

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1604

September Term, 2014

KEVIN CORNNELL PRESCO

v.

STATE OF MARYLAND

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

JJ.

Opinion by Wright, J.

Filed: July 8, 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.

Appellant, Kevin Cornell Presco, was tried before a jury in the Circuit Court for Worcester County. On June 12, 2014, he was found guilty of robbery, second-degree assault, and theft. On September 5, 2014, the court sentenced Presco to twenty-five years' incarceration, to be served without the possibility of parole. This appeal followed.

Presco asks whether the circuit court erred in permitting a witness to testify that an otherwise unidentifiable person in a surveillance video was Presco. For the following reasons, we find no error and affirm the circuit court's decision.

Facts

On October 22, 2013, a man wearing a gray sweater and a ski mask robbed the Duck In, a convenience store in Pocomoke City, Maryland. Two employees, Leslie McCabe and Presco's wife, Leslie Presco, were present at the time of the robbery. The robber made Mrs. Presco open a cash register dedicated to lottery sales. All told, the robber left the scene with approximately \$3,761.00. The entire incident was captured on the store's surveillance cameras. Shortly after the robbery, Presco arrived at the Duck In to pick up his wife, at which point he was apprehended by the police.

At trial, the State attempted to identify the robber as Presco by offering the testimony of McCabe and Lieutenant Lynell Green, an officer of the Pocomoke City Police Department. During McCabe's testimony, she described the robber as "completely covered up" to the point where she "couldn't even have told you his skin color." Notwithstanding his attempted disguise, McCabe also described Presco as tall, stating that he was "very tall compared to most of our customers."

Lt. Green testified that he was familiar with Presco because the two “saw each other frequently,” they “had brief conversations” in the past, and that they “had a good rapport.” After reviewing the surveillance video, over Presco’s objection, Lt. Green testified that he believed “[i]n [his] heart” that Presco was the robber.

The State also entered into evidence two photographs to identify Presco as the robber. One photograph, taken from the surveillance footage, depicts the left hand and wrist of the robber. The other photograph, taken by the police after Presco was in custody, depicts Presco holding up his left hand to reveal a tattoo on his hand and wrist. In addition, the State entered a stipulation into evidence that, if called to testify, a forensic video technician would testify that she compared these two photographs, that “the dark mark visible on the suspect’s left outer forearm is consistently observed throughout several frames of the video,” and that “the dark mark visible on the suspect’s left outer forearm is consistent with the location of the tattoo on the known still image of Presco.”

In defense, Presco called his wife, Mrs. Presco, to testify. She stated that the robber was not familiar to her and was not her husband.

Based on the evidence before it, the jury convicted Presco of robbery, second-degree assault, and theft.

Discussion

As an initial matter, the State argues that Presco waived his right to appeal as to the admission of Lt. Green’s testimony, noting that Detective Jason Burnett provided similar, if not the same, testimony without objection as follows:

[PROSECUTOR]: And when you first arrived, do you remember what you initially observed?

[DET. BURNETT]: As I was getting out of my vehicle, I observed the defendant, Mr. Presco, being placed in the rear of a Pocomoke City police car.

[PROSECUTOR]: And did you at that time speak to anyone about the fact that he had been detained?

[DET. BURNETT]: **I spoke to several of the officers on scene including Lieutenant Green and Officer Tucker who advised that they had witnessed the surveillance video and Mr. Presco matched the description of the subject.**

(Emphasis added).

“Where competent evidence of a matter is received, no prejudice is sustained where other objected evidence of the same matter is also received.” *Jones v. State*, 310 Md. 569, 589 (1987) (citations omitted), *vacated on other grounds*, 486 U.S. 1050 (1988). *See also Berry v. State*, 155 Md. App. 144, 170 (2004). “We shall not find reversible error when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection” *Berry*, 155 Md. App. at 170 (citations omitted). Thus, we agree with the State that Presco’s claim is not properly before us.

Even if preserved, however, Presco’s argument has no merit. Presco challenges the admissibility of Lt. Green’s lay person testimony that the robber in the surveillance video was Presco. Specifically, Presco argues that his relationship with Lt. Green lacked the requisite “substantial familiarity” to be “helpful” to the jury, and that Lt. Green should not have been permitted to “opine that the [robber] was Presco merely because he had similar

mannerisms and physique.” We disagree. We believe that Lt. Green had a sufficient “substantial familiarity” with Presco, and that Lt. Green’s familiarity with Presco’s mannerisms and physique placed him in a unique position to be “helpful” to the jury.

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.

