, he testified, over objection, that the video showed

appellant approaching a man at the gas station and talking to him. Hartmann also said that appellant backed off, then displayed a knife and got in the car and drove away after the other man ran around to the passenger side of the car. He said the man in the video also had the same coat as appellant when they arrested him. He admitted that he could not see appellant's face in the video.

The prosecution was unable to produce the security video at trial. As to that issue, Huntley testified that he had called the manager to make arrangements to meet the manager the next morning to copy the video but that he was busy when the manager was available, and the manager was not there when he was available; so they never met. Huntley notified Detective Marvin Ticas, the lead investigator, that he was unable to obtain the video.

For his part, Hartmann testified that "the manager that was on-duty could not provide [them] with the videotape." He said that he was aware of the General Orders for the Prince George's County Police Department and that one of the Orders was to determine if there is a surveillance video in a case and to collect it. He said that it was generally the duty of the investigator to follow up with "those type of things." He confirmed that the video was not collected in this case.

Mesay Tunna, who owned the Valero station, testified that the station had a surveillance system with 13 functioning cameras, that the quality of the video surveillance was "somewhat good I guess," and that none of his employees could operate the system.

Tunna said that cameras were motion-activated and that the length of time the system retained data depended on whether it was constantly recording based on a lot of foot traffic. The system could hold video a minimum of seven days and a maximum of twelve days. Tunna could not remember if Prince George's County Police contacted him in January 2014 to obtain video surveillance. He said that he had provided videos to them "quite often." He said that there was no way to recover videos once they were recorded over. If he had been contacted within seven days, Tunna would have been able to make a copy of video for the police. He said, "Normally, when the detectives approach me they leave a thumb drive and that's where I copy it for them."

Finally, Detective Ticas testified that he attempted to obtain video surveillance several days after the incident. He said that the manager "mentioned something that were [sic] either deleted already or he just couldn't get the camera to work." He said that the manager said he would call someone to work on the camera and that he later called and said that "he had no luck on getting the camera to work." He testified, "I guess the port to record what was viewing it wouldn't allow me to record it to put it on the thumb drive, or anything like that." Ticas said that if he had taken any notes on his interactions with the manager, they were no longer in the files.

Analysis

I. Huntley's and Hartmann's Identification of Appellant: Lay Opinion Testimony; the Best Evidence Rule; and a Possible Due Process Violation

Appellant argues that, while the officers were permitted to testify to the events they saw unfold on the gas station video, they were not permitted to offer their lay opinion as to the identity of the assailant because (1) the video was not available for the jury and, as a result the lay opinion identification was "speculative" and "not helpful to the jury", and (2) the officers did not have "substantial familiarity" with appellant's appearance as required by *Moreland v. State*, 207 Md. App. 563 (2012). Appellant also argues, generally that the officers' lay opinion identification testimony violated appellant's due process rights because the "State should not be able to convict a defendant on unchallengeable opinions about evidence that the State has failed to produce."

The State claims that appellant failed to preserve his arguments that the lay opinion was not permitted because the officers lacked "substantial familiarity" and that due process prohibited the lay opinion. The State argues that the lay opinion identification testimony did not violate appellant's due process rights and that it was admissible under the rules of evidence, and that any error in admitting the evidence was harmless.

We hold that the court did not abuse its discretion by permitting the police officers to identify appellant in the video. We explain.

Preservation

In his brief, appellant offers three distinct, but related, arguments that the lay opinion evidence was inadmissible at trial (1) because the video was missing, (2) because the officers lacked familiarity with appellant, and (3) because appellant's due process rights were violated. Both Huntley and Hartmann offered lay identification opinion testimony. Thus, it behooves us to examine the theories of inadmissibility appellant advanced below at the various stages of the proceeding with respect to the various witnesses.

