Circuit Court for Baltimore City
Case No. 116314003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2470

September Term, 2017

DEVON LITTLE

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: February 25, 2019

Appellant Devon Little was convicted in the Circuit Court for Baltimore City of first degree murder and three related handgun charges. Appellant presents the following questions for our review:

> "1. Did the trial court err in allowing a lay witness to provide expert testimony?
>
> 2. Did the trial court err in allowing lay opinion testimony?
>
> 3. Did the trial court err in refusing to give a missing witness instruction?"

Finding that the trial court erred in allowing lay opinion testimony, we shall reverse.

I.

Appellant was convicted by a jury in the Circuit Court for Baltimore City of first degree murder, use of a firearm in the commission of a crime of violence, carrying a handgun, and possession of a regulated firearm by a prohibited person. The court sentenced him to a term of incarceration of life for murder; twenty years, the first five without the possibility of parole, for use of a firearm; and five years, without the possibility of parole, for possession of a firearm. For sentencing purposes, the court merged the carrying a firearm conviction with the other firearm-related offenses.

The primary issue and appellant's defense at trial was the identity of the shooter. We set out the following facts gleaned from the trial record. On September 24, 2016, at approximately 1:00 p.m., the victim, Levon Stokes, sat in his car near the intersection of South Carey Street and Baltimore Street in Baltimore, Maryland. There were multiple alleyways near the intersection, one of which opened onto the street beside Mr. Stokes'

car. Three of his relatives and one of his associates were nearby, and his relatives each testified for the State.

Mykel Butler, Mr. Stokes's cousin, testified that shortly before the shooting, she saw him sitting in his car at the intersection of South Carey and Baltimore Street. She stepped into a fast food restaurant, and while inside, she heard a gunshot. She saw the shooter atop of Mr. Stokes, shooting him. She testified that the shooter was wearing a black hoodie and that after the shooting, he walked into the alley. At trial, Ms. Butler identified appellant as the shooter. When interviewed by the police about a month after the shooting, Ms. Butler said that "I never seen his face." She nevertheless identified appellant as the shooter in a police-displayed photographic array. At trial, she explained that she only saw the shooter in profile.

Tierra Cox, Mr. Stokes's sister, testified that before the shooting, she and her mother, Tonia Cox, walked over to Mr. Stokes's car. They spoke to Mr. Stokes through the rolled-down window on the passenger side of the vehicle. They saw Mr. Stokes speaking to appellant, who wore a black sweatshirt. Tierra Cox testified that shortly thereafter, appellant walked up to the car and shot Mr. Stokes. After the shooting, she ran about a block, turned, and entered an alley, where she encountered appellant, who walked up to her and asked her "what happened?" She did not respond, and appellant walked away. Several weeks later, in a police-displayed photo array, Tierra Cox identified appellant as the shooter. At trial, she identified appellant as the shooter.

Tonia Cox testified at trial that appellant was the man Mr. Stokes was speaking to and that appellant repeatedly entered and exited the alley before he walked up to the car

and shot Mr. Stokes through the driver's side window. She ran up the block and onto another street, where she saw appellant exit another alley. At the police station, she said that she could not identify the shooter, but at trial she said that she "made something up" in order to get out of the station. After about a month, she contacted the police, told them her earlier statement was untrue, and identified appellant in a photo array.

Detective Hassan Rasheed, the lead detective on the case, testified at trial. He said that he reviewed surveillance video from nearby businesses which showed a person the police believed to be the shooter based upon his clothing. They could not see the person's face. The State did not introduce the video into evidence, but the detective described what he had viewed. The detective expressed an opinion that, based upon the video, his interviews with witnesses, and his canvass of the area, witnesses Tierra and Tonia Cox could have run in different directions and still both have seen the shooter moments after the shooting.

The witnesses testified also to a second shooting within a block of the victim's automobile. At the scene of the Stokes shooting, the police found 9mm shell casings; at the second shooting, the police found seven .45 caliber shell casings. Det. Rasheed testified that the police suspected that Mr. Stokes' associate "Country" committed the second shooting, and Tonia Cox said that she believed it was in retaliation for the Stokes shooting. Det. Rasheed testified that he thought surveillance video showed Country running down a street near the shooting with a gun after the Stokes shooting. No one called Country as a witness at the trial. At the conclusion of the trial, defense counsel sought a missing witness instruction based upon the State's failure to call Country as a witness.

