

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1104

September Term, 2014

ANTHONY DESHIELDS

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: July 31, 2015

*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.

On February 10, 2014, appellant, Anthony Deshields, was indicted for distribution of narcotics and possession of controlled dangerous substances (not marijuana). He was tried before a jury in the Circuit Court for Wicomico County on June 17, 2014, which found him guilty of possession and distribution of cocaine. The court sentenced Deshields to eighteen years' incarceration. This appeal followed.

On appeal, Deshields asks whether the circuit court erred in permitting testimony from two undercover police officers, when their testimony was offered to identify Deshields and to narrate a video as lay opinions as to what the video depicted, in violation of Md. Rule 5-701.¹ For the following reasons, we find no error and affirm the court's decision.

Facts

On October 16, 2013, the Salisbury Police Department conducted a series of operations in which they attempted to purchase controlled dangerous substances from suspected drug dealers. During one such operation, three undercover police officers, disguised as construction workers, sat in an unmarked car. After exiting the car, they approached Deshields, who was wearing a basketball jersey, and solicited him for drugs. Deshields sold the officers cocaine in exchange for \$40.00 currency. The undercover officers captured the event in an audio-video recording. After the transaction, the officers

¹ In his brief, Deshields phrased the question as :

Where undercover officers covertly videotaped a drug transaction, did the trial court abuse its discretion by permitting two of these officers to identify Mr. Deshields as the drug dealer on the video and also to narrate what took place on this videotape?

drove away and radioed uniformed police officers – giving a description of Deshields so that he could be apprehended.

At trial, the State called two of the undercover officers, Corporal Brooks Phillips and Detective Jeffrey Johns, to testify regarding their involvement in the transaction. During Cpl. Phillips’s testimony, the State played the audio and video recording for the jury. Cpl. Phillips identified Deshields as the subject of the video recording. Over Deshields’s objection, Cpl. Phillips proceeded to narrate the video recording to the jury. Describing the video, he stated that “[u]p to this point we approach the Defendant. The Defendant and Detective Johns had a short conversation during which the Defendant agreed to sell Detective Johns crack cocaine.” In response to what he observed, Cpl. Phillips explained, “I observed the Defendant hand Detective Johns crack cocaine. Detective Johns then handed the Defendant U.S. currency and we began slowly creeping down the road and the Defendant was standing next to Detective Johns trying to get Detective Johns to smoke the crack cocaine.”

Det. Johns was called to the stand. During Det. Johns’s testimony, he also narrated the audio recording for the jury. Over Deshields’s objection, Det. Johns stated:

[D]o you know where I can get a 40, you know where I can get a 40. What do you need? A 40. Yeah, I got you right here. He specifically said I got some preem, this is all slang term for the reference of crack cocaine. \$40 is a common denomination for an amount of crack cocaine sold on the street. When he refers to it as preem I know that he’s referring to it as premium, like high quality. He had it in his hands. Right about where he stops is where he actually displays to me the crack cocaine in his hand and I’m giving him the \$40 in U.S. currency.

Det. Johns also identified Deshields as the person who sold him cocaine that day.

After deliberating for nine minutes, the jury returned a guilty verdict on both counts. After a brief sentencing hearing, the circuit court sentenced Deshields to eighteen years' incarceration for distribution (with the possession count merging into it).

Additional facts are included below where relevant.

Discussion

On appeal, Deshields contends that Cpl. Phillips and Det. Johns should not have been permitted to narrate the video recording for the jury. The State responds that this issue is not properly before this Court because it was not preserved. We disagree. Regardless, because of the absence of a complete record, and the fact that the circuit court properly exercised its discretion by admitting the testimony, Deshields's argument has no merit.

