

Circuit Court for Baltimore City
Case No. 117235007

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3237

September Term, 2018

JAMAR JACKSON

v.

STATE OF MARYLAND

Berger,
Gould,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: December 17, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Baltimore City, Appellant Jamar Jackson was found guilty of two counts of attempted second-degree murder, two counts of first-degree assault, two counts of second-degree assault, two counts of use of a firearm in a crime of violence, two counts of reckless endangerment, one count of wearing, carrying, or transporting a handgun on his person, and one count of illegal possession of a regulated firearm. Jackson presents three issues for our review, which we rephrase slightly:

1. Whether the trial court committed reversible error in instructing the jury, over defense counsel's objection, that his presence at the scene of the crime may be a fact in determining guilt.
2. Whether the trial court committed reversible error in instructing the jury over defense counsel's objection, as to flight from the scene of the crime.
3. Whether the trial court erred when it allowed lay witnesses who lacked substantial familiarity with the Appellant to repeatedly identify Appellant from video surveillance footage.

As we shall explain, we hold that the trial court did not err in giving either instruction, nor did it err in admitting the lay witness identifications of Jackson. We, therefore, affirm the judgments of the Circuit Court for Baltimore City.

FACTS AND PROCEEDINGS

Jackson was arrested in connection with a shooting that occurred outside of King's Grocery on the corner of North Avenue and Mount Street. William Brown testified that on July 7, 2017, around 10:30 p.m., he had stopped at King's Grocery after going to a friend's house. Upon exiting the store, William turned left onto North Avenue. He testified

that an individual came up behind him, grabbed him, put a gun to his side, and said “you about to die today.” William told the individual he had the wrong person, but the individual stated to William “nah, you know what you did.” The individual took William around the corner to Mount Street, at gunpoint. William testified that he then turned around and tried to fight the individual for the gun. During the struggle William was shot three times.

Alan Brown, William’s brother, was present during the incident. He testified that he had been across the street talking to someone in a car on the corner of North Avenue and Mount Street. When he saw that someone had a gun on his brother, he took a gun from the individual he had been speaking to and ran over to defend William. Alan stated that the individual shot at him and he retreated around the corner. When he came back around the corner, Alan and the individual exchanged gunfire. Alan testified that the individual ran across the street toward a truck, in between two cars, to the passenger side of the truck. As the truck pulled away from the scene, Alan fired at it. Alan stated that at first he thought the vehicle leaving the scene was an “Excursion, one of those big luxury vans,” black or dark blue. He testified that when he spoke to detectives he could not describe the face of the shooter because the entire incident happened so quickly, and his brother’s life was at stake.

At trial, the State played surveillance footage obtained from King’s Grocery from three different angles.¹ At the corner of the screen, a black truck arrives and parks across the street from the store on Mount Street. Shortly after the truck’s arrival, the shooter walks

¹ William and Alan both narrated the footage when they testified.

toward the store and turns the corner onto North Street, out of the camera's view. The individual turns back into the view of the camera, onto Mount Street, a few seconds later, holding William at gunpoint. The footage shows a struggle ensue between William and the shooter. During the struggle, the gun is visibly fired several times. The struggle ends with William on the ground, close to the wall of the store. The shooter disappears from the camera's view after stumbling backwards from William, in the direction of the curb. The black truck pulls away from the scene, heading North on Mount Street, as Alan is shooting at it. As the truck turns left onto North Avenue, it collides with another vehicle. The truck continues down North Avenue without stopping.

Two 9-millimeter cartridge cases and a license plate were recovered at the scene. The police ran the license plate and connected it to a 2003 black GMC Yukon, owned by Cedric Caison, Jackson's codefendant.² In an interview with Detective Andre Parker, Caison acknowledged that he was the driver of the Yukon that can be seen in the surveillance footage and that he was indeed at the scene of the crime. He informed Detective Parker that he was purchasing marijuana when the shooting erupted, but maintained that he was not transporting any passengers in his vehicle and was not involved in the shooting.

On July 11, 2017, William was shown a photo array in the hospital by Detective Parker. He recognized one of the photographs as Caison and informed the Detective that

² Jackson omits from his recitation of the facts that he was tried jointly with Cedric Caison, the owner of the vehicle identified at the scene.

he knew Caison through one of his cousins, but did not know why he would have been in the neighborhood. William picked out another individual from the photo array and informed the detective that the man in the picture looked like the man who shot him, but thinner. William testified that during this interview he described the shooter as being about his own weight, with no hair, and a goatee. Detective Parker testified that William described the shooter as “light-skinned, heavy build, bald head.”