The fact that Tierra and Tonia Cox saw appellant at approximately the same time, one block north and one block south from the shooting, created an apparent conflict in their testimony. Det. Rasheed offered four opinions to resolve the conflict. First, Det. Rasheed concluded that based on his interviews with the two women, he knew the paths they took away from the shooting, marking the locations on a map for the jury. Second, he testified that based on his interviews, Tierra Cox encountered appellant in a specific location, a place she did not identify when she testified, but that he nonetheless marked on the map. Third, Det. Rasheed testified that based on his interview *and* surveillance video from the area, he knew where Tierra Cox saw appellant and the direction appellant was walking. Fourth, the detective opined that—based on his knowledge of the area and review of surveillance video—appellant traveled from one woman's location to the other on a circuitous path that he reconstructed for the jury.

As indicated, the jury convicted appellant, the court imposed sentence, and appellant filed this timely appeal.

II.

Appellant presents three questions for our review. First, he argues that the circuit court erred when it admitted testimony from Jennifer Anderson, a police crime lab technician. Ms. Anderson testified that she examined the bullet casings from Mr. Stokes's shooting for fingerprints but not for DNA. Appellant contends that Ms. Anderson's testimony that it would be futile to search the bullet casings for DNA evidence because the heat of the gun's firing "[b]urns off DNA" was a specialized conclusion requiring expert

testimony. As the State did not offer Ms. Anderson as an expert witness, appellant argues that the circuit court erred in admitting the testimony. Appellant argues that the error was not harmless because without Ms. Anderson's testimony explaining the lack of physical evidence, "the jury may well have concluded that the State did not meet its burden without the improperly admitted evidence."

Second, appellant argues that the circuit court erred by admitting Det. Rasheed's opinion that Tierra and Tonia Cox both testified accurately that they saw appellant in different alleys moments after the shooting. Appellant argues that because the State did not qualify Det. Rasheed as an expert witness, his opinion was necessarily a lay opinion. Under Maryland Rule 5-701, a lay witness's opinion testimony must be rationally based on the perception of the witness and be helpful to the jury's understanding of the testimony at issue or determination of fact. Appellant argues that Det. Rasheed's opinion failed to satisfy either requirement—he explicitly based his conclusion on Tierra and Tonia Cox's hearsay statements rather than his own perception, and the jury heard the witnesses' testimony, making Det. Rasheed's opinion unnecessary and unhelpful to the jury. Because the two witnesses' testimony was the core of the State's case and Det. Rasheed's opinion testimony resolved a critical discrepancy therein, appellant argues that the circuit court's admission of the opinion could not be harmless error.

Third, appellant seeks review of the circuit court's refusal to give the jury a "missing witness" instruction for the witness known as Country. At the close of evidence, appellant requested a missing witness instruction, i.e., an instruction that the jury could infer that the State failed to call Country as a witness despite its access to him because his testimony was

unfavorable to the State. The circuit court denied appellant's request, and appellant contends that this was error because he satisfied the requirements for a missing witness instruction.

As to Ms. Anderson's testimony to her forensic analysis of the bullet casings, the State argues that the testimony was admissible and relevant because in opening statement, defense counsel had challenged the thoroughness of the police investigation. The State explains that the evidence was not offered for the truth of the matter asserted but rather as an explanation for why the technician did not swab fired cartridge casings for DNA.

Turning to Det. Rasheed's testimony, the State argues that Det. Rasheed did not opine that Tierra and Tonia Cox might have seen the same shooter at the same time despite fleeing in different directions. Instead, the State argues, Det. Rasheed answered in the affirmative to the question "Do you have an opinion as to whether or not it's possible that they could have each ran in opposite directions and still seen the same shooter?" In other words, it is the State's position that Det. Rasheed testified *only* that he had an opinion as to whether it was possible but that he did not provide his opinion. The State argues that such testimony in the examination of a lay witness is admissible. In a footnote to this argument, the State argues further that appellant did not preserve review of Det. Rasheed's other testimony as improper lay opinion. It concludes that any opinion as to the location of the individuals involved was admitted properly because it was based on the detective's perception of the crime scene and helpful to the jury.

Finally, the State argues that the circuit court did not err or abuse its discretion in refusing to instruct the jury on a missing witness. The State asserts first that a missing

witness instruction is never a mandatory instruction, and hence, the failure to so instruct is not error. As to the merits, the State maintains that appellant was not entitled to a missing witness instruction because the State's failure to call Country as a witness was adequately explained.

III.

