Circuit Court for Anne Arundel County
Case No. C-02-CR-16-002432

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2337

September Term, 2017

MICHAEL CLEMENT SAMPSON

v.

STATE OF MARYLAND

Wright,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 23, 2019

On October 27, 2017, a jury sitting in the Circuit Court for Anne Arundel County convicted appellant, Michael Clement Sampson, of attempted rape in the second degree, attempted sex offense in the fourth degree, three counts of assault in the second degree, and false imprisonment. The court sentenced appellant to an aggregate term of nearly 20 years' imprisonment.[1]

On appeal, appellant raises the following question for this Court's review:

> Did the trial court abuse its discretion in refusing to give a lack of flight instruction to the jury?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Crime and Investigation

On November 8, 2016, H.C. was working a double-shift as a server at Applebee's from 10:00 a.m. to 8:00 p.m. That afternoon, she observed her co-worker, appellant, enter the restaurant from the back door. At approximately 4:48 p.m., while H.C. was rolling silverware at the back of the restaurant, appellant came up behind her, told her that he was going to "fuck the shit out of" her, and then attempted to "shove his hands down [her] pants." H.C. immediately squatted down to prevent appellant's hands from going below her stomach and said: "What are you doing?" Appellant then walked away.

[1] The court sentenced appellant to 6,873 days, or roughly 18.8 years on the attempted second-degree rape conviction and one year, consecutive, on the attempted sex offense in the fourth-degree conviction. The court merged the remaining convictions for sentencing purposes.

As appellant was leaving, H.C. asked him to get Jen or Ryan, two of the other servers, to come work beside her.[2] When appellant returned seconds later, he asked H.C. what she had said, picked her up, and dragged her to the staff bathroom that was five to ten feet behind them.

H.C. told appellant to stop as she struggled to get free. Once in the bathroom, appellant closed the door partially and yelled: "Shut the fuck up bitch. Shut the fuck up." Appellant pulled H.C.'s pants down. When she continued to scream, he placed her in a headlock and moved her close to the sink so that she was facing the bathroom mirror. He then pushed her to the floor, forced her onto her stomach, and tried to put his penis into her vagina.[3] H.C. continued to plead for appellant to stop until appellant bit her ear. At some point, appellant put his hand in her mouth, pulled down her jaw, and caused injury to her lips.

Several minutes after the attack began, appellant got up, turned from her, and she was not sure what he was doing. She quickly got up and ran to her car, which was parked outside.

H.C. decided to return to the restaurant because she "didn't want [appellant] to get away with what he did." Once inside, she told two of her co-workers what happened, one of whom relayed the information to the manager, Dominic Burrell. Mr. Burrell

[2] H.C. testified that she made this request because she felt safer with Jen or Ryan working beside her.

[3] At trial, H.C. stated that, while appellant's penis touched her vagina, there was never full penetration.

subsequently called the police. After briefly speaking with officers, H.C. was transported to Baltimore Washington Hospital Center, where she received treatment for her injuries and was examined by Darlene Engel, a Sexual Assault Forensic Examiner ("SAFE") nurse.

The general manager, Charles Brown, subsequently sent appellant home. After the police arrived, they were able to review the video surveillance footage that showed appellant coming up behind H.C., reaching down her pants and, moments later, grabbing H.C. and forcing her across the room out of view of the camera.

Michelle Jackson, a crime scene technician with the Anne Arundel County Police Department, arrived at the restaurant and investigated the crime scene. While in the bathroom, she found H.C.'s employee badge in the sink and a silver earring that belonged to H.C. on the bathroom floor.

II.

Trial

Appellant's trial began on October 24, 2017. Jennifer Helmick, who also worked as a server at Applebee's, testified that, on November 8, 2016, appellant came to the restaurant early to pick up his paycheck, asked her how she was doing, and then left. Later that afternoon, she received a text from appellant asking her where he could cash his check, which surprised her because she had never provided appellant her phone number. She texted appellant that he could cash the check at Safeway.

