UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2263

September Term, 2015

DEANDRE WEEMS

v.

STATE OF MARYLAND

Berger,
Friedman,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: February 6, 2017

Tried by a jury in the Circuit Court for Prince George's County, appellant, Deandre Weems, was convicted of first-degree premeditated murder, two counts of use of a handgun in the commission of a crime of violence, armed robbery, robbery, and first and second-degree assault.[1] The trial court sentenced Weems to life in prison, after which he timely noted this appeal, presenting the following questions for our consideration:

> 1. Did the trial court abuse its discretion by permitting Sergeant Jordan Swonger to refer to a "report map" during his testimony regarding Appellant's cell phone records?
>
> 2. Is the evidence legally insufficient to sustain Appellant's conviction of first-degree premeditated murder?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

At approximately 9:30 p.m. on October 21, 2013, Margie Hurd was working at the front desk of the Oxon Hill, Prince George's County, Clarion Hotel, checking guests into the hotel. While she was on the phone with a hotel guest, a man with a gun -- later identified as Weems -- jumped over the front desk.[2] Hurd screamed for help. With the gun pointed at her stomach,[3] Weems twice told her to shut up. He then grabbed Hurd's hair and ordered her to open the cash drawer. Weems grabbed cash from the drawer and then jumped back

[1] The State *nolle prossed* one count of the indictment at the close of its case-in-chief.

[2] Hurd identified Weems as the robber from a photo array. She also made an in-court identification of him as the robber.

[3] At the time of the robbery, Hurd was five months pregnant.

over the front desk, after which Hurd ran to the bathroom. A hotel security video of the robbery was admitted into evidence as State's exhibit 10.[4]

Larry Reid was having drinks with friends in the lobby bar of the Clarion Hotel on the evening of October 21, 2013, when he heard screams coming from the lobby. He observed Jesse Chavez, whom he knew as the bar manager, run toward the front desk. Reid followed and saw Chavez confront a man who had jumped across the front desk. Reid retreated and shortly thereafter heard a single pop. When Reid returned to the front of the building, he saw a car "flying past," but he was unable to get a license plate number. He also saw Chavez, who had been shot, lying face down right outside the hotel's entry door.

William Warner, a hotel guest on October 21, 2013, was served by Chavez in the hotel's restaurant that evening. After his meal, Warner went outside to smoke a cigarette. He heard a commotion from inside the hotel and turned to see Chavez struggling with two black men as they exited the hotel. One of the men fired a gun at Chavez's chest, and Chavez fell at Warner's feet.[5] The shooter then entered a car that had pulled into the portico of the hotel.

[4] For unknown reasons, the time stamp on the video recording was off from the timing of the actual events by approximately 40 minutes.

[5] Chavez was pronounced dead at the scene. The assistant medical examiner determined that the cause of death was a gunshot wound to his chest and the manner of death a homicide. A bullet was removed from Chavez's chest during autopsy and provided to the police, and a spent shell casing was recovered from the exterior of the hotel, just outside the front door.

Jerome Hodge was stopped at a traffic light directly across from the Clarion Hotel when he and his passenger heard the gunshot. They observed two men run toward the side of the hotel and jump into a dark car, which sped away. Hodge made a U-turn toward the hotel to see the car with three people inside make a left turn onto Oxon Hill Road. He attempted to follow the car to obtain a license plate but was unsuccessful and lost sight of the car in traffic.

Weems was developed as a suspect in the robbery and murder through an anonymous tip to Crime Stoppers. After a computer search revealed an open warrant for a failure to appear in court in 2013, Weems was arrested at his apartment in Washington, D.C., on October 26, 2013.[6] To the police, Weems identified his cell phone number as 202-378-7908. The police requested cell phone records relating to that phone number.

A search warrant was executed at Weems's apartment, and the police recovered a black handgun and cartridges from the top of a kitchen cabinet. The State's firearm identification and examination expert determined that the handgun, a .380 caliber Taurus semiautomatic pistol, was operable and that it had fired both the fired cartridge case recovered from the exterior of the Clarion Hotel on October 21, 2013 and the fired bullet recovered from Chavez's body during autopsy.

Prince George's County Police Sergeant Jordan Swonger, accepted by the court as an expert in the field of cell phones and cell phone technology, reviewed the phone records

[6] Latrice Nelson, Paula Hill, and Renaldo Washington also lived in the apartment. Washington and another man, Kimfrey Williams, were also charged in the Clarion Hotel robbery and murder.

for Weems's cell phone from 8:59 p.m. until 11:00 p.m. on October 21, 2013[7] and prepared a written report, as well as a presentation based on a Google Earth map, to summarize his findings and help explain the records to the jury. He explained that when a person makes or receives a call on a cell phone, the phone chooses a cell phone tower "based on the best, closest available tower that can service the call," with the possibility that several towers might cover the same area.

