

Circuit Court for Baltimore City  
Case No. 1171213014

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 3428

September Term, 2018

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TERRELL GIBSON,

v.

STATE OF MARYLAND

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Meredith,  
Wells,  
Wright,  
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Wells, J.

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Filed: August 20, 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.

A jury in the Circuit Court for Baltimore City convicted Terrell Gibson, appellant, of first-degree murder and use of firearm in the commission of a crime of violence. The court sentenced Gibson to life plus 15 years' imprisonment, with all but 65 years suspended. On appeal, Gibson presents the following questions for our consideration, which we reproduce verbatim:

1. Did the trial court abuse its discretion in giving a flight instruction where the sole contested issue was the identity of the person who committed the crime and fled the scene?
2. Did the trial court abuse its discretion in denying the defense's request for mistrial after the lead detective identified Mr. Gibson from inconclusive surveillance footage?
3. Was the evidence legally sufficient to support Mr. Gibson's convictions?

Concluding the court committed no reversible errors, we affirm.

### **FACTUAL BACKGROUND**

On July 2, 2017, Dionay Smith was shot and killed in his first-floor apartment at 1401 Argyle Avenue in Baltimore City. Smith sustained a gunshot wound to his right cheek that left a residue of "soot seared edges," indicating that the muzzle of a shotgun had been pressed against his skin at the time the gun was fired. The shotgun had dispersed pellets throughout Smith's brain, transecting his brain stem and causing a "rapidly fatal" injury. On the day of Smith's murder, home security video captured an individual running down the hallway of the building, stuffing a gun into his waistband. The State charged Gibson with Smith's murder and the use of a handgun in the commission of that crime.

Dexter Richardson, who lived in a room across the hall from Smith, described the building as a three-level house, split into different sections “like apartments” or “rooms.” On the morning of July 2, 2017, Richardson had helped Smith move his belongings to a room on the second floor of the building. Later that day, when Richardson believed that Smith was at work, Richardson noticed that something had been left on in Smith’s first-floor apartment. Richardson approached the room and saw that the door was ajar. Inside the room, Richardson saw a pool of dried blood on the floor.

Soon thereafter, according to Richardson, he heard knocking on Smith’s window and went to the front door and let Gibson in the building. Richardson told Gibson that he thought that Smith was dead. Richardson said that Gibson asked him “does anyone else know?” Richardson stated that initially Gibson seemed “remorseful” but then he “flipped” and told Richardson to go back to his room. Richardson stated that, at that point, he was scared and “felt like [Gibson] was going to kill [him],” so rather than go to his room, he ran upstairs to his mother’s apartment and told her that he thought Smith was dead. Richardson stated that he had seen Gibson with Smith in the building before, but he had not previously spoken to Gibson.

On the following day, Richardson was interviewed at the police station, where he identified Gibson from a photo array. He acknowledged at trial that when he was first shown the photos, he told the detective that the person he identified “slightly look[ed] familiar” but that he was not “really sure.” Richardson was shown the photos again and told the detective that he was about “twenty-five percent sure” that he recognized the person he had identified in the photo. While at the police station, Richardson spoke to his

mother on the phone and told her that he identified Gibson by the photo array, but he also told her that he was unsure. Richardson testified that he had said that he was only twenty-five percent sure of his photo identification because he was scared and “didn’t know what to think.”

A security camera linked to a Comcast home security account recorded footage of the first-floor hallway of 1401 Argyle Street, 24 hours per day, 7 days per week. Richardson reviewed the security video from July 2, 2017 and identified himself on the video entering the building at 2:27 p.m. He identified Smith in the first-floor hallway at approximately 6:00 p.m., and he identified himself speaking to Gibson, who was wearing a gray t-shirt, in the hallway at approximately 7:30 p.m. Richardson testified that he had no doubt that Gibson was the person he had let in to the building.

Willie Lee Ebron lived on the third floor of the building at 1401 Argyle Avenue. He recalled seeing Gibson on July 2, 2017, talking to another individual in the hallway of the building, between 10:00 a.m. and 2:00 p.m. Ebron estimated that he had seen Gibson in the building with Smith four or five times previously but stated that he had never spoken to Gibson. Ebron viewed the surveillance video from July 2, 2017 and identified himself passing two men in the hallway at approximately 4:36 p.m. Ebron identified Gibson in the video as the individual wearing a “[b]aseball hat and a tank top T-shirt.”