Ms. Helmick stated that H.C. arrived at the restaurant around 10:30 a.m., and for most of the day, she seemed happy. At approximately 4:00 p.m., however, Ms. Helmick

observed H.C. crying, shaking, and appearing confused. When she asked H.C. what had happened, H.C. told her that appellant had raped her in the staff bathroom.

H.C. made an in-court identification of appellant as the person who had sexually assaulted her. She testified that she had been working at Applebee's for approximately two months before the incident. Although she and appellant "got along," they never had been in a romantic relationship, and they were not friends. Approximately one to two weeks prior to the incident, she had borrowed money from appellant to pay rent. When she tried to pay him back, however, he told her not to worry about it.[4]

H.C. explained that, two days prior to the sexual assault, she received a text from appellant asking if she "was going to take his black snake or something," which she interpreted as referring to his penis. She did not remember whether appellant had sent her other sexually explicit messages.

On the morning of November 8, 2016, the day the assault occurred, appellant had come into the restaurant to get his check, but he left since it was not his shift. He returned later in the afternoon. H.C. testified that none of the sexual acts that occurred after his return were consensual.

Ms. Engel, a registered nurse at Baltimore Washington Hospital Center, testified that H.C. arrived at the hospital on November 8, 2016, and filed a complaint of sexual

[4] At the time, H.C. interpreted this gesture as appellant just "being nice."

assault.[5] After taking H.C.'s statement about what occurred, Ms. Engel drew H.C.'s blood and conducted a head to toe assessment of H.C. She observed that H.C.'s eyes were bloodshot, consistent with crying, and she had swelling around her lip, a "patterned . . . bite mar[k] area" to her right ear, and bruising on her elbow. After inspecting H.C. for injuries, Ms. Engel conducted a gynecological exam and observed that H.C. had tearing in her genital area that was consistent with her account of what happened to her in the Applebee's bathroom. As part of the examination for sexual assault, Ms. Engel swabbed H.C.'s genital area, the ear that had been bitten, and the inside of H.C.'s mouth. She subsequently sent the swabs to the Anne Arundel County Police Department.

Emilie Dembia, a Forensic Biologist with the Bureau of Alcohol, Tobacco, and Firearms in Anne Arundel County, testified as an expert in forensic serology and DNA analysis.[6] Although the swabs taken during the SAFE examination revealed the presence of H.C.'s DNA, none of them matched appellant's DNA.

As indicated, the jury found appellant guilty of several offenses, including attempted rape in the second degree and attempted sex offense in the fourth-degree. This appeal followed.

[5] Ms. Engel testified that she was an emergency room nurse, as well as a certified Sexual Assault Forensic Examiner ("SAFE").

[6] Ms. Dembia testified that "[s]erology as it relates to forensics is the identification of bodily fluids."

DISCUSSION

Appellant contends that the circuit court abused its discretion in refusing to give a lack of flight instruction to the jury. Specifically, he argues:

> Under th[e] circumstances, [appellant's] absence of flight was no less probative of a consciousness of innocence than his flight from the scene would have been probative of a consciousness of guilt had he fled. If juries are instructed that flight may show a consciousness of guilt and thus may be considered evidence of guilt where the evidence shows that the defendant fled from the scene of the alleged crime, fundamental fairness requires that the jury be instructed that absence of flight may show a consciousness of innocence and thus may be considered evidence of innocence where the evidence shows that the defendant remained at the scene of the alleged crime.

The State argues that the court "properly exercised its discretion [in] declining [appellant's] request" for two reasons. First, the requested instruction "is an incorrect statement of law," and therefore, it "did not trigger the . . . court's obligation under Maryland Rule 4-325(c) to give the requested instruction." Second, the "evidence did not warrant [appellant's] absence of flight instruction" because "absence of flight evidence is generally irrelevant," and the "court fairly covered the circumstances of [appellant's] lack of flight in the instructions given."

A.

Proceedings Below

At the close of the State's case, defense counsel asked the court to give the jury the following instruction:

> A person'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. Conversely, lack of flight after being

> accused of committing a crime, is not enough by itself to establish innocence, but it is a fact that may be considered by you as evidence of innocence. You must first decide whether there is evidence of lack of flight. If you decide there is evidence of lack of flight, you then must decide whether this lack of flight is evidence of innocence.