In defining a cell tower "sector," Swonger stated:

> Picture a complete cherry pie. It's a complete circle. A typical tower layout divides that cherry pie of the circle into three sectors or three slices, each one of the sectors covering a third of the area. So, if you were to take a knife and chop three, three lines into—three equal lines into the pie, you end up with pieces of the pie which project out in a cone, like a triangle shape. And those three sectors then cover the total area around the cell phone tower.

Swonger's report map contained lines showing which third of the circle, or "pie piece," Weems's phone was located in during each phone call between 8:59 p.m. and 11:00 p.m. on October 21, 2013.

During that time period, 13 phone calls were made from Weems's phone. The first call was made in the area of Weems's apartment in Washington, D.C. The next several calls hit off different cell towers in Washington, D.C., and Maryland, and calls at 10:05 and 10:06 p.m. hit off the tower at the top of the Clarion Hotel. By 10:07, the phone had

[7] The first 911 call relating to the robbery and shooting at the Clarion Hotel was received at 10:04 p.m. that night.

returned to Washington, D.C., and the last four calls, beginning at 10:29 p.m., again hit off the tower close to Weems's apartment.[8]

At the close of the State's case-in-chief, Weems moved for judgment of acquittal. The court denied the motion. Weems did not put on any evidence, and at the close of the entire case, he renewed his motion for judgment of acquittal, which the court again denied.

DISCUSSION

I.

Appellant contends that the trial court abused its discretion in permitting Sergeant Swonger to refer to a "report map" during his explanation of the location of Weems's cell phone during the relevant portions of the evening of October 21, 2013, as its probative value was outweighed by the danger of unfair prejudice.[9] Moreover, he concludes, the relevance of the report map was questionable, as the data contained thereon indicated only within which sector served by each cell phone tower the phone was located at various times but did not show the actual location of Weems's cell phone; therefore, the report evidence

[8] Swonger testified that it takes between five and ten minutes to drive between Weems's apartment and the Clarion Hotel, depending on traffic conditions.

[9] Weems's first question, as presented in his brief, is: "Did the trial court abuse discretion by permitting Sergeant Jordan Swonger to refer to a 'report map' during his testimony regarding Appellant's cell phone records?" To the extent that Weems is complaining of the use of the "report map" Swonger prepared, this issue is not preserved for our review, as Swonger's report was admitted into evidence with no objection from the defense. From counsel's argument at trial, Weems's somewhat murky explanation of the issue in his brief, and the State's response in its brief, however, we infer that Weems actually takes issue with Swonger's reference to the Google Earth presentation, and that is the issue we consider.

did not have the tendency to make the existence of any fact of consequence more or less probable than it would have been without the evidence.

Prior to Swonger's testimony, defense counsel objected to the use of a Google Earth presentation showing the cell tower locations appellant's phone hit off on October 21, 2013, on the basis that it did not show the triangulation indicating the sector the phone was in, or "the pie piece" indicating the applicable 120 degree sector of the 360 degree circle around the tower. Counsel argued:

> I think having the pie pieces there is important because it shows that it's not located at the pinpoint of that cell tower which is an important—this is demonstrative evidence with Google Earth zooming in and all of these things. That's very—it's very weighty evidence, I mean, having that in there. Without the pie pieces showing where they are—I'm not opposed to one large map with the pie pieces. It's when you take out the pie pieces, because the pie pieces is [sic] a key part of the analysis of the site information. And so not having that direction, I think there's a very strong likelihood that they're going to start to think that he was here, then there, then there. And in fact, I think that he's being called out of order is also kind of—that we're going to be talking about a cell phone and a cell phone that has not yet been linked up to the defendant is also an issue. So those are my objections.[10]

The prosecutor agreed to "using kind of a combination" of Swonger's map, which delineated the "pie pieces," and the Google Earth map, on which she was able to zoom into a specific cell tower location. She also clarified that Swonger would not testify that

[10] Counsel's other objection related to the prosecutor's suggestion that Swonger's testimony be taken out of order because the trial was progressing quicker than she expected, and her remaining witnesses were not yet in court. Defense counsel argued that Swonger's testimony regarding the location of Weems's cell phone, when no evidence of any cell phone had yet been entered, would be inappropriate and confusing to the jury. The court refused to take the witness out of order.

Weems's phone was at an exact location but rather that "there is a cell phone tower and that there's three pie pieces if you will that come off of it and that he's able to ascertain which of the sectors or the pie pieces the phone is in, that it's not plopped down in the middle."

Defense counsel argued that the Google Earth evidence was "overly prejudicial" and worried about its authenticity, that is, "being able to show the reality of what the cell towers do" without the pie pieces on the map. The court ruled that the map was more probative than prejudicial and "that the concern about the triangulation is clearly overcome because they're going to. . . show that on a map. And you [, defense counsel,] certainly get an opportunity to question it and could cross-examine in that regard, so that's overruled."

