UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1847

September Term, 2015

GABRIEL MANDELL BROWN

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: April 11, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In the aftermath of a Monday Night Football victory by Washington over Dallas, Gabriel Mandell Brown, ("Appellant"), quarreled with his girlfriend and stabbed her brother. A jury in the Circuit Court for Montgomery County, rejecting Appellant's claim of self-defense, convicted him of second degree assault. Appellant, who was sentenced to five years, contends that "it was error for the trial court to instruct the jury on flight of the defendant as evidence of consciousness of guilt." We disagree and affirm the conviction.

BACKGROUND

Although Appellant does not challenge the sufficiency of the evidence, we shall summarize the evidence presented at the trial in the light most favorable to the State, as the prevailing party, in order to provide background for our discussion of Appellant's challenge to the flight instruction. *See Page v. State*, 222 Md. App. 648, 654, *cert. denied*, 445 Md. 6 (2015).

The assault took place on October 28, 2014, in the front yard of a Germantown residence shared by Christopher Benjamin; his two children; his fiancée, Melissa Dupree; Ms. Dupree's sister, Nicole Battle; and her husband, James Battle. Joining them for the football game that evening were Appellant and his girlfriend, Rosalind Benjamin, who is Christopher's sister.[1]

[1] To avoid confusion, we shall use the first names of the four witnesses who share last names, *i.e.*, Christopher Benjamin, brother of Rosalind Benjamin, and married couple James and Nicole Battle.

During the game, Appellant and James were rooting for Washington, while Christopher favored the Dallas team. Over the course of the evening, Appellant became intoxicated and irritated with Rosalind, expressing his disappointment that she was not supporting his team. After Washington's overtime victory, Rosalind and Appellant left, with Rosalind driving her vehicle. During the drive toward their home, the couple argued "about the support issue[.]"

Shortly after their departure, Christopher received what appeared to be an inadvertent "pocket call" from Appellant's cell phone. Christopher testified at trial that he heard Appellant yelling at Rosalind, "don't you know what I could do to you right now, [bitch.]" Christopher and Ms. Dupree then left home to investigate what was "going on" between Appellant and his sister.

Before they turned off their street, however, Rosalind and Appellant came "flying" back down the road. She parked in the spot that Ms. Dupree had just vacated and ran to her brother's home.

Seeing this, James Battle went outside on the sidewalk to block Appellant from following Rosalind. Appellant then punched James in the nose and the two men "got to fighting."

Meanwhile, Christopher and Ms. Dupree drove back to their residence, where Appellant and James were "hollering and screaming" in the front yard but no longer fighting. Christopher approached Appellant from behind and said, "you got to stop all this noise." Christopher then "went to grab him to talk to" Appellant, trying "to restrain him .

. . so he wouldn't get in trouble[.]" He wrapped his arms around Appellant's upper arms, but Appellant spun around quickly and they "got to tussling," ending up in a neighbor's flower bed. Once Christopher restrained Appellant's hands, he saw that Appellant was holding a knife. Christopher grabbed it and threw it into the neighbor's yard.

At that point, Ms. Dupree approached and saw that Christopher was "drenching wet with blood." Appellant had stabbed him in his upper right chest. Realizing that he was injured, Christopher went inside his residence.

The neighbor next door observed portions of this altercation. After Christopher went inside, she opened her front door and asked Ms. Dupree if she should call the police. In response, Appellant walked up her steps, saying "sure, lady, why don't you go right ahead and call the police." Frightened, the neighbor "slammed" her door and called 911 to report the fight.

After James Battle saw "[b]lood just gushing out of" Christopher, he returned outside and approached Appellant, who "put his hand up and . . . started fighting again." James "put him on the ground" and hit him "about three times," until Ms. Dupree persuaded him to let Appellant go.

Appellant then got in the driver's seat of Rosalind's car and, using her keys, started the vehicle. While on the phone with the 911 dispatcher, the neighbor, who described Appellant as a very drunk man, reported that he was "trying to get into this car and to leave" and expressed her concern that "[h]e may kill somebody." After the car started and its alarm went off, she saw her neighbors "trying to pull him out of the car." Eventually, she

reported that "[t]he drunk person . . . is going down" the street, "and he is falling on his behind."

According to James Battle, Appellant "was in the car driving – he was trying to pull off when Melissa [Dupree] was trying to tell him no, and Rosalind was trying to tell him no." Eventually, James, Rosalind, and Ms. Dupree pulled Appellant out of the vehicle, in order to prevent him from driving in his inebriated state.

