UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0820

September Term, 2014

DONIELLE McCOY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: May 21, 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.

Donielle McCoy was convicted by a jury of several offenses in relation to his participation in a group attack on Ronald Reeves. McCoy alleges that the trial court erred (1) by giving "mere presence" jury instructions, (2) by improperly admitting inadmissible hearsay, (3) by excluding him from a bench conference, and (4) by convicting him upon insufficient evidence of one of the charged offenses. We affirm as to all counts.

FACTUAL BACKGROUND

Ronald Reeves was at his mother's home in Baltimore City, when four men, including Donielle McCoy and his co-defendant, Jeffrey Bryant, began banging on the back door. Reeves came out of the front door armed with brass knuckles and looking to fight the four men. When McCoy pulled out a long knife, however, Reeves decided to run. Reeves was chased through the streets and into another house. Two men sitting in front of that house joined the fracas, and they all chased him out of the house, down the street, and into a bowling alley. Somewhere along the way, Reeves was stabbed in the back. The severity of the resulting injury was a subject of dispute at trial, with Reeves testifying that he had suffered a collapsed lung. McCoy and Bryant disputed the veracity of the whole chase story, suggesting that it never happened and that Reeves couldn't have run so far with a collapsed lung.

McCoy was convicted by a jury of first degree assault, conspiracy to commit first degree assault, and wearing or carrying a dangerous weapon openly with the intent to injure.

ANALYSIS

I. Mere Presence Instructions

McCoy alleges that the trial court erred by giving pattern jury instructions to the effect that a person's "mere presence" at the crime scene is insufficient to prove guilt.[1] According to McCoy, his theory of the case was that he was not present at the scene of the crime. Because the need for mere presence instructions was not suggested by this theory, McCoy now argues that it was prejudicial to provide mere presence instructions. The State argues (1) that the need for a mere presence instruction was generated by the victim's testimony placing McCoy at the crime scene; (2) that the instruction was necessary for McCoy's co-defendant, Bryant, who admitted to being present at the scene but who denied participating in the criminal acts; (3) that the words of the instruction do not suggest that McCoy was actually present at the crime scene and, therefore, cannot be prejudicial.[2]

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[1] The jury instructions given were Maryland Criminal Pattern Jury Instructions 3:25 and 6:00.

[2] Although we will not reach the merits of this issue, we do wish to make one tangential comment about McCoy's presentation. In both his brief and the rebuttal portion of his oral argument, McCoy's counsel directed our attention to an unreported opinion of this Court. This violated Maryland Rule 1-104(a), which declares that our unreported opinions are "neither precedent within the rule of stare decisis nor persuasive authority." In an attempt to circumnavigate Rule 1-104(a), counsel relied on Rule 1-104(b), which permits citation to unreported cases for "any purpose other" than as mandatory precedent or persuasive authority, and arguing that he was citing the unreported case for its "logic" not its persuasive authority. We do not see any difference between the "logic" of an opinion and its "persuasive authority" and reject the distinction. We, therefore, disregard the citation to the unreported opinion.

We do not reach these issues, however, because the objection was not preserved at the trial court. Maryland Rule 4-325(e) provides that "[n]o party may assign as error the giving … of an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Md. R. 4-325(e). After the trial court instructed the jury, McCoy's counsel indicated that he had no objections, thus affirmatively waiving any claim of error.

Failure to object after the allegedly erroneous instruction is given, however, may be excused if there is "substantial compliance" with the Rule, which is defined as follows:

> There must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the grounds for objection unless the ground for objection is apparent from the record[,] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Robinson v. State, 209 Md. App. 174, 200 (2012).

We hold, however, that this is not a case of substantial compliance either, as the discussion of the instructions at the bench makes clear:

> THE COURT: All right. Do we want presence of the Defendant?
>
> [Bryant's Counsel]: Yes.
>
> [Ass't State's Attorney]: Yes, Your Honor.
>
> THE COURT: [McCoy's Counsel,] just so the record is clear?
>
> [McCoy's Counsel]: Uh, I would object, but -- I don't need that instruction.

THE COURT:	All right. Well, I think it's -- I don't see where it necessarily hurts your client one way.
[McCoy's Counsel]:	No, I don't think it's one of those things.
THE COURT:	All right. So I will give it.

If ambiguously using the word "object" is sufficient to raise the objection (which we do not think it was), saying that he does not "need" the instruction is not a "definitive statement of the ground." Moreover, counsel's subsequent agreement that the instruction does not "hurt" McCoy serves as a retraction of the objection. Finally, there is nothing in the record to suggest that, if counsel changed his mind and wanted to object to the instruction later, after the instructions were given, that to do so would have been futile or useless. We, therefore, hold that McCoy waived any claim on appeal regarding the "mere presence" instructions.

II. Hearsay Testimony

McCoy's second claim is that hearsay evidence was improperly admitted, over his objection, which tended to bolster Reeves's description of the seriousness of his injuries. The relevant testimony, in context, was as follows:

[Ass't State's Attorney]:	And what injury did you specifically suffer to your back or lungs or your body?
[Reeves]:	My lung collapsed.
[Ass't State's Attorney]:	Okay. And how long were you in the hospital?

