UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2661

September Term, 2015

DELANTE TERRANCE RICHARDSON

v.

STATE OF MARYLAND

Wright,
*Krauser,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Krauser, J.

Filed: June 8, 2017

*Krauser, J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Delante Terrance Richardson, appellant, was convicted by a jury, in the Circuit Court for Prince George's County, of robbery, second-degree assault, conspiracy to commit robbery, and theft of property valued under $1,000. On appeal, he contends that the circuit court erred in denying his request, at trial, that he be permitted to stand up, at the defense table, so that the jury could see his multiple tattoos, a feature not mentioned by his thirteen-year-old victim, when he described his assailant to police or, later, at trial. For the reasons that follow, we conclude that the court did err in so ruling, but that mistake amounted to no more than harmless error. Accordingly, we affirm.

FACTS

As a thirteen-year-old boy – whom we shall refer to as "L.M." – was walking home from school, on December 12, 2014, a four-door black Audi, with Maryland license plates and tinted windows, blocked his path. A few seconds later, a man, standing behind him, said, "Just let it go." Then, when L.M. turned around, the man tackled him. During the struggle that ensued, L.M.'s phone fell out of his pocket. Grabbing the phone, the man climbed into the passenger side of the Audi, and that vehicle then drove away.

Later, in a statement to the police, L.M. described his attacker as a clean-shaven black male, 19 to 20 years old, 5 feet 3 inches tall, with dreadlocks, who was wearing a red and black coat and blue jeans. About a month later, L.M. identified appellant, as his assailant, from a collection of six 8.5 by 11 inch full-face photographs of men who fit the

description[1] that the victim gave of his attacker. L.M. then identified him, again, at trial, as the man who had assaulted him and stolen his cell phone.

DISCUSSION

At the conclusion of the State's case-in-chief, defense counsel informed the court that the defense would not be calling any witnesses, nor would appellant testify, but that he wanted appellant to "stand up" so that the jury could "see what he look[ed] like." During the colloquy that ensued between the trial court and counsel, the court asked counsel why appellant standing up to exhibit his tattoos was not "testimonial," which, if it were, would subject him to c-ross-examination. Defense counsel responded: "Because they can already see it. I just want them to get a closer look. It is here. It is in the public." The court denied that request, stating that "you should be satisfied with him sitting there then. If it adds nothing more than [sic] you should be okay with him sitting there. I will not allow that. He will testify or he will not testify." Though appellant was denied the opportunity to stand and show off his tattoos to the jury, defense counsel nonetheless stressed, during closing argument, that L.M. had never advised police or testified at trial that his assailant had tattoos.

Appellant contends that the trial court erred in denying his request to exhibit his tattoos to the jury, on the grounds that the court erred in concluding that the act amounted to "testimony" and thus he was subject to cross-examination. In support of that contention, he points out that the prosecution may, in Maryland, compel defendants to provide

[1] The other five pictures were of men who were of the same race and approximately the same age as appellant, and wore dreadlocks, as did the victim's assailant.

demonstrative evidence of physical traits and characteristics at trial (such as voice and handwriting exemplars), and that evidence is not "testimonial" for Fifth Amendment[2] purposes. He then cites a number of extra-territorial decisions for the proposition that, if the prosecution can compel a defendant to show physical characteristics to the jury, then surely the defense may do so as well, without such evidence being deemed "testimonial," and thereby subjecting the defendant to cross-examination. *See United States v. Bay*, 762 F.2d 1314 (9th Cir. 1985); *State v. Gaines*, 937 P.2d 701, 702-04 (Ariz. Ct. App. 1997); *Smith v. State*, 574 So.2d 1195, 1196 n.3 (Fla. Dist. Ct. App. 1991); *State v. Martin*, 519 So.2d 87 (La. 1988); *State v. Gallegos*, 853 P.2d 160, 161 (N.M. 1993); *State v. Hart*, 412 S.E.2d 380, 381 (S.C. 1991). Moreover, because the State's case relied largely, if not entirely, on L.M.'s identification of him, appellant contends that this error was not harmless.