On July 3, 2017, Ebron identified Gibson from a photo array as a person “who looks like the guy who comes around to see [Smith].” Ebron recalled that he had told police that he was not “a hundred percent sure” that he recognized the person he had identified. He was unsure whether the police had shown him the photo array before or after he had

watched the surveillance video. At trial, Ebron testified there was no question that Gibson was the person he had seen in the hallway on July 2, 2017.

Baltimore City Police Detective Michael Moran, the lead homicide detective assigned to the case, responded to 1401 Argyle Avenue on July 2, 2017 and observed Smith, in the first-floor front room, deceased, with a gunshot wound to the face. Detective Moran testified that no firearms or ballistics evidence was obtained from Smith's room. Detective Moran subsequently collected "wadding and pellets from a 410 shotgun" from the medical examiner's post-mortem examination of Smith. The firearm used in the homicide was not recovered.

As part of his investigation, the detective obtained video recordings from the first-floor hallway of the building for July 2, 2017. He viewed the video and observed an individual wearing "a white tank top, jeans, and white and black tennis shoes, kind of a muscular build," with a "chisel[ed] face" who "walked with a bow leg" remove a "pistol grip shotgun" from an "Eastern baseball bag" and walk around the hallway with it "for quite a while." Additional video footage recorded at 6:30 p.m. showed the individual, wearing a white tank top and jeans, running down the hallway while shoving a gun into his waistband before exiting through the front door of the building. On July 6, 2017, Gibson was brought to the police station for questioning.

Daniel Lamont, a firearms examiner for the Baltimore City Police Department Crime lab, described the gun held by the suspect in the security video as a shotgun, rather than a revolver, with what appeared to be a pistol grip. The parties stipulated that a DNA analysis of swabs taken from Smith's front pockets yielded a DNA profile consistent with

DNA from Smith and at least two minor contributors. Gibson was excluded as a DNA contributor.

At the close of the State’s evidence, Gibson moved for judgment of acquittal, which the trial court denied. The jury convicted Gibson of first-degree murder and use of a firearm in the commission of a crime of violence. The court sentenced Gibson to life plus 15 years’ imprisonment, with all but 65 years suspended. He noted a timely appeal.

## DISCUSSION

### I. The Trial Court Instructing the Jury on Flight Was Not Error

Gibson argues that the trial court abused its discretion in giving the flight instruction because the instruction was not applicable under the facts of this case. Gibson contends that where, as here, the sole issue at trial was the identity of the shooter, and there is no dispute that the person who fled the scene was the shooter, the instruction was irrelevant and improperly suggested to the jury that evidence of flight was evidence of Gibson’s guilt.

The State contends that the flight instruction was generated by the evidence in this case, even though the identity of the perpetrator was at issue. The State argues that even if the trial court abused its discretion in giving the flight instruction, any error was harmless.

Maryland courts have consistently recognized the admissibility of “consciousness of guilt evidence, including flight from the scene of a crime, or flight from apprehension as a factor that may be considered in determining guilt.” *Jones v. State*, 213 Md. App. 483, 508 (2013) (internal quotation marks and citation omitted). *See also Thompson v. State*, 393 Md. 291, 304 (2006). “A person’s post-crime behavior often is considered relevant to

the question of guilt because the particular behavior provides clues to the person’s state of mind.” *Thomas v. State*, 372 Md. 342, 352 (2002).

The continued validity of flight instructions is questionable in many jurisdictions. In *Thompson*, 393 Md. at 309-10, the Court of Appeals identified a number of jurisdictions that no longer allow flight instructions:

*See Hadden v. State*, 42 P.3d 495, 508 (Wyo.2002) (determining that the giving of a flight instruction is reversible error because it impermissibly emphasizes a single piece of circumstantial evidence); *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind.2001) (concluding that the flight instruction should not be given because it is “confusing, unduly emphasizes specific evidence and is misleading”); *State v. Hall*, 297 Mont. 111, 991 P.2d 929, 937 (1999) (holding that flight instructions should not be given because of the limited probative value of the evidence); *Fenelon v. State*, 594 So.2d 292, 295 (Fla.1992) (determining that “the better policy in future cases where evidence of flight has been properly admitted is to reserve comment to counsel” due to the disagreement over what kind and what amount of evidence will support the giving of a flight instruction); *Renner v. State*, 260 Ga. 515, 397 S.E.2d 683, 686 (1990) (holding that “while the state may offer evidence of and argue flight, it shall be reversible error for a trial court in a criminal case to charge the jury on flight” because the instruction could be interpreted by the jury as implying that the trial court believes there to be evidence of flight that indicates a consciousness of guilt of the defendant); *State v. Cathey*, 241 Kan. 715, 741 P.2d 738, 748-49 (1987) (disapproving of flight instructions because it “emphasize[s] and single[s] out certain evidence admitted at a criminal trial”); *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169, 171 (1980) (holding that flight instructions are either an unnecessary “sanction [of] the use of circumstantial evidence” or improper comment that “place[s] undue emphasis upon that evidence”); *State v. Stilling*, 285 Or. 293, 590 P.2d 1223, 1230 (1979) (stating that the “significance of flight should be left to argument”); *State v. Reed*, 25 Wash.App. 46, 604 P.2d 1330, 1333 (1979) (observing that evidence of flight should be “reserved for counsel’s argument, with little if any comment by the bench” because of the danger of “plac[ing] undue emphasis upon that evidence.”); *State v. Fleming*, 523 S.W.2d 849, 854 (Mo.Ct.App. 1975) (noting that the Missouri Supreme Court had prospectively barred flight instructions).

*See also Thomas*, 372 Md. at 353 (citations omitted) (“Although evidence of consciousness of guilt has long been allowed as evidence in the courts of this State and is universally admitted in courts around the country, courts have nonetheless recognized the danger with respect to this category of evidence and increasingly have become cautious in evaluating it.”).

We note that the Supreme Court of the United States has also cautioned against the use of flight evidence. In *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963), the Court noted: “we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime.” Following *Wong Sun*, federal courts have discouraged the use of flight instructions. *See United States v. Rodriguez*, 53 F.3d 1439, 1451 (7th Cir. 1995) (“we ... reassert our position that flight instructions should be given with caution, if at all.”); *United States v. Williams*, 33 F.3d 876, 879 (7th Cir. 1994) (explaining that evidence of flight requires “careful deliberation in its admission”); *United States v. White*, 488 F.2d 660, 662 (8th Cir. 1973) (noting the unreliability of flight as an indication of guilt, finding that evidence of guilt was too speculative for jury to draw an inference of consciousness of guilt); *United States v. Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973) (describing evidence of flight as “marginally probative” of guilt or innocence and commenting that justice is “best served if this matter is reserved for counsel’s argument, with little if any comment by the bench”); *Austin v. United States*, 414 F.2d 1155, 1157 (D.C. Cir. 1969) (advising that flight instructions should be used only “sparsely” and must be accompanied by an explanation by the trial judge of the possible motives that may account for flight).

The Court of Appeals has rejected the notion that flight instructions are *per se* improper, recognizing that the Maryland Pattern Jury Instruction on flight does not impermissibly emphasize the value of flight evidence. *Thompson*, 393 Md. at 310. The Court has recognized that the flight instruction is appropriate in certain circumstances so long as the instruction is applicable to the facts presented by the evidence at trial and there is no alternative explanation for the flight that would render the instruction misleading. *Id.* at 315. This position is consistent with the majority of federal and State jurisdictions which allow flight instructions where the evidence is sufficient to support an inference of consciousness of guilt. *Id.* at 306, n. 2 (and cases cited).

Maryland Rule 4-325(c) provides that “[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]” We review a trial court’s decision to give a jury instruction under an abuse of discretion standard. *See Hallowell v. State*, 235 Md. App. 484, 510 (2018) (citing *Thompson*, 393 Md. at 311). In determining whether a trial court abused its discretion in granting or denying a request for an instruction, a reviewing court considers: “(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.” *Bazzle v. State*, 426 Md. 541, 549 (2012) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)). A requested instruction is justified so long as there is “‘some evidence’ that supports the requested instruction[.]” *Id.* at 551. “[D]etermination of whether the evidence is sufficient to generate the desired instruction,” however, ‘is a question of law for the judge.’” *Bazzle*, 426 Md. at (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)).

