

Circuit Court for Baltimore City
Case No. 121215007

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 70

September Term, 2023

JOEL LEWIS

v.

STATE OF MARYLAND

Graeff,
Arthur,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 19, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

On September 13, 2022, a jury in the Circuit Court for Baltimore City convicted Joel Lewis, appellant, of attempted second-degree murder and related offenses. The court sentenced appellant to 15 years.

On appeal, appellant presents the following questions for this Court's review:

1. Could any rational trier of fact have determined beyond a reasonable doubt that [appellant] is the individual depicted in the Liquor Plus surveillance footage, and that he, in fact, committed the crimes of attempted murder in the second degree and possession of a handgun, where the only evidence tying [appellant] to being present at the scene of the incident on June 27, 2021 is that he wore a similar shirt to an individual identified on surveillance footage when he was arrested 10 days after the incident and no DNA evidence, no firearm, and no medical records of the alleged victim were ever recovered?
2. Did the [c]ircuit [c]ourt err in refusing to give the jury a missing witness instruction where the State failed to call the alleged victim, John Bell, to testify at trial, and no other witness identified [appellant] as the perpetrator of the crimes alleged?
3. Did the [c]ircuit [c]ourt err in refusing to give the jury a missing evidence instruction where the State failed to obtain and produce Mr. Bell's medical records which may have demonstrated whether Mr. Bell was the victim of one or multiple gunshot wounds?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

On June 27, 2021, at approximately 4:46 a.m., Baltimore City police officers responded to a shooting on the 1400 block of East Fayette Street, near the Douglass Homes

community. Upon arrival, officers observed a person outside a 7 Mart convenience store suffering from an apparent gunshot wound to the shoulder.¹

Emergency Medical Services (“EMS”) arrived on the scene and assessed the victim as sustaining “several gunshot wounds” in the “upper left back, neck and left eyebrow.” EMS personnel were unable to identify the victim or “obtain any information about the patient.” The unidentified victim was transported to a local hospital for treatment.

Detective Michael Nolan-Anderson, a member of the Baltimore City Police Department, investigated the shooting. He canvassed the areas to determine whether “any video surveillance photos [existed] that could have possibl[y] captured the shooting.” As part of his investigation, he retrieved security camera footage from nearby businesses and Baltimore City’s network of closed-circuit television surveillance cameras, known as CitiWatch.

Video taken from Liquor Plus, located across the street from the 7 Mart convenience store, captured the shooting. The video, which was played for the jury, showed two individuals engaging in a brief verbal exchange at the corner of East Fayette and North Caroline streets. The shooter, later identified as appellant, approached the victim while brandishing what appeared to be a handgun in his left hand. The victim pushed appellant’s

¹ At trial, a recording from the body-worn camera of Officer Joel Estevez, a member of the Baltimore City Police Department, was played. It showed Officer Estevez stating: “It looks like he got shot in the shoulder.” When Officer Estevez asked the victim where he was shot, the victim stated: “In the face and shit. I’m all right.”

hand away as appellant pointed the handgun toward his head. Appellant then struck the victim. Appellant then stepped back, raised the handgun, and fired toward the victim.²

Appellant and the victim then walked away in separate directions. Appellant walked North on Caroline Street toward the Douglass Homes Community, and the victim walked west on Fayette Street toward the 7 Mart.

Video surveillance from a gas station adjacent to Liquor Plus captured the victim walking west on Fayette Street, crossing the street towards the 7 Mart, and then collapsing. Detective Nolan-Anderson testified that the victim sat outside 7 Mart for a “brief period of time” before anyone contacted 911.

Detective Nolan-Anderson also retrieved surveillance video from Baltimore City’s CitiWatch cameras and city-owned cameras located in the Douglass Homes Community. He used the surveillance videos to “get a better picture[] of what [the shooter]” was wearing. Using surveillance footage captured by security cameras prior to the shooting, he saw that the suspect in the shooting was wearing a “Subway shirt.” He knew it was a Subway t-shirt by “looking at it” because he had eaten at Subway multiple times. After the shooting, the video showed the suspect “running through th[e] back parking lot area, back through Douglass Homes, out towards . . . Orleans Street.”