Appellant then walked down the street, toward the exit leading out of the neighborhood development. Ms. Dupree saw him "kind of stumbling and coming down the street." As Appellant "heard the sirens" of approaching police cars, he "fell to the ground right in the middle of the street[.]" When police arrived, he was lying in the intersection, "heavily intoxicated" and unable to stand or walk without assistance. Appellant repeatedly stated, "they beat me up," but he did not identify any of his assailants.

At trial, Appellant did not dispute that he stabbed Christopher Benjamin, inflicting a chest wound that was treated as presumptively life-threatening, at a hospital emergency room. Instead, appellant testified that he drew his knife after the "first initial blow and the punches were coming[.]" In fear for his life as James and Christopher surrounded him at the same time, he "used his knife to defend" himself. The State countered that Appellant's account of that encounter was not credible, and that he could not claim self-defense because he was the initial aggressor, he failed to retreat, and he introduced the knife into the fistfight without justification.

In considering whether to give the pattern flight instruction, the trial court and counsel focused on the evidence that Appellant was "trying to get into the truck and drive away," rather than the evidence that Appellant "walked down the sidewalk and passed out in the street." Defense counsel argued that the flight instruction was not "generated" because that evidence was "equally suggestive of he's trying to save his life. He's getting his butt kicked." The trial court pointed out that the instruction requires the jury to "first decide whether there is evidence of flight," and if so, "whether this flight shows a consciousness of guilt." It then explained why the evidence warranted the instruction:

> So he knows he stabbed him. He's acknowledged that he stabbed him. He says he was trying to get away. His testimony was that he was trying to get away because they were still trying to beat him up. And the State's version is that they were trying to grab the keys and get the keys away from him so he couldn't get away. But it's basically for the jury to decide whether there's evidence of flight. . . .
>
> [T]hat's why we spent so much time about whose keys they were and wrestling for the keys and why he was dragged out of the car and all the rest of that stuff. So, otherwise, I don't know why we went into all that, to tell you the truth. So I'm going to go ahead and give the instruction. I think it's going to be up to the jury to make a determination, and that's what the instruction says. They can consider it if they find that he was fleeing. And I think it's pretty clear from that point.

The jury acquitted Appellant of first degree assault but convicted him of second degree assault. This timely appeal followed.

DISCUSSION

Appellant contends that the trial court erred in giving a flight instruction because the evidence showed only that he departed the scene of the altercation to avoid a further beating. The court gave the following instruction, which mirrors the pattern instruction:

> Flight of the defendant. A person's flight immediately after the commission of a crime or after being accused 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 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.

Citing *Thompson v. State*, 393 Md. 291, 312 (2006), *Hoerauf v. State*, 178 Md. App. 292 (2008), and other cases examined below, Appellant contends that "[i]t was error for the trial court to instruct the jury on 'flight' of the defendant as evidence of consciousness of guilt," because "no reasonable person could find 'flight,'" where the circumstances of his failed attempt to depart were "fully explained" by the evidence that he was attempting to get away from the beating inflicted by James Battle, Christopher Benjamin, and Rosalind Benjamin. In support, Appellant argues that the record establishes the following:

> During a verbal argument with his girlfriend, Appellant Brown tried to follow her into the house, when he was physically confronted by two, admittedly, angry men. There was absolutely no evidence that Appellant was seeking a confrontation with the two men who confronted and fought him.
>
> Moreover, it was undisputed that Appellant was fighting two, much larger men. Appellant stands only 5'6" tall and weighs only 150 pounds. On the other side, Christopher Benjamin, who moves furniture

> for a living, describes himself as 5'9" tall and 200 pounds, and James Battle is about 6'3" tall and weighs "270" pounds, almost twice as much as Appellant. At times, Appellant was fighting-off punches from not only those two, much larger men, but his girlfriend, as well.
>
> After being physically dominated and beaten, by a total of three angry people, Appellant was simply trying to leave the scene. His departure was hardly unexplained. For a man who has just lost a fight, departure was a matter of common sense.

(Record citations omitted).

The State responds that "Appellant's 'spin' on the evidence is immaterial" and that the cases he relies on "are inapposite," because in this case, "there were competing inferences as to why Appellant attempted to flee the scene." In light of those "differing inferences," the State argues that "it was for the jury to decide whether his flight showed a consciousness of guilt in the stabbing or was motivated by concern for his own well-being – a fact the pattern instruction on flight makes abundantly clear."

Standards Governing Flight Instructions

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[.]" 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).

"A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State*, 426 Md. 541, 550 (2012). Evaluating

whether there is enough evidence to generate a requested instruction is a "preliminary determination" that presents "'a question of law for the judge[,]' and on appellate review, we must determine whether the requesting party '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.'" *Page*, *supra*, 222 Md. App. at 668 (quoting *Bazzle*, 426 Md. at 550, and *Dishman v. State*, 352 Md. 279, 292-93 (1998) (some internal quotation marks omitted)), *cert. denied,* 445 Md. 6 (2015). This has become known as the "some evidence" standard because "the threshold is low, as [the party seeking the instruction] needs only to produce 'some evidence' that supports the requested instruction." *Bazzle*, 426 Md. at 551.