Both Presco and the State agree that Lt. Green’s testimony was lay opinion testimony. Nonetheless, Presco challenges its admissibility.

First, based on the facts of this case, the strength of Lt. Green’s relationship with Presco was a matter for the jury to weigh; it had no bearing on admissibility. *See Moreland*, 207 Md. App. at 445 (“several jurisdictions agree that whether a lay witness’[s] prior contacts with the defendant are extensive enough to permit a proper identification is a matter of weight for the jury, not admissibility”) (citing *Robinson v. Colorado*, 927 P.2d 381, 383 (Colo. 1996)). At trial, Lt. Green offered his lay opinion testimony that the robber was Presco. Subsequently, Mrs. Presco offered her testimony that the robber was not her husband. We must assume that because the jury convicted Presco, the jury found Lt. Green to be more credible than Presco’s wife.

Second, even if Presco had presented a question about admissibility, his argument still fails. Ordinarily, the admissibility of evidence is placed within the sound discretion of the trial court. Md. Rule 5-104(a) (“[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court”); *Moreland v. State*, 207

Md. App. 563, 568 (2012) (citations omitted). A trial court’s evidentiary ruling will remain undisturbed 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.” *Moreland*, 207 Md. App. at 568-69 (citing *Decker v. State*, 408 Md. 631, 649 (2009)). A trial court has abused its discretion when its decision is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.” *Id.* (citing *Gray v. State*, 388 Md. 366, 383 (2005)).

The decision to admit Lt. Green’s lay opinion testimony, as to his belief that Presco was the robber in the surveillance video, is within the realm of what this Court considers to be “minimally acceptable.” In overruling Presco’s objection at trial, the circuit court explained, “[w]ell this isn’t the opinion of the masses. This is an opinion of somebody who said that he saw the defendant frequently and was familiar with his physique and other attributes.” The decision to admit lay person opinion testimony as to the identity of the subject in a surveillance video is squarely within the prerogative of the trial judge, and, in this instance, an exercise of sound discretion.

Further, Presco could not point to a “specific rule or principle of law” that would bar admission of Lt. Green’s testimony. Presco attempts to do so by distinguishing the instant case with the facts and circumstances in the *Moreland* case. However, the two cases are not inconsistent, and, in fact, the *Moreland* case supports the circuit court’s ruling.

In *Moreland*, a surveillance camera captured the footage of a bank robbery. At trial, several witnesses, including bank employees, were called to testify as to the events of the robbery. Each witness identified the appellant as one of the robbers. Further evidence was

provided to identify the appellant as one of the robbers. A police officer, who was not involved in the investigation of the robbery, testified that “he ha[d] known the appellant . . . for 40 to 45 years,” that they “grew up and went to school together,” and “[a]lthough [the police officer] is not related to the appellant by blood, he refers to the appellant as his ‘cousin.’” *Moreland*, 207 Md. App. at 567. The police officer then identified the individual depicted in a still photograph of the surveillance footage as the appellant.

Presco avers that Lt. Green lacked the “substantial familiarity” with him sufficient to warrant lay opinion testimony that the robber was Presco. In the *Moreland* case, the police officer who testified as to the identity of the defendant had a “long-term relationship” with the defendant. *Moreland*, 207 Md. App. at 573. In the instant case, Lt. Green testified that he had “a good rapport” with Presco because of their “brief conversations” about their mutual interests in starting a mentor program. Lt. Green also testified that he saw Presco “frequently.”

In *Moreland*, we determined that the long-term relationship made the police officer “better able to identify the appellant in the video recording and still photographs than the jurors would be.” *Id.* In the instant case, Lt. Green’s prior sightings of Presco made him better able to identify Presco in the video than the jurors. Lt. Green’s testimony was rationally based on his own perception of Presco from his previous encounters. He described Presco as “a pretty tall young man” with a unique physique. Lt. Green stated:

He looked like he worked out a lot. And he was always on a bike. When I saw him he was riding a bike. And he’s – he has a – unique because he’s, like – he’s, like, over 6’3’’, 6’4’’, approximately 270 [pounds]. And most guys I came in contact with in Pocomoke, either they was [sic] tall and skinny but the head wasn’t proportion [sic] to their body.

A lay witness offering his opinion on the identity of a suspect in a surveillance video must have a “substantial familiarity” with the defendant in order to be “helpful” to the jury. Lt. Green’s relationship with Presco placed him in a better position than the jury to identify the robber because of his familiarity with Presco’s physique.

The circuit court exercised sound discretion in admitting Lt. Green’s testimony. Therefore, for the reasons above, we affirm the circuit court’s judgment.

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