Following this meeting with detectives, William started his own investigation. He testified that he was Facebook friends with Caison for years. He testified that he saw Jamar Jackson listed as one of Caison’s friends, right under his own cousin. William testified that he clicked on Jackson’s Facebook and stated that as soon as he saw Jackson’s picture, “[e]verything about that night came back into my head and I realized that was the guy.” William informed Detective Parker about the photograph he discovered on Facebook. Detective Parker testified that at this time, William did not know Jackson’s name, so he conducted a facial recognition analysis that came back as a match to Jamar Jackson. William subsequently appeared for another interview and was shown another photographic array, which included a different photograph of Jackson. William identified the photograph of Jackson as his shooter and wrote, “this is the man who shot me three times” underneath of the photograph.

The jury ultimately found Jackson guilty of attempted second-degree murder of William, attempted second-degree murder of Alan, first-degree assault of William, first-degree assault of Alan, second-degree assault of William, second-degree assault of Alan,

two counts of the use of a firearm in a crime of violence, two counts of reckless endangerment, one count of wearing, carrying, or transporting a handgun on his person, and one count of possessing a firearm after being convicted of a disqualifying crime.

Jackson was sentenced as follows: 30 years for the attempted second-degree murder of William Brown; 30 years, concurrent, for the attempted second-degree murder of Alan Brown; 20 years, consecutive, for the use of a handgun in a crime of violence as to William Brown; 20 years, concurrent, for the use of a handgun in a crime of violence as to Alan Brown; 3 years, concurrent, for wearing, carrying, and transporting a handgun; 15 years, consecutive, the first 5 years without the possibility of parole, for the illegal possession of a regulated firearm. We shall supplement additional facts as required by the issues of this appeal.

DISCUSSION

I. The court properly instructed the jury on presence and flight.

Jackson contends that the trial court committed reversible error when it gave two jury instructions. He argues that the trial court erred when it gave the following instruction on presence:

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 witnesses 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.

Second, Jackson argues that the court erred when it instructed the jury on flight:

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 consistent with innocence. You must first decide whether there's evidence of flight. If you decide there's evidence of flight, you must then decide whether this flight shows consciousness of guilt.

The standard for reviewing jury instructions is well settled. "A Maryland appellate court reviews a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011). "A trial court must give a requested jury instruction where (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given."³ *Carroll v. State*, 428 Md. 679, 689 (2012) (quotations and citations omitted). For an instruction to be factually generated, a party must "must produce 'some evidence' sufficient to raise the jury issue." *Arthur v. State*, 420 Md. 512, 525 (2011).

Jackson first argues that the judge erred in instructing the jury that a person's presence at the scene may be a fact used in determining his guilt because the instruction was not applicable to the facts of the case, and is inconsistent with his defense. Jackson's theory of the case at trial and on appeal is that he was not present at the scene of the crime

³ Jackson does not dispute that either instructions were incorrect statements of the law or that the law was not covered elsewhere in the instructions. We, therefore, only address whether the instructions were generated by the evidence.

and that this case is one of mistaken identity. He urges that by giving the instruction on presence, it guided the jury to find that he was present at the scene of the crime.

In our view, the record reflects that the State presented several pieces of evidence that Jackson was present at the scene of the shooting.⁴ Therefore, the trial court did not err in instructing the jury involving the Appellant's presence at the scene of the crime. Critically, the State presented surveillance footage of the shooting. Although the quality of the footage was somewhat grainy, the shooter's features are discernable. The jury was free to determine whether they found that Jackson was the individual depicted in the footage. Additionally, William made several identifications of Jackson based on his perception of the person who attacked him. He testified that he was able to recognize Jackson as the shooter after viewing his photograph on Facebook and that he was the individual on the surveillance footage. William also testified about the description of his attacker that he gave the detectives. Certainly, the testimony of William, along with the surveillance footage constituted "some evidence" sufficient to raise the jury issue" that Jackson was present.⁵ See *Arthur, supra*, 420 Md. at 525. Accordingly, we hold that the circuit court did not abuse its discretion by giving the challenged jury instruction.

⁴ Although we acknowledge Jackson's argument that the presence instruction was not applicable to him, but only to his codefendant, we nevertheless hold that the issue was generated by the evidence with respect to Jackson as well.