Maryland recognizes that mere evidence of flight is not sufficient, in and of itself, to establish the guilt of a defendant, but it is one factor which may be considered in determining guilt. *Sorrell v. State*, 315 Md. 224, 228 (1989). The Court of Appeals has set forth the following “four inferences [that] must reasonably be able to be drawn from the facts of the case as ultimately tried,” in order for a flight instruction to be appropriate: “[1] that the behavior of the *defendant* suggests flight; [2] that the flight suggests a consciousness of guilt; [3] that the consciousness of guilt is related to the crime charged or a closely related crime; and [4] that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.” *Thompson*, 393 Md. at 312 (citing *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977)) (emphasis added). A flight instruction is unwarranted unless all four inferences can be drawn from the evidence presented. *Id.*; accord *Page v. State*, 222 Md. App. 648, 669 (2015). We view the evidence in the light most favorable to the State to determine whether there was sufficient evidence to support the inference that it was the defendant’s behavior that suggested flight. See *Page*, 222 Md. App. at 668-69 (citing *Hoerauf v. State*, 178 Md. App. 292, 326 (2008)).

Gibson does not dispute that the flight instruction given by the court was a correct statement of law.<sup>1</sup> He contends that the flight instruction was not applicable here because

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<sup>1</sup> Over defense counsel’s objection, the trial court provided the Maryland Pattern Jury Instruction on flight:

Flight or concealment. A person’s flight in this matter immediately after the commission of a crime or after being accused of [] committing a crime is not in and of itself enough to establish guilt, but rather it’s a factor that may be considered by you as evidence of guilt.

the first inference cannot be satisfied unless “the defendant” behaves in a way that suggests flight, and here, he disputes that he was the person who fled. He points out that “[t]he proper inquiry is whether the evidence could support an inference that *the defendant’s* conduct demonstrates a consciousness of guilt.” *Jones*, 213 Md. App. at 509 (quoting *Thomas v. State*, 168 Md. App. 682, 712 (2006) (emphasis added)). “[T]he classic case of flight is where a *defendant* leaves the scene shortly after the crime is committed and is running, rather than walking[.]” *Hoerauf*, 178 Md. App. at 324 (2008) (emphasis added).

Indeed, our analysis of flight instructions typically focuses on the defendant’s behavior, not his identity. *See id.* at 326 (flight instruction was inappropriate where evidence showed that defendant “simply walked away from the scene of the crime”); *State v. Shim*, 418 Md. 37, 59 (2011) (flight instruction was inappropriate where there was no evidence that defendant “fled”); *Page*, 222 Md. App. at 670 (flight instruction was appropriate where the defendant “ran, not walked, away immediately after the shooting”). Gibson argues that because the sole issue in this case was whether he was the person shown in the security video fleeing from the scene, the jury should not have been instructed that flight is evidence of guilt.

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Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide that there is evidence of flight, then you must decide whether this flight shows a consciousness of guilt.

*See* Maryland State Bar Ass’n Criminal Pattern Jury Instructions 3:24 (2nd Ed. 2018).

We are aware of no reported Maryland decision addressing the question of whether a flight instruction applies where the identity of the perpetrator of the crime is the central issue at trial and there is no dispute that the perpetrator is the same person observed fleeing from the scene.<sup>2</sup> Gibson urges us to adopt the approach set forth in a number of Massachusetts decisions concluding that a flight instruction is inappropriate where, as here, the sole issue in the case is the identity of the perpetrator and there is no dispute that the crime actually occurred.

In *Commonwealth v. Groce*, 517 N.E.2d 1297, 1300 (Mass. App. Ct. 1988), the sole issue was whether the defendant had robbed the victim and fled the scene. The trial court, *sua sponte*, gave a lengthy instruction on consciousness of guilt, referring to “the defendant’s conduct” numerous times, and then commenting on the use of the term “defendant” in the instruction in an attempt to explain it. *Id.* The Massachusetts Appeals Court noted that the issue of the appropriateness of a flight instruction typically arises where the conduct at issue is “unquestionably attributable to the defendant.” *Id.* Because the only question was the identity of the assailant, the court explained that “[t]he evidence of the assailant’s flight with the fruits of the robbery did not shed any light on the issue of identification; it did not give rise to a reasonable inference that the defendant was the

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<sup>2</sup> In *Montague v. State*, 244 Md. App. 24, 58 (2019), *cert. granted*, Pet. Docket No. 472, Sept. Term, 2019 (March 11, 2020), the appellant raised the issue of whether evidence of flight was relevant and a jury instruction on flight was warranted, where the identity of the shooter was the only issue in the case. Because appellant failed to preserve his argument challenging the flight instruction, however, we did not reach the merits of that issue. *Id.* at 60. We noted that had appellant preserved the issue, his argument would fail because there was eyewitness testimony that appellant had shot the victim and fled from the scene. *Id.* at 60, n.11.