We begin with appellant's second question: whether the trial court erred or abused its discretion in admitting into evidence Det. Rasheed's opinions regarding the eyewitness' testimony. Appellant argues that the court admitted improper "lay opinion" testimony as to Tonia and Tierra Cox's testimony that they both saw appellant after the shooting. The State replies that Det. Rasheed never opined that it was possible for both women to see appellant moments after the shooting and that his opinions on the two women's locations and appellant's flight path were not preserved for our review and do not warrant reversal. Det. Rasheed's first three opinions, to the extent that he testified that he knew where Tonia and Tierra Cox were when they saw appellant, were improper opinions.

The State, in a footnote, states that appellant's argument that Det. Rasheed's opinion was improper lay testimony because it was based upon hearsay was not preserved for our review. We disagree and hold that appellant preserved the issue of Det. Rasheed's opinion testimony for our review in accordance with Rule 4-323.[1]

[1] "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Rule 4-323(a). "[T]he court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the (footnote continued . . .)

Appellant objected each time the State asked Det. Rasheed for his opinion. His objections included an anticipatory objection at the bench "to this Detective marking or somehow showing on the map the direction of any other witness' travel on what they say happened" because those State's witnesses testified previously to the events. The court declined to rule on that objection, stating that "it's all in the phraseology" of counsel's questions. Appellant objected and was summarily overruled several times. He offered so many objections to the line of questioning that the court noted in a bench conference that it discouraged "constant interruption of any witness." He later objected and requested a mistrial on the basis that "the officer's . . . testified as to hearsay as to where he believes [Tierra Cox] was." When the court denied his mistrial request, appellant requested and the court granted a standing objection to the line of questioning. Plainly, appellant preserved the issue for our review on each of the grounds he raises.

As appellant points out, Tierra and Tonia Cox both testified that after the shooting, they ran in opposite directions and each saw the shooter immediately after the shooting. Recognizing the apparent inconsistency in the testimony, the State asked Det. Rasheed repeatedly whether he though it was possible for Tonia and Tierra to have both seen the shooter shortly after the shooting. The prosecutor asked Det. Rasheed, "based on your interviews with Tonia Cox and Tierra Cox, do you—do you have a belief as to where each way they ran?" Det. Rasheed, who did not witness the shooting or its immediate aftermath,

continuing objection is effective only as to questions clearly within its scope." Rule 4-323(b).

answered "Yes." The prosecutor then asked the following questions, interrupted by repeated objections from defense counsel, which the court overruled:

> [THE STATE]: Do you have an opinion as to whether or not it's possible that they could have each ran in opposite directions and still seen the same shooter?
>
> * * *
>
> DET. RASHEED: Yes.
>
> [THE STATE]: How is that possible looking at this map?
>
> [The court sustained an objection to the previous question because it was not phrased "What is that opinion?"]
>
> [THE STATE]: What is that opinion.
>
> * * *
>
> DET. RASHEED: Yes. *Basically, based on my interviews with both Ms. Tierra and Ms. Tonia, I'm able to see that—or say for certain that Ms. Cox, Ms. Tierra, ran [south] and Ms. Tonia ran [north]*. Basically, when this incident occurred, they were both standing side by side. And then after the incident occurred, they actually ran separate directions.
>
> * * *
>
> [THE STATE]: Okay. You've heard both of their statements that they gave you regarding seeing the shooter after they ran away?
>
> DET. RASHEED: Yes.
>
> [THE STATE]: Okay. Since they—*do you have an opinion as to how that's possible since they both ran in opposite directions?*
>
> * * *
>
> DET. RASHEED: Yes.

> [THE STATE]: What is it?
>
> DET. RASHEED: *Ms. Tierra actually encountered the subject after the shooting in a different location*. Is it okay if I mark it on [the map of the area around the shooting]?
>
> [THE STATE]: Please.
>
> DET. RASHEED: *Ms. Tierra actually encountered the suspect on Stockton Street in this alley here.*
>
> * * *
>
> DET. RASHEED: As to the fact that Tierra Cox actually encountered the subject was, again, right here. . . . *Based on the interview and the video recovered, Ms. Tierra Cox actually sees the Defendant again somewhere in this area here going toward Carrollton [S]treet.*
>
> * * *
>
> [THE STATE]: And do you have an opinion as to whether or not based on your walking the scene, examining the scene, your investigation, whether or not it's possible for the shooter to be [in the two locations provided by the witnesses] within that time frame?
>
> DET. RASHEED: Yes, ma'am. Based on the video, as well as actually walking the scene, I can determine that the individual went from this here, came down this street here, came past this liquor store here, where I also recovered video from Hollins Liquor Store, and turned into a—it's a cut. It's not even an alley. It's a cut in the rear of Hollins Liquor Store. And when you walk into that cut, it puts you right here.

