

Circuit Court for Baltimore City
Case No. 122207010

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2066

September Term, 2023

HENRY ALLEN

v.

STATE OF MARYLAND

Berger,
Ripken,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 15, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

This appeal arises from appellant Henry Allen’s (“Allen”) conviction for first-degree attempted murder, reckless endangerment, and additional weapons-related charges following a May 2022 shooting in Baltimore City. At the conclusion of trial, Allen objected to the State’s request for a flight instruction, arguing that his “whole defense” was that he was not the individual pictured in surveillance footage of the shooting. Although the court denied the State’s request for a mere presence instruction based on this argument, the court reasoned that the flight instruction did not presume presence and, therefore, did not prejudice Allen’s defense.

On appeal, Allen presents one question for our review, which we have rephrased as follows:¹

Whether the trial court abused its discretion in instructing the jury on flight.

For the following reasons, we answer this question in the affirmative. We, therefore, vacate the judgment and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

On May 31, 2022, a shooting took place at the 1800 block of Edmondson Avenue in Baltimore City, Maryland. Following the shooting, Baltimore City Police detectives viewed security camera footage that captured the incident. In the footage, a man can clearly

¹ Allen phrased the question as follows: Did the trial court abuse its discretion in instructing the jury on flight when defense counsel made clear, and the trial judge recognized, that the sole issue at trial was the identity of the fleeing offender?

be seen walking around a corner, retrieving a handgun from his bag or pocket, and firing several shots at an unidentified individual across the street. The suspect then turns and runs off camera. No victim was identified following the shooting. Based on these videos, Detective Scott Klein (“Detective Klein”) identified Allen as the shooter and arrested him on June 10, 2022.

Allen pleaded not guilty to the offense and, at trial, maintained that he was not the individual depicted in the surveillance footage. The defense offered the following opening statement, in full, related to this defense:

Mr. Allen is presumed to be innocent, that presumption, that cloak of innocence stays with him throughout the entire proceeding, through the entire trial until the verdict, a verdict is reached. That concept is so important that I need to address it. We don’t have to say anything during trial. We don’t have to present witnesses or put on a defense. I don’t have to make an opening statement or a closing argument. He is presumed innocent and the State has to prove, the State has the burden of proving each and every element of each crime alleged. The State must prove each and every element beyond a reasonable doubt, and there is reasonable doubt here. Mr. Allen maintains that that was not him, that’s why he’s not guilty.

Detective Klein was the only witness called at trial. During direct examination, the State established that Detective Klein was assigned to the Western District Action Team (DAT). This team “is assigned to do proactive enforcement,” which involves “trying to make felony drug and gun arrests.” Detective Klein testified that in his capacity as a DAT member, he was in the area of the shooting on a daily basis. On the day in question,

Detective Klein responded to a ShotSpotter alert at the scene.² While on the scene, Detective Klein testified that he viewed surveillance video taken by West Carry Out & Grocery, a shop located on the corner where the shooting occurred. Detective Klein also testified that he found shell casings on the ground outside the shop and along Edmondson Avenue. These shell casings were marked and eventually recovered.

During Detective Klein's direct examination, the State played the surveillance footage for the jury. In the footage, the shooter can be seen wearing a Pittsburgh Pirates baseball hat and carrying a black satchel over his shoulder. Detective Klein testified that at the time he first viewed the video he recognized the shooter to be Allen. He then identified Allen in the courtroom. The State also introduced Detective Klein's body worn camera footage from a June 2, 2022 interaction with Allen.³ Detective Klein testified that while patrolling that day he saw Allen standing in the same intersection where the shooting had taken place. He was wearing a Pittsburgh Pirates hat and carrying a black satchel over his shoulder. Following this interaction, Detective Klein submitted a report naming Allen as his suspect in the shooting. On June 10, 2022, Detective Klein received copies of the surveillance videos capturing the shooting, obtained an arrest warrant, and arrested Allen.

On cross examination, defense counsel engaged in the following line of questions:

[DEFENSE]: Detective Klein, you said that there were five shell casings that were picked up?

² ShotSpotter is an automated electronic system located throughout Baltimore City that alerts police to potential gunfire.

³ This footage was played without sound because the court had previously granted Allen's motion to suppress statements made to police during the interaction.

[WITNESS]: That's correct.

[DEFENSE]: And they were turned into evidence control?

[WITNESS]: That's correct.

