UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2340

September Term, 2015

STANLEY O. SHYNGLE

v.

STATE OF MARYLAND

Woodward, C.J.
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: July 12, 2017

On August 13, 2015, a jury sitting in the Circuit Court for Carroll County convicted appellant, Stanley Shyngle, of three counts each of: robbery with a deadly weapon, robbery, first-degree assault, and use of a firearm in a crime of violence. On November 12, 2015, the trial court denied appellant's Motion for New Trial, and sentenced appellant as follows: twenty years, with all but four years suspended for the first robbery with a deadly weapon count; ten years, with all but four suspended for the second robbery with a deadly weapon count, to run consecutive; ten years with all but four years suspended for the third robbery with a deadly weapon count, to run concurrent to the second robbery with a deadly weapon count; five years for the first use of a firearm in a crime of violence count, to run consecutive to the armed robbery counts; and five-year concurrent sentences for the second and third use of a firearm counts.[1]

Appellant timely appealed his convictions.[2] He presents the following issues for our review, which we have slightly rephrased:

1. Was the evidence insufficient to convict appellant?
2. Did the trial court err in denying appellant's Motion for New Trial?

We affirm.

FACTUAL BACKGROUND

Amanda Davis ("Davis"), the assistant manager at the Panera Bread ("Panera") restaurant in Eldersburg, Maryland, first met appellant in October of 2013, when she

[1] The trial court merged all of the first-degree assault and robbery counts into the robbery with a deadly weapon counts for sentencing purposes.

[2] We note that the State filed, but subsequently withdrew, a cross-appeal.

conducted his new employee orientation. Appellant worked at the Panera for nine or ten months, and initially worked with Davis for approximately twenty hours a week. Appellant first worked at the sandwich station during the daytime, but after several weeks he began working as a baker in an overnight position. Overnight bakers typically work from 10:00 p.m. until 6:00 a.m. the following morning. Although his baking shift would end at 6:00 a.m., appellant would often stay to eat and socialize with the daytime staff who were opening the restaurant. Despite the fact that some of Davis's shifts did not begin until 5:00 a.m., she would sometimes arrive between 4:00 and 4:30 a.m. Similarly, although some of Davis's shifts would typically conclude at 10:30 p.m., she would often stay later to perform other managerial duties and to talk with the overnight bakers. Appellant stopped working at Panera in August of 2014.

On September 26, 2014, at approximately 10:30 p.m., Davis finished her shift at Panera, entered her vehicle, and heard a banging on her driver's side window. She looked up to see two men screaming at her to exit her car. One of them was holding a black gun. The men wore masks and dark clothing. The gunman wore a dark blue sweatshirt with a white emblem. Once out of her car, the man carrying the gun told Davis, "We're going to the safe." The three then headed back toward the Panera. While walking toward the restaurant, the man holding the gun took Davis's Samsung Galaxy S4 cellular phone. Davis did not have a password or passcode enabled on her phone.

As Davis began to open the locked door to the Panera, she told the men, "Please. I'll give you anything you want. I have a little girl." The gunman responded, "I don't want

to hear that right now." Upon hearing those words, Davis immediately thought of appellant, whom she had heard utter those words numerous times while working together at Panera. The words always stood out to Davis as "weird" when she heard appellant say them. In fact, appellant was "the only person that ever said [that phrase] to [Davis]." Connecting the voice to the familiar phrase, Davis realized, at that moment, that appellant was the gunman.

Once inside the restaurant, Davis led the two robbers toward a hallway in the back by the ovens, offices, and dry storage. As the three walked down the hallway, Davis called out to the two overnight bakers, Jacob Johnson ("Johnson") and Jordan Vogelsang ("Vogelsang"), telling Johnson not to do anything. The gunman and his accomplice then led Davis, Johnson, and Vogelsang to the office in the back of the restaurant. The gunman ordered Johnson and Vogelsang to get down on their knees and face the hallway wall, and again, Davis recognized appellant's voice.

Davis was not the only person who recognized appellant based on his voice. In addition to spending time with appellant during shift overlaps, Johnson had provided appellant with twenty individualized baking training sessions lasting eight hours each, and then worked with appellant for several weeks until appellant left his job at Panera. Johnson recognized appellant's voice and his eyes through the mask appellant wore. Johnson later testified at appellant's trial that after hearing appellant's voice and seeing appellant's eyes, "[it was] one hundred percent, I [knew] [it was] him." Similarly, Vogelsang, who worked

with appellant once or twice a week for approximately six months as an overnight baker, also recognized appellant based on his facial features underneath appellant's mask.

After Johnson and Vogelsang were on their knees as instructed, the gunman ordered Davis to open the safe, and then instructed her to "Find something. Fill it up." Davis found a bag and filled it with employee paychecks, coins, and paper currency. As she hurried to fill the bag, she heard the gunman say, "Move faster. Move faster." Again, Davis recognized the gunman's voice as that of appellant.