During Swonger's testimony, defense counsel renewed his objection to the expert's use of the Google Earth demonstrative evidence, which Swonger used to show the jury the location of each cell phone tower Weems's phone hit off between 8:59 and 11:00 p.m. on October 21, 2013.[11] Swonger also referred to his own written report, which showed the specific sector of each cell phone tower Weems's phone hit off during the relevant times.

Defense counsel cross-examined Swonger extensively regarding cell tower sectors. Swonger readily clarified that, in plotting the sectors in which Weems's phone hit during each phone call, he "absolutely d[id]n't know" exactly where within the sector the phone was located.

[11] Defense counsel made no objection to Swonger's status as a cell phone and cell phone technology expert.

Appearing to concede that the Google Earth evidence was relevant, Weems now argues that its probative value was nonetheless outweighed by the danger of unfair prejudice, because Swonger's testimony revealed that the cell site data, as detailed on the map, could not show the actual location of his phone and thus did not make it more or less probable that he committed the charged crimes. *See* Maryland Rule 5-401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.") and Rule 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). We disagree.

Swonger's testimony, aided by Weems's cell phone records,[12] Swonger's report and map based on those records, and the Google Earth map, which presumably coincided for the most part with Swonger's map but did not contain the sector delineations, detailed the general movement of Weems's phone within an hour before and after the robbery and shooting at the Clarion Hotel. The evidence demonstrated that at 8:59 p.m. on October 21, 2013, Weems's phone hit off the tower close to his Washington, D.C., home. Between 9:20 and 9:47 p.m., the phone moved from Washington, D.C. to Maryland, and at 10:05 and 10:06, minutes after the 911 call relating to the robbery and shooting, the phone hit off

[12] Weems provided the police his cell phone number upon his arrest. He did not dispute at trial, and does not dispute on appeal, that the cell phone records admitted as evidence related to calls made or received by his phone.

the tower located atop the Clarion Hotel. By 10:29 p.m., the phone had returned to the area of Weems's home. The phone data, in its totality, provided circumstantial evidence that Weems, who, with his phone, travelled from his home to the Clarion Hotel at exactly the time it was robbed and back to his home, was the person who committed the robbery and shooting at the Clarion Hotel. The Google Earth map, in particular, aided the jury in identifying the location of each cell phone tower in relation to his home, the route to and from the Clarion Hotel, and the hotel itself.

The Google Earth map's lack of sector identifying markings, and the data's inability to pinpoint the exact location of Weems's phone within each cell tower sector, does not render the relevant evidence unduly prejudicial. Indeed, Swonger referenced his own map, which did show the delineation of each sector that was absent from the Google Earth exhibit, and explained to the jury that his data did not indicate an exact location of the phone. It is therefore unlikely that the jury impermissibly inferred that Weems was in any exact location at any particular time from the data on the map.

The evidence of the movement of Weems's phone during the time periods shortly before and after the robbery was highly probative, and we perceive no undue prejudice to Weems in the admission of the Google Earth map evidence through the testimony of Swonger, particularly when substantially similar map evidence was admitted without objection through the report prepared by Swonger. Therefore, the trial court did not abuse its discretion in admitting the evidence. *See State v. Simms*, 420 Md. 705, 725 (2011) (admissibility of relevant evidence is reviewed under an abuse of discretion standard).

II.

Weems also claims that the evidence adduced by the State was insufficient to sustain his conviction of first-degree premeditated murder because it did not prove that the shooting of Chavez was premeditated or that Weems had an intent to kill.[13] Because only one shot was fired at Chavez, Weems continues, this case stands in contrast to Maryland case law, which generally finds premeditation in the fact that the defendant fired numerous shots at the victim.

We recently set forth the applicable standard for reviewing challenges to the sufficiency of the evidence:

> 'In reviewing the sufficiency of the evidence, an appellate court determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Derr v. State,* 434 Md. 88, 129, 73 A.3d 254 (2013); *Painter v. State,* 157 Md. App. 1, 11, 848 A.2d 692 (2004) ("[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder'") (citations omitted) (emphasis in original).
>
> The appellate court thus must defer to the factfinder's "opportunity to assess the credibility of witnesses, weigh the

[13] In his brief, Weems at least alludes to an argument that the evidence was insufficient because no witness identified him as the shooter. During his motion for judgment of acquittal, however, Weems did not specifically raise an issue with regard to the lack of identification of the shooter. Therefore, he has failed to preserve that issue for appellate review. *Starr v. State*, 405 Md. 293, 302 (2008) ("A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4–324(a) to 'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal.").

