UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1665

September Term, 2015

KAREN M. MURPHY

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Reed, J.

Filed: March 20, 2017

A jury in the Circuit Court for Baltimore City convicted Karen M. Murphy of three counts of second degree assault and one count of conspiracy to assault. The Honorable Martin P. Welch sentenced Ms. Murphy to five years' imprisonment, all but one year suspended, with two years of supervised probation upon release. Ms. Murphy subsequently noted a timely appeal, presenting the following two questions for our review:

1. Was it error to instruct the jury on flight?
2. Was the evidence sufficient to sustain the convictions?

For the following reasons, we answer the first question in the negative and the second question in the affirmative. Therefore, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On June 6, 2014, Kristina Gibson, her boyfriend Christopher Fisher, and their nine-year-old son Logan boarded an "overcrowded" MTA bus driven by appellant, Karen Murphy. Ms. Gibson did not want to pay fare for her son, but appellant stated that payment was required for all. As the bus ride continued, appellant heard Mr. Fisher complain about her driving, stating "She about to throw me through the window."

When the bus began to fill, appellant instructed Fisher and Gibson to "move to the back of the bus" to make room for the additional passengers. At this point, Mr. Gibson and appellant became involved in a verbal altercation, beginning with Mr. Gibson allegedly calling appellant a "bitch." Appellant told Mr. Fisher not to tell her how to do her job, and

dared him to cross the bus' yellow line to confront her. At this point, Ms. Gibson told her boyfriend to stop talking and to "just get the bus number."

Two stops later, a number of teens boarded the bus. According to Ms. Gibson, appellant was overheard saying "I don't care where the 'F' they get off. You get off and you take care of that, and I'll wait for you." Two of the teens were heard yelling "We're going to 'F' these crackers up. We got this when they get off." Hearing this, Mr. Fisher called a friend to meet them at the stop for help.

While disembarking from the bus, Mr. Fisher, Ms. Gibson, and their son were assaulted by the teens. According to Ms. Gibson, appellant screamed "that's what you get," at the victims and allegedly waited for the attackers, saying "Hurry up! Let's go." Once the teens re-boarded the bus, appellant left the scene and continued on her route. Mr. Fisher, Ms. Gibson, and their son Logan suffered severe physical and emotional injuries as a result of this incident. Appellant denies encouraging the teens to attack anyone.

At trial, after defense counsel objected to its reading, the judge instructed the jury as to the legal significance on "flight of the defendant." That flight instruction, from the Maryland Criminal Pattern Jury Instruction ("MPJI-Cr"), reads as follows:

> A person's flight immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstance 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 there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

MPJI-Cr 3:24.

Defense counsel made another unsuccessful objection after the instruction was read, arguing that appellant's actions did not constitute flight because her job required her to continue on her scheduled bus route. The jury returned a verdict in favor of the prosecution, finding appellant guilty on three counts of second degree assault and one count of conspiracy to assault. This appeal followed.

DISCUSSION

JURY INSTRUCTIONS

A. Parties' Contentions

Appellant asserts the trial judge erred when instructing the jury on "flight of the defendant." Principally, appellant argues that "[w]here the circumstances of one's leaving the scene are otherwise explained, that is mere 'departure,' not flight, and 'flight' instructions are inappropriate." Appellant's Br. at 7-8 (quoting *State v. Shim*, 418 Md. 37, 58-59 (2011). Appellant relies on our decision in *Hoerauf v. State*, which established the following standard for distinguishing between a mere departure and flight:

> We believe the proper rule to be that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

178 Md. App. 292, at 324-25 (2008).

Employing this distinction, appellant argues that her "leaving" can be explained by her need to continue driving her bus along the required route, rather than fleeing from

apprehension. Using this logic, appellant attempts to analogize this situation to previous cases before the Court of Appeals. Specifically, in *State v. Shim*, the Court of Appeals held that the "evidence demonstrated only that the shooter left the . . . facility after the shooting [but] . . . [t]here was no evidence that the shooter fled." 418 Md. at 58. Because of this lack of evidence, the Court of Appeals held that the trial court abused its discretion in giving the flight instruction. *Id.* Appellant also cites *Thompson v. State* to further argue that the existence of an alternative explanation for a defendant's departure does not warrant a flight instruction. *See* 393 Md. 291 (2006). Appellant points to numerous authorities from other jurisdictions that forbid a flight instruction if the circumstances of the departure can otherwise be explained. Thus, because her departure can otherwise be explained by her need to continue along her route, appellant asserts the trial court committed a prejudicial error when it read a flight instruction to the jury.