assailant[,]” and, therefore, the instruction “was inapposite.” *Id.* The court determined that, though the trial judge may have intended to avoid such a result, he nonetheless may have conveyed to the jury the impression that he thought it was the defendant who had fled, and therefore the error was not harmless. *Id.*

Gibson also relies on the analysis set forth in *Commonwealth v. Pina*, 717 N.E.2d 1005 (Mass. 1999). In *Pina*, eyewitnesses identified the defendant as the assailant who had shot the victim at close range. 717 N.E.2d at 1009-10. The defense’s theory of the case was that the eyewitnesses had misidentified the defendant. *Id.* at 1008-9. Relying on *Groce*, the Massachusetts Supreme Judicial Court reinforced that “there is no rationale for a consciousness of guilt instruction where the only contested issue is identification and there is no dispute that the person fleeing the scene of the crime was the same as the assailant.” *Id.* at 1011. The court noted that “[i]t would have been best had the judge not given the consciousness of guilt charge.” *Id.* The court determined, however, that the instruction was not reversible error in light of the judge’s other comments clarifying the instruction.

In *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 887 (Mass. 2015), eyewitness testimony identified the assailant as the person who had fled after punching the victim. Over defendant’s objection, the court instructed the jury on consciousness of guilt. *Id.* at 888-889. The court explained that, “[u]nder these circumstances, if the jury finds that it was the defendant who fled, the jury will find him guilty, not because flight evidences consciousness of guilt but because flight reveals the defendant to be the assailant.” *Id.* at 888. Indeed, “the risk that a consciousness of guilt instruction might imply that the

defendant was the person who fled outweighed the negligible benefit of instructing the jury that flight may be evidence of consciousness of guilt.” *Id.* at 889. The court determined that, though the giving of the flight instruction was improper, it did not constitute prejudicial error because the evidence of defendant’s guilt was “overwhelming” and the entirety of the trial court’s instructions made it unlikely that the jury believed the judge to be indicating that the defendant was the person who had fled. *Id.* at 889.

Massachusetts courts have also recognized that in cases where identity is an issue and consciousness of guilt evidence consists of flight, independent evidence is required to ensure that the consciousness of guilt instruction would not “convey[] to the jury the notion that the judge believed that it was [the defendant] who fled.” *Commonwealth v. Horsman*, 712 N.E.2d 1152, 1156 (Mass. App. Ct. 1999). In *Horsman*, the court held that the flight instruction was proper, explaining that unlike *Groce*, there was “additional, independent consciousness of guilt evidence – the defendant’s false statement to the police.” *Id.* We note that in *Pina*, decided three months after *Horsman*, there was independent evidence of identification of the defendant by multiple eyewitnesses to the shooting. 717 N.E.2d at 1008-9. *See also Commonwealth v. Vick*, 910 N.E.2d 339, 346 (Mass. 2009) (holding that a consciousness of guilt instruction was proper with respect to the defendant’s alleged flight, even though identity was an issue, where judge provided “well balanced” instruction and there was independent evidence of consciousness of guilt consisting of defendant’s inculpatory statements to police).

The State asserts that a flight instruction is not necessarily improper simply because the identity of the perpetrator is an issue. In *People v. Avila*, 208 P.3d 634, 646-47 (Cal.

2009), *cert. denied*, 558 U.S. 1126 (2010), a case relied upon by the State, the defendant was convicted of multiple murders following a series of brutal knife attacks in a parking lot. On appeal, the Supreme Court of California held that evidence that the perpetrator had fled the scene and police had searched for him unsuccessfully for two years before apprehending him at the airport was sufficient for the trial court to instruct the jury as to whether flight had occurred and the weight, if any, to attribute to the flight. *Id.* at 662. The court, relying on *People v. Mason*, 802 P.2d 950 (Cal. 1991) (en banc), explained that, “a flight instruction does not create an unconstitutional permissive inference or lessen the prosecutor’s burden of proof, and is proper even when identity is at issue.” *Id.*

In *Mason*, the Supreme Court of California had previously rejected the notion that a flight instruction should not be given when identity is an issue. 802 P.2d 950. There, the defendant was convicted of multiple murders which had occurred on separate dates. *Id.* at 953. Approximately four weeks after one of the murders, the defendant escaped from police following a car chase. *Id.* at 956. At trial, the court admitted the evidence of the defendant’s flight from police as evidence of consciousness of guilt. *Id.* at 967-68. On appeal, the defendant challenged the flight instruction, relying on *People v. Anjell*, 100 Cal. App.3d 189 (1979), which had widely been interpreted as stating, in dictum, that a flight instruction is not appropriate where the perpetrator had fled the scene and the identity of the perpetrator is disputed. *Id.* at 969.