Defense counsel advised the court that, although the requested instruction was not a pattern jury instruction, it was the converse of Maryland Criminal Pattern Jury Instructions ("MPJI-Cr.") 3:24 (2d ed. 2017), which provides:

> **FLIGHT OR CONCEALMENT OF DEFENDANT**
>
> **A person's flight [concealment] 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 [concealment] 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 [concealment]. If you decide there is evidence of flight [concealment], you then must decide whether this flight [concealment] shows a consciousness of guilt.**

The prosecution, in opposing defense counsel's proffered instruction, stated as follows:

> It's not a real instruction. It's something that . . . [defense counsel has] constructed himself. The scenario that this Instruction was designed to cover is when suppose . . . the possible suspect gets a phone call, they're coming to charge you right now. And the guy's like I'm out of here and runs away. Or a bank robber robbery, the person is running away. Because that flight can help establish evidence of guilt.
>
> [Defense counsel] is arguing [that] . . . the lack of flight or staying at the scene equates [with] innocence. I don't think that's it at all. Or necessarily true. It might mean that. It might mean someone just happens to stay there when they've been accused of a crime, but it might mean that somebody did something wrong and doesn't admit that they did something wrong. That he wants to keep his job. Maybe he's going to play it off he didn't do it. Maybe he's going to think she doesn't tell and no one will ever know.

> So it can mean so many different things. I think it's wrong to be able to draw an inference that his flight—and the evidence hasn't been generated from this trial. The only evidence that's been gathered about him is that he hung around until some manager told him to go home. And we know that that manager told him because that type of behavior isn't acceptable at Applebee's and they wanted him out of the building before he hurt anybody else. Which I'm not—so I think that Instruction[']s being misused, misconstrued, and it's not appropriate.

Defense counsel, in response, stated:

> Your Honor, you are not bound to only use Instructions from the Maryland Pattern Jury Instructions, and if my client had decided to, after she ran out the door, if he had walked to the restaurant next door to order his dinner, you can be sure that [the prosecutor] would have been requesting the Flight Instruction, saying that he fled Applebee's because he knew he was, he was afraid he was going to be arrested. And she would have wanted the inference that just because – even though he was only going next door to get his dinner or going to Pier One to get a scented candle, she would have been asking for the Flight Instruction.
>
> So the fact that he's hanging out and has to be told to leave, I think is evidence that he didn't think he had done anything wrong.

The court declined to give the instruction, stating: "[F]light is unusual behavior, whereas sticking around – to be very colloquial – or hanging around could be probative of either, and it's incumbent upon both sides to argue that." Moreover, the court stated that it had no obligation to give MPJI-Cr. 3:24, or the "converse of that." Defense counsel objected to the court's omission of the absence of flight instruction.

B.

Analysis

Pursuant to Maryland Rule 4-325(c), a trial court must, upon the request of any party, instruct the jury regarding the applicable law. *Nicholson v. State*, 239 Md. App. 228, 239 (2018), *cert. denied*, 462 Md. 576 (2019); *Woolridge v. Abrishami*, 233 Md. App. 278,

305, *cert. denied*, 456 Md. 96 (2017). In reviewing a trial court's decision not to give a requested instruction, we consider the following factors: "'(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.'" *Wallace & Gale Asbestos Settlement Trust v. Busch*, 238 Md. App. 695, 715 (2018) (quoting *Tharp v. State*, 129 Md. App. 319, 329 (1999)), *aff'd on different issue*, __Md._, No. 58, September Term, 2018 (July 3, 2019). *See also* Maryland Rule 2-520(c) ("The court need not grant a requested instruction if the matter is fairly covered by instructions actually given."). We review a trial court's decision not to give a proposed jury instruction under an abuse of discretion standard, but we will reverse if "'the defendant's rights were not adequately protected.'" *Carroll v. State*, 428 Md. 679, 689 (2012) (quoting *Cost v. State*, 417 Md. 360, 369 (2010)).