⁵ We are unpersuaded by Jackson's reliance on *Brogden v. State*, 384 Md. 631 (2005) and *Fleming v. State*, 373 Md. 426 (2003), as both are easily distinguishable from the present case. *Brogden* involved a supplemental jury instruction on an affirmative defense related to a handgun charge, which the defendant had never presented to the jury. *Brogden, supra*, 384 Md. at 639. The presence instruction, however, did not shift the

Jackson next argues, for similar reasons, that the flight instruction given to the jury was not factually generated. He again avers that the instruction was inconsistent with his theory of the case, that he was not present at the shooting. The Court of Appeals has articulated the following standard on when a flight instruction is generated:

[F]or an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Thompson v. State, 393 Md. 291, 312 (2006).

The State presented evidence that the shooter fled the scene in Caison's truck. The surveillance video shows Caison's truck arrive on Mount Street. After shooting William, the individual disappears from the view of the camera, in the direction of Caison's truck. Seconds later, Caison's truck leaves the scene under gunfire by Alan, and collides with another vehicle. At that point, the surveillance video shows Caison's truck driving without stopping. Additionally, Alan and William testified that they saw the shooter, who they identified as Jackson, run to the passenger side of the truck. William also testified that he heard a car door close. Indeed, from this evidence, a reasonable juror could easily infer

burden to Jackson, and was generated by the facts as presented to the jury by the State. Additionally, the presence instruction is not limited to the narrow set of facts in *Fleming, supra*, 373 Md. 631, as Jackson suggests. Jackson's argument that the instruction was not generated by the facts because this is not a drug case or one involving a charge of aiding and abetting is unavailing.

that following the shooting, the assailant ran across the street, got into Caison’s truck and fled the scene.

Jackson’s argument that the surveillance, at most, showed “mere departure,” and that nothing in the behavior of the shooter suggested flight to avoid apprehension for the shooting, is unavailing. Notably, if the jury were to adopt the State’s theory of the case and find that Jackson was the individual in the footage, and that he ran to Caison’s truck immediately after the shooting, got into the passenger side of the vehicle, and sped away, it would be reasonable to infer that he did so in order to avoid apprehension for the shooting. Accordingly, we hold that the circuit court did not abuse its discretion in instructing the jury that a person’s flight immediately after the commission of a crime may be considered as evidence of guilt.

II. The court properly allowed William, Alan, and Detective Parker to identify Jackson in the surveillance video.

Jackson also contends that the trial court erred by admitting testimony by William Brown, Alan Brown, and Detective Parker that Jackson was the individual in the surveillance video. He contends that the testimony amounted to improper lay witness opinions and that the probative value of the testimony was substantially outweighed by its prejudicial effect. Initially, we reject with the State’s contention that Jackson has not preserved this issue for our review with regard to William’s identifications. Because the angles of the videos are all different, Jackson’s failure to object to William’s identification of Jackson in two of the videos, did not constitute a waiver of his ability to object to the third video.

“[T]he admissibility of evidence ordinarily is left to the sound discretion of the trial court.” *Moreland v. State*, 207 Md. App. 563, 568 (2012) (citations and quotations omitted). “We will not disturb a trial court’s evidentiary ruling 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.” *Id.* at 568-69. The admissibility of lay witness opinion is governed by Maryland Rule 5-701, which provides:

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.

Md. Rule 5-701. “The rationale for the standard set by Rule 5-701 is two-fold: the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge of the witness.” *State v. Payne*, 440 Md. 680, 698 (2014) (citations and footnote omitted). A prototypical example of a proper lay opinion includes the identity of a person. *See Ragland v. State*, 385 Md. 706, 717 (2005); *see also Walter v. State*, 239 Md. App. 168, 200 (2018).

Relying on *Moreland*, *supra*, 207 Md. App. at 572, Jackson argues that neither William, Alan, nor Detective Parker had “substantial familiarity” with Jackson to properly identify him on the surveillance tapes. In *Moreland*, we adopted the reasoning of the Colorado Supreme Court in *Robinson v. Colorado*, 927 P.2d 381 (Colo. 1996), on the issue before us. *See Moreland*, *supra*, 207 Md. App. at 571-74. The *Robinson* Court explained that a majority of courts had determined that “a lay witness may testify regarding the

identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury.” *Robinson, supra*, 927 P.2d at 384. The Court went on to explain:

All of the courts among the majority agree that a lay witness who has substantial familiarity with the defendant, such as a family member or a person who has had numerous contacts with the defendant, may properly testify as to the identity of the defendant in a surveillance photograph. Moreover, several jurisdictions agree that whether a lay witness’ prior contacts with the defendant are extensive enough to permit a proper identification is a matter of weight for the jury, not admissibility.