[DEFENSE]: Were they turned in to check for finger prints?

[WITNESS]: No.

[DEFENSE]: What about DNA?

[WITNESS]: No, that wouldn't be done in a case like this.

[DEFENSE]: But it could be done?

[WITNESS]: No, not by BP.

[DEFENSE]: It's a policy, but it's not. It could have; but it's against your policy, is that correct?

[WITNESS] I could have filled a request form out to have them finger printed, but because there was no victim. The crime lab would have not processed that request for finger printing to be done.

Defense counsel then began a line of questioning regarding the demographics of criminal defendants saying, “. . . in high crime areas, unfortunately, that means a lot of young black men are in the area,” followed by, “[a]re the majority of people who commit crime . . .” The State objected. During a bench conference, defense counsel explained that she wished to question Detective Klein regarding his knowledge of crime demographics based on “[h]is experience of who he arrested.” The court sustained the State's objection. Defense counsel then asked, “[d]etective, in your experience, what is the race of the majority of your arrestees?” The State again objected, and the court sustained the objection. Defense counsel asked no further questions and the witness was dismissed. Counsel then moved for a judgment of acquittal, arguing that the State had not presented

sufficient evidence to prove any elements of the crimes charged. The court denied the motion and proceeded to jury instructions.

The State requested that the court provide the jury with instruction 3:25 Presence of Defendant. The instruction reads:

A person's presence at the time and place of a crime, without more, is not enough to prove that the person committed the crime. The fact that a person witnessed a crime, made no objection, or did not notify the police does not make that person guilty of the crime. However, a person's presence at the time and place of the crime is a fact in determining whether the defendant is guilty or not guilty.

Defense counsel objected to this instruction, arguing that,

[h]is presence is our contention, Your Honor, that he was not there. He has been identified, so I have to, I guess, stipulate to that, but I'm not agreeing that he was there. Our whole defense is that it is not him. So, I don't believe that this is an appropriate instruction; in fact, it undermines our whole defense. Cause there's only --

The court then interjected, saying,

I think that the problem with the instruction, particularly with these facts . . . is that it could be somewhat prejudicial to the defense because the instruction presumes that the issue of the defendant actually being present in the area of a crime being committed is not at issue, as much as whether or not he committed the crime. And I think in this particular case that is what the whole issue is for the defense. So, when you read the instruction it almost, like I said, presumes that -- it [*sic*] kind of been proven that he was there . . . As opposed to this particular instance, which is . . . he was the person or he wasn't the person. It wasn't an issue of, you know, he was the person; but did he do it? And that's what this instruction is really for. So, I think . . . it could be somewhat prejudicial to the defense. I will sustain the objection and I will not read the instruction.

The State also requested that the court provide the jury with instruction 3:24 Flight or Concealment of Defendant. This instruction reads:

Defendant(s)' flight immediately after the commission of a crime, or after being accused of committing 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.

Defense counsel objected to this instruction as well, arguing,

the flight is just like the presence. It puts the client right there. He was not. Flight usually means running away from the police. In this case, the shooter just went about his business running away, but there was no police presence and I think it's akin to his presence there. It's too prejudicial more than it is prohibitive [*sic*]. Cause the video sort of speaks for itself.

The court disagreed, saying,

I don't think that this . . . reads the same as the presence instruction. This one still leaves open for the jury to determine whether the defendant was actually there or was actually the person who's there. It's a totally different . . . action as opposed to the other one which I said sort of presumes there was presence and there needed to be some evaluation of what the presence means . . . It doesn't presume flight necessarily. It certainly doesn't presume that the defendant . . . was present at all. The State would have to prove, and it specifically says that you have to decide whether there's even evidence of flight. The other one didn't say you had to decide if there's evidence of presence, which was the problem with that instruction to begin with. The objection is overruled.

In her closing argument, defense counsel reiterated the argument that Allen was not the shooter, explaining to the jury that there “is no physical proof that Mr. Allen discharged a

handgun.” Counsel concluded by saying, “[n]ow he maintains his innocence when he pleaded not guilty and requested a jury trial. It’s not him and he’s not guilty.” The jury found Allen guilty on all counts. He was sentenced to forty years in prison with all but twenty years suspended. This timely appeal followed.