Once the gunman took the bag from Davis, he ordered her to exit the office, get on her knees, face the wall, and count to thirty. The robbers left the restaurant with approximately $5,700.

Davis, after counting to thirty, stood up, looked around the restaurant, and then went back to her car to lock her car doors. She then returned to the restaurant and brought Johnson and Vogelsang into the office. Davis locked the office door and dialed 911. She remained on the phone with 911 dispatch until police officers arrived. When officers arrived, Davis instructed Johnson and Vogelsang to stay in the office and on the phone with 911 dispatch, and then Davis left the office to open the restaurant door for the officers. Davis explained what had transpired to the arriving officers, and provided a written statement. The written statement, however, did not mention that Davis believed appellant to be the gunman. According to Davis, although she was certain appellant had been the gunman, when she wrote her statement, she was too hurt that someone she knew, worked with, and even counseled, could threaten her life over a few thousand dollars.

Carroll County Sheriff's Detective William Murray responded to the robbery call at the Panera in Eldersburg. Detective Murray arrived after Davis provided her written statement. He interviewed Davis, Johnson, and Vogelsang upon arriving at the restaurant; all three witnesses identified appellant as one of the robbers. Although officers did not check for fingerprints or DNA evidence, Detective Murray reviewed Panera's employee records and identified a cellular phone number and a home phone number for appellant. He then sent a telephone preservation request to AT&T, the carrier for the cellular phone. Detective Murray confirmed appellant's address, and obtained a warrant to search appellant's home. While executing the search warrant, Detective Murray seized an iPhone belonging to appellant, and a dark blue Nike sweatshirt with a white Nike logo on the left chest area.

Maryland State Police Officer Frank Fornoff arrested appellant on October 15, 2014, pursuant to a fugitive warrant. At the time of his arrest, appellant had in his possession a Samsung Galaxy S4 cellular phone, headphones, and a charging device.

Carroll County Sheriff's Investigator Michael Dougherty, an expert qualified in forensic cell phone analysis, analyzed both the iPhone taken from appellant's room and the Samsung Galaxy phone taken from appellant's person during the arrest. Investigator Dougherty bypassed the lock on the iPhone by successfully guessing appellant's address as the password: 3713 for 3713 Trent Road. Next, Dougherty downloaded all data and content from the iPhone. From this information, Dougherty determined that the last time anyone had used the iPhone was September 30, 2014, four days after the robbery.

Dougherty accessed the Samsung Galaxy phone pursuant to the investigation on October 21, 2014. As with the iPhone, Dougherty was able to successfully unlock the Samsung Galaxy cellular phone by again entering appellant's address. When Dougherty compared the Samsung Galaxy's unique identification number to the box for Davis's Samsung Galaxy phone, Dougherty determined that the phone belonged to Davis.

In addition to reviewing the physical and electronic contents of the cellular phones, Dougherty also performed a historical cell site analysis of the iPhone. This involved reviewing the cell towers that pinged to appellant's iPhone from 11:01 pm to 11:45 p.m. on the night of the robbery. Dougherty determined that appellant's iPhone received ten calls during this time period, all of which pinged to the general Eldersburg area.

At appellant's criminal trial, the State called as witnesses: Davis, Johnson, Vogelsang, Detective Murray, Dougherty, and other officers involved in the investigation. As noted previously, the trial court accepted Dougherty as an expert in historical cell site analysis and forensic cellular phone analysis. Additional facts will be supplied as necessary.

DISCUSSION

I. Sufficiency of the Evidence

Appellant first argues that the evidence presented at trial was insufficient to support his convictions. The standard of review for the sufficiency of the evidence is "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."

Hobby v. State, 436 Md. 526, 538 (2014) (citations and quotation marks omitted). "The test is not whether the evidence *should have or probably would have* persuaded the majority of the fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Painter v. State*, 157 Md. App. 1, 11 (2004) (internal citations and quotations omitted). In applying this test, "[w]e defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Neal v. State*, 191 Md. App. 297, 314 (2010) (internal citations and quotations omitted).

Appellant argues that the evidence was insufficient for three reasons: first, the voice identification was not reliable; second, officers never discovered any incriminating evidence on either of the phones they recovered from appellant; and third, that Dougherty failed to confirm the reliability of the equipment he relied upon in conducting his investigation, rendering his testimony at trial inaccurate. Additionally, appellant argues that the State failed to produce as evidence: the gun used in the robbery, fingerprints of the perpetrators, the identity of the second robber, incriminating text messages or phone calls from appellant's phones, and witnesses from AT&T to verify the reliability of the equipment Dougherty used during the investigation.

We summarily reject these contentions. "[I]t is not the role of the appellate court to re-weigh the evidence and to reevaluate the credibility of witnesses." *State v. Manion*, 442 Md. 419, 445 (2015) (citing *Dawson v. State*, 329 Md. 275, 281 (1993)), *reconsideration denied* (April 17, 2015). "Further, it is well established in Maryland that the testimony of even a single eyewitness, if believed, is sufficient evidence to support a conviction."