The State responds that the circuit court did not abuse its discretion in denying appellant's request, because the jury could view appellant at the counsel table, and a "closer look" would have, in effect, been cumulative and unnecessary. Moreover, defense counsel, the State points out, stressed, during closing argument, the purported discrepancy between appellant's appearance and L.M.'s description of his attacker to police and later at trial. And that, in combination with the fact that the tattoos, as defense counsel conceded at trial, could be seen by the jury as appellant sat at counsel's table, left the jury well aware of the

[2] The Fifth Amendment of the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V.

tattoos appellant wished to highlight by standing up and possibly approaching the jury at trial.[3]

Although "[d]eterminations regarding the admissibility of evidence generally are left to the sound discretion of the trial court," *Easter v. State*, 223 Md. App. 65, 74 (2015), *cert. denied*, 445 Md. 488 (2015); *see also Ware v. State*, 348 Md. 19, 65 (1997) (holding that a "decision to admit demonstrative evidence rests within the sound discretion of the trial court"), because the trial court's ruling that appellant would be offering "testimony" if he showed his tattoos to the jury was a legal determination, we shall accord that determination *de novo* review. *See Martin v. TWP Enters., Inc.*, 227 Md. App. 33, 48 (2016); *In re Adriana T.*, 208 Md. App. 545, 569 (2012) ("The *de novo* standard of review applies to the trial court's conclusion of law that the evidence at issue is or is not 'of consequence to the determination of the action.'") (quoting *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 620 (2011)).

Applying that standard of review, we note that the Court of Appeals has determined that evidence of physical traits or characteristics of a defendant does not amount to "testimony." In *Hopkins v. State*, 352 Md. 146, 156 (1998), for example, the Court held that requiring the defendant to repeat, in court, a phrase used by the robber, for identification purposes, as a witness stated that "she could identify [the defendant] positively by the [vocal] exemplar," was "non-testimonial, and, therefore, not protected by

[3] Although appellant's counsel stated, in his brief, that appellant be permitted to "approach the jury," the record reflects that appellant's trial counsel only asked that appellant be permitted to "stand up."

the Fifth Amendment's prohibition against compelled incrimination." *Id.* at 156-57 (citations omitted). That legal precept was reaffirmed by this Court in *Jones v. State*, 213 Md. App. 483, 494 (2013), where we declared that the "protections of the Fifth Amendment prohibiting the admission of compelled statements or physical communications that are self-incriminatory do not apply to physical characteristics such as the giving of a blood sample, voice sample, or handwriting exemplar." *See also Vandegrift v. State*, 82 Md. App. 617, 639 (1990) ("Moreover, it has long been established that the compelled display of physical characteristics, such as a voice exemplar, does not violate the Fifth Amendment privilege against compulsory self-incrimination.").

Moreover, as this Court has observed, "criminal defendants have been required to exhibit, or refrain from altering or concealing, a wide variety of identifying characteristics, ranging from voice, to blood, to handwriting, to limbs, or other body parts." *Dove v. State*, 47 Md. App. 452, 459 (1980) (affirming an order requiring the defendant to cut his hair and grow facial hair prior to a pretrial lineup identification, so that his appearance, at that lineup, matched his appearance at the time of his arrest). *See also Doye v. State*, 16 Md. App. 511, 522-24 (1973) (finding no violation of the defendant's Fifth Amendment rights by the trial court when it compelled him to show his forearm to the jury, which purportedly matched the description given, at trial, by the sexual assault victim of her assailant's forearm).

However, neither this Court nor the Court of Appeals has specifically addressed whether a defendant, as opposed to the State, may be permitted to show a physical trait or characteristic to the jury, without testifying, as evidence that a misidentification had

occurred or, in other words, whether such demonstrative evidence is of a non-testimonial nature. Therefore, in support of his contention that such evidence is non-testimonial, appellant relies, as noted earlier, on decisions of one federal appellate court and several other state appellate courts, which he claims have so held. *See Bay*, 762 F.2d; *Gaines*, 937 P.2d at 702-04; *Smith*, 574 So.2d at 1196 n.3; *Martin*, 519 So.2d; *Gallegos*, 853 P.2d at 161; *Hart*, 412 S.E.2d at 381.