The Supreme Court of California clarified that *Anjell* “[did] not stand for such a sweeping proposition” and expressly rejected misapplications of *Anjell* and its progeny as establishing a bright-line rule excluding the use of a flight instruction where identity is an

issue. *Id.* (quoting *People v. Rhodes*, 209 Cal.App.3d 1471, 1475 (1989)). The court further explained that a flight instruction is proper in certain circumstances, even when the defendant’s identity is disputed:

If there is evidence identifying the person who fled as the defendant, and if such evidence “is relied upon as tending to show guilt,” then it is proper to instruct on flight. “The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. The jury’s need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether [the person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving other issues bearing on guilt. The jury needs the instruction for the second step.”

*Id.* (quoting *People v. London*, 206 Cal. App. 3d 896, 903 (1988) (internal citations omitted)).

The State also relies on *Germany v. State*, 999 P.2d 63, 69-70 (Wyo. 2000), in support of its position that a flight instruction is proper even where the identity of the perpetrator is disputed. In *Germany*, the defendant’s ex-wife testified that she and the defendant had burglarized a jewelry store and attempted to flee when police arrived, and though she had been caught by police, the defendant had escaped. *Id.* at 64. At trial, the defendant provided evidence of an alibi in Las Vegas at the time of the burglary and claimed that because his identity as the perpetrator was contested, a flight instruction was improper. *Id.* at 68-9. The appellate court determined that a flight instruction is not necessarily inappropriate because the identity of the perpetrator is contested, where there is evidence identifying the defendant as the perpetrator and the person who fled. *Id.* at 69.

The court reasoned that the jury would “consider the relevance of [the defendant’s] flight only if it first identified him as the person who fled.” *Id.* at 70.

Although the analysis of the appellate courts of the Commonwealth of Massachusetts is compelling and perhaps worthy of consideration, our Court of Appeals has yet to determine that it is reversible error for a trial court to give the flight instruction in a case where the identity of the defendant is contested. We decline to make a contrary decision here. Consistent with the holding in *Wright v. State*, No. 73, September Term 2019, also decided by this Court this term, until the Court of Appeals takes a contrary approach, we determine it is not error for a trial court to give the flight instruction even where the identity of the defendant is at issue.

Here, it was undisputed that the shooter and the person who fled the building were one and the same. The security video showed the suspect pacing in the hallway with a shotgun hours before he ran out the front door while stuffing a gun in his waistband. The sole issue for the jury’s determination was whether Gibson was the suspect on the video. As Gibson admits, the trial court accurately instructed the jury using the approved patterned jury instructions on flight and consciousness of guilt. The flight instruction did not imply to the jury that the court believed that Gibson committed the murder. Indeed, the court avoided telling the jury that the issue of identity was settled. If the jury had concluded that appellant was *not* the person in the surveillance video, it was free to conclude that he had not fled the scene and someone other than him had committed the murder. The court did not err in giving the flight instruction.

## II. The Trial Court Did Not Abuse Its Discretion in Denying the Defense's Request for a Mistrial

Gibson argues that the trial court abused its discretion in denying his motion for a mistrial after Detective Moran identified Gibson as the individual captured on the security video in Smith's building. Gibson argues that whether he was the individual in the video was the central issue in the case, and the prejudicial effect of Detective Moran's testimony could not be cured by a curative instruction. He also contends that Detective Moran's statement constituted inadmissible lay opinion testimony.<sup>3</sup> Gibson asserts that a mistrial was the only way to protect his right to a fair trial.

During Detective Moran's direct testimony, the prosecutor played the security video and questioned him regarding the footage of the suspect:

[PROSECUTOR]: What, if any, investigative value did observing this clip provide you with?

[DETECTIVE MORAN]: Showed *the defendant* with a white tank top, jeans, black and white - -

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: Detective Moran, based on - - based on this clip were you - - aside from looking for a firearm were you looking for any other personal effects that the suspect may have had with him at the time of this incident?

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<sup>3</sup> Gibson states in one sentence of his brief that Detective Moran's statement constituted inadmissible lay opinion testimony. He includes no further argument on the issue. We therefore deem it waived and decline to review it. *Health Svcs. Cost Review Comm'n v. Lutheran Hosp. of Md., Inc.*, 298 Md. 651, 664 (1984) ("This Court has consistently held that a question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review.").

