UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2167

September Term, 2014

RAYMOND KELLY

v.

STATE OF MARYLAND

Meredith,
Hotten,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: November 10, 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.

Raymond Kelly, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of second-degree murder and attempted robbery. He was subsequently sentenced by the court to concurrent terms of imprisonment of 30 years and 13 years, respectively. Appellant asks two questions on appeal:

> I. Did the trial court err in denying his motion for a mistrial when the jury announced an allegedly inconsistent verdict that appellant could not reject and ask the jury to continue deliberating because the jury had seen appellant in shackles after rendering their verdict but before they were hearkened?
>
> III. Did the trial court err in refusing to give an instruction on cross-racial eyewitness identification?

For the reasons that follow, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that appellant fatally shot Maricus Perkins during an attempted armed robbery. Testifying for the State, among others, was an eye-witness to the shooting and two witnesses who had seen the victim just before the shooting. The theory of defense was mistaken identification. The defense presented no witnesses.

Around 1:30 p.m. on October 3, 2011, Wayne Ryer, who worked as a "hack," drove Maricus Perkins and his girlfriend, Ashley Cook, to the Sixth Street area of Brooklyn, Maryland where Ryer parked his minivan.[1] Perkins had arranged to meet and sell drugs to

[1] A "hack" is a slang term for an unlicensed taxi cab. Ryer testified pursuant to a grant of immunity. In exchange for his testimony, the State agreed not to prosecute him for operating a taxi without a license and any drug offenses.

a man named "Sticks" at the location. Perkins was sitting in the front passenger seat; Cook was sitting in the back seat.

Ryer and Cook testified that while the three waited in the minivan, a man that Ryer and Cook later identified in court as appellant, came up to the minivan and spoke to Perkins. Cook testified that she had met appellant, who she knew as Sticks, several times before when Perkins had sold him drugs. Cook described appellant as tall and skinny, and he was wearing all black, including skinny black jeans. Ryer recalled appellant as a tall, skinny, African-American in his mid-twenties, with his hair brushed straight down and wearing a long black leather jacket that fell to his knees.

After appellant smelled the baggie of marijuana given to him, he said that his friend wanted to buy some too. Appellant then walked across the street where, according to Cook, appellant said "the police was coming." Ryer heard a man yell "Five 0" but did not know if it was appellant. An expert in drug culture testified that five 0 (5-0) meant police – and the effect of calling that out would be to "clear the corner." Appellant then walked down a hill and disappeared from their view.

At that point, Perkins called someone on his cell phone, exited the van, and walked a short distance away. After a few minutes, Perkins walked back to the van, told Cook to give him the drugs, and said that he would "serve" them himself. He then walked away in the direction that appellant had walked. A couple of minutes later, Ryer heard arguing, and both he and Cook heard three gunshots. Cook called the police, who responded within

minutes. Ryer let Cook out of the van and then drove away. Cook spoke to the police that day but gave little information. An autopsy was subsequently performed, and the medical examiner opined that the cause of death was homicide by shooting. Perkins had been shot twice: once in the abdomen severing an artery and once in the thigh.

Less than a month after the shooting, on October 26, Cook gave a statement to the police and identified appellant, from a six-person police photographic array, as the person who had spoken to Perkins just before the shooting. The next day, on October 27, Ryer gave a statement to the police. He also identified appellant, from a six-person police photographic array, as the man who had spoken to Perkins just before the shooting.

At the crime scene, the police found three cartridge casings, two bullet fragments, and a cell phone. A firearms expert testified that the cartridge casings were all fired from the same gun, but he could not say whether the bullet fragments had all been fired from the same gun or whether the bullet fragments had come from the casings that were recovered. Additionally, the firearms expert testified that the bullets could have been fired from a handgun or possibly a rifle. Cook and Perkins's mother identified the cell phone found at the crime scene as belonging to Perkins. The State introduced into evidence incoming and outgoing texts and telephone calls from the phone. Starting at 12:16 p.m. on the day of the murder, there were several outgoing and incoming texts between Perkins and appellant regarding a drug deal. The last communication from Perkins's cell phone was to appellant at 1:45 p.m.