Id. at 383. Further, “although the witness must be in a better position than the jurors to determine whether the image captured by the camera is indeed that of the defendant, this requires neither the witness to be ‘intimately familiar’ with the defendant nor the defendant to have changed his appearance.” *Id.* at 384.

At trial, William identified Jackson in the surveillance footage as the individual who shot him. He testified several times that during the attack he made an effort to get a look at his attacker, and was able to give detectives a description of the individual during his interviews. Additionally, Alan identified Jackson in the surveillance footage at trial as the person who attacked his brother. Alan testified that his identification was based on “what he saw on the screen, just like what you see on the screen.” Prior to trial, he was unable to make an identification of the shooter when presented with a photo array by detectives. He

selected a photo that he testified “looked like the person that was doing the shooting.” The photo array he was given, however, did not include a photograph of Jackson.

William’s and Alan’s identifications were admissible, as long as they met the requirements of Rule 5-701, and there was some basis to conclude that they were in a better position to identify the person in the surveillance than the jury. Critically, both William and Alan were physically present during the shooting and observed the shooter’s physical appearance first-hand. Their identifications would certainly be helpful to jurors, who did not see the shooter first-hand, but only through the surveillance footage.⁶ Moreover, Alan and William’s presence at the scene put them in a far better position to identify the shooter when compared to anyone else. Although neither William or Alan had seen Jackson before the night of the shooting, their familiarity with him goes to the weight of their testimony and not the admissibility of their testimony. The court, therefore, did not abuse its discretion by allowing William and Alan to testify that Jackson was the individual in the surveillance footage.

Jackson’s argument that Detective Parker identified him in the surveillance footage mischaracterizes the record. Detective Parker testified that based on his interviews with William, he was able to identify the individual in the video as Jackson. We agree with the State that the “crux of the testimony elicited on re-direct was that William eventually identified the person as Jackson.” Detective Parker did not testify that he was able to

⁶ Although Alan testified that his identification of Jackson was based on seeing the surveillance tape and seeing Jackson in court, he is still in a better position than a juror to correctly identify Jackson. Alan was present and personally observed the shooter.

identify Jackson based on his own perception or familiarity. Instead, the Detective testified to William’s identification and how the investigation ultimately pointed to Jackson.

Last, Jackson argues that the repeated identifications of Jackson as the individual in the surveillance was improper bolstering and was substantially more prejudicial than probative. He asserts that the repeated identifications from the surveillance video, by three separate witnesses, combined with the ongoing narration of the footage, created a prejudicial effect that warrants reversal. We disagree. Indeed, Maryland Rule 5-403 allows a court to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Md. Rule 5-403.

To be sure, much of the evidence offered against any criminal defendant might prove to be prejudicial to their defense. Nevertheless, in order to justify the exclusion of relevant evidence, “the ‘danger of unfair prejudice’ must not simply outweigh [its] ‘probative value’ but must, as expressly directed by Rule 5-403, do so ‘substantially.’” Indeed, “[b]y its express provisions, Rule 5-403 has steeply tilted the weighing process in favor of admissibility.” *Newman v. State*, 236 Md. App. 533, 555 (2018). We have expressed that:

This final balancing between probative value and unfair prejudice is something that is entrusted to the wide discretion of the trial judge. The appellate standard of review, therefore, is the highly deferential abuse-of-discretion standard. The fact that we might have struck the balance otherwise is beside the point. We know of no case where a trial judge was ever held

to have abused his discretion in this final weighing process. As a practical matter, that will almost never be held to have occurred.

Id. at 556. The trial court has wide discretion in weighing the probative value of the evidence against the prejudicial effect of the identifications. Absent clear abuse, we shall not disturb the trial court’s ruling. As we explained, *supra*, the identifications of Jackson by two individuals who were present during the shooting, and who perceived the features of the shooter, would be helpful to the jury. Although the repeated identifications may have been potentially prejudicial to Jackson, their probative value is not substantially outweighed by the danger of unfair prejudice. Notably, the circuit court instructed the jury that they should examine the identifications with “great care,” and that it was for them to determine the “reliability of any identification and give it the weight [they believed] it deserv[ed].” We, therefore, hold that the trial court did not abuse its discretion in allowing the identifications.

For these reasons, we hold that the trial court did not abuse its discretion in admitting the lay witness identifications of Jackson. We further hold that the trial court did not err in instructing the jury concerning presence and flight from the scene of the crime. We, therefore, affirm the judgments below.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**