UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1400

September Term, 2015

MARQUISE LEWIS

v.

STATE OF MARYLAND

Krauser, C.J.,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 23, 2016

A jury in the Circuit Court for Montgomery County convicted Marquise D. Lewis, appellant, of one count of motor vehicle theft and one count of theft of property valued between $10,000 and $100,000. In this appeal, appellant presents the following questions for our review, which we rephrase as follows:[1]

> 1. Did the trial court err in refusing to strike testimony that referenced an inadmissible statement made by appellant?
>
> 2. Was the evidence sufficient to sustain the judgments of convictions?

We shall hold that the trial court erred in refusing to strike testimony that was inadmissable, and hold that the evidence was sufficient to sustain appellant's convictions. We shall reverse.

I.

Appellant was charged by criminal information in the Circuit Court for Montgomery County with twenty charges related to the theft of three vehicles. The jury convicted appellant of one count of motor vehicle theft and one count of theft of property valued between $10,000 and $100,000. The court sentenced appellant to a term of incarceration of

[1]The verbatim questions presented by appellant read as follows:

> "1. Where the perpetrator had been described as wearing a white t-shirt, did the trial court err in refusing to strike inadmissable evidence that a white t-shirt belonged to appellant?
>
> 2. Was the evidence sufficient to convict Mr. Lewis of stealing the vehicle?"

fifteen years with all but four suspended, three years probation, and restitution in the amount of $145.

In the early morning hours of August 6, 2014, Rashawn Wyche was at home when he heard the door of his 2007 Cadillac Escalade shut and the engine start. At the time, the vehicle was parked in the driveway of Mr. Wyche's home, with an ignition key left inside the car. Mr. Wyche "went and looked to see" and "saw the car kind of backing down the driveway." Mr. Wyche "got a quick look at the driver" and noticed that "it was a black guy" with a "white t-shirt" and "kind of like twisty hair." Mr. Wyche called 911. Around the same time, one of Mr. Wyche's neighbors, Brian Laliberte, discovered that his 2012 Honda Odyssey had been stolen from his driveway. Mr. Laliberte indicated that an ignition key had been left inside the car. Mr. Laliberte did not see the person who stole his car.

At approximately 2:17 a.m., roughly six minutes after Mr. Wyche called 911, Officer Dan Campbell of the Montgomery County Police Department responded to the scene. Shortly thereafter, Officer Campbell "began setting up a perimeter" with approximately nine other officers of the Montgomery County Police Department.

The officers soon located the two stolen vehicles, along with a third vehicle, on a residential street near Mr. Wyche and Mr. Laliberte's homes.[2] Officer William Sands testified that "[a]ll three vehicles had their lights on, and were running," and "all the driver's

[2]Officer Campbell testified that the distance by car was about "four minutes, five minutes at most."

doors" were open. In addition, Officer Sean Pierce testified that three individuals were seen 'fleeing' from the vicinity of the three vehicles. Officer Drew Martinez observed one of the individuals running from the driver area of the Escalade, described as "a black male, short dreads, white t-shirt." Officer Pierce and his partner, a K-9 officer, pursued the suspects.[3] About five to ten minutes later, Officer Pierce came upon a fenced-in residential yard approximately 500 feet from where the three vehicles were located. He announced his presence and an individual, later identified as appellant, surrendered to the police.

Officer Campbell approached the area to assist Officer Pierce. Using his flashlight, Officer Campbell spotted appellant behind the fence in a wooded area. Officer Campbell noted that appellant was "crouched down, kind of in a ball" and "shirtless." Officer Campbell testified that he noticed a white t-shirt on the ground "maybe 3 feet" away from appellant. Officer Visha Meneses, one of the officers involved in appellant's arrest, testified that a pair of gloves was also located near the white t-shirt. After scaling the fence and placing appellant in handcuffs, Officer Campbell asked appellant if the white t-shirt was his, and appellant responded, "[y]es."

Appellant was charged by criminal information with twenty counts related to the theft of the three vehicles.[4] Appellant filed a pre-trial motion to suppress the statement he made

[3]The trial court ruled that the evidence of flight from the vehicle through K-9 tracking was inadmissible.

