

Circuit Court for Baltimore City
Case Nos. 116363008 & 116363009

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Consolidated Cases

No. 237
September Term, 2018

MARQUIS ALSTON

v.

STATE OF MARYLAND

No. 457
September Term, 2018

COREY CLARK

v.

STATE OF MARYLAND

Fader, C.J.,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: February 7, 2019

*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.

The appellants, Corey Clark and Marquis Alston, were jointly tried in the Circuit Court for Baltimore City by a jury, presided over by Judge Althea Handy, from January 16, 2018, through January 19, 2018.¹ The appellant Clark was convicted of two counts of first-degree assault, two counts of attempted robbery, one count of the use of a firearm in the commission of a crime of violence, two counts of conspiracy to commit assault in the first degree, two counts of conspiracy to rob, and two counts of conspiracy to commit armed robbery. He was sentenced to a total of 74 years of incarceration.

The appellant Alston was convicted of attempted armed robbery, attempted robbery, conspiracy to use a firearm in the commission of a crime of violence, and two counts each of conspiracy to assault, conspiracy to rob, and conspiracy to commit armed robbery. He was sentenced to 25 years of imprisonment for conspiracy to commit armed robbery and to a consecutive sentence of 20 years, all suspended, for attempted armed robbery. Both appellants have appealed their convictions, and we have consolidated the two appeals for our present review.

Factual Background

The attempted armed robberies, which are the core crimes in this case, occurred at approximately midnight on Sunday, December 4, 2016, in downtown Baltimore. The two victims were James Jordan and Timmy King, visitors to Baltimore from Dothan, Alabama. Jordan and King that afternoon had attended the Miami Dolphins–Baltimore Ravens

¹ The appellant Clark had earlier gone to trial in July of 2017, but a mistrial was declared by Judge Timothy Doory. His retrial was the joint trial with the appellant Alston now before us.

football game.² After the game, they visited three or four strip clubs until 11 p.m. On their way back to the Radisson Hotel at 101 West Fayette Street, they stopped at a convenience store to purchase a six pack of beer. As they then resumed their walk toward the Radisson, they were confronted by two armed assailants. The entire confrontation lasted only 30–45 seconds.

The appellant Clark was one of the two armed assailants. The second of the armed assailants ultimately ran from the crime scene on foot and has never been identified. It was the appellant Alston who drove the getaway car, a silver van, that sped the appellant Clark away from the crime scene.

The attempted robbery itself was very much of a botched effort. The victim King testified that the assailants “came up behind, out of nowhere.” King further testified that one of the men who came up behind him put a gun to his back, grabbed him by the shoulder, and demanded money. At the same time, the second assailant stepped in front of the victims and, with a gun in his left hand, pointed it at the victim Jordan. Both assailants were wearing dark clothing, hoodies and pants. One or the other said to the victims, “Be quiet. We want your money.”

When the victim Jordan refused to hand over his money and then pushed his assailant’s hands away two or three times, the unidentified assailant said to the appellant Clark, “Cap that motherfucker.” At that point, however, the counterattack had begun. As the victim Jordan punched the appellant Clark, the victim King grabbed for Clark’s gun. It

² The Ravens won the game by a score of 38 to 6.

was at that point that the victim King was shot in the neck. At that, both assailants immediately fled the scene.

At trial, both victims identified the appellant Clark both as the man who shot King and as the man who had earlier pointed the gun at Jordan. The victim King also identified the appellant Clark as the assailant who had been going through his pockets while holding him at gun point. King also described Clark as having had a small bandana tied around his face. The bandana covered his mouth and went up to just below his nose. At one point during the brief struggle, King was able to look the appellant Clark directly in the face as the bandana came down and King saw his “little mustache and a little fuzzy beard.”

When the victim King was shot, both assailants took flight. The unidentified assailant ran up the street and Jordan initially gave chase. When Jordan saw a police officer in front of the Radisson, however, he abandoned the chase and informed the officer of the crime. The victim King, meanwhile, watched as the appellant Clark ran toward and jumped into a silver van. As King described it, the sliding door of the van immediately behind the driver’s seat was already open as the appellant Clark jumped in.