> evidence, and resolve conflicts in the evidence[.]" *Pinkney v. State,* 151 Md. App. 311, 329, 827 A.2d 124 (2003); *see also State v. Mayers,* 417 Md. 449, 466, 10 A.3d 782 (2010) ("[w]e defer to any possible reasonable inference the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence") (citations omitted). Circumstantial evidence, moreover, is entirely sufficient to support a conviction, provided that the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused. *See, e.g., State v. Manion,* 442 Md. 419, 431–32, 112 A.3d 506 (2015); *Painter,* 157 Md. App. at 11, 848 A.2d 692.'

Anderson v. State, 227 Md. App. 329, 346–47 (2016) (quoting *Benton v. State,* 224 Md. App. 612, 629–30 (2015)).

First-degree murder includes "a deliberate, premeditated, and willful killing." *Morris v. State,* 192 Md. App. 1, 31 (2010) (citing Md. Code, §2-201(a)(1) of the Criminal Law Article). As defined by Maryland Pattern Jury Instruction—Criminal 4:17,

> [w]illful means that the defendant actually intended to kill [the victim]. Deliberate means that the defendant was conscious of the intent to kill. Premeditated means that the defendant thought about the killing and that there was enough time before the killing, though it may only have been brief, for the defendant to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice. The premeditated intent to kill must be formed before the killing.

See also Pinkney v. State, 151 Md. App. 311, 331–32 (2003). In other words, to prove first-degree murder, the State must adduce evidence "'that the defendant possess[ed] the intent to kill (willful), that the defendant ha[d] conscious knowledge of that intent (deliberate), and that there [was] time enough for the defendant to deliberate, *i.e.,* time

enough to have thought about that intent (premeditate).'" *Morris,* 192 Md. App. at 31 (alterations in original) (quoting *Willey v. State,* 328 Md. 126, 133 (1992)).

Because few defendants announce to witnesses their intent to kill, we most often have to look to other factors to discern whether the defendant had a specific intent to kill. *Pinkney,* 151 Md. App. at 332. "In Maryland, it is well established that 'under the proper circumstances an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body.'" *Buck v. State,* 181 Md. App. 585, 642 (2008) (quoting *Smallwood v. State*, 343 Md. 97, 104 (1996)). Indeed, "[i]t is permissible to infer that 'one intends the natural and probable consequences of his act.'" *Smallwood,* 343 Md. at 105 (quoting *Ford v. State*, 330 Md. 682, 704 (1993)).

Here, there was evidence that Weems raised his arm and fired a deadly weapon directly at Chavez's chest from a distance of several feet or less. The jury rationally could have concluded that Weems's actions demonstrated a specific purpose and intent to kill Chavez, even if he fired only one shot.

The evidence also provides support for a finding of deliberation and premeditation, which are often reviewed together. *Pinkney*, 151 Md. App. at 335. The test for deliberation and premeditation is whether the defendant had sufficient time to reflect, although the deliberation or premeditation need not exist for any particular length of time and the reflection time can be very brief. *Tichnell v. State,* 287 Md. 695, 717–18 (1980). *See also Wood v. State*, 209 Md. App. 246, 319 (2012) (quoting *Smith v. State,* 41 Md. App. 277, 317–18 (1979)), *aff'd*, 436 Md. 276 (2013)("'Deliberation and premeditation may be instantaneous. The period of time required for premeditation and deliberation in first-

degree murder is only that which is necessary for one thought to follow another. For a killing to be premeditated there need be no appreciable space of time between the intention to kill and the killing—they may be as instantaneous as successive thoughts of the mind.'"). Importantly, "'premeditation may be established circumstantially from the facts of a particular murder.'" *Pinkney,* 151 Md. App. at 336 (quoting *Hounshell v. State*, 61 Md. App. 364, 374 (1985)).

In this matter, the evidence showed that when Chavez heard Hurd screaming in reaction to the robbery, he ran toward the lobby and placed himself between the robber and the front door of the hotel. He struggled physically with the robber, and the struggle continued outside the hotel. Once outside, the robber raised his arm, pointed his gun at Chavez's chest, and fired, after which Chavez fell. The jury reasonably could have inferred that Weems, his quick getaway thwarted by Chavez, formed the intent to fire the loaded weapon he had brought to the robbery during the struggle. In deliberately raising his weapon and pointing the gun at Chavez's chest, rather than, *e.g.*, running or firing the gun in the air or at a less vital portion of Chavez's body, Weems had sufficient time to form the intent to kill rather than wound.

In sum, the evidence, which included a shot fired at and striking a vital part of Chavez's anatomy from close range, was legally sufficient to support a conviction for premeditated first-degree murder. It was the jury's function to decide which inferences to

draw from proven facts, and the jury in this case reasonably could have found that Weems willfully and with premeditation and deliberation intended to kill Chavez.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.