[4]Two other individuals were also apprehended.

to Officer Campbell that the white t-shirt belonged to him, arguing that he was not read his rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The suppression court granted the motion.

Because the trial judge was not the same judge as the suppression judge, on the first day of trial, appellant's counsel reminded the trial court of the suppression court ruling and asked the court to instruct the State's witnesses not to reference the statement:

> "[DEFENSE COUNSEL]: There was a motion to suppress, and I don't know if Your Honor is familiar with that, but when my client was arrested, the officer asked him about a shirt and gloves that were on the ground. He was not Mirandized. He was under arrest, and so, Judge Rupp suppressed that statement. So, we're just asking that the State inform her witnesses not to mention that question or answer.
>
> THE COURT: What was the question and answer?
>
> THE STATE: The State's fully aware of the motion that was litigated, and won't bring it up. It was essentially a statement when the defendant, I believe, was in handcuffs already as to the items next to the defendant. So, the State is not trying to elicit the statement.
>
> THE COURT: What was the question and answer, [Defense Counsel]?
>
> [DEFENSE COUNSEL]: Is that your shirt?
>
> THE COURT: Is that your shirt?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: All right, and he responded yes, I'm assuming?

> [DEFENSE COUNSEL]: Well, we're moving to exclude the whole question and answer.
>
> THE COURT: Well, I mean, I guess I need to know what the import of it was, so there's no—
>
> [DEFENSE COUNSEL]: The officer said that he responded yes.
>
> THE COURT: That he responded yes, okay.
>
> [DEFENSE COUNSEL]: And then there were some gloves that the officers say were associated with that shirt, so obviously, that's included.
>
> THE COURT: That's a fruit.
>
> [DEFENSE COUNSEL]: Exactly.
>
> THE COURT: All right."

Officer Visha Meneses was the State's first witness. On two occasions, the court sustained objections to her testimony conveying appellant's inadmissable statement. Officer Meneses's testimony regarding the circumstances which brought her to the area of the call went as follows:

> "[OFFICER MENESES]: . . .We asked him where his shirt was, and he said he—
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: All right. Why don't you ask another question."

The second objection to Officer Meneses's testimony attempting to introduce the inadmissable statement went as follows:

"[THE STATE]: And what was Mr. Lewis wearing?

[OFFICER MENESES]: He was wearing shorts. Not sure what kind of shorts. He didn't have a shirt on. And I'm not sure if he was wearing sneakers, or not, but I just remember, shorts, no shirt, and dreads. And we asked him if [he] had the white shirt on.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained."

During the trial, Officer Meneses testified as follows about finding the white t-shirt and gloves:

"[STATE]: And what did you see, if anything, in [appellant's] proximity?

[OFFICER MENESES]: After [Officer] Campbell took him away, I stayed with one of the K-9 officers. And like about two feet from where we were, in the brush, we found the white shirt and then I found gloves right there as well."

On cross-examination, appellant's counsel inquired in greater detail about how the shirt and gloves were located:

"[DEFENSE COUNSEL]: Okay, and you said this area is very dark?

[OFFICER MENESES]: Yes.

[DEFENSE COUNSEL]: It's a residential area?

[OFFICER MENESES]: Yes.

[DEFENSE COUNSEL]: And the place where [appellant] was, was in the back of this yard, right?

> [OFFICER MENESES]: Yeah. I don't know if it was the back [or] front, but there is houses all over that area.
>
> [DEFENSE COUNSEL]: All right. Okay, and you had a flashlight?
>
> [OFFICER MENESES]: When I got there, no. I didn't have my, I didn't have my flashlight on me, sir.
>
> [DEFENSE COUNSEL]: You said it was very dark.
>
> [OFFICER MENESES]: Yes.
>
> [DEFENSE COUNSEL]: How were you able to see?
>
> [OFFICER MENESES]: Because the other officers had, K-9 always has their flashlights on them. So, they were flashing their lights while they had their dogs.
>
> [DEFENSE COUNSEL]: Okay, so you weren't able to look around the yard to see if there [were] other items there?
>
> [OFFICER MENESES]: When K-9 left, we tracked the, when Officer Campbell left, we immediately just stayed tracking *before he said he ditched the white shirt*. So, we looked in the area and right there, we found it.
>
> [DEFENSE COUNSEL]: I move to strike.
>
> THE COURT: Overruled."