Cut To The Chase

It was time for the appellant Alston to take center stage. Officer Jessica Scott had shortly beforehand responded to the Radisson Hotel for a disorderly conduct call and was just leaving when she saw the victim King bleeding from the back of his neck. King pointed to a silver van and yelled that the guy who had shot him was in there. Officer Scott, immediately joined by Officer Carlos Martinez in a second police car, gave chase. At

Barclay and 24th Streets, the van door opened and the appellant Clark jumped out and started running. The van drove off in the opposite direction. Officer Martinez followed the van while Officer Scott followed the appellant Clark.

The appellant Clark ran into an alley. Officer Scott stopped her police car at the mouth of the alley and got out. She drew her service revolver and ordered the appellant Scott to come out. He did so, and was arrested in the alley without further incident. The chase of the van, meanwhile, continued for approximately two more minutes. When the van then stopped, Officer Martinez arrested the appellant Alston, who had been the driver of the van.

The Contentions

Both appellants raise two joint contentions. They claim

1. that Judge Handy erroneously permitted the State to use a fake gun as demonstrative evidence; and
2. that all but one of the numerous conspiracy convictions should have been vacated.

The appellant Alston alone raises one additional contention. He claims

3. that Judge Handy erroneously permitted the State to introduce into evidence an allegedly prejudicial photograph of the appellant Alston.

A Routine In-Court Demonstration

In Ware v. State, 348 Md. 19, 65, 702 A.2d 699 (1997), Judge Raker said of demonstrative evidence:

Demonstrative evidence is generally offered for clarification or illustration of the witness's testimony and it need not be original or authentic. "Instead, the theory justifying admission of these exhibits requires only that the item

be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact.”

(Emphasis supplied; citation omitted).

The standard of appellate review, moreover, makes it clear that decisions with respect to the use of demonstrative evidence are entrusted to the broad discretion of the trial judge.

The decision to admit demonstrative evidence rests within the sound discretion of the trial court. . . . The trial judge’s determination will not be reversed absent a clear abuse of discretion.

Id. (Emphasis supplied). See also Andrews v. State, 372 Md. 1, 20–21, 811 A.2d 282 (2002).

The actual gun that was used in this attempted robbery was never recovered. The entire criminal episode lasted less than one minute. Four men had been standing close to one another on a street in downtown Baltimore at approximately midnight. A gun that was originally pointed at one victim, that was pushed away several times by that victim, and that was then grabbed by the second victim, ended up firing a bullet into the neck of the second victim. It was important for the jury to get a picture of exactly what happened during that brief but turbulent encounter. It was clearly a sequence that could be communicated more effectively by a demonstration than by words alone.

Over defense objection on both occasions, each of the two victims was allowed to demonstrate to the jury exactly what had transpired at the crime scene by physically demonstrating what had happened. The demonstration was allowed to include a small green

rubber gun in place of an actual gun. The defense claimed that the use of the green rubber gun was inflammatory. Judge Handy, however, ruled that its use was permissible.

THE COURT: So you're objecting?

[ALSTON'S DEFENSE COUNSEL]: I would object.

THE COURT: And what's the basis for the objection?

[ALSTON'S DEFENSE COUNSEL]: Basis of the objection basically is, although it's obviously not the gun that was used to shoot Mr. King, I believe it will inflame the jury, considering it is a gun, although a fake gun, being used, in the description.

[CLARK'S DEFENSE COUNSEL]: Your honor, I think it's prejudicial. I think if we had the real gun, we won't use that gun obviously to do any type of demonstration. There was no gun recovered in this case. The use of a fake gun I think is prejudicial.

THE COURT: All right. I will overrule the objection. It's demonstrative evidence to try and show the jury what occurred. Doesn't have anything to do with the identification of either of the defendants.

(Emphasis supplied).

After Judge Handy made her ruling and the direct examination of the victim King resumed, the prosecuting attorney advised King as follows:

Now, Mr. King, as we observed in the footage, that the camera kind of pans around and we catch little pieces, but we never get the camera to focus or stop when we'd like it to, so what I would ask you to do now, I'm going to ask you to step off the stand and I'd like for you to demonstrate using the very green, very rubber revolver.