DISCUSSION

I. The trial court erred by instructing the jury on flight.

On appeal, Allen argues that the court abused its discretion by instructing the jury on flight when defense counsel made clear, and the trial judge recognized, that the sole issue at trial was the identity of the fleeing offender. We agree. A trial court’s decision to give a particular instruction is reviewed for abuse of discretion. *Wright v. State*, 474 Md. 467, 481 (2021). “A trial court abuses its discretion if it commits an error of law in giving an instruction.” *Id.* Maryland Rule 4-325(c) requires a trial court give a requested instruction when “(1) the requested instruction is a correct statement of the 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.” *Thompson v. State*, 393 Md. 291, 302 (2006).

“[W]hether a flight instruction ‘is applicable under the facts of the case’ is, by definition, a case-specific determination.” *Wright*, 474 Md. at 485. In *Wright*, the Supreme Court of Maryland explored the applicability of a flight instruction when “the sole contested issue is the defendant’s identity as the person who committed the charged offenses *and* fled the scene.” *Id.* The Court held in *Wright* that “[i]n such a case, a flight

instruction does not ‘aid the jury in clearly understanding the case, . . . provide guidance for the jury’s deliberations, and . . . help the jury arrive at a correct verdict,’ . . . and therefore generally should not be given.” *Id.* (quoting *Chambers v. State*, 337 Md. 44, 48 (1994)).

The reasons for this are twofold. First, when identity alone is the issue, “a consciousness of guilt instruction would provide no relevant guidance to the jury[.]” *Wright*, 474 Md. at 485 (quoting *Commonwealth v. Bastaldo*, 472 Mass. 16, 32 (2015)). Such an instruction speaks to whether “the person who fled was aware that what had occurred between him and the victim was wrongful.” *Wright*, 474 Md. at 485 (quoting *Commonwealth v. Groce*, 25 Mass. App. Ct. 327, 331 (1988)). It does not, however, “shed any light on the issue of identification,” nor does it “give rise to a reasonable inference that the defendant was the assailant.” *Id.* Second, and more importantly, giving a flight instruction when the sole issue is identity poses the risk “that the jury might think the judge was suggesting that the defendant was the person who fled and therefore the person who committed the crime.” *Wright*, 474 Md. at 485 (quoting *Bastaldo*, 472 Md. at 32).

The Court in *Wright* made clear, however, that “a trial judge should not be left to guess or speculate whether the sole issue in dispute at trial is the identity of the fleeing offender.” *Wright*, 474 Md. at 486. Instead, “defense counsel must expressly and unambiguously state -- prior to the jury charge -- that the defense solely contests the identity of the defendant as the fleeing offender.” *Id.* In so holding, the Court provided two avenues through which defense counsel may accomplish this.

One way to do this would be for the parties to enter into a stipulation which says, in effect, that: (1) the parties agree the State has proven that the person who fled the scene is guilty of the charged offense(s); (2) the defendant disputes that the defendant is the person who committed the offense(s) and fled the scene; and (3) it is the State's burden to prove beyond a reasonable doubt that the defendant is the person who committed the offense(s) and fled the scene. Alternatively, if defense counsel tells the trial court prior to the jury charge that, in closing argument, the defense will not contest any issue other than the identity of the defendant as the fleeing offender, that will ordinarily suffice to make clear that it is the sole issue in dispute.

Id. at 486-87.

In *Wright*, the Court held that the trial court did not abuse its discretion by giving the flight instruction because Wright had not unambiguously made identity the only contested issue prior to the jury charge. There, although identity was a significant part of Wright's defense against attempted first degree murder and other charges, Wright did not effectively narrow the case to that issue alone. Initially, during his opening statement defense counsel told the jury that "the video footage they would be viewing 'just shows a small portion of what's going on,' and that 'there's a lot more to this case.'" *Id.* at 489. Defense counsel told the jury that "the State would not produce any witnesses to the shooting to testify who the shooter was *and the circumstances around the shooting.*" *Id.* Next, while cross-examining one of the State's witnesses, defense counsel asked "several questions that seemingly were irrelevant to the question of identity, but that might have some relevance to the shooter's mental state, including whether [the witness] remembered

being in a fight prior to being shot, whether he remembered punching anyone,” and whether he had “been involved in physical altercations before.” *Id.*

When the State requested the flight instruction, defense counsel stated that “the whole crux of the case was that Mr. Wright did the shooting.” He did not, however, “say that Wright’s identity as the fleeing offender was the only issue in the case, that the sole defense was identity, or that he would concede in his closing argument that the State had proved all the other elements of the charged offenses, including the mental state elements.” *Id.* The Court concluded, therefore, that “the trial judge in Wright’s case did not know what defense counsel was going to argue in his summation,” and therefore did not err in giving the flight instruction under those circumstances. *Id.*