The jury convicted appellant of one count of theft of a motor vehicle and one count of theft between $10,000 and $100,000 for the theft of the Cadillac Escalade. This timely appeal followed.

II.

Before this Court, appellant contends that the circuit court erred when it failed to strike Officer Meneses's inadmissable testimony after appellant's counsel moved to strike Officer Meneses's statement that "he said he ditched the white shirt." At the pre-trial suppression hearing, the court held that appellant's statement claiming ownership of the t-shirt violated the precepts of *Miranda v. Arizona*, 384 U.S. 436 (1966). He argues that this was not invited error because even though the statement by Officer Meneses was made in response to a question by appellant's counsel, the answer was unresponsive to the question that was posed, *i.e.*, whether Officer Meneses was able to look around and see other items there. The issue is preserved for appellate review, he argues, because after the statement was made by Officer Meneses, appellant's counsel moved immediately to strike the statement from the record. Appellant contends that the pronoun "he" in the statement referred clearly to appellant and although "he" is present in place of appellant's name, context allows for a reasonable person to understand that the word "he" refers to appellant. Appellant contends that the court's failure to strike the testimony constitutes reversible error that is not harmless.

Appellant further contends that the evidence was insufficient to prove that he stole the Escalade. He argues that the State failed to establish criminal agency because the description of the suspect was vague, describing only his race, that he had on a white t-shirt, and had some form of hair braid. There was nothing in the stolen automobile that connected appellant to the theft nor was anything found on appellant that indicated he was involved in

any criminal activity. Additionally, appellant argues that because the trial court excluded the K-9 tracking evidence, the direction of flight from the vehicle was vague; there was no evidence that the individual spotted near the car when police arrived was appellant and no evidence that police were able to follow the individual spotted near the car to the location where the appellant was detained.

The State argues that the statement appellant challenges is not the same as the statement he moved to suppress. The State contends that the statement by appellant that the trial court suppressed was his admission that the shirt belonged to him. The statement that is now being challenged, however, makes no reference to whose shirt it was. Furthermore, the State argues in the alternative that any error was harmless beyond a reasonable doubt because there were instances at trial where police officers testified that at the time of the arrest, appellant was shirtless and a white t-shirt was located a few feet away. This testimony, the State argues, provided enough circumstantial evidence to the jury to connect appellant to ownership of the shirt.

The State maintains that the evidence was sufficient to support appellant's convictions of theft of the automobile. The State contends that because appellant matched the description of the suspect, matched the description of the person who fled from the car when police approached, was found near the area of the stolen car, and failed to offer support for an alternative explanation of his presence, any reasonable trier of fact could establish, through

inferences, logic, and common sense, that appellant was the individual who stole the automobile.

III.

The circuit court ruled that appellant's statement that the shirt on the ground belonged to him was inadmissible at the pre-trial suppression hearing because it was acquired by the State in violation of *Miranda*. Officer Meneses's statement, "he said he ditched the shirt," although conveyed in slightly different parlance, was the same statement that the trial court ruled inadmissible and struck twice previously from the record. We reject the State's interpretation of the statement and the State's argument that a reasonable person could attribute the statement to any speaker other than appellant. The officer's testimony refers clearly to appellant. Although the word "he" is used in place of appellant's name, the statement conveys the same exact information such that it expresses appellant's claim of ownership of the shirt. Viewed in context, it is clear that appellant is the subject of the statement and because the shirt was "ditched," there is an inference that appellant disposed of the shirt. Appellant's counsel moved immediately to strike the statement. The trial court erred in not striking the statement.

