Circuit Court for Howard County
Case No. 13-K-18-058697

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3304

September Term, 2018

MELVIN A. JACOME

v.

STATE OF MARYLAND

Shaw Geter,
Gould,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Gould, J.

Filed: May 13, 2020

*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.

Melvin Jacome killed X.Y. as part of a botched robbery when both boys were 15 years old. A jury in the Circuit Court for Howard County found Mr. Jacome guilty of first-degree murder, among other crimes. Facing a life sentence, Mr. Jacome now challenges his convictions on a variety of grounds. He argues that the trial court erred by: 1) restricting the cross-examination of his co-defendant; 2) overstepping its authority during sentencing; 3) admitting irrelevant and prejudicial exhibits; 4) refusing to instruct the jury on self-defense; 5) denying his motion for judgment of acquittal as to first-degree murder; and 6) instructing the jury as to transferred intent. Finding no error, we affirm.

BACKGROUND FACTS AND PROCEEDINGS

In October 2017, Mr. Jacome, Francisco Rodriguez, Luis Ordonez and two of their friends were looking for someone to rob. Mr. Rodriguez proposed A.W., an acquaintance of his who had advertised marijuana for sale on Snapchat (a multimedia messaging application), as the target. Mr. Ordonez texted A.W. to arrange a meeting.

Later that night, Mr. Jacome's group drove to the agreed-upon location for the transaction. However, when they got there they noticed that, much to their dismay, A.W. had brought several friends with him. To put them at ease, A.W. agreed to meet Mr. Ordonez alone. Messrs. Jacome and Ordonez then left the rest of their group to meet up with A.W.

Unbeknownst to A.W., his friends had followed him and were hiding in the trees to look out for him. When Messrs. Jacome and Ordonez spotted these friends, they got scared and ran off. After they returned to Mr. Ordonez's car, Mr. Jacome told Mr. Rodriguez, who was driving, to leave. About a minute later, Mr. Rodriguez saw A.W. and his friends,

and he slowed down. Mr. Jacome rolled down his window and fired his gun, hitting one of A.W.'s friends, X.Y. Mr. Jacome and his friends then fled the scene. After spending two days in critical condition, X.Y. succumbed to the gunshot wound.

Mr. Jacome was arrested and tried for the murder of X.Y. At trial, Mr. Rodriguez, who had accepted a plea deal, testified as a witness for the State and identified Mr. Jacome as X.Y.'s killer. A jury found Mr. Jacome guilty of first-degree murder and other related charges, and the court sentenced him to life imprisonment plus ten years. This appeal followed.

DISCUSSION

CROSS-EXAMINATION REGARDING MR. RODRIGUEZ'S PLEA DEAL

Mr. Jacome argues that the trial court erred by restricting the cross-examination of his co-defendant, Mr. Rodriguez, regarding the charges and penalties he would have faced had he not agreed to cooperate with the State. In Mr. Jacome's view, he was impermissibly prohibited from asking Mr. Rodriguez questions about two charges: accessory after the fact to first-degree murder and first-degree assault of X.Y. According to Mr. Jacome, these restrictions on his cross-examination of Mr. Rodriguez prevented the jury from "fairly assess[ing] the credibility and bias of Francisco Rodriguez when determining its verdict."

Md. Rule 5-616(a)(4) allows a party to attack a witness's credibility through questions that show that "the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely." However, the trial court must also "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment

of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Md. Rule 5-611(a). We review the court's determination "as to whether particular questions are repetitive, probative, harassing, confusing, or the like" for an abuse of discretion. Manchame-Guerra v. State, 457 Md. 300, 311 (2018) (quotation omitted).

In assessing the scope of cross-examination as to a plea agreement, "[t]he key question is whether the jury was made aware of the witness's potential motive to testify in a particular way, including a desire for leniency in sentencing, and whether the added information about the specific sentence that the witness might have received in the absence of the plea agreement would have changed the jury's perception of the witness's credibility." Peterson v. State, 444 Md. 105, 152 (2015). In other words, the jury must be allowed to hear enough information about how "sweet" the plea deal is to allow it to make a "discriminating appraisal" of the witness's credibility. Id. at 153.

Here, the State introduced into evidence Mr. Rodriguez's plea deal: he would testify against Mr. Jacome in exchange for a recommended sentence of 15 years, with all but 18 months suspended, on a charge of conspiracy to commit armed robbery. However, when Mr. Jacome's counsel attempted to cross-examine Mr. Rodriguez on the charges for first-degree assault of X.Y. and accessory after the fact, the trial court prevented him from doing so, reasoning that those charges would have merged had Mr. Rodriguez been found guilty of murder. Mr. Jacome's counsel and the court had this exchange during a bench conference:

[THE COURT]: If the State's case ended right now and if [your] client was found guilty of every count on the indictment, some things would merge into others by operation of law.