For the purpose of our analysis, Det. Rasheed offered four opinions relevant here. He testified first that, based on interviews, he knew the paths taken by Tonia and Tierra Cox, and he marked them for the jury. He testified second that, based on interviews, Tierra Cox encountered appellant in a specific location to which she did not testify, and he marked

it for the jury. He testified third that, based on interviews and surveillance video, Tierra Cox saw appellant in a specific location as appellant moved in a specific direction, and he demonstrated those locations for the jury. And he testified fourth that, based on walking the scene and his investigation, it was possible for appellant to move between the two locations within the time frame described.

We hold that the trial court erred or abused its discretion in allowing Det. Rasheed to testify as a lay witness and offer opinions based solely on hearsay. Det. Rasheed's testimony was also improper because he essentially resolved the inconsistencies in the testimony of two key eyewitnesses in the case.

Rule 5-701, which addresses lay witness testimony, provides as follows:

> "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

Rule 5-702, which addresses testimony by an expert, provides as follows:

> "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony."

Once a trial court makes a finding of relevance and admits evidence, we generally do not reverse the trial court's decision "unless the evidence is plainly inadmissible under

a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Merzbacher v. State*, 346 Md. 391, 404–05 (1997).

The detective's testimony was improper for multiple reasons. His testimony was based primarily upon hearsay and not his perception, and the testimony was not helpful to the jury because the jury heard all of the testimony and was charged with reconciling any conflicts in the testimony. In *Smith v. State*, 182 Md. App. 444, 490 (2008), a police detective testified that, based on the statements of witnesses, he believed that the murder and traffic stop at issue occurred less than two minutes apart. On appeal, this Court held that the detective's opinion was improper under Rule 5-701. *Id.* at 491. We held that because the detective testified as a lay witness, he could testify only to things he perceived. *Id.* As he did not perceive the traffic stop and murder, it was improper to allow him to testify to the timing of those events. *Id.* We noted also that "The mere fact that those third parties were witnesses at trial and available for cross-examination does not change the limitations imposed by Rule 5-701 on lay opinion testimony." *Id.*

In appellant's case, Det. Rasheed testified as a lay witness. Therefore, he could testify only to things rationally based on *his* perceptions. The detective's first and second opinions relied entirely on hearsay and were therefore improper. He did not observe the two witnesses' flight, and it was beyond his perception to trace on a map the paths the two women took. His third opinion was improper to the extent that he stated that he knew where Tierra Cox saw appellant. Though it was permissible for Det. Rasheed to trace appellant's path from surveillance footage and walking the scene, as he did, it was impermissible for him to extrapolate from Tierra Cox's statements where she was when

she saw appellant. No surveillance footage provided that information. The detective's fourth opinion, that appellant could have moved from one location to another in a certain time frame, was a permissible lay opinion because it was not founded in hearsay and relied only on his walking the scene.

In addition, Det. Rasheed's opinions as to the witnesses' locations were improper because they usurped the role of the jury as finder of fact. Appellant argues that it was improper for the detective to usurp the jury's role and offer conclusions about whether or not other witnesses' testimony was feasible. We agree. A lay witness opinion must be "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Rule 5-701. Lay opinion testimony is not helpful when it assesses the credibility of other witnesses to resolve disputed facts. *Bohnert v. State*, 312 Md. 266, 277 (1988); *see also Hutton v. State*, 339 Md. 480, 503 (1995) (holding that no witness "is in a better position to assess the credibility of a witness than is the jury" because "the veracity of a witness is not beyond the understanding of a juror"). Such opinions are inadmissible as a matter of law. *Bohnert*, 312 Md. at 279.

In *Bohnert*, the key issue at trial was the credibility of the victim, who alleged that the defendant committed sexual offenses against her. *Id.* at 268. There was no physical evidence to support her testimony, and the defendant denied the allegations. *Id.* at 270, 273. The Court noted that "[i]t was clearly apparent that the State's case hinged solely on the testimony of [the victim]," meaning that "[the victim]'s credibility was crucial." *Id.* at 270. To improve the victim's credibility regarding the disputed facts, the prosecutor offered the expert opinion of a social worker. *Id.* at 270–71. The social worker based her

testimony entirely on interviews she conducted with the victim and the victim's mother. *Id.* at 271–72. When asked if she had an opinion "as to whether or not [the victim] . . . was sexually abused," the social worker testified that, based on her interviews with the victim and the victim's mother, the victim "was, in fact, a victim of sexual abuse." *Id.* at 271.

The Court explained the law as follows:

> "We have insisted that, in a jury trial, the credibility to be given a witness and the weight to be given his testimony be confined to the resolution of all of the jurors. It is the settled law of this State that a witness, *expert or otherwise*, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law."