As for flight instructions specifically, the Court of Appeals has identified the following requirements:

> [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.

Thompson v. State, 393 Md. 291, 312 (2006).

In determining when there is sufficient evidence to establish these inferences, this Court, in *Hoerauf*, 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*." BLACK'S LAW

DICTIONARY 670 (8th ed. 2004). 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[.]

2 Wigmore, EVIDENCE § 276 (Supp. 2007) (footnote omitted).

"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." 22 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5181 (1978 & Supp. 2007). 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. *State v. Lincoln*, 183 Neb. 770, 164 N.W.2d 470, 472 (1969). 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.

In *Lincoln*, a window at a jewelry store was broken at night and various items taken from the window display. Within seconds a service man from the alarm company saw a car, with the defendant and a companion inside, come around the corner one block from the scene of the crime traveling 30 miles per hour without its headlights on. Five minutes before the burglary, a police officer observed the same car with its lights off in an alley 2 ½ blocks from the jewelry store. When the officer started to drive his cruiser down the alley, the defendant's car pulled out at the other end of the alley.

The Supreme Court of Nebraska decided that a flight instruction was proper where the defendant's conduct was "clearly sufficient to sustain an inference of flight as distinguished from mere departure from the

> scene of a crime." The Court drew a distinction between the meaning of the words "flight" and "departure:"
>
> > The term "flight" is often misused for the word "departure." **Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt.** "Flight" may be established by a broad range of circumstances. **We believe the proper rule to be that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, 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.**
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> *Id*. [at 471.] . . .
>
> Therefore, we 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 323-26 (footnote and some case citations omitted; emphasis added in *Hoerauf*). *Accord Page,* 222 Md. App. at 669–70; MPJI-Cr.3:24, Comment.

Analysis

Appellant contends that "no reasonable person could say either: (1) that the 'circumstances' of [his] leaving the scene of the assault were 'unexplained'; or (2) that [he] departed the scene – at the repeated urging of everyone else present – any faster than at a 'walk.'" He cites *Thompson, Hoerauf,* and *State v. Shim*, 418 Md. 37 (2011), along with commentary and extra-jurisdictional cases,[2] as support for the proposition that, "[w]here

[2] Appellant cites a lengthy list of "[c]ases from other jurisdictions and treatises" that he proffers as "support for this Court's holding in *Hoerauf* – quoted with approval . . . in

the circumstances of one's leaving the scene are otherwise explained, that is mere 'departure,' not flight, and 'flight instructions' are inappropriate."

The issue presented by this appeal is not whether Appellant proffered a plausible "non-flight" explanation for his attempt to leave, because it is undisputed that he did so, based on the evidence that he tried to drive away after being struck by James Battle, Christopher Benjamin, and Rosalind Benjamin. Instead, the question is whether the trial court was *required to accept* Appellant's "non-flight" explanation and, consequently, to ignore the evidence presented by the State to support a countervailing "flight" inference that Appellant attempted to leave in order to avoid an arrest and prosecution for stabbing Christopher. As the case law discussed below teaches, when the evidence supports competing inferences as to the accused's reason for leaving the crime scene, the court must give the flight instruction, which directs the jury to resolve that conflict.

Applying this lesson, we are not persuaded that the trial court erred or abused its discretion in giving a flight instruction in this case. Because the evidentiary record supports differing conclusions as to why Appellant attempted to leave the scene of the assault, "the determination as to the motivation for flight [was] properly entrusted to the jury." *Thompson,* 393 Md. at 305.

Thompson and Shim, and by the Comment to MPJI-Cr. 3:24 -- that giving the pattern 'flight' instruction is 'error,' where the 'circumstances' of the departure were otherwise explained." As Appellant recognizes, these authorities add nothing new to our established precedent. Accordingly, they have no persuasive value in resolving this appeal.

In *Thompson*, the Court of Appeals recognized that "a defendant's flight may be motivated by reasons unconnected to the offense at issue in the case." *Id.* (citations omitted). In that case, when police sought to question the accused about a robbery and shooting earlier that evening, he fled, with 86 vials of crack cocaine on his person. *Id.* at 313-14. The drug evidence was suppressed before trial. *Id*. at 295. The Court of Appeals held that the trial court erred in giving a flight instruction, because the fact that the accused was carrying a large quantity of cocaine,

> 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 Appellant's case, there is no comparable evidence that he possessed contraband and, therefore, no "Hobson's choice" that prevented him from presenting to the jury his alternative reason for leaving the scene of the altercation after police were called. In contrast to *Thompson*, this jury was able to consider the evidence that Appellant's attempt

to leave may have been motivated by a fear for his physical safety, rather than a fear of being arrested for assault.