[DEFENSE COUNSEL]: So, that doesn't matter. That has no basis for you to restrict my cross-examination of this cooperating witness. You face the penalties in jeopardy for every charge in the indictment against him.

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[THE COURT]: Well you know, I disagree with you to some extent sir because if there's two counts, first degree murder and first degree assault and by law first degree assault merges into murder, then the most he's exposed to is life. He's not exposed to [] life plus 25. And if you were allowed to ask each and every count . . . then that is legally impossible. That's my concern.

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[DEFENSE COUNSEL]: Just so the record is clear, in addition to the first degree, first degree murder charge that he was indicted for, he's got four counts of first degree assault on four separate victims, which clearly could lead him to consecutive sentences for each one separate assault[]. Indisputably, yes, it would merge if he was convicted of first degree murder but it would not merge if he was found not guilty of first degree murder. And those four separate counts will not merge against each other because they're just different victims alleged.

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[DEFENSE COUNSEL]: I intend to go through every one of [the counts].

[THE COURT]: All right.

[DEFENSE COUNSEL]: And the penalties.

[THE COURT]: All right. I think that [defense counsel] should be permitted to demonstrate the jeopardy that he faced. But I don't think you should be permitted to do it in a way that exaggerates the jeopardy that he faces and confuses the jury and causes us to give them in essence a set of jury instructions as to the elements and offense and things of that nature.

Following the bench conference, Mr. Jacome's counsel's cross-examination of Mr. Rodriguez continued:

Q: Mr. Rodriguez, you're charged with murder in the first degree of [X.Y.], were you not originally?

A: Yes sir.

Q: And you risked spending the rest of your life in jail for that charge, did you not?

A: Yes sir.

Q: You were also charged with assault within the first degree of [A.W.], were you not?

A: Yes sir.

Q: You risked facing 25 years in prison for that charge, were you not?

A: Yes sir.

Q: You also were charged with assault in the first degree as to [J.J.], were you not?

A: Yes sir.

Q: You risked spending 25 years in jail for that charge, were you not?

A: Yes sir.

Q: You were charged with assault in the first degree of [J.D.], were you not?

A: Yes sir.

Q: You risked spending 25 years in jail for that charge?

A: Yes sir.

Q: You were charged with assault in the first degree of [M.J.], were you not?

A: Yes sir.

Q: You risked spending 25 years in jail for that charge, did you not?

A: Yes sir.

Q: You were charged with possession of a handgun, an illegal handgun, were you not?

A: Yes sir.

Q: You were facing 5 years mandatory in prison for that, were you not?

A: Yes sir.

Q: You were also charged with and you plead[ed] guilty to conspiracy to commit armed robbery, did you not?

A: Yes sir.

Q: You could receive up to 15 years for that offense, right?

A: Yes sir.

Q: But you expect as a result of your testimony the State's going to let you go tomorrow, right?

A: Not tomorrow, sir.

Q: Well as soon as possible, right?

A: Yes sir.

We do not see an abuse of discretion in the trial court's limited restriction of the cross-examination of Mr. Rodriguez. The jury was told the exact terms of Mr. Rodriguez's plea deal. It knew the maximum prison time he was facing if he had been found guilty of each charge against him—life plus 120 years. What the trial court did not allow was testimony as to Mr. Rodriguez's maximum exposure had he been convicted of all charges *except* first-degree murder. In that scenario, there would have been no life sentence, but

there would have been an additional 10 years for the first-degree assault of X.Y. and another 25 years for accessory after the fact, for a total of 35 years.

The trial court was concerned that if the jury knew the maximum sentences for first-degree assault and accessory after the fact, it would not appreciate that those sentences would have merged into the life sentence for first-degree murder, and would only have been served if he had been acquitted of first-degree murder. The trial court concluded that the potential for the jury to be confused or misled in this manner outweighed the incremental value that the additional information would have yielded. Because the jury was given abundant information about Mr. Rodriguez's potential exposure had he not agreed to the plea deal, and such information fairly conveyed just how "sweet a deal" he received, we conclude that the trial court's ruling was well within its discretion.

THE SENTENCING

Mr. Jacome also claims that the trial court erred in his sentencing in two respects: 1) by affirmatively making a plea offer to Mr. Jacome before trial started; and 2) by impermissibly considering his failure to plead guilty in its sentencing decision. We reject these contentions for two reasons.

First, Mr. Jacome did not object to these alleged errors in the circuit court, and therefore he failed to preserve these issues for our review. See Md. Rule 8-131(a).