I'd like you to step down and I'd like you to be you, and I would like you to have me be the defendant Clark, and I would like you to demonstrate where you were in relation to the defendant – in relation to defendant Clark, how the gun was pointed at you and any – where Mr. Jordan was and any actions that you recall from the encounter. So, how far away were you – if I'm defendant Clark, how far away were you?

(Emphasis supplied).

We hold that Judge Handy did not abuse her discretion. The demonstration clearly could have helped the jury to understand more clearly exactly what had happened. In a rapid flurry of arms and hands and guns and bodies, the appellant Clark pointed a gun at the victim Jordan and demanded money; the victim Jordan pushed the gun away from pointing at him three times; the second victim King grabbed for the gun; and the gun fired a bullet into the neck of King. A live demonstration sought to put the jury at the crime scene and that, of course, is the ultimate goal of any effective trial presentation.

On the other side of the balance scale, we see no remote chance of inflammatory prejudice. A little green rubber gun won't do that trick. It was no mystery to anyone that a gun had been involved. How else did a bullet get into King's neck? In this case, there was a critically important object (a gun) that was being pushed and shoved and wrestled around and it was important to illustrate that critical sequence. For that purpose, the use of a little green rubber gun was no more inflammatory than it would have been to use somebody's wallet or a little toy truck or the judge's gavel for precisely that same demonstrative purpose. How did that hand-held object get from where it was being brandished in front of the victim Jordan's chest to where it fired a bullet into the victim King's neck? In any event, the use of the small rubber gun was innocuous and we see no abuse of discretion.

In arguing that the State's use of the little green rubber gun was prejudicially inflammatory, the appellant relies exclusively on Andrews v. State, 372 Md. 1, 811 A.2d 282 (2002). That case and this, however, are not remotely apposite. In terms of its capacity

to pack an emotional punch, Andrews involved the actual murder of an infant daughter by the baby's father in a case of the "Shaken Baby Syndrome." The father had shaken his infant daughter hard enough to cause head trauma and bleeding in the brain.

The demonstration in that case allowed an expert in the physiology of head injuries to use a doll designed for infant CPR training to demonstrate to the jury "the amount of force 'an adult would be required to use to inflict the injuries sustained'" by the infant victim. 372 Md. at 25. The emotional impact of such a demonstration was self-evidently a disturbing one. The demonstration, moreover, was doubly flawed. The weight of the doll was less than one-third of the weight of the baby, and there was a considerable difference between the doll's neck and the strength of the infant's neck muscles. The expert in that case conceded that those differences made the demonstration "incomplete." The Andrews case is completely inapposite.

Conspiracy In An Omnibus Crime

The second joint contention need not detain us long. Commendably, the State acknowledges that the appellants should not have been convicted of more than one charge of conspiracy and that all other conspiracy convictions must be vacated. As this Court explained in Savage v. State, 212 Md. App. 1, 13, 66 A.3d 1049 (2013), the unit of prosecution for conspiracy is "the agreement or combination, rather than each of its criminal objectives." (Citation omitted). In the hands of clever draftsmen, most substantive crimes may be subdivided into myriad greater inclusive and lesser included elements and each is a viable charge. A criminal meeting of the minds, by contrast,

embraces both the whole and all of its parts into a single monolithic totality. It also embraces multiple victims as well as multiple elements. It is impervious to deconstructive subdivision. In this case, each of the appellants was properly convicted of a single conspiracy to commit armed robbery. As to each, all other conspiracy convictions were redundantly improper and must be vacated.

The Imagination Of The Beholder

This final contention is raised by the appellant Alston alone. State's Exhibit 10A was a full body shot of the appellant Alston taken shortly after he was arrested by Officer Martinez. The photograph showed Alston as he looked at the time of his arrest. It identified him as the driver of the getaway van that had been chased for approximately eight minutes by Officer Martinez and Officer Scott and that was ultimately stopped by Officer Martinez.