Conversely, the State contends that the trial court did not abuse its discretion when it instructed the jury on flight of the defendant. The State argues that a requested instruction is to be given if "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given." Appellee's Br. at 3 (quoting *Thompson*, 393 Md. at 302). Addressing the first and third of these factors, the State asserts that the pattern instruction on flight is a correct statement of Maryland law and was not covered by other jury instructions.

Regarding the second factor, the State argues that the facts of the case are sufficient to meet the "low" threshold for the giving of the flight instruction. Appellee's Br. at 4 (quoting *Page v. State*, 222 Md. App. 648, 668 (2015)). Again citing *Thompson*, the State asserts that in order to warrant a flight instruction, "the evidence must provide the basis for drawing four inferences: '(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to the actual guilt of the crime charged.'" Appellee's Br. at 5 (quoting 393 Md. at 312 (quoting *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977))). Taking the witness testimony together with the video evidence, the State contends, these inferential requirements are satisfied and the low legal threshold needed to warrant a flight instruction has been met. Because the evidence showed that appellant encouraged the attack on the three victims and waited for the attackers to re-board the bus after the assault, the State argues that appellant's leaving could reasonably have been viewed as flight.

Further, the State asserts that appellant's leaving demonstrated "a consciousness of guilt . . . pursuant to an effort to avoid apprehension or prosecution based on that guilt." Appellee's Br. at 8 (quoting *Page*, 222 Md. App. at 669-70). As evidenced by her failure to put her seatbelt on and calling the students to hurry, the State argues that a reasonable inference is that appellant was in a rush to leave before the authorities arrived. Because some evidence exists pointing to flight, according to the State, the cases cited by appellant are distinguishable from the case at bar. Those cases, the State points out, lack additional

evidence that would allow inferences of consciousness of guilt to be made. Therefore, the State concludes that the trial court did not abuse its discretion when it gave a flight instruction to the jury.

Finally, assuming, *arguendo*, that the trial court did err in generating the flight instruction, the State asserts that the harmless error doctrine applies. The State argues that because of the "overwhelming direct evidence of [appellant]'s guilt," and because the State did not highlight the flight instruction in its closing argument, any error that might have been committed was harmless. Appellee's Br. at 12.

B. Standard of Review

This Court has recently articulated the appropriate standard of review for determining the propriety of a jury instruction:

> Generally, "[w]e review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *Thompson v. State*, 393 Md. 291, 311, 901 A.2d 208 (2006) (citations omitted). . . . "A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State*, 426 Md. 541, 550, 45 A.3d 166 (2012). This preliminary determination "'is a question of law for the judge[,]'" and on appellate review, we must determine whether the requesting party "'produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Id.* (quoting *Dishman v. State*, 352 Md. 279, 292-93, 721 A.2d 699 (1998)). This threshold is low, in that the requesting party must only produce "some evidence" to support the requested instruction. *Id.* at 551, 45 A.3d 166 (citing *Dykes v. State*, 319 Md. 206, 216, 571 A.2d 1251 (1990)).

Page, 222 Md. App. at 668.

C. Analysis

Maryland Rule 4-325 sets forth the procedural requirements for when and how a jury instruction is required to be given. "The Court of Appeals has interpreted this rule as requiring a court 'to give a requested instruction under the following circumstances: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.'" *Page*, 222 Md. App. at 668 (quoting *Ware v. State*, 348 Md. 19, 58 (1997)). Appellant disputes the second requirement articulated by the Court of Appeals. Because we believe the flight instruction was generated from the facts of the case, we disagree with appellant and shall affirm the decision of the circuit court.

Flight instructions have been consistently upheld as correct statements of Maryland law. *See Thompson*, 393 Md. at 304-06. Additionally, the flight instruction would not have been adequately covered by any other jury instruction. Thus, we must determine only whether "the requested instruction is applicable under the facts of the case." *Page*, 222 Md. App. at 668.

The Court of Appeals, adopting the four-prong test from the United States Court of Appeals for the Fifth Circuit, has held that a flight instruction is proper if the following four inferences can be drawn from the facts of the case: "the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged . . . and that the consciousness of guilt of the crime

charged suggests actual guilt of the crime charged." *Thompson*, 393 Md. at 312. *See United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977). "[W]hen a flight instruction is not generated by the facts of the case," however, "the instruction should not be given." *Hoerauf*, 178 Md. App. at 326.