Second, none of this happened. Contrary to Mr. Jacome's claim, the trial court never "made a plea offer" to him; rather, it merely asked the State if it would object to the court binding itself to the State's recommended sentence as a cap. Nor did the court state

or imply that its sentence was influenced by Mr. Jacome's rejection of the State's pre-trial plea deal. As such, we perceive no error in Mr. Jacome's sentence.

ADMISSION OF EVIDENCE OF GUNS AND MONEY

Mr. Jacome objects to the admission of certain exhibits depicting him with guns and money, arguing that they "had no relevance to the trial" and portrayed him as "nothing but a thug." However, aside from these conclusory statements, Mr. Jacome does not explain why this evidence is irrelevant or how it impermissibly depicts him as a "thug."[1] It is not our responsibility, "merely because a point is mentioned as being objectionable at some point in a party's brief, to scan the entire record and ascertain if there be any ground, or grounds, to sustain the objectionable feature suggested." State Roads Comm'n v. Halle, 228 Md. 24, 32 (1962); see also Klauenberg v. State, 355 Md. 528, 552 (1999) (holding that "arguments not presented in a brief or not presented with particularity will not be considered on appeal"). Nevertheless, we have reviewed the objected-to exhibits and are satisfied that the trial court did not abuse its discretion in their admission. See Gordon v. State, 431 Md. 527, 533 (2013) (noting that "ordinarily a trial court's rulings on the admissibility of evidence are reviewed for abuse of discretion").

[1] Mr. Jacome's original brief did not identify the exhibits which he challenged. He subsequently filed an "errata" sheet listing the 14 exhibits to which he objected but did not explain what he found objectionable. He eventually provided more detail in his reply brief. However, ordinarily we "will not consider an issue raised for the first time in a reply brief." Jones v. State, 379 Md. 704, 713 (2004).

JURY INSTRUCTIONS ON SELF-DEFENSE

Mr. Jacome argues that the trial court erred by failing to instruct the jury on perfect and imperfect self-defense. In evaluating the propriety of a trial court's refusal to give a requested instruction, we must determine whether "(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." Holt v. State, 236 Md. App. 604, 620 (2018) (quotation omitted). A trial court must give a self-defense instruction where there is "some evidence" in support of each element of the defense, a relatively low burden. Id. at 620-21. "Furthermore, in evaluating whether competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused." Bazzle v. State, 426 Md. 541, 551 (2012) (cleaned up).

Here, the trial court correctly declined to instruct the jury on self-defense because the defense was not "applicable to the facts of the case." See Holt, 236 Md. App. at 620. To generate a perfect self-defense instruction, the facts must show that the defendant did not have the ability to retreat from the confrontation; to generate an imperfect self-defense, the facts must show that the defendant subjectively believed that he did not have the ability to do so. See Burch v. State, 346 Md. 253, 283 (1997). Further, the harm from which the defendant is defending himself must be "imminent or immediate." Dykes v. State, 319 Md. 206, 211 (1990). In this case, the facts do not support either defense.

The trial court, in rejecting the instruction, said it best:

> [W]hat is important to me is that the defendant returned to the car, got into the car. The car started to leave. They were in the act of retreating. There is no evidence that they were precluded from leaving by the road being

> blocked in any fashion. There is no evidence that they saw any weapons on the part of [A.W.] or [A.W.'s] friends.
>
> There is, number one, a retreat problem for me as it relates to both self-defense and imperfect self-defense. Number two, there is an imminency problem for me as it relates to the response to any threat that may have been there. And I don't think that there was a reasonable basis for a threat. . . . And there was no evidence to support the targeting of persons from a distance and the shooting and killing of them from a car that was leaving the scene of the event.
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> I don't believe that the evidence has generated the defense of self-defense. . . . I don't find that there is even some evidence that exists to cause me to give that instruction. And I am mindful that if there is some evidence I am required to give it. And I find that there is no evidence that exists.

The trial court's analysis strikes us as eminently reasonable. Not only was Mr. Jacome able to retreat, he was in fact retreating, in a car no less, while his would-be attacker was in pursuit (if one could call it that) on foot. Because there was no evidentiary basis for a self-defense instruction, the trial court did not err in refusing Mr. Jacome's request for one.

FIRST-DEGREE MURDER ELEMENTS

Mr. Jacome argues that the evidence was not legally sufficient to convict him of first-degree murder because it did not show that he intended to kill X.Y. or anyone else.[2] Mr. Jacome asserts that his firing of the gun was only intended as a "warning shot which was fired into the air in order to scare [A.W.] and his friends." In support of this contention, Mr. Jacome points to several pieces of evidence, including that:

- The shot occurred when the car in which Mr. Jacome was riding was driving over speed bumps;
- The shot was from a significant distance;

[2] Md. Code Ann., Crim. Law § 2-201(a)(1) (2002, 2012 Repl. Vol.) defines first-degree murder, in part, as "a deliberate, premeditated, and willful killing." Mr. Jacome appears to mainly be challenging the "deliberate" or intentional element of the crime.