Detective Nolan-Anderson’s initial efforts to identify the suspect based on the footage were unsuccessful. Using a still-photo he captured from one of the videos, along

² A single casing was found in the lot adjacent to the Liquor Plus business.

with the suspect's general description, he created a flyer for other officers to review to assist him in identifying the suspect in the shooting.

Detective Jack Boyd, a member of the Baltimore City Police Department, testified that, on July 6, 2021, he was reviewing a live feed of CitiWatch cameras, looking "for the shooting suspect." He was looking for a black male with a Subway t-shirt and a small limp when he walked. When he observed a man wearing a Subway t-shirt "pull out a gun from a satchel bag that he had strapped across his chest," Detective Boyd notified patrol officers, who subsequently apprehended and arrested appellant.³ Officers transported appellant to the Southeast District to be interviewed.

On July 5, 2021, Detective Nolan-Anderson spoke to the victim, who was determined to be Jonathan Bell, at the hospital. It was difficult to communicate with Mr. Bell because he was not "all there" mentally. Mr. Bell was mumbling and not really coherent. Mr. Bell, however, did provide a description of his attacker, who he described as a "black male in his 40s." Detective Nolan-Anderson did not show Mr. Bell the video taken from the Liquor Plus business, nor did he confirm with Mr. Bell that the individual from the Liquor Plus surveillance footage was the person who shot him.

Following Mr. Bell's release from the hospital, Detective Nolan-Anderson did not have any contact with Mr. Bell, and he was not aware of Mr. Bell's location. There was a video on social media that showed Mr. Bell wandering around the Douglass Homes area

³ The gun recovered during the arrest was a BB gun. The firearm used in the shooting was never recovered.

“in the hospital gown in the blue pants and no shirt, talking to people there.” The police “tried to locate him,” but they “could not find him or where he lives.”

On July 6, 2021, Detective Nolan-Anderson and his Sergeant interviewed appellant. Appellant waived his *Miranda* rights prior to questioning.⁴ Audio and video from the interview were captured on body-worn cameras and admitted into evidence.

Appellant initially denied being in the vicinity of the Douglass Homes community during the time of the shooting. He subsequently acknowledged, however, that he was on North Caroline Street between Orleans and East Fayette Streets with another individual, who appellant alleged was in the area to obtain drugs.⁵

During the interview, officers showed appellant two screenshots taken from surveillance footage. The second screenshot was a picture taken from the Liquor Plus convenience store footage depicting the person who shot Mr. Bell and then walked away. Appellant acknowledged that he was the person depicted in that screenshot, and he signed his name underneath the photo.

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ Relying on Google Maps, we take judicial notice that North Caroline Street, between E. Fayette and Orleans Streets, runs North to South near the Douglass Homes community. See *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of a Google map and satellite image); *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (taking “judicial notice of a Google map and satellite image as a ‘source[] whose accuracy cannot reasonably be questioned’” (quoting FED. R. EVID. 201(b))).

At the close of the State's case, appellant made a motion for judgment of acquittal. Appellant did not present any additional evidence. After hearing arguments from both parties, the court denied the motion.

This timely appeal followed.

DISCUSSION

I.

Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to support his convictions. He argues that the State did not prove beyond a reasonable doubt that Mr. Bell was the victim of the incident shown on the Liquor Plus surveillance footage, that appellant possessed a firearm, or that appellant was the assailant.

The State contends that the evidence was sufficient to sustain appellant's convictions. It asserts that video surveillance taken from the scene of the shooting shows appellant striking a person in the face, "taking a few steps back, pulling his gun up, and then firing a bullet into [Mr.] Bell's shoulder." The footage shows a "'muzzle flash,' which would be created by a firearm," and it notes that "a shell casing from a bullet was found on the scene." Appellant "signed a photograph of himself just a few video frames after he is seen shooting" Mr. Bell. Mr. Bell subsequently was found nearby with a gunshot wound, and two individuals identified the victim as Mr. Bell.