Appellant argues that her need to continue along her bus route explains her departure, thus barring the availability of a flight instruction. In *Hoerauf*, we held that "there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt." 178 Md. App. at 325-25. Appellant cites *State v. Shim*, in which the defendant simply left the scene of a shooting, without any evidence to raise the leaving to a flight. 418 Md. at 58-59. However, in the present case, "some evidence" does exist indicating flight, diminishing the value of *Shim*'s reasoning. *Page*, 222 Md. App. at 668. Testimony at trial supports the notion that appellant encouraged the teenage attackers to "hurry up" and "get back on the bus." Additionally, appellant forgot to put her seatbelt back on, in violation of MTA policy. Because of these two pieces of circumstantial evidence, *Shim* is distinguishable from the case at bar.

Appellant also contends that the Court of Appeals' decision in *Thompson* supports her argument. In that case, the defendant claimed to have fled police because he was in possession of drugs, not because he had just committed the shooting for which he was convicted. *Id.* The Court of Appeals ruled that the flight instruction constituted error

because, given the defendant's drug possession, it prejudiced the jury against him. *Id.* However, the Court explained that "[w]here the defendant possesses an innocent explanation that does not risk prejudicing the jury against him, it would be expected that the defendant would present his purported reasons for his flight to the jury." *Id*. at 315. After all, "[t]he language of the [flight] instruction leaves it to the jury to first decide whether there is evidence of flight. Only then is the jury instructed to decide whether the evidence of flight shows a consciousness of guilt." *Hoerauf*, 178 Md. App. at 326. In the present case, appellant clearly possesses an innocent explanation for her departure, namely her need to continue along her bus route. After hearing both innocent and incriminating explanations, it is the role of the jury to determine which scenario is applicable under the facts of the case. Given the existence of some evidence indicating flight and the presence of a possible innocent explanation, the trial court correctly instructed the jury on flight of the defendant, thus allowing them to make the required factual determination.

Furthermore, the four inferences of *Myers*, which were adopted by the Court of Appeals in *Thomas v. State*, 372 Md. 342 (2002), can reasonably be drawn when viewing the facts "in the light most favorable to the requesting party, here being the State." *Page*, 222 Md. App. at 668 (citing *Hoerauf*, 178 Md. App. at 326). First, the behavior of appellant during and after the altercation allows a reasonable person to infer flight. By staying at the stop longer than usual, encouraging the attackers to quickly get back on the bus, and failing to re-seatbelt herself, a jury could reasonably infer appellant's behavior exhibited flight rather than simple departure. Second, the evidence supports a connection between flight

and consciousness of guilt, as appellant served as the "getaway driver" for the attackers. A reasonable inference from this evidence is that appellant understood that the authorities would soon arrive and acted to avoid apprehension. Finally, the logical extension of the aforementioned inferences satisfies the third and fourth prongs of the *Myers* test.

Moreover, appellant places too much weight on the existence of her innocent reasons for departing the scene, that is, continuing along her bus route. It is true that "[a]lternate explanations for a defendant's flight may weaken the inference that the defendant's actions were attributable to guilt [and] should be considered by the jury to inform their weighing of the evidence." *Jones v. State*, 213 Md. App. 483, 509 (2013) (citing *State v. Edison*, 318 Md. 541, 549 (1990)). However, the existence of this innocent explanation does not completely preclude the presence of an equally non-innocent explanation for appellant's departure after the assault took place. The pattern jury instruction clearly leaves this determination to the jury as fact-finder. *See* MPJI-Cr 3:24 (instruction on flight of defendant). Thus, we conclude that the instruction properly left to the jury the decision of whether appellant's behavior constituted flight and, if so, whether her flight evidenced her guilt.

For the aforementioned reasons, we hold that the lower court did not abuse its discretion where it generated a jury instruction on flight of the defendant.

SUFFICIENCY OF THE EVIDENCE

A. Parties' Contentions

Appellant argues that the evidence is insufficient to show that appellant participated in an assault upon Ms. Gibson or her nine-year-old son, Logan. Specifically, appellant argues she never intended to assault the two victims because "everything seemed focused on the father, Christopher Fisher." Furthermore, appellant argues that the evidence establishes nothing more than the occurrence of an argument between appellant and Mr. Fisher, and that appellant did not encourage anyone to do anything. For these reasons, appellant requests that her convictions be reversed without the ordering of a new trial.