Appellant moved *in limine* to prohibit both Huntley and Hartmann from offering their lay opinion that appellant was the carjacker. During the hearing on the motion, appellant claimed that such lay opinion was inadmissible because the video was not available to show the jury, and also because it was inadmissible hearsay. Appellant said "[w]hat we are saying is the conclusions that he wants to draw from the tape cannot come in. Specifically that his conclusion that the person he saw on that video was [appellant]." The Court denied the motion.

When Hartmann began to testify to what he saw on the video (after appellant had been arrested by Huntley) appellant promptly objected, and, when asked for grounds said at one point "[p]retrial" and at another "conclusionary." The court granted a continuing objection.

Next, appellant objected on four separate occasions when Huntley began to testify about appellant's appearance in the video and, when asked for grounds said: "[h]earsay, due process, conclusionary." The court granted appellant a continuing objection**.**

We agree with the State that at no time during trial did appellant ever advance the theory that the lay opinion identification testimony of either officer should be prohibited because the officers were not "substantially familiar" with appellant. As a result appellant has waived his right for appellate review of this contention. *See e.g. von Lusch v. State*, 279 Md. 255, 263 (1977). Nevertheless, even if this contention were preserved, as will be seen, it lacks merit.

Appellant's contention that his due process rights were violated is also not preserved for appeal because, while it is true that appellant objected on bare "due process" grounds during Huntley's testimony, he did not object on those grounds when Hartmann testified to the exact same thing. See e.g. *Williams v. State*, 131 Md. App. 1, 17, (2000) (objection was waived when the same evidence came in on other occasions, both earlier and later, without objection.) Again, even if this contention were preserved, as will be seen, it likewise lacks merit.

The Merits

It is ordinarily within the sound discretion of the trial court to determine the admissibility of evidence. Md. Rule 5-104(a) ("[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . ."). A trial court's

evidentiary ruling will not be disturbed absent error or a clear abuse of discretion. *Moreland v. State*, 207 Md. App. 563, 568 (2012) (*citing Decker v. State*, 408 Md. 631, 649 (2009)). To constitute an abuse of discretion, the judicial decision "has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *DeLeon v. State*, 407 Md. 16, 21 (2008).

Appellant argues that the officers' identification of appellant from an unavailable surveillance video was inadmissible because such a lay opinion is not "helpful" to the jury as required by Md. Rule 5-701. Appellant reasons:

> Here the lay opinions were not helpful to the jury. Rather than helping jurors understand what was in the video, the officers' testimony provided the only evidence of what the video purportedly had shown. The opinions were unhelpful and speculative because there was no way for jurors to judge whether they were correct.

Appellant directs us to no case standing directly for the proposition that lay opinion identification testimony of the sort at issue in this case is inadmissible when the video is not available to show the jury.

The fatal difficulty with appellant's argument is that he conflates two separate and distinct legal principles – the best evidence rule (Md. Rule 5-1002) and the lay opinion rule (Md. Rule 5-701). As will be seen, the ability of a lay witness to offer an opinion on the identity of a person depicted in a video does not depend upon the availability of the video at trial.

The Best Evidence Rule.

The best evidence rule, as set forth in Md. Rule 5-1002, states: "To prove the content of a writing, recording, or photograph, the *original* writing, recording, or photograph is required, *except* as otherwise provided in these rules or by statute." (Emphasis added). Maryland Rule 5-1001 defines "photograph" to include "still photographs, X-ray films, video tapes, and motion pictures." Some exceptions to the best evidence rule are found in Rule 5-1004, which provides:

> The contents of a writing, recording, or photograph may be proved by evidence other than the original if:
>
> *(a) Original Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;*
>
> (b) Original Not Obtainable. No original can be obtained by any reasonably practicable, available judicial process or procedure;
>
> (c) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing or trial, and that party does not produce the original at the hearing or trial; or
>
> (d) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

(Emphasis added.)