- The shot would have been extremely difficult to make accurately, even by a trained sharpshooter; and

- Mr. Rodriguez testified that it was never the group's intention to kill anyone.

The flaw in this argument is that, as compelling as this evidence may seem to Mr. Jacome, a reasonable jury could have instead inferred that Mr. Jacome did intend to kill X.Y. In reviewing the sufficiency of the evidence, our task is merely to determine "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jones v. State, 240 Md. App. 26, 41 (2019) (quotation omitted). "[W]e do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence," but rather "defer to any reasonable inferences a jury could have drawn." Id. at 42 (quotations omitted).

Here, there was evidence that, after an aborted drug deal with A.W., Mr. Jacome aimed a laser-sighted pistol at A.W. and his friends and pulled the trigger. Specifically, there was:

- Testimony that Mr. Jacome's plan to rob A.W. was thwarted by the presence of A.W.'s friends.

- Testimony from Mr. Rodriguez that at the time of the shooting, he saw one of A.W.'s friends "pointing fingers," after which he heard a gunshot. Mr. Jacome, with a gun in his hand, then immediately leaned towards him and said, "shut the fuck up, keep driving, don't stop."

- Testimony from A.W. that, at the time of the shooting, he saw a laser emanating from the rear window of a black sedan which moved from him to X.Y. A shot then rang out, at which point X.Y. dropped to the ground.

- Evidence that, after the murder, Mr. Jacome arranged to have his friend hide the murder weapon and that he told the friend that "he might have killed somebody."

- A text message from Mr. Jacome that "[the individual is in] critical[] condition. I hit him with a hollo[w]."

This evidence is sufficient for a reasonable jury to infer that Mr. Jacome intended to kill A.W. or one of his friends, and thus sufficient to support his conviction for first-degree murder.

TRANSFERRED INTENT

Finally, Mr. Jacome contends that the trial court erred by instructing the jury on transferred intent. According to him, a transferred intent instruction—stating that if someone intends to kill one person but mistakenly kills another person, the jury may still find that the defendant had the intent to kill the person who actually dies—only applies to "bad aim cases" where the defendant shoots at a person, misses, and kills someone else. Mr. Jacome argues that the instruction does not apply to cases of mistaken identity. Accordingly, he contends, because the State only advanced a mistaken identity scenario, the transferred intent instruction did not apply.[3]

Mr. Jacome overlooks that the State advanced, as alternative theories, both the "bad aim" scenario and the "mistaken identity" scenario. During closing argument, the State explained:

[3] The State argues that Mr. Jacome made a different argument when objecting to the transferred intent instruction, and therefore did not preserve this specific argument for appellate review. Because we are addressing Mr. Jacome's argument on the merits, we need not delve into what exactly he asserted at trial.

> You can believe that he mistook who was who, because he's never met them before. *Or that while they were moving and driving his aim slid and he hit the wrong person. His aim was level at heads, but he hit the wrong person.* You can believe either version of that, whichever you like. That's what transferred intent tells you.

(Emphasis added). The trial court, when deciding to give the transferred intent instruction, acknowledged these alternative theories:

> [W]hat I'd like to specifically note that I don't think has been noted is that my recollection of [A.W.'s] testimony, and of course it's the jury's recollection that governs, not mine, but my recollection is that when the green light came out it was moving all over the place. But then it focused on him and it rested. And he indicated -- my recollection is -- under his left eye. And he placed his finger to the upper cheekbone area.
>
> [X.Y.] was standing next to [A.W.] and it moved off of him. There was a shot and at the time of the shot clearly the green light was on [X.Y.]. And I recall [defense counsel's] cross-examination most specifically of Detective Cheuvront about the moving car and the moving of the gun and the moving of the arm and things of that nature. And I think to myself, from this evidence the jury can infer that there was a targeting of [A.W.] going on. With the green light moving around there was selection of a target. Not with the green light selecting the target but the shooter, and that when the target was selected the green light became consistent -- meaning the laser light -- on [A.W.].
>
> Now movement to [X.Y.] could be because of the jostling of the car. It could be because of mistaking them. I don't know. But in that the defendant had interaction with [A.W.] I think that there is a sufficient evidentiary basis that has generated the instruction . . . .

As explained above, to generate a jury instruction, there must merely be "some evidence" supporting the underlying theory. See Holt, 236 Md. App. at 620-21. As the trial court pointed out, there was sufficient evidence to generate a transferred intent instruction under a "bad aim" theory of the case. Therefore, the trial court did not err in giving this instruction.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.