Id. at 278 (emphasis added). The Court explained the reasons the social worker's testimony was inadmissible as follows:

> "The opinion of [the social worker] that [the victim] in fact was sexually abused was tantamount to a declaration by her that the [victim] was telling the truth and that [the defendant] was lying. In the circumstances here, the opinion could only be reached if the [victim]'s testimony were believed and [the defendant]'s testimony disbelieved. The import of the opinion was clear—[the victim] was credible and [the defendant] was not. Also, the opinion could only be reached by a resolution of contested facts—[the victim]'s allegations and [the defendant]'s denials. Thus, the opinion was inadmissible as a matter of law because it invaded the province of the jury in two ways. It encroached on the jury's function to judge the credibility of the witnesses and weigh their testimony and on the jury's function to resolve contested facts. Inasmuch as the opinion was inadmissible as a matter of law, it was beyond the range of an exercise of discretion. In ruling on a question of law a judge is either right or wrong, and discretion plays no part. In this case he was wrong. We hold that the receipt in evidence of [the social worker]'s opinion that the [victim] 'was, in fact, a victim of sexual abuse,' constituted reversible error.

Id. at 278–79.

In *Hutton*, an expert witness testified that a victim suffered from Post-Traumatic Stress Disorder as a result of the abuse to which the victim testified. *Id.* at 505. The prosecutor then asked the expert, "[H]ow do you assess credibility?" *Id.* at 488. The expert testified that, based on his interview with the victim, "the victim's symptoms were not 'in any way faked. She couldn't fake this level at this time or such severe withdrawal and shutting down of herself.'" *Id.* at 505. The Court held that the expert's opinion was inadmissible because it was an assessment of a witness's credibility and thus "invaded the province of the jury" to assess witness credibility. *Id* at 503, 505.

In the instant case, once Tonia and Tierra Cox offered their testimony as to where they ran and where and when they saw appellant, it was the jury's responsibility to determine whether they were credible and to find facts based on their testimony. Det. Rasheed, like the expert witnesses in *Bohnert* and *Hutton*, formed opinions that went entirely to the witnesses' credibility and that resolved apparent inconsistencies in the testimony the jury heard. Like the expert witnesses, his opinions as to the women's locations were based entirely on his interviews with them. As a matter of law, such opinions are inadmissible because they are not helpful to the jury. The circuit court erred or abused its discretion in admitting Det. Rasheed's three opinions as to where Tonia and Tierra Cox ran after the shooting.[2]

[2] We note that Det. Rasheed's fourth opinion, that appellant could have moved between two locations in the time frame described, was based on his personal knowledge of the scene and not on an evaluation of witness credibility and apparently conflicting testimony.

We turn to the ultimate question: were the trial court's errors harmless? An error is harmless if we are satisfied that there is no reasonable possibility that the evidence at issue contributed to the guilty verdict. *See Dorsey v. State*, 276 Md. 638, 659 (1976). The primary witnesses in the case against appellant were the three eyewitnesses, including Tierra and Tonia Cox. Both witnesses declined to identify appellant on the day of the shooting, and both changed their testimony approximately one month later.[3] Similarly, Ms. Butler only identified appellant weeks after the shooting, and she testified at trial that she saw him from a distance and in profile. There was no physical evidence linking appellant to the shooting.

At trial, Tierra and Tonia Cox each testified that they fled the shooting in opposite directions but that they each saw and identified appellant in separate encounters minutes after the shooting. To resolve the difference in their testimony, the State asked Det. Rasheed repeatedly if "it's possible that they could have each ran in opposite directions and still [have] seen the same shooter?" That two of the three witnesses claimed to have seen appellant in two different places shortly after the shooting was an apparent inconsistency in their testimony. The State apparently thought the discrepancy was important, because the State tried repeatedly at trial to have Det. Rasheed explain it. Det. Rasheed's improper opinion testimony explained away the flaw with the imprimatur of an experienced police detective, potentially tilting the jury's witness credibility determination

[3] Friends showed Tierra Cox a picture from appellant's Instagram page, after which she identified appellant in a photo array. She testified at trial that the Instagram photo was unclear and that the identification was not based on the Instagram photo.

in the same manner as the social worker's support of the victim's testimony in *Bohnert*, 312 Md. at 279. We hold that admitting the opinion testimony here was not harmless and constitutes reversible error.[4]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

[4] Because we reverse and remand for a new trial on the basis of Det. Rasheed's improper opinion, we do not address appellant's other two issues.