[DETECTIVE MORAN]: I was looking for that baseball bag that the shotgun was removed from.

[DEFENSE COUNSEL]: Your Honor, may we approach, please?

THE COURT: Yes, ma'am.

(Emphasis added). Defense counsel approached the bench and explained to the court that the detective had just testified to the central issue in the case – whether Gibson was the individual seen on the video. The court asked defense counsel if she wanted a curative instruction and she responded that an instruction “might make it worse.” Defense counsel then conferred with Gibson and asked the court for a curative instruction. The State also requested a curative instruction. After conferring with the parties as to the content of the instruction, the court instructed the jury as follows:

THE COURT: Ladies and gentlemen of the jury, after consulting with the attorneys, I have some instructions to give to you. The last two statements by the State's witness will be discarded and stricken. Therefore, you should not consider those statements in any way. The issue of the identity of the person in the video is to be determined solely by the jury.

Following the court's instruction, the State played the remainder of the video and concluded its direct examination of Detective Moran. The defense then cross-examined Detective Moran. At the conclusion of the State's redirect examination, the court adjourned for the day.

The following morning, before the jury was seated, defense counsel requested a mistrial due to the “egregious nature” of Detective Moran's misstatement regarding the video. The court denied the request for a mistrial, explaining that the curative instruction was appropriate and provided at the request of the parties.

We have said that, “the granting of a mistrial is an extraordinary remedy that should only be resorted to under the most compelling of circumstances.” *Molter v. State*, 201 Md. App. 155, 178 (2011). The decision as to whether to grant a mistrial lies within the sound discretion of the trial court. *Winston v. State*, 235 Md. App. 540, 570, *cert. dismissed*, 461 Md. 509 (2018). “Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused, and [i]n order to warrant a mistrial, the prejudice to the accused must be real and substantial.” *Wagner v. State*, 213 Md. App. 419, 462 (2013) (internal quotation marks and citation omitted).

We recognize that the trial court is in a superior position to assess the effect of any improper testimony. *Howard v. State*, 232 Md. App. 125, 161, *cert. denied*, 453 Md. 366 (2017); *accord State v. Hawkins*, 326 Md. 270, 278 (1992). The Court of Appeals has explained the process for determining whether a mistrial is warranted:

When a party makes or introduces an improper statement at trial, “[t]he trial judge must assess the prejudicial impact of the inadmissible evidence and assess whether the prejudice can be cured. If not, a mistrial must be granted. If a curative instruction is given, the instruction must be timely, accurate, and effective.”

*Simmons v. State*, 436 Md. 202, 219 (2013) (quoting *Carter v. State*, 366 Md. 574, 589 (2001)). We focus our review on “the key question[,] ... whether the defendant was so prejudiced by the improper reference that he was deprived of a fair trial.” *Howard*, 232 Md. App. at 161 (quoting *Parker v. State*, 189 Md. App. 474, 494 (2009)); *accord Kosh v. State*, 382 Md. 218, 226 (2004).

In evaluating whether a defendant was prejudiced and whether a mistrial was warranted, we consider the following factors: (1) “whether the reference to the inadmissible

evidence was repeated or whether it was a single, isolated statement”; (2) “whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement”; (3) “whether the witness making the reference is the principal witness upon which the entire prosecution depends”; (4) “the timeliness of the curative instruction”; and (5) “whether a great deal of other evidence exists.” *McIntyre v. State*, 168 Md. App. 504, 524-25 (2006).

In analyzing the relevant factors in the context of this case, we note that Detective Moran’s statement was a single, isolated incident and the prosecutor did not refer to the detective’s improper identification of Gibson during the remainder of the trial or closing argument. *See Carter*, 80 Md. App. at 691-92 (holding that a police officer’s isolated reference to the defendant’s previous arrest in another jurisdiction did not warrant a mistrial where the prosecutor did not elicit the statement or refer to it during the remainder of the trial, and a sufficient curative instruction was given). Though Detective Moran was the lead investigator in the case, he was not the State’s principal witness. The State’s primary evidence was the video itself. The State also relied on Richardson’s and Ebron’s identifications of Gibson, their testimony that they recognized Gibson from their previous observations of him in the building, and their interactions with him on the day of the murder.