Transito Garcia testified that she worked in the rental office at 4228 Sixth Street, collecting rents and managing the rental properties. On October 3, she saw through her office window two men on the walkway between two apartment complexes grab a younger man by his neck. The man who was accosted said, "I don't have it man. . . . Let me go, let me go." One of the other men said, "[T]oday you going to die N." Garcia testified that while several other people heard and saw what was happening, they closed their apartment doors. She heard three gunshots. She called the police but did not speak to them when they canvassed the area because she was scared. She finally spoke to the police two weeks later, on October 20. Although she was still scared to speak to the police, she described the shooter as a very tall African-American with a medium build and wearing baggie light blue jeans and a black sweater with the hood up. She did not identify anyone from the six-person photographic array the police showed her. When asked to identify the shooter in court, she looked at appellant and said "[h]e had the hair longer back then." She testified that she had seen appellant and his accomplice every day from her office before the shooting but not after.

About four months after the shooting, on February 20, 2012, appellant gave a statement to the police. He told the police that on the day of the shooting he had met the victim at about 10:00 a.m. at a convenience store on 9th Street, about a five minute walk from the shooting. The victim sold him drugs after which both men left the area.

We shall provide additional facts as needed to answer each question raised.

DISCUSSION

I.

Appellant argues that the trial court erred in denying his motion for a mistrial because when the jury announced their allegedly inconsistent verdict, appellant could not reject the verdict and ask the jury to continue deliberating as the jury had seen him in shackles. The State responds that the court committed no error because the court had not ordered appellant shackled, was never asked to remove appellant's shackles, and the verdict was not inconsistent. We agree with the State and shall address appellant's argument in two parts: whether the court erred regarding the shackling and whether the verdict was inconsistent.

A. Prejudice due to shackling?

Appellant was charged with first-degree murder; felony murder; second-degree murder; attempted armed robbery; attempted robbery; use of a firearm in the commission of a crime of violence; and wearing, carrying, or transporting a handgun. After reviewing the transcripts it appears that during trial, sometimes the court would ask the security personnel to unshackle appellant when he was brought into the courtroom at the beginning of each day and other times the transcript was silent on this point. Nowhere in the transcript, however, is there any discussion by the parties or the court or any objection from defense counsel regarding the shackling of appellant.

Appellant's trial lasted a week, after which the jury retired to deliberate. At the end of the second day of deliberations, the court was informed that the jury had reached a

verdict. Before the jury was brought in, the parties identified themselves on the record with defense counsel announcing that appellant was to his left. There is nothing in the record to indicate whether appellant was shackled or not. We note that when the court announced that it was "bringing down the jury" to deliver their verdict, defense counsel never asked that his client's shackles be removed.

A few minutes later, the jury was brought into the courtroom and they announced their verdict. The jury found appellant guilty of second-degree murder and attempted robbery. The jury found appellant not guilty of the remaining charges, except that it rendered no verdict on the use of a firearm charge due to finding him not guilty of the wearing, carrying, or transporting a handgun charge. After the jury was polled, but before it was hearkened, the court asked the parties to approach the bench. A 21 minute bench conference ensued. At the bench conference, defense counsel argued that the verdict was legally inconsistent because it was legally impossibly for the jury to find appellant guilty of second-degree intent to kill murder and attempted robbery but acquit him of felony murder and wearing, carrying, or transporting a handgun where it was undisputed that the killing was done with a gun. The court agreed. The court advised defense counsel that he could accept the jury's verdict or the court could send the jury home and tell them to return the following Monday to continue its deliberations. Defense counsel asked to speak with appellant about his options.

The bench conference concluded but resumed a few minutes later. When the court asked if appellant also wanted to approach the bench, defense counsel told the court: "I ha[ve] one other concern now if we're sending them out to redeliberate. Now he's in shackles walking all over the place." When the court responded, "I can't do anything about that[,]" defense counsel conceded, "No, That's a tiny issue." Defense counsel again asked to speak privately with appellant about his options. The bench conference concluded and the court excused the jury to the jury room.