Although the State maintains that the court did not err, in the alternative, the State argues harmless error. Unless we are "able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and

a reversal is mandated." *Dorsey v. State*, 276 Md. 638, 659 (1976). The threshold requirement for establishing reversible error is that this court must, after conducting an independent review of the record, be "satisfied that there is no reasonable possibility that the evidence complained of whether erroneously admitted or excluded may have contributed to the rendition of the guilty verdict." *Id.* The State bears the heavy burden of establishing beyond a reasonable doubt that the error was harmless and that the result would not have been different even if the error had never occurred. *Schmitt v. State*, 140 Md. App. 1, 44 (2001).

Applying the *Dorsey* test to the facts in this case, upon our own independent review of the entire record, we are not persuaded beyond a reasonable doubt that Officer Meneses's inadmissable testimony regarding appellant's statement did not contribute to the guilty verdict. Absent Officer Meneses's statement that appellant claimed he owned the white t-shirt, there is minimal evidence connecting appellant to the theft of the Escalade. This court cannot say that the error complained of in no way influenced the outcome of the trial. The error is not harmless and instead is reversible error.

IV.

We address next appellant's sufficiency of the evidence claim. We must address the claim because, if the evidence is insufficient, the State may not retry appellant because of double jeopardy protections. *Burks v. United States*, 437 U.S. 1, 17 (1978) (holding that the

Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient); *see also State v. Kramer*, 318 Md. 576, 593 (1990). Under the well-settled standard of review for the sufficiency of evidence, "[w]e must determine '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.'" *Handy v. State*, 175 Md. App. 538, 561 (2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This test extends to criminal convictions resulting from circumstantial evidence, as "circumstantial evidence alone is 'sufficient to support a conviction, provided the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (quoting *Hall v. State*, 119 Md. App. 377, 393 (1998)).

The jury convicted appellant of motor vehicle theft of the Cadillac Escalade in violation of Section 7-105[5] of the Criminal Law Article and theft in violation of 7-104[6] of

[5]Section 7-105 states as follows: "A person may not knowingly and willfully take a motor vehicle out of the owner's lawful custody, control, or use without the owner's consent."

[6]Section 7-104 states as follows: "(a) A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:

> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(continued...)

the Criminal Law Article. After reviewing the evidence in the light most favorable to the prosecution, we hold that the evidence is sufficient to support the convictions. When police arrested appellant, he was found crouching in a wooded area of a fenced lot in a residential neighborhood, and it was nearly 3:00 AM. Police officers located appellant within the perimeter they had created, 500 feet away from the recovered Cadillac Escalade, and the police did not observe any other foot or vehicle traffic within the perimeter. Appellant lived in Prince George's County and not Montgomery County. He had no connection to the property where the police found him crouching. The circumstantial evidence surrounding appellants location in proximity to the vehicle would lead a rational trier of fact to conclude a connection between the stolen vehicle and appellant due to the suspicion surrounding his presence.

Appellant matched further the description of the individual Mr. Wyche provided to the police—a black male with braided hair. Although appellant was shirtless when he was arrested and his statement claiming ownership of the white t-shirt was suppressed, a rational trier of fact could reasonably infer that the white t-shirt, located 3 feet away from appellant, belonged to him. Appellant matched also the description by Officer Martinez of the black male with braided hair and "wearing" a white t-shirt observed fleeing from the driver area

[6](...continued)

> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

of the Cadillac Escalade. The circumstantial evidence of appellant's flight from and proximity to the vehicle, paired with his match of the description of the suspect, that he was crouched down and appeared to be hiding, and at that time of night, support the rational inference that appellant stole the Escalade from Mr. Wyche's driveway, fled after being spotted by police, and attempted to change his appearance while hiding to avoid arrest. When viewed in the light most favorable to the prosecution, any rational trier of fact could have inferred that appellant was responsible for the theft of the Cadillac Escalade beyond a reasonable doubt. The evidence is therefore sufficient to support appellant's convictions. Because the evidence the State presented at trial was sufficient to support the judgment of conviction, the State is not barred by double jeopardy principles to retry appellant in a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED TO MONTGOMERY COUNTY FOR A NEW TRIAL. COSTS TO BE PAID BY MONTGOMERY COUNTY.