As stated above, the question Deshields raises on appeal is properly before this court because the issue has not been waived. Md. Rule 8-131(a), in pertinent part, provides:

Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Further, we have held that “[w]here a party asserts specific grounds for an objection, all other grounds not specified by the party are waived.” *Webster v. State*, 221 Md. App. 100, 111 (2015) (quoting *Thomas v. State*, 183 Md. App. 152, 177 (2008)) (alteration in original); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011) (“when an objector sets forth the specific grounds for his objection . . . the objector will be bound by

those grounds and will ordinarily be deemed to have waived other grounds not specified”) (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004)) (alteration in original); *Klaunberg v. State*, 355 Md. 528, 541 (1999) (“It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal”) (citations omitted). A reviewing court can look at the context of the objection to determine the nature of the objection. *See Phillips v. State*, 425 Md. 210, 217 (2012) (reviewing the context of an objection to determine whether the issue raised on appeal was preserved).

Based on our review of the record, the specific grounds on which Deshields objected does not preclude our review of the issue raised on appeal. During Cpl. Phillips’s testimony, the following ensued:

(Playing DVD).

[STATE’S ATTORNEY]: What are we looking at, [Cpl. Phillips]?

[DEFENSE ATTORNEY]: Object.

THE COURT: Overruled.

[CORPORAL PHILLIPS]: This is the video that I took on October 16th during which the Defendant sold Detective Johns –

[DEFENSE ATTORNEY]: I would object.

THE COURT: Overruled.

[DEFENSE ATTORNEY]: The contents of the video speak for themselves. This officer is narrating the video.

THE COURT: Yeah, the video speaks for itself. He can testify to what he did himself and what he saw himself.

[STATE'S ATTORNEY]: I think relevant evidence is anything that helps the jury to understand what's happening.

[DEFENSE ATTORNEY]: And I submit him narrating what's occurring, the jury can see it.

THE COURT: He can narrate if he was there personally, he's subject to cross-examination.

[DEFENSE ATTORNEY]: Will the Court grant me a continuing objection?

THE COURT: All right, noted.

* * *

[STATE'S ATTORNEY]: Is the individual captured in this photograph the same individual that sits in the courtroom today to the left of counsel?

[DEFENSE ATTORNEY]: Object.

[CORPORAL PHILLIPS]: Yes, he is.

[DEFENSE ATTORNEY]: His opinion of the video doesn't matter at this juncture, it's the jury's opinion.

[STATE'S ATTORNEY]: Is the individual that you observed with your own two eyes at the car window at this point the same individual that's in the courtroom today?

[CORPORAL PHILLIPS]: Yes, sir, he is.

THE COURT: Overrule the objection.

Deshields also objected to Det. Johns's narration of the video. During Det. Johns's testimony, the following ensued:

[DETECTIVE JOHNS]: Do you want me to narrate now?

[STATE’S ATTORNEY]: I’ll stop [the video].

[DEFENSE ATTORNEY]: Object to the narration.

THE COURT: You have a continuing objection.

The continuing objection asked for and received was based on the initial objection, that “the contents [of the video] speak for themselves” and “the jury can see it.” The circuit court overruled the objection, stating that the witnesses could narrate the video because they were there, personally, and were subject to cross-examination.

Plainly, evaluating the entire context of the exchange, the specific objection raised at trial is no different from the one raised on appeal. The statement “the contents of the video speak for themselves” and “the jury can see it” can be interpreted as the testimony would not be “helpful to the jury.” Therefore, this issue was properly preserved.

Deshields, however, has failed to provide a complete record on the issue raised.

Md. Rule 8-411(a), in pertinent part, states:

Unless a copy of the transcript is already on file, the appellant shall order in writing from the court reporter a transcript containing: . . . a transcription of . . . all the testimony . . . and . . . if relevant to the appeal and in the absence of a written stipulation by all parties to the contents of the recording, a transcription of any audio or audiovisual recording or portion thereof offered or used at a hearing or trial.

Md. Rule 8-413(a), in turn, states that “[t]he record on appeal shall include . . . the transcript required by Md. Rule 8-411[.]” Further, Md. Rule 8-602(a) provides that “[o]n motion or on its own initiative, the Court may dismiss an appeal for any of the following reasons: . . . the contents of the record do not comply with Rule 8-413[.]”

A transcript of the audio contained in the video recording is, notably, missing from the record. As set out in Md. Rule 8-411(a), it was Deshields’s responsibility to provide us with that transcript. Failure to provide that transcript violates Md. Rule 8-602(a)(6), alone warranting dismissal of Deshields’s claim.