[Reeves]:	I was in the hospital for three days, I actually was supposed to stay there longer but I'm my mom's only son and she's disabled so I had to do what I had to do, to get out of there fast.
[Ass't State's Attorney]:	So they let you out? Did they ask you to stay longer?
[Reeves]:	Uh-huh.
[McCoy's Counsel]:	Objection.
[Reeves]:	Yes.
THE COURT:	All right. Overruled. Next question.

The Assistant State's Attorney's question—"[d]id they ask you to stay longer?"—was objectionable on two grounds: first, because it is a leading question, and second, because it calls for a hearsay response. Neither McCoy's counsel's objection nor the trial court's ruling specified the grounds for the objection. McCoy has not complained about the leading nature of the question on appeal nor would he succeed if he did as "the allowance of leading questions rests in the discretion of the trial court." Md. R. 5-611(c). We point it out, however, because the leading form of the question tends to obscure the hearsay nature of the question and response.[3] In effect, Reeves's assent to the Assistant

[3] We believe that a misunderstanding of the leading nature of the question is the genesis of the State's argument that Reeves's statement was only non-hearsay circumstantial evidence that Reeves had a serious injury and therefore admissible. We reject this theory.

State's Attorney's question adopts the out-of-court request by an unnamed hospital employee for Reeves to stay longer in the hospital. That statement was offered both for the truth of the matter asserted (that the hospital asked Reeves to stay longer) and for the natural implication of that statement (that Reeves was seriously injured). As hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted, Md. R. 5-801(c), we find that this was improper hearsay.

Nevertheless, we hold that the admission of this hearsay was harmless beyond a reasonable doubt. We come to this conclusion for two related reasons: *first*, because the exact same evidence had already been admitted without objection; and *second*, because it was merely cumulative to other admitted evidence regarding the severity of Reeves's injuries. As recounted above, immediately before the improper hearsay statement (that some unnamed hospital employee had asked Reeves to remain in the hospital longer), Reeves testified that "I was in the hospital for three days, I actually was supposed to stay there longer." That statement—which contained the same essential information as the improper hearsay statement—was completely unobjectionable. Thus, the jury already knew that Reeves was supposed to have stayed longer. In such a circumstance, the subsequent admission of the hearsay statement was harmless error. *See Yates v. State*, 429 Md. 112, 120 (2012) (holding that there is no reversible error if the essential contents of the objectionable testimony have been established and presented to the jury without objection). Moreover, there was significant testimony that Reeves had suffered a serious injury requiring treatment at Maryland Shock Trauma, including use of a "breathing

machine" and a three-day hospital stay. Given all that, we find the erroneous admission of the hearsay statement to have been harmless beyond a reasonable doubt.

III. Opportunity to Participate in Trial

McCoy's third claim is that he was prevented from participating in a bench conference at which allegedly inconsistent jury verdicts were discussed and, as a result, that he was denied the right to be present at a critical stage of his trial.[4] We reject this contention. Maryland Rule 4-231(b) governs the defendant's right to be present: "A defendant is entitled to be physically present in person at … every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248." The bench conference at issue concerned the question of whether the jury verdicts were inconsistent as a matter of law. While some discussion of the facts underlying those verdicts was relevant to the topic and were discussed, it does not change the fundamental character of the bench conference as concerning a legal question. *See State v. Tumminello*, 16 Md. App. 421, 436-37 (1972). As a result, McCoy did not have a right to be present at the bench conference at issue.

IV. Sufficiency of the Evidence

Finally, McCoy argues that there was insufficient evidence adduced at trial to convict him of the crime of carrying a dangerous weapon openly with the intent to injure.

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[4] The State makes a strong and persuasive argument that McCoy waived his right to participate in this bench conference. Despite this, in the interest of judicial economy, we will exercise our discretion under Rule 8-131(a) to address the merits of this argument.

McCoy did not object on this basis nor move for judgment of acquittal on this count and thus asks us to review the sufficiency of the evidence for "plain error." Even if we were so inclined, we lack the discretion to do so. *Williams v. State*, 131 Md. App. 1, 7 (2000) (quoting *Wersten v. State*, 228 Md. 226, 229 (1962)) ("However, this was a jury trial and no motion for a judgment of acquittal was made; hence, *we are not at liberty to pass upon the sufficiency of the evidence*.").[5]

CONCLUSION

In his brief and at oral argument, McCoy suggested that the root of his complaints lay in the alleged ineffective assistance of his trial counsel. Whether this is true, is not for us to say. Our affirmance of the conviction in this case is, of course, without prejudice to McCoy's right to raise those claims through post-conviction procedures.

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

[5] We need not address McCoy's argument concerning a jury instruction providing the definition of a dangerous weapon because the basis for the claim of error was with a faulty transcript, not a faulty instruction.