The State, however, argues that the evidence showed appellant encouraged the assault on the three victims. The State asserts that the testimony adduced at trial supports the convictions for appellant's assault and conspiracy charges. With reference to Gibson and her son, the State points to numerous instances in which appellant allegedly said "I don't care where the 'F' *they* get off. You get off and you take care of that, and I'll wait for you." From this evidence, the State argues that a jury could reasonably infer that appellant was an accomplice to the assaults. Further, the State asserts there was sufficient evidence that appellant conspired to assault Mr. Fisher and, thus, was an accomplice to his assault. The State again points to the witness testimony and video evidence to establish the existence of both a conspiracy between appellant and the juvenile attackers and the assault on Mr. Fisher's person. Accordingly, the state contends that the convictions should be upheld.

B. Standard of Review

This Court recently reiterated the appropriate standard of review for an appeal based on the sufficiency of the evidence:

> The test of appellate reviews of evidentiary sufficiency is 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.'" *State v. Coleman*, 423 Md. 666, 672, 33 A.3d 468 (2011) (quoting *Facon v. State*, 375 Md. 435, 454, 825 A.2d 1096 (2003)). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt. *State v. Albrecht*, 336 Md. 475, 479, 649 A.2d 336 (1994). "We 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657, 28 A.3d 687 (2011) (quoting *Bible v. State*, 411 Md. 138, 156, 982 A.2d 348 (2009)). Further, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385, 47 A.3d 1140 (quoting *Morris v. State*, 192 Md. App. 1, 31, 993 A.2d 716 (2010)), *cert. denied*, 429 Md. 83, 54 A.3d 761 (2012).

Donati v. State, 215 Md. App. 686, 718 (2014), *cert. denied*, 438 Md. 143 (2014).

C. Analysis

Appellant argues that the evidence adduced at trial does not support convictions of conspiracy or assault against Gibson, Fisher, and their son. After viewing the evidence in

the light most favorable to the prosecution, we hold that a rational trier of fact could have found the essential elements of the crime satisfied. We explain.

In the case at bar, the jury was instructed as to the battery variety of second-degree assault. "Under Maryland common law, an assault of the battery variety is committed by causing offensive physical contact with another person." *Nicolas v. State*, 426 Md. 385, 403 (2011). Moreover, "second degree assault requires: (1) that the defendant caused offensive physical contact with the victim; (2) that the contact was the result of an intentional *or* reckless act of the defendant and was not accidental; and (3) that the contact was not consented to or legally justified." *Pryor v. State*, 195 Md. App. 311, 335 (2009) (emphasis in the original).

Appellant first disputes the presence of any intent to assault Ms. Gibson and her son, claiming "everything [was] focused on the father, Christopher Fisher." However, appellant neglects the fact that recklessness is sufficient to satisfy the *mens rea* element of second degree assault. "The test is whether the appellant's misconduct . . . was so reckless as to constitute a gross departure from the standard of conduct that a law abiding citizen would observe." *Minor v. State*, 326 Md. 436, 443, (1992). Viewing the testimony of Ms. Gibson and the bus video evidence in the light most favorable to the prosecution, we cannot say the evidence is insufficient to show that appellant participated in an assault upon Ms. Gibson and her son. The record contains evidence that appellant consistently referred to the group as a whole and called for the juvenile attackers to "'F' them up." From these facts, a reasonable jury could infer that appellant's conduct was so reckless as to cause the

assault to Gibson and her son. Furthermore, a reasonable jury could have found the elements of second-degree assault on Mr. Fisher beyond a reasonable doubt, as the testimony at trial showed that appellant encouraged the attack on Mr. Fisher specifically.

We also hold that the evidence was sufficient to convict appellant of conspiracy to assault. Ms. Gibson testified that she heard appellant saying "I don't care where the 'F' they get off. You get off and you take care of that, and I'll wait for you." In Maryland, "a criminal conspiracy consists of the combination two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Townes v. State*, 341 Md. 71, 75 (1988). "The essence of a criminal conspiracy is an unlawful agreement." *Id.* The jury considered both the testimonial evidence and the bus video, and determined that appellant formed an agreement with the juveniles that she would wait for the assault to be over and let them back on the bus to escape apprehension. Giving due deference to the jury's factual determinations, we hold that the evidence was sufficient to support not only appellant's convictions of second degree assault, but also her conviction of conspiracy.

For the foregoing reasons, we hereby affirm the judgment of the court.

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