Of these cases, appellant principally relies upon *State v. Martin*. In that case, the victim of a rape testified that her attacker had a tattoo on his right upper arm "which 'said something like Angela' and 'had some loops in it.'" 519 So.2d at 87. When Martin asked to be permitted to show his arms to the jury to make it clear that he did not have a tattoo matching this description, the trial court ruled that he could display the tattoo, but only if the prosecution could cross-examine him as to the origin of his tattoos and whether any tattoos had been removed, whereupon Martin withdrew his request. *Id.*

Noting that "the state unquestionably would have had the right to compel Martin to display his arms to the jury, had it desired such a display," the Supreme Court of Louisiana avowed that "[c]onsiderations of due process and reciprocity require us to answer that question [whether there is a difference when the defense seeks production of a physical trait] in the negative." *Id.* Specifically, it held that, as Martin would not be "testifying" by showing his arms to the jury, the State had no right to cross-examine him following that display. *Id.* at 91-92.

The Supreme Court of South Carolina reached a similar conclusion in *State v. Hart*, 412 S.E.2d at 381. Charged with armed robbery, Hart requested the opportunity, at trial,

to "exhibit" certain physical characteristics of his face and hands for the jury to see, as the victim had testified that the robber was 5 feet 2 inches tall, between twenty and twenty-five years of age, with "badly stained" teeth and "gaps around his bottom teeth," as well as eyes which "were wide and surprised-looking but not out of alignment." *Id.* at 382. Hart did not appear to possess any of these traits. In fact, Hart was 5 feet, 9 inches tall, thirty-three years old at the time of the crime, and had a noticeable scar on his left hand, a chipped front tooth, had "no gaps between his bottom teeth," and his right eye was "out of alignment due to a previous injury." *Id.* The trial court ruled that the defendant could "exhibit," to the jury, these physical characteristics, but that the prosecution could then cross-examine him. *Id.* at 381. As a consequence, Hart chose not to display those physical characteristics for the jury, and, after Hart was convicted of armed robbery, he appealed. *Id.*

The Supreme Court of South Carolina reversed, holding that the trial court had erred in so ruling, because "[i]t is well-settled that the State's exhibition of a defendant's physical characteristics does not implicate the defendant's privilege against self-incrimination because such an exhibition is not testimonial." *Id.* (emphasis omitted). The South Carolina appellate court reasoned: "Since constitutional due process ensures reciprocity as essential to a fair trial, a physical exhibition when offered by the defendant cannot constitute a waiver of his right against self-incrimination." *Id.* (internal citations and emphasis omitted). *See also Bay*, 762 F.2d at 1315 (holding that "[i]f this [display of the defendant's tattooed hands] can be compelled by the government when it is to the government's advantage, surely the defendant can make the same showing without taking the stand, when such a showing is to his advantage"); *Gaines*, 937 P.2d at 703 (concluding that "a physical

display offered by the defendant should be treated exactly like such a display offered by the state"); *Gallegos*, 853 P.2d at 161 (concluding that "a tattoo display used to identify an individual or rebut a witness's identification is admissible as demonstrative evidence").

We agree with our sister state appellate courts that, because the prosecution can compel a display of non-testimonial physical evidence without violating a defendant's Fifth Amendment right against self-incrimination, the defense may do so as well, without waiving that amendment's protections. We therefore hold that the circuit court erred in ruling that appellant would be "testifying" by showing the jury his tattoos, and was thus subject to cross-examination. Nonetheless, an "independent review of the record" has persuaded us, "beyond a reasonable doubt, that th[at] error in no way influenced the verdict,'" and thus amounted to harmless error. *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

The record reveals, for example, that L.M. gave a detailed description of his assailant. And, when L.M. was asked how certain he was, he testified, "[t]he memory that I got back when I first saw him today, the memory is pretty much stuck with me, I can't forget what happened. His face is pretty much I can't forget. When I saw the picture again, it just popped back in." Moreover, a month after the robbery, L.M. identified appellant as his assailant from a series of six full-face photographs depicting appellant and five other individuals, who were similar in appearance to him, and, the photo of appellant, we note, does not appear to show him with any visible facial or neck tattoos. Furthermore, L.M. testified that his attacker was wearing a red and black coat, which might have covered the tattoos on appellant's arms.

What is more, the circuit court observed, in rendering its ruling, that appellant was sitting in full view of the jurors throughout the trial. And, finally, defense counsel conceded, in making his request, that the jurors could see the appellant's tattoos during the trial. Finally, in closing argument, defense counsel highlighted appellant's tattoos and L.M.'s failure to mention them in his description of his attacker. And, in so doing, he made the jury well aware of this purported discrepancy in L.M.'s identification.

Accordingly, we find that, although it was error for the circuit court to conclude that appellant's request to display his tattoos was "testimonial," that mistake amounted to no more than harmless error.

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