"The standard for appellate review 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.” *Scriber v. State*, 236 Md. App. 332, 344 (2018) (quoting *Darling v. State*, 232 Md. App. 430, 465 (2017)). *Accord Ashford v. State*, 358 Md. 552, 570-71 (2000). The relevant question “is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.” *Scriber*, 236 Md. App. at 344 (quoting *Darling*, 232 Md. App. at 465). “When making this determination, the appellate court is not required to determine ‘whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’” *Roes v. State*, 236 Md. App. 569, 583 (2018) (quoting *State v. Manion*, 442 Md. 419, 431 (2015)). “This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact.” *Scriber*, 236 Md. App. at 344 (quoting *Darling*, 232 Md. App. at 465).

Appellant does not contend that there was insufficient evidence to show the elements of the crimes of which he was convicted.⁶ Rather, he asserts that the evidence was insufficient to show that he was the perpetrator, i.e., the assailant shown in the Liquor

⁶ A conviction for attempted second-degree murder requires the State to “show a specific intent to kill—an intent to commit grievous bodily harm will not suffice.” *Wallace v. State*, 475 Md. 639, 657 (2021) (quoting *State v. Earp*, 319 Md. 156, 164 (1990)). To convict appellant of attempted murder in the second degree, the State must prove:

- (1) that the defendant took a substantial step, beyond mere preparation, toward the commission of murder in the second degree;
- (2) that the defendant had the apparent ability, at that time, to commit the crime of murder in the second degree; and
- (3) that the defendant actually intended to kill (name).

Id. at 657 (quoting Maryland Criminal Pattern Jury Instruction 4:17.13(B) (2d ed. 2012)).

Plus surveillance footage. Appellant acknowledged, however, that he was the person depicted in the screenshot taken from the footage mere seconds after Mr. Bell was shot. Appellant signed his name underneath the photo, indicating that he was the person in the photo at the scene of the shooting. This evidence, along with the video depicting a shooting, a video showing the victim walking away and collapsing near the 7 Mart, the shell casing found at the scene, and Mr. Bell found near the 7 Mart with gunshot wounds, was sufficient to support the jury's finding that appellant was the person who shot Mr. Bell.

II.

Jury Instructions

Appellant contends that the circuit court abused its discretion in declining to give the jury "proposed missing witness and missing evidence jury instructions." He asserts that the court should have given a missing witness instruction based on the State's failure to call Mr. Bell as a witness. Although he acknowledges the testimony of Detective Nolan-Anderson that the police could not locate Mr. Bell, he asserts, without support, that the State's resources "could have been employed to locate Mr. Bell and secure his attendance at trial through subpoena or otherwise," and, therefore, Mr. Bell was "peculiarly available" to the State. Appellant also argues that the court abused its discretion by declining to give a missing evidence instruction to the jury based on the State's failure to produce Mr. Bell's medical records.

The State contends that the court "properly exercised its discretion in declining to provide missing witness and missing evidence instructions." It argues that neither Mr.

Bell, nor his hospital records, were “peculiarly available to the State.” The State asserts that, despite “countless efforts trying to locate” Mr. Bell, it had “no idea of his whereabouts,” and the State was unable to obtain Mr. Bell’s medical records, despite issuing two subpoenas.

A.

Proceedings Below

Prior to instructing the jury, defense counsel stated that the instructions should include both a missing witness and missing evidence instruction, explaining that “the missing evidence would be the medical records from the hospital” and the “missing witness would be Mr. Bell,” the victim. With respect to a missing witness instruction, the State advised that Mr. Bell was “not particularly in the control of the State to produce.” The court then stated that it was “going to deny the instruction” because Mr. Bell was “unavailable.” It stated, however, that defense counsel could address the issue in closing argument.

With respect to a missing evidence instruction relating to the hospital records, the court noted that there was not a missing evidence pattern jury instruction. It then stated:

That doesn’t mean that the Defendant wouldn’t be entitled to it if it accurately states the law.

In this case though, no proposed instruction has been given, which I wouldn’t make dispositive if I thought it was that important. But I don’t, because it seems to be in the nature of the missing witness instruction, which [I] decline to give on the grounds it’s better left to argument in the circumstances of this case.