The best evidence rule applies to the missing surveillance video because Md. Rule 5-1001 includes "video tape" and "motion pictures" within the definition of "photograph". Md. Rule 5-1004 provides that the contents of the missing video may be

proved by "evidence other than the original" because, under subsection (a) the original had been "lost or destroyed."[2] Thus, the best evidence rule did not bar the testimony of Huntley and Hartmann about the contents of the surveillance video. Appellant expressly concedes this point and concedes that the officers were permitted to describe the carjacking that occurred on the video.

However, appellant maintains that, because the video was missing, the officers were not permitted to offer their "lay opinion" that appellant was the one doing the carjacking. This argument is unpersuasive; the officers' lay opinions were admissible despite the lack of the best evidence, *i.e.*, the surveillance video itself.

Once one of the exceptions set forth in Md. Rule 5-1004 is met, secondary evidence is permitted to prove the contents of the missing evidence. "'The Best Evidence Rule states a preference for original documents, but does not foreclose use of secondary evidence after a proper foundation has been laid showing good and sufficient reasons for the failure to produce the primary evidence.'" *Gordon v. State*, 204 Md. App. 327, 347 (2012), (quoting *Cooper v. State*, 41 Md. App. 392, 398 (1979)).

The Supreme Judicial Court of Maine considered an identical argument on similar facts in *State v. Robinson*, 118 A.3d 242 (Me. 2015). Robinson was charged with burglary. At trial, the owner of the premises was permitted to testify that he had a security

[2]Appellant does not contend that the recording was lost or destroyed by the police or that the State's failure to obtain it was the result of bad faith.

video and recognized Robinson as the culprit. The recording had been erased automatically and was unavailable at trial. The owner was permitted to testify that, in his opinion, Robinson was the person on the video. *Id.* at 246–47. The Court stated:

> Once the requirements of M.R. Evid. 1004[3] are met, any type of secondary evidence, not otherwise inadmissible, becomes admissible. That this evidence may not be credible does not affect its admissibility, but only its weight. The weight is a matter for the trier of fact to resolve.

In this case, there was no suggestion that the police acted in bad faith by not obtaining the video from the Valero gas station before the video was overwritten by the recording device. As a result, the best evidence rule did not prohibit the State from using secondary evidence in the form of the officers' testimony about what they saw on the video prior to its destruction. Therefore, we turn to whether the officers' identifications of appellant as the carjacker depicted in the surveillance video was properly admitted as lay opinion testimony irrespective of the availability, *vel non*, of the surveillance video.

Pursuant to Md. Rule 5-701, a lay witness may testify "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."

Fashioned after the analogous federal rule of evidence, the Maryland Rule generally permits a lay witness to testify about "the appearance of persons or things,

[3] Maine Rule 1004 is substantively identical to Md. Rule 5-1004.

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[.]" *Ragland v. State*, 385 Md. 706, 717-18 (2005). Indeed, one of the "quintessential" examples of permissible lay witness testimony is the "identification of an individual[.]" *Id*. at 718.

For example, in *Moreland*, *supra*, this Court held that the trial court did not err or abuse its discretion in admitting a lay witness's testimony identifying the accused in a bank surveillance video. The witness had known the accused for 40 to 45 years, so his "lay opinion testimony was not based on speculation or conjecture, and did not amount to a mere conclusion or inference that the jury was capable of making on its own." *Id*.

In *Moreland* we approved the "majority rule" applied in *Robinson v. Colorado*, 927 P.2d 381, 382 (Colo. 1996), where a police officer identified the accused from a surveillance photograph taken during a convenience store robbery. *See Moreland*, 207 Md. App. at 573 ("We find the reasoning of the Colorado Supreme Court . . . and the majority rule on this issue be sound."). In that case, the officer recognized the accused because he had encountered him previously. *Robinson*, 927 P.2d at 382. The Robinson Court reasoned 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." *Id*. at 382-83.