The Maryland appellate courts have consistently held that an instruction that the jury may consider the defendant's flight as evidence of his intent or consciousnesses of guilt is proper if the evidence supports such an instruction. *See Thompson v. State*, 393 Md. 291, 312 (2006); *Hallowell v. State*, 235 Md. App. 484, 510 (2018). Here, however, appellant was not requesting a flight instruction, but rather, its converse, i.e., an absence of flight instruction. As the State notes, appellant cites no cases requiring such an instruction to be given.

Courts from other jurisdictions that have addressed the issue, however, have rejected arguments similar to that of appellant, holding that a defendant is not entitled to an absence of flight instruction. *See e.g.*, *United States v. McQuarry*, 726 F.2d 401, 402 (8th Cir.

1984); *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972); *United States v. Scott*, 446 F.2d 509, 510 (9th Cir. 1971); *Albarran v. State*, 96 So.3d 131, 192–93 (Ala. Crim. App. 2011), *cert. quashed*, 96 So.3d 216 (2012), *cert. denied*, 568 U.S. 1032 (2012); *State v. Walton*, 769 P.2d 1017, 1029–30 (Ariz. 1989), *aff'd*, 497 U.S. 639 (1990); *People v. Cowan*, 236 P.3d 1074, 1129–30 (Cal. 2010), *cert. denied*, 563 U.S. 905 (2011); *State v. Otero*, 715 A.2d 782, 788 (Conn. App. Ct. 1998), *cert. denied*, 719 A.2d 905 (1998); *Adams v. State*, 203 S.E.2d 318, 319 (Ga. Ct. App. 1973); *State v. Peck*, 95 P. 515, 518 (Idaho 1908); *Com v. Martin*, 472 N.E.2d 276, 280 (Mass. App. Ct. 1984); *Starr v. State*, 433 P.3d 301, 305–06 (Nev. Ct. App. 2018); *State v. Burr*, 461 S.E.2d 602, 620 (N.C. 1995), *cert. denied*, 517 U.S. 1123 (1996); *State v. Sims*, 469 N.E.2d 554, 557 (Ohio Ct. App. 1984); *Com. v. Hanford*, 937 A.2d 1094, 1097–98 (Pa. Super. Ct. 2007), *appeal denied*, 956 A.2d 432 (2008); *State v. Brewster*, 449 P.2d 685, 687 (Wash. 1969).

The decision of the Superior Court of Pennsylvania in *Hanford* is instructive. In that case, the defendant raped his co-worker at a hotel after the two had spent the day drinking. *Hanford*, 937 A.2d at 1096. The defense requested an instruction that the jury be allowed to infer his innocence from the fact that he did not attempt to flee the hotel after his co-worker called the police. *Id.* at 1097.

In upholding the trial court's refusal to give the instruction, the Superior Court noted that, although "a 'flight instruction . . . is well established in this Commonwealth, there is no authority for a corresponding but inverse 'absence of flight' instruction." *Id.* at 1097. The court stated that, because evidence of absence of flight can be interpreted in multiple ways, many of which have "little to do with consciousness of guilt," the probative value of

such evidence was highly limited. *Id.* Indeed, as the court explained, a defendant's decision not to flee may, in fact, reflect a strategic choice:

> As the trial court noted, "[T]he individual may be unaware that he is a suspect in a pending investigation; he may believe that he is more likely to be perceived as innocent of the crimes charged if he refrains from hiding; or perhaps he may not want to make a bad situation worse." (Trial Ct. Op. at 16). While an affirmative action such as flight is usually performed for a reason that can be determined upon investigation, inaction does not lend itself to so tidy an inquiry.

Id. Because an absence of flight could be interpreted in multiple ways, the court concluded that an instruction regarding an absence of flight would require a "logical leap of deductive reasoning that [it could not] endorse." *Id.* Moreover, because the defendant was "already clothed with a presumption of innocence," the jury did not need to be "additional[ly] charged on an inference of innocence where a suspect [did] not flee." *Id.* at 1097–98 (quoting *Com. v. Collins*, 810 A.2d 698, 701 (Pa. Super. 2002)).

We conclude, for reasons consistent with those in *Hanford*, that a defendant generally is not entitled to an absence of flight instruction. Accordingly, the circuit court did not abuse its discretion in refusing to give the proffered instruction.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.