With the jury out of the courtroom and after speaking with appellant again, defense counsel advised the court:

> [A]t this point, after speaking with [appellant], my first – my request is I would, at this point, request that the Court grant a mistrial because the jury has now seen [appellant] all shackled up. Everybody has seen him, and I don't believe that if we go and ask for them to redeliberate all over again, they have now seen him with all the officers in the courtroom, all shackled at the trial table, and given that, I don't think that would be a fair situation for [appellant] to have the jury hav[ing] seen all of that, and then say now you've got to go start over again. So given that, Your Honor, I would ask for a mistrial.

The court denied the motion stating that it did not find "manifest necessity." It is from this ruling that appellant appeals.

"'A request for a mistrial in a criminal case is addressed to the sound discretion of the trial court and the exercise of its discretion . . . is reviewable on appeal to determine whether or not there has been an abuse of that discretion by the trial court in denying the mistrial.'" *Cooley v. State*, 385 Md. 165, 173 (2005)(quoting *Wilhelm v. State*, 272 Md. 404, 429

(1974)). "[T]he declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Id*. (internal quotation marks and citation omitted). *See also Carter v. State*, 366 Md. 574, 589 (2001)(Mistrials are an "extraordinary remedy," to be "avoided in the absence of manifest necessity[.]")(internal quotation marks and citation omitted). In evaluating requests for a mistrial, the Court of Appeals has written:

> The possible prejudice that a defendant may suffer as a result of alleged misconduct forms the threshold for the decision whether to grant a mistrial. "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226, 854 A.2d 1259, 1264 (2004)(quoting *Kosmas v. State*, 316 Md. 587, 595, 560 A.2d 1137, 1141 (1989)).
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> * * *
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> "'The applicable test for prejudice is whether we can say, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [jury's] judgment was not substantially swayed by the error." The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error.'"
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> *Wilhelm*, 272 Md. at 416, 326 A.2d at 716 (citations omitted). *See also Walker v. State*, 373 Md. 360, 399, 818 A.2d 1078, 1100 (2003).

Cooley, 385 Md. at 173, 175 (brackets added).

Although a trial judge has discretion regarding courtroom security, as a general rule an accused has a right to be tried without being physically restrained. *Wagner v. State*, 213 Md. App. 419, 476 (2013)(citations omitted). "This is because requiring a defendant to wear shackles that will be seen by a jury implicates the defendant's due process right to a

fair trial." *Id*. (citations omitted). Like a mistrial decision, we review the decision of a trial judge in restraining a defendant during trial for an abuse of discretion. *See Miles v. State*, 365 Md. 488, 570 (2001), *cert. denied*, 534 U.S. 1163 (2002). An abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court. Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Fontaine v. State*, 134 Md. App. 275, 288 (quotation marks and citations omitted), *cert. denied*, 362 Md. 188 (2000).

It is unclear after reviewing the transcripts whether appellant was shackled or not during the trial generally – at no time did the parties discuss the shackling of appellant nor did appellant's counsel object to his shackling. On some days, the court asked the security to remove appellant's shackles, and on other days the record is silent. Prior to the jury entering the courtroom to read their verdict, the record is silent as to whether appellant was shackled or unshackled. If appellant was shackled, however, defense counsel did not ask the court to unshackle appellant then or anytime thereafter. Moreover, once the jury entered the courtroom, there was no evidence in the record that the jury could see the shackles. It was only after the jury had read their verdict and the parties were engaged in a lengthy bench conference that defense counsel informed the court that the jury had seen appellant walking "all over the place" in his shackles.

We believe that appellant has failed to make an adequate record that error occurred here. Because there is no evidence that the trial court ordered appellant shackled or was ever

asked to exercise its discretion concerning the propriety of having appellant shackled, and because there is no evidence that the jury ever saw appellant shackled except because of his own actions in moving about the courtroom, we cannot find that the court exercised its discretion let alone abused its discretion regarding the shackling of appellant. *See Ball v. State*, 57 Md. App. 338, 360 ("[A] judge cannot abuse his discretion when he is not called upon to exercise discretion."), *cert. denied*, 300 Md. 88 (1984), and *Allen v. State*, 89 Md. App. 25, 43 (1991), *cert. denied*, 325 Md. 396 (1992)("'Invited error' is the shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit — mistrial or reversal — from that error.") (citations omitted).

B. Inconsistent verdicts

Appellant states in his brief, with no argument to support his statement, that the verdicts were legally inconsistent.[2] Appellant is incorrect.