In this case, Huntley testified that he viewed the video on two occasions, once before arresting appellant and once after. The first time he watched the video (which he watched multiple times), he recognized appellant as someone who he had regularly seen in front of a liquor store across the street from the Valero gas station during the preceding month. When Huntley approached appellant in front of the liquor store on the afternoon of the carjacking, appellant started to walk away from him and later admitted that he had a knife in his pocket. Huntley arrested appellant and then went back to the Valero gas station to review the video again to "re-verify" and make "one-hundred percent sure" that he had arrested the assailant shown in the video.

Discounting the strength of Huntley's familiarity with him, appellant stresses that, unlike the police officer witness in *Moreland*, who had previously known Moreland "for 40 to 45 years," 207 Md. App. at 567, Huntley had only seen appellant five or six times in the past month, did not know his name, and did not testify to any specific prior interactions. Hence, appellant asserts, Huntley did not have "substantial familiarity" with or intimate knowledge of his appearance.

We are unconvinced. We made clear, in *Moreland* that the lay witness need only be personally familiar with the defendant, and the intimacy level of the witness' familiarity with the defendant goes to the weight to be given to the witness' testimony, not the admissibility of such testimony. *Id.* at 572-73. Because Huntley had regularly seen appellant in the previous month across the street from where the carjacking took

place, he was personally familiar with appellant regardless of whether he knew his name or any other personal details of his life and was permitted to offer a lay opinion about appellant's identity in the missing surveillance video. As a result, the trial court did not abuse its discretion in permitting Huntley's testimony.

Appellant points out that Hartmann, on the other hand, had no familiarity with appellant prior to the day of the offense. While that may be true, it is worth noting that on the day of the offense, he was with Huntley when appellant was arrested. He was then asked by Huntley to watch the video and "confirm what we saw on the video, just a different pair of eyes that this was in fact the suspect." Hartmann was present when appellant was arrested and therefore was familiar with appellant's appearance when he watched the video. That Hartmann's familiarity was not more extensive went only to the weight of his testimony and not its admissibility. Under the circumstances, we see no abuse of discretion in permitting the testimony. That Hartmann saw appellant dressed in clothing similar to those he wore in the surveillance video provided a sufficient basis for his lay opinion. The fact that he was not more familiar with appellant went to the weight of the testimony, not its admissibility. *Moreland*, 207 Md. App. at 572-73.

In conclusion, even if appellant's lay opinion argument were preserved for review, it would not convince us to reverse appellant's convictions.

Due Process.

Appellant asserts that the admission of the officers' lay opinions as to the identity of appellant on video violated his due process rights. He contends that the due process violation arose because there was no way for the defense to challenge the identification testimony. Appellant complains that "[t]he State should not be able to convict a defendant based on unchallengeable opinions about evidence that the State has failed to produce."

Appellant has a point—his cross-examination might have been more effective if the recording was available. But, by the same token, the recording might have made the State's case stronger. But, in our view, nothing about the lay opinion testimony in this case comes close to the level of a due process violation, and appellant cites no authority that would suggest otherwise. Because the evidence was fully admissible under the rules of evidence and the video was not destroyed in bad faith, we see no violation of appellant's due process rights.

II. The Missing Evidence Instruction

Because the State had not produced the Valero gas station surveillance video that it claimed showed appellant committing a carjacking, the defense requested that the court give the following "missing evidence" instruction:

> You have heard testimony about a surveillance video, which was not entered into evidence in this case. The destruction of evidence or the failure to preserve evidence by the police may give rise to an inference unfavorable

> to the State. If you find that the intent was to conceal the evidence, the destruction or failure to preserve must be inferred to indicate that the State and/or the police believe that their case is weak and that they would not prevail if the evidence was preserved. If you find that the destruction or failure to preserve the evidence was negligent, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to the State.

The trial court declined to give the instruction on the basis that the police never had the video in their possession. Appellant argues that the trial court abused its discretion in failing to give the requested instruction. In support, appellant relies heavily on *Cost v. State*, 417 Md. 360 (2010) where the Court of Appeals found, under the unique circumstances of that case, that the trial court abused its discretion in declining to instruct the jury on missing evidence. We conclude that the trial court did not abuse its discretion in declining to give the instruction.