And, [defense counsel], certainly is able to argue that the State, if it really thought this guy had been shot three times, should have brought in the medical records. And I’ll leave it up to him and his trial tactics as to what, if anything, he decides to do in that regard.⁷

B.

Analysis

A circuit court has broad discretion to determine whether to give a requested jury instruction, and we review the court’s decision in that regard for an abuse of discretion. *Howling v. State*, 478 Md. 472, 492-93, *cert. denied*, 143 S. Ct. 428 (2022). Md. Rule 4-325(c) requires the court to give instructions to the jury as to applicable law, but it does not require the court to instruct on inferences to be drawn from missing witnesses or missing evidence. *Patterson v. State*, 356 Md. 677, 684-85, 688 (1999).

1.

Missing Witness Instruction

The “missing witness rule” refers to the inference that a party who does not call a witness, who is peculiarly available to that party, did not do so because the testimony would

⁷ We note that, although Md. Rule 4-325(f) requires a party to object “on the record promptly after the court instructs the jury,” defense counsel did not object to the failure to give a missing evidence or missing witness instruction at the conclusion of the instructions. The purpose of the rule is to correct any error while there is an opportunity for the court to do so. But substantial compliance with the rule can suffice when an objection is clearly made and the court denies it and makes clear that renewal of the objection after instructing the jury would be futile. *See Gore v. State*, 309 Md. 203, 209 (1987); *Bowman v. State*, 337 Md. 65, 69 (1994); *Horton v. State*, 226 Md. App. 382, 414 (2016). Here, the issue was thoroughly discussed prior to the instructions to the jury, and it was reasonable for defense counsel to believe further objection would be futile. There was substantial compliance with the rule.

be unfavorable to that party. *Harris v. State*, 458 Md. 370, 388 (2018). A court has discretion to give a missing witness instruction if the facts support it, but the court has no discretion to give such an instruction if the facts do not support an inference that the witness would be adverse to the party failing to call the witness. *Id.* at 405-06. For such an inference to apply, the following prerequisites must be shown: (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and non-cumulative, and (4) who is not called to testify. *Id.* at 404. *Accord Woodland v. State*, 62 Md. App. 503, 510, *cert. denied*, 304 Md. 96 (1985). A witness is peculiarly available to a party when “the witness is physically available only to the opponent or [when] the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party.” *Bereano v. State Ethics Comm’n*, 403 Md. 716, 742 (2008) (quoting *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983)).

Here, the record supports the circuit court’s conclusion that Mr. Bell was not “peculiarly available” to the State. Detective Nolan-Anderson testified that, after Mr. Bell was discharged from the hospital, he was unable to locate him despite a thorough search of the Douglass Homes area. He testified that he made “countless efforts trying to locate” Mr. Bell, to no avail. Under these circumstances, the court did not abuse its discretion in denying the request for a missing witness instruction.

2.

Missing Evidence Instruction

We reach the same conclusion regarding appellant’s contention that the circuit court abused its discretion in declining to give a missing evidence instruction to the jury. In *Patterson*, 356 Md. at 682, the Supreme Court discussed the law concerning missing evidence and explained: “If the State fails to produce evidence that is reasonably available to it or fails to explain why it has not produced the evidence, a defendant is permitted to comment about the missing evidence in his or her closing argument to the jury.” The Court held, however, that “a party generally is not entitled to a missing evidence instruction.” *Id.* at 681.

To be sure, in extraordinary circumstances, where the State had evidence in its possession but did not preserve it, a missing evidence instruction may be available to a defendant. *See Cost v. State*, 417 Md. 360, 380-81 (2010) (Cost was entitled to a jury instruction on missing evidence where the State destroyed highly relevant evidence in its custody that it typically would retain and submit for forensic examination). Here, however, the record indicates that the State never obtained Mr. Bell’s medical records, despite issuing two subpoenas. Under these circumstances, we hold that the circuit court did not err or abuse its discretion in denying appellant’s request to give a missing evidence instruction.

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