In an effort to diminish the probative value of the photograph, Alston protests that the photograph "had no relevancy to the issues at trial" because he, himself, acknowledged in his testimony that he had been the driver of the van that was stopped by the police and any other identification, therefore, was not needed. His anachronistic flipping of time sequences is interesting. The photograph was introduced as part of the State's case in chief before Alston took the stand as part of the defense case. Judge Handy's ruling was made, of course, when the photograph was first introduced.

It is as the appellant Alston turns to the issue of prejudice, however, that the contention takes on an aura of unreality. Alston argues, "[T]he photograph depicts Mr.

Alston facing forward with his hands pulled back, clearly handcuffed.” (Emphasis supplied). The defense and this Court must be looking at very different photographs.

The defense argument goes on, “[T]he prejudicial effect of the photograph was great. The photograph left the unmistakable impression upon the jury that Mr. Alston was a dangerous man that the police needed to closely guard and restrain in handcuffs.” (Emphasis supplied).

The defense then cites Arca v. State, 71 Md. App. 102, 523 A.2d 1064, cert. denied, 310 Md. 276, 528 A.2d 1287 (1987), as a controlling decision dealing with “photographs of this nature.” In Arca, the police were dealing with an identification a witness had made from a photographic array. The State moved into evidence “the photographic array, including what is obviously a police ‘mug shot’ of appellant.” 71 Md. App. at 104. The photograph shows Arca seated and wearing a chest plate with the identification number covered but showing the front and profile views commonly associated with police booking photographs. In Arca, 71 Md. App. at 106, Judge Wilner observed, “Notwithstanding the court’s effort to ameliorate the prejudicial effect of the photographs, the implication that appellant had prior police contact remained strong.”

The innocuous photograph in this case is from an entirely different universe. This was no mug shot or booking photograph indicating that the appellant Alston had been in the police file because of his prior criminal record. It was a full body shot. It did not show a front view and a profile of the appellant’s upper body. There was no chest plate nor were there identifying numbers. There were, most significantly, no handcuffs.

Involved was a full body shot of Alston, standing up and looking straight at the camera. He is wearing a black and red baseball cap. He is wearing baggy black trousers. He is wearing what appears to be a slightly oversized black jacket. Because of the black on black coloring, one cannot tell where the jacket stops and the pants begin. One cannot tell where the sleeves are. The picture reveals little more than a silhouette. From the general configuration, it might be inferred that Alston's left arm is behind his body. This is by no means sure. There is no such inference with respect to the right arm, which appears to be simply dangling down beside the body. There is no break in the line from the shoulder down. There is, moreover, no remote suggestion of handcuffs. We see nothing in the photograph of Alston that would keep it from being legitimately displayed in the family photo album. The introduction into evidence of the photograph did not deny the appellant Alston a fair trial.

CONVICTIONS OF APPELLANT ALSTON FOR CONSPIRACY TO USE A FIREARM IN A CRIME OF VIOLENCE, CONSPIRACY TO ASSAULT JAMES JORDAN, CONSPIRACY TO ASSAULT TIMMY KING, CONSPIRACY TO ROB JAMES JORDAN, CONSPIRACY TO ROB TIMMY KING, AND CONSPIRACY TO COMMIT ARMED ROBBERY OF JAMES JORDAN VACATED; ALL OTHER CONVICTIONS AFFIRMED.

CONVICTIONS OF APPELLANT CLARK FOR CONSPIRACY TO ASSAULT JAMES JORDAN, CONSPIRACY TO ASSAULT TIMMY KING, CONSPIRACY TO ROB JAMES JORDAN, CONSPIRACY TO ROB TIMMY KING, AND CONSPIRACY TO

COMMIT ARMED ROBBERY OF JAMES JORDAN VACATED; ALL OTHER CONVICTIONS AFFIRMED.

COSTS TO BE DIVIDED AS FOLLOWS: ONE-HALF OF COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE ; ONE-FOURTH OF COSTS TO BE PAID BY APPELLANT CLARK; ONE FOURTH OF COSTS TO BE PAID BY APPELLANT ALSTON.