Moreover, the trial court acted promptly in sustaining the defense’s objection and granting the defense’s request for a curative instruction. The court then instructed the jury to disregard the detective’s misstatement and reminded them that the identity of the person in the video was to be determined solely by them. Generally, cautionary instructions are deemed to cure most errors and jurors are presumed to follow the instructions provided by

the trial judge. *Carter*, 366 Md. at 592. *Accord Jones v. State*, 217 Md. App. 676, 697-98 (2014) (quoting *Spain v. State*, 386 Md. 145, 160 (2005)) (“Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury’s part to the contrary.”); *see also Drake v. State*, 186 Md. App. 570, 589-90 (2009) (concluding that the trial court’s curative instruction, given on the following morning after the alleged error occurred, was sufficient to cure any possible prejudice to the defendants), *rev’d on other grounds*, 414 Md. 726 (2010).

Assessing the record before us and the prompt curative instruction given, we are not persuaded that Detective Moran’s testimony resulted in unfair prejudice to Gibson that deprived him of a fair trial. Accordingly, we find no abuse of discretion in the trial court’s denial of Gibson’s motion for mistrial.

### **III. The Evidence Was Sufficient to Sustain Gibson’s Convictions**

Gibson argues that the evidence was insufficient to support his convictions. Specifically, he contends that the State produced no physical evidence or eye-witnesses testimony connecting him to the murder, not was there any evidence of any motive for the murder. Gibson contends that because the testimony of Richardson was unreliable, and the video surveillance footage was inconclusive, the jury was forced to resort to speculation to reach its verdict.

“When reviewing the sufficiency of evidence, we view the evidence and any reasonable inferences therefrom in the light most favorable to the State and determine whether ‘any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.” *Sewell v. State*, 239 Md. App. 571, 607 (2018) (quoting *Donati v. State*, 215 Md. App. 686, 718 (2014)). This standard “applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone.” *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). “Circumstantial evidence may support a conviction if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture, but circumstantial evidence which merely arouses suspicion or leaves room for conjecture is obviously insufficient.” *Id.* (quotation marks and citations omitted).

We defer to “any reasonable inferences” the jury could have drawn in reaching the verdict. *Redkovsky v. State*, 240 Md. App. 252, 263 (2019). “Our role is not to retry the case: [b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.” *Nicholson v. State*, 239 Md. App. 228, 252 (2018), *cert. denied*, 462 Md. 576 (2019) (quotation marks and citation omitted). Nor do we weigh the evidence to determine whether the State has proved its case beyond a reasonable doubt, but rather, we ascertain only whether there is any relevant evidence sufficient to support the conviction. *Lindsey v. State*, 235 Md. App. 299, 311, *cert. denied*, 458 Md. 593 (2018).

Our review of the record, in the light most favorable to the State, reveals that a rational trier of fact could conclude that Gibson was the person who shot Smith. Richardson and Ebron recalled seeing Gibson in the hallway of the building on the day of the murder and both identified Gibson on the security footage for that day. The jury could

reasonably infer that the individual whom Richardson and Ebron identified on the video was the same person captured on the video pacing in the hallway with a shotgun and, later in the video, running down the hallway while shoving a gun into his waistband. Gibson’s challenges to the significance of the video footage and the inconsistencies in the identifications of Richardson and Ebron went to the weight and credibility of the evidence, not the sufficiency of the evidence. *See Correll v. State*, 215 Md. App. 483, 502 (2013) (explaining that “it is the jury’s task to resolve any conflicts in the evidence and assess the credibility of witnesses.”) (quotation marks and citation omitted).

Moreover, Gibson’s argument that the evidence was insufficient to support his convictions because the State failed to establish evidence of a motive is without merit. The State was not required to prove that Gibson had a motive for killing Smith, only that he had the specific intent to kill him. “Our courts have held that a jury is justified in finding that a defendant had a specific purpose to kill when he shot the victim several times at point blank range.” *Anderson v. State*, 227 Md. App. 329, 347-48 (2016) (holding that evidence that the defendant shot the victim in the face from a close distance was sufficient to support a conviction for attempted first-degree murder) (citation and footnote omitted); *accord Cummings v. State*, 223 Md. 606, 611-12 (1960) (holding that the defendant had “a specific purpose and design to kill” where “he shot the deceased seven times with a deadly weapon at point-blank range”). In this case, the evidence that the barrel of the gun was pressed to Smith’s face and a shot was fired, killing him instantly, was sufficient to establish that Gibson had the requisite intent to kill Smith.

We conclude that there was sufficient evidence from which the jury could have concluded that Gibson was guilty of first-degree murder and use of a firearm in the commission of a crime of violence.

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