The trial court has a duty to instruct the jury, upon request in a criminal case, on the applicable law. Maryland Rule 4-325 provides, in pertinent part, as follows:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

The Court of Appeals has observed that Md. Rule 4-325(c) requires that the trial court give a requested instruction under the following circumstances: "(1) the requested instruction is a correct statement of law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly

covered elsewhere in the jury instruction actually given." *Stabb v. State*, 423 Md. 454, 465 (2011).

Ordinarily, the concept of "the applicable law" in the context of Rule 4-325(e) does not apply to evidentiary inferences or factual matters. *Patterson v. State*, 356 Md. 677, 683 (1999). The Court of Appeals explained in *Patterson* as follows:

> Because most evidentiary inferences are questions of fact, not questions of law, missing evidence instructions can be distinguished from instructions on the elements of the crime that a defendant is charged with, instructions on the affirmative defenses that a defendant may utilize, and from evidentiary presumptions that the law recognizes but, without an instruction, a jury would not recognize. Elements, affirmative defenses and certain presumptions relate to the requirement that a party meet a burden of proof that is set by a legal standard . . . . An evidentiary inference, such as a missing evidence or missing witness inference, however, is not based on a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts. A determination as to the presence of such inferences does not normally support a jury instruction. While supported instructions in respect to matters of law are required upon request, instructions as to evidentiary inferences normally are not.

Patterson, 356 Md. at 684-85.

The Court explained further that, "[w]hen evidence is missing, apparently due to the act or omission of one of the parties, an inference that the evidence would have been unfavorable to that party may be appropriate. That is all that is required." *Id*. at 688. The Court concluded, however, that "regardless of the evidence, a missing evidence

instruction generally need not be given; the failure to give such an instruction is neither error nor an abuse of discretion." *Id*. We will turn to *Cost v. State,* upon which appellant relies.

In *Cost*, the Court of Appeals identified an exception to the general rule enunciated in *Patterson.* The Court stated that "substantive Maryland evidence law" may require a missing evidence instruction under "exceptional" circumstances. 417 Md. at 378-79. Cost was charged with reckless endangerment based upon the stabbing of a fellow inmate in prison. *Id*. at 363. Within several days of the stabbing, and before the evidence could be investigated and analyzed, the cell was cleaned. *Id*. at 366. Blood-stained linens and clothing and dried blood on the cell floor were destroyed. *Id*. at 380. The Court found that these items were "highly relevant" because at trial, it was significant whether the victim was in fact stabbed and whether the stabbing caused him to bleed significantly. *Id*. The Court also noted that these blood-stained items were the type of evidence "normally . . . retained and submitted to forensic examination." *Id*. at 382. The Court concluded that these facts amounted to the "exceptional case" where the trial court's refusal to give the requested missing evidence instruction was an abuse of discretion.

The Court emphasized, however:

> Our holding does not require a trial court to grant a missing evidence instruction, as a matter of course, whenever the defendant alleges non-production of evidence that the State might have introduced. Instead, we recommit the decision to the trial court's discretion . . . . In another case, where the destroyed evidence was not so highly relevant, not the type of

> evidence usually collected by the State, *or not already in the State's custody* . . . a trial court may well be within its discretion to refuse a similar missing evidence instruction.

Id. (Emphasis added).

From the foregoing, we glean that the trial court in *Cost* abused its discretion in failing to give a missing evidence instruction because the missing evidence in that case was highly relevant *and* the type of evidence usually collected *and* in the State's custody. The present case is not "exceptional" as contemplated by *Cost*. The trial court properly exercised its discretion in not giving the requested instruction as the State was never in custody of the surveillance video and there was no evidence of bad faith on the part of the police.

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.