Here, unlike *Wright*, defense counsel made clear from the beginning of this trial until its conclusion that the shooter’s identity was the only question at issue in the case. The State’s case was built around a clear, close-range surveillance video of the shooting. Viewing the video, there was no question that the crimes alleged had taken place. It was plain for both the court and the jury to see that someone had stepped onto the sidewalk, pulled out a gun, fired multiple shots across the street, and fled the scene. Defense counsel, in turn, built its defense around the contention that the shooter depicted in the video was not Allen. Counsel said as much in her brief opening statement, explicitly telling the jury that Allen was not guilty because he was not at the scene of the crime.

While questioning Detective Klein, defense counsel also limited her questions to issues surrounding the suspect’s identity. She stressed that no fingerprints or DNA had

been retrieved from the shell casings to confirm the shooter’s identity and unsuccessfully initiated a line of questioning related to identifying physical qualities of criminal defendants in the area of the shooting. At no point during either her opening statement or cross-examination did defense counsel suggest any defense beyond identity. Finally, in objecting to the mere presence instruction, defense counsel explicitly stated that the question of Allen’s presence at the scene and his identity as the shooter was his “whole defense.”

The court’s own statements strongly indicate that there was no misunderstanding regarding this defense. In ruling on the State’s requested jury instructions, the court’s reasoning centered solely on how each instruction affected Allen’s defense that he was not the shooter. The court explained that giving the mere presence instruction would undermine the “whole issue” Allen had presented, because it presumed his presence at the scene of the crime. The court reiterated that in “this particular instance, . . . [i]t wasn’t an issue of, you know, he was the person; but did he do it,” but rather if “he was the person or he wasn’t the person.” The court reviewed the flight instruction through the same lens, explaining that it would not prejudice Allen’s defense in the same way because, in the court’s reading, it did not presume his presence at the scene.

Under the circumstances of this case, defense counsel made it explicitly clear -- and the court understood -- that there was “no dispute that the same individual committed the offense and fled from the scene,” no question “whether the incident had actually occurred or whether what had occurred was a crime, only whether the defendant was the one who

committed it.” *Wright*, 474 Md. at 485 (quoting *Groce*, 25 Mass. App. Ct. at 331.) The flight instruction, therefore, would risk prejudicing Allen’s defense while providing no relevant guidance to the jury. For these reasons, we hold that the trial court erred in instructing the jury on flight under the circumstances of this case.

II. The court’s error in instructing the jury on flight was not harmless beyond a reasonable doubt.

The State argues that, even if the court erred in giving the flight instruction, this error was harmless because the court also instructed the jury on identification and the State presented strong identifying evidence through video footage and witness testimony. We enunciated the harmless error test in *Dorsey v. State*, 276 Md. 638, 659 (1976) explaining:

[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed “harmless” and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of whether erroneously admitted or excluded -- may have contributed to the rendition of the guilty verdict.

Dorsey, 276 Md. at 659; *see also Williams v. State*, 462 Md. 335, 355 (2019) (reaffirming the *Dorsey* standard and explaining that “[c]onsistent with the *Dorsey* standard, unless we determine beyond a reasonable doubt that the error in no way influenced the verdict, the error cannot be deemed harmless, and a reversal is mandated.”).

Here, we are unable to determine beyond a reasonable doubt that the court’s error in giving the flight instruction in no way influenced the verdict. The Court’s holding in *Wright* speaks directly to the risk of prejudice produced when a flight instruction is given

under the circumstances of this case. To be sure, the State's evidence was compelling. It did not, however, relieve the jury of its role in determining whether or not Allen was the shooter seen in the surveillance footage. Because the flight instruction carried the risk of prejudicing Allen's defense by suggesting that he was the individual who fled the scene of the crime, we hold that the court's error was not harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the circuit court erred in instructing the jury on flight when Allen made clear to the court that the sole question at issue in the case was the identity of the shooter. Because we determine that this error was not harmless beyond a reasonable doubt, we vacate the judgment below and remand for a new trial.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY VACATED.
CASE REMANDED FOR A NEW TRIAL.
COSTS TO BE PAID BY APPELLEE.**