In *Hoerauf*, we addressed whether there was sufficient evidence to infer flight and consciousness of guilt. The accused was present while his companions robbed juvenile victims outside a commuter train stop. Police later arrested the accused in circumstances that we concluded did not support a flight inference:

> 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).

State v. Shim, 418 Md. 37, 57 (2011),[3] provides another example of a case in which there was no evidence of "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[.]" *Hoerauf***,** 178 Md. App. at 326. In *Shim*, "'[t]he rational inferences to be drawn from the evidence demonstrated only that the

[3] A different aspect of this decision, concerning criminal voir dire, was abrogated by *Pearson v. State*, 437 Md. 350 (2014).

shooter left the [crime scene] after the shooting. There was no evidence that the shooter fled. The evidence that appellant took steps to avoid being apprehended did not amount to flight.'" *Shim*, 418 Md. at 59. The Court of Appeals held that, where "the evidence only shows that the perpetrator left the crime scene at some point after the murder[,]" the State failed to establish "that the behavior of the defendant suggests flight." *Id.* at 40, 59.

In contrast to *Hoerauf* and *Shim,* where there was no evidence as to the timing or manner in which the accused left the crime scene, here there is largely uncontested evidence as to when and how Appellant attempted to leave, and such evidence supported the flight inference proffered by the State, which was that Appellant tried to drive away in an effort to avoid the impending arrival of police. Minutes after he stabbed Christopher Benjamin, Appellant told a neighbor to "go right ahead and call the police[,]" then attempted to drive away in Rosalind's car, despite being so intoxicated that he thereafter collapsed in the middle of the street. As multiple witnesses testified, and Appellant admitted, he was trying to leave. Rather than getting into the vehicle and staying until he could assert his claim of self-defense to responding officers, Appellant retrieved Rosalind's keys, got in the driver's seat, started the car, and attempted to drive away. When the efforts of three people finally prevented him from doing so, Appellant took off on foot, making it only a short distance before police arrived.

In our view, this constitutes "some evidence" from which the jury could find that Appellant's failed attempt to drive away qualified as flight "with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt[.]"

Hoerauf, 178 Md. App. at 325. Indeed, the jury could conclude that Appellant's eagerness to put himself at risk of injury while driving intoxicated undermined his testimony that he was trying "to drive to escape danger." We agree with the trial court that whether Appellant sought to avoid police, or instead to avoid the members of the Benjamin household, was a disputed matter for the jury to resolve in accordance with the flight instruction.

We are not persuaded otherwise by *Young v. State*, 234 Md. 125 (1964), cited by Appellant and in the comment to the pattern instruction, as a case in which a flight instruction would not be warranted. *See* MPJI-Cr. 3:24, Comment. That decision involved a probable cause determination based on evidence that an African American male, "walking through the rows of parked cars followed by another [African American] man carrying packages in both arms—went to one of the automobiles, opened the trunk, slammed it shut and walked away rapidly." *Id.* at 130. The Court of Appeals held that, because this information was not sufficiently connected to a prior report that suspects had been seen trying to open car doors in that parking lot, there "was not enough . . . to lead a reasonably cautious man to believe that a larceny was being or had been committed[.]" *Id.*

Young is inapposite, both factually and legally, because no flight instruction was requested or given. Even if the Court of Appeals had indicated that a flight instruction was unwarranted, the scant evidence that the accused walked rapidly away from a parked vehicle distinguishes that case. As discussed above, the evidence here was that after stabbing Christopher Benjamin, Appellant attempted, unsuccessfully, to leave by car before he took off on foot. The speed at which Appellant might have driven is not a matter

on which we may speculate. Moreover, although "[w]e have recognized that one of the 'classic' instances of flight 'is where a defendant leaves the scene shortly after the crime is committed and is running, rather than walking[,]'" *Page,* 222 Md. App. at 670–71 (quoting *Hoerauf*, 178 Md. App. at 324), there is no minimum speed demarcating flight from mere departure.

Here, in contrast to *Thompson*, *Hoerauf*, *Shim*, and *Young*, there were evidentiary conflicts central to determining whether Appellant attempted to leave in order to avoid arrest and prosecution, or whether he did so in order to avoid injury. Because the evidence of how and why Appellant left the scene of the assault supported competing inferences as to his motivation, the trial court properly gave the pattern flight instruction, thereby allowing the jury to resolve that evidentiary conflict.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.