Marlin v. State, 192 Md. App. 134, 153 (2010) (citing *Walters v. State*, 242 Md. 235, 237-38 (1966)). The jury here heard testimony from Davis, Johnson, and Vogelsang. All three recognized appellant, in various ways, as the armed robber. "Voice identification, coupled with other circumstances, is sufficient to support a conviction[.]" *Buzzbee v. State*, 58 Md. App. 599, 613 (1984) (citing *Hall v. State*, 5 Md. App. 599, 609 (1969)). The jury also heard how police recovered from appellant a Samsung Galaxy phone with identification numbers matching the phone stolen from Davis in the robbery. Finally, the jury heard evidence that pinged appellant's iPhone to the Eldersburg area on the night of the robbery. The testimony of Davis, Johnson, or Vogelsang, alone, suffices to sustain appellant's convictions. The case against appellant becomes even stronger when the identification evidence is coupled with the fact that appellant was in possession of Davis's phone, or that appellant's iPhone could be pinged to the Eldersburg area. In short, a rational trier of fact could have found the essential elements of all of the crimes beyond a reasonable doubt.

II. Jury Mishandling

Appellant's second allegation of error is that the trial court erred in denying his Motion for New Trial. The alleged error appellant complains of took place when the trial court provided a laptop to the jury during jury deliberations, so that the jurors could review audio and video evidence. When the jury informed the bailiff that the laptop was password protected, the bailiff provided the jury with a different laptop. The court notified counsel of the switch, and asked both the State and appellant's trial counsel if there were any

"questions, comments or concerns." Both answered in the negative, and the jury eventually convicted appellant of the abovementioned charges.

Following his conviction, appellant filed his Motion for New Trial, alleging, among other things, that the trial court failed to disable internet access for the second laptop provided to the jury, and that within only two hours of receiving this second laptop, the jury returned its guilty verdicts. According to appellant, "The jury appeared to have browsed [appellant's] background and quickly reached a verdict to convict."

On November 12, 2015, prior to sentencing, the trial court held a hearing on appellant's motion. The court denied the motion, stating that it had made clear to the jurors that they were to decide the case based on the evidence, and were instructed throughout the trial not to perform any outside or independent investigation. Additionally, the trial court noted that appellant's concerns were purely speculative other than the fact that the bailiff provided the jurors with a second laptop. Finally, the court stated that appellant waived the issue because it specifically asked whether there was an issue with replacing the laptop, and appellant's counsel indicated that there was none.

We hold that appellant affirmatively waived this issue by stating that he had no questions, comments, or concerns regarding the new laptop. We have previously commented that parties are not "permitted to 'sandbag' trial judges by expressly, or even tacitly, agreeing to a proposed procedure and then seeking reversal when the judge employs that procedure[.]" *Claybourne v. State*, 209 Md. App. 706, 748 n.28 (2013) (quoting *Miles v. State*, 365 Md. 488, 554 (2001)). When a party affirmatively advises the court that it has

no objection to an issue, even a plain error analysis is inappropriate. *See Booth v. State*, 327 Md. 142, 180 (1992) (holding that, when a party affirmatively advised the court that it had no objection to a proposed jury instruction, error was waived.). Assuming *arguendo* that appellant did not affirmatively waive his claim, we nevertheless conclude that the trial court did not err in denying his Motion for New Trial.

We review the trial court's decision to deny appellant's Motion for New Trial for an abuse of discretion. *Cooley v. State*, 385 Md. 165, 175 (2005). Here, at the conclusion of all of the evidence, the trial court instructed the jurors as follows,

> It is more important than ever that now that all of the evidence is in, you have been instructed as to the law and the only thing remaining really is for for [sic] the lawyers to deliver their closing arguments before you take this case to begin your deliberations, that you not begin your deliberations at this point in time, that you not talk to anyone about the case, that you not allow anyone to talk to you about the case, that you not do any outside or independent investigation into this matter. And that you not look at or listen to any media reports regarding this case.

[8/12 198-199]. "Jurors generally are presumed to follow the court's instructions[.]" *Dillard v. State*, 415 Md. 445, 465 (2010) (citing *Ezenwa v. State*, 82 Md. App. 489, 518 (1990)).

Appellant speculates that the jurors ignored the court's instructions, stating, "The jury pool was made up of some tech savvy people and a lawyer. It is entirely possible that the lawyer may have search [sic] the judiciary website and found [appellant's] prior crime. The other jurors may or may not have seen it." That "it is entirely possible" that the jurors accessed the internet does not persuade us that the trial court abused its discretion. A motion for a new trial must be based on evidence. *See Grandison v. State*, 425 Md. 34, 76

(2012) (holding that the trial court did not abuse its discretion in denying a motion for a new trial where there was no evidence to support the defendant's claim.). In a motion for a new trial, "the burden of persuading the trial judge that such a remedy is called for is on the defendant, as the moving party." *Jackson v. State*, 164 Md. App. 679, 686 (2005). Appellant did not meet his burden. Accordingly, the trial court did not abuse its discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.