Putting the above deficiency aside, we conclude that the circuit court exercised sound discretion when it allowed Cpl. Phillips and Det. Johns to narrate portions of the video recording and to identify Deshields as the person depicted in the recording. It is ordinarily within the sound discretion of the trial court to determine the admissibility of evidence. Md. Rule 5-104(a) (“[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court”); *see also Moreland v. State*, 207 Md. App. 563, 568 (2012). A trial court’s evidentiary ruling will not be disturbed absent error or a clear abuse of discretion. *Moreland*, 207 Md. App. at 568-69 (citing *Decker v. State*, 408 Md. 631, 649 (2009)). We review it under an abuse of discretion standard, and we will not reverse “simply because [we] would not have made the same ruling.” *DeLeon v. State*, 407 Md. 16, 21 (2008) (citation omitted). Rather, to constitute an abuse of discretion, the decision “has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.” *Id.* (citation omitted).

It is pellucid that Cpl. Phillips’s and Det. Johns’s testimony was offered as lay opinion testimony. Generally, lay opinion testimony is admissible under Md. Rule 5-701, which states:

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.

We have held that “[t]he two requirements in Rule 5-701 for the admissibility of lay opinions are conjunctive. Thus, a lay opinion must be based on the perceptions of the witness and must be helpful to the trier of fact.” *Goren v. U.S. Fire Ins. Co.*, 113 Md. App. 674, 686 (1997) (emphasis omitted). Cpl. Phillips's and Det. Johns's testimonies satisfy the first requirement of Md. Rule 5-701 because they were present during the drug transaction. Deshields focuses on the second requirement of Md. Rule 5-701 contending that their testimony was not “helpful” to the jury. We disagree.

Deshields points to several cases in his attempt to illustrate why the officers' testimonies were not helpful. Each case he cites does not support his argument. In *Moreland*, we decided that the lay witness testimony of a *non-eyewitness* police officer was “helpful” to the jury, and therefore admissible, because the officer had sufficient “substantial familiarity” with the defendant. *See Moreland*, 207 Md. App. at 573 (“Owens had substantial familiarity with the appellant and intimate knowledge of his appearance prior to the time of the robbery, having known him for 40 to 45 years. That long-term relationship made Owens better able to identify the appellant in the video recording and still photographs than the jurors would be.”).

In *Moreland*, we examined *Robinson v. Colorado*, 927 P.2d 381 (Colo. 1996) (*en banc*), and adopted the reasoning from that case. *Moreland*, 207 Md. App. at 571-73. The *Robinson* Court also examined the admissibility of lay witness testimony of a *non-*

eyewitness, determining that the witness’s testimony was “helpful,” and therefore admissible, because the witness had a previous “face-to-face” encounter with the defendant. *Robinson*, 927 P.2d at 384. Ultimately, the *Robinson* Court concluded that “[a]lthough [the witness] was not intimately familiar with [the defendant], his personal familiarity was sufficient to be helpful to the jury.” *Id.* (citation omitted).

While the facts here are slightly different, the reasoning of *Moreland* and *Robinson* remains sound. Although Cpl. Phillips and Det. Johns did not have an “intimate familiarity” with Deshields, their “personal familiarity” was sufficient to be helpful to the jury. That the officers were present during the transaction cannot be denied. The two officers captured the footage on the audio-video recording device *themselves*. It would be folly to forbid a witness from testifying as to her personal experience merely because a video is also present. *See Robinson v. State*, 348 Md. 104, 120 (1997) (“To restrict such testimony to underlying factual observations would [] deprive the trier of fact of the necessary benefit of the percipient mind’s prior experiences.”).

Further, any lack of an intimate familiarity with Deshields, while going to the weight of the officers’ lay opinion testimonies, does not bear on admissibility. *See Moreland*, 207 Md. App. at 573; *Robinson*, 927 P.2d at 384. Cpl. Phillips’s and Det. Johns’s lay opinion testimonies, in this case, were helpful to the jury. Therefore, we hold that the circuit court did not abuse its discretion in its admission.

**JUDGMENT OF THE CIRCUIT COURT
FOR WICOMICO COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**