"We review de novo the question of whether verdicts are legally inconsistent." *Teixeira v. State*, 213 Md. App. 664, 668 (2013). Factually inconsistent verdicts are illogical but permitted in Maryland. *McNeal v. State*, 426 Md. 455, 458 (2012). In contrast, legally inconsistent verdicts are not permitted. *Id*. (citing *Price v. State*, 405 Md. 10, 35 (2008)). The Court of Appeals has said that a legally inconsistent verdict is one "where a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the

[2] Notably, appellant never objected to any of the jury instructions cited below.

first charge[.]" *McNeal*, 426 Md. at 458. Another helpful definition is that "[a] legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law." *Id*.

In *Price*, the appellant had been charged, among other things, with drug trafficking crimes and possession of a firearm during and in relation to a drug trafficking crime. *Price*, 405 Md. at 13-14. The jury acquitted appellant of the drug trafficking crimes but found him guilty of the firearm charge which had as an essential element a drug trafficking crime. *Id*. at 15. The Court of Appeals reversed, finding the verdict legally inconsistent. *Id*. at 34.

i. Legally inconsistent: guilt as to second-degree murder and attempted robbery but acquittal on felony murder?

The jury was instructed on the felony murder count as follows:

> In order to convict the Defendant of first degree felony murder, the State must prove (1) that the Defendant attempted to commit a robbery; (2) that the Defendant killed [the victim]; (3) that the Defendant had the intent to commit the robbery before or at the same time as the act causing the death of [the victim]; and (4) that the act resulting in the death of [the victim] occurred *during* the attempted commission of the robbery.
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> When a person is charged with felony murder based on an alleged robbery, the sequence of events can be important. To convict the Defendant of robbery the State does not have to prove that the Defendant decided to rob [the victim] before or at the same time as the commission of the acts that, the act that killed [the victim]. For robbery it is sufficient if the State proves that the act of force and the robbery were parts of the same general event, even if the Defendant made the decision to rob [the victim] as an afterthought after the commission of the act that caused the death of [the victim].
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> The law as to felony murder is different. To find the Defendant guilty of felony murder, the State must prove that the Defendant had the intent to rob

> before or at the same time as the commission of the act that killed [the victim]. When the decision to rob the victim was an afterthought, made after the commission of the act that caused the victim's death, a Defendant may not be convicted of felony murder.

(Emphasis added). *See* Md. Pattern Jury Instructions - Cr. 4:17.7 (defining the elements of felony murder to include that the death must occur *during* the commission of the attempted felony).

The felony-murder charge contains elements distinct from second-degree murder and attempted robbery, specifically, that the murder must occur *during* the commission of the underlying felony. Thus, the jury's acquittal on felony-murder was not legally inconsistent with a finding of guilt on second-degree murder and attempted robbery.[3]

ii. Legally inconsistent: guilt as to second-degree murder but acquittal on wearing, carrying, or transporting a handgun when death was by handgun?

The trial court instructed the jury on wearing, carrying, or transporting a handgun as follows:

> The Defendant is charged with the crime of carrying a handgun with the purpose of injuring or killing another. In order to convict the Defendant, the State must prove (1) that the Defendant wore, carried or transported a handgun that was within his reach and available for his immediate use; and (2) that the Defendant wore, carried, or transported a handgun that was within his reach and available for his immediate use with the deliberate purpose of injuring or killing another person. A handgun is a pistol, revolver *or other*

[3] We note that had the jury found appellant guilty of felony murder but not guilty of the underlying felony (attempted robbery), the verdict would have been legally inconsistent.

> *firearm capable of being concealed on or about the person* and which is designed to fire a bullet by the explosion of gunpowder.

(Emphasis added). The State's firearms expert testified that the three recovered cartridge casings were .40 caliber and the recovered bullets were "40/ten millimeter," explaining that the bullets encompassed two different but very close in size calibers. As to the "style of weapon" used, the expert testified "probably the majority of .40 caliber [weapons] are handguns but there are companies that make a .40 caliber carbine rifle which is a rifle for all intents and purposes. It's a long gun." Although the expert conceded that it was rare for that type of firearm to come into the police department, he testified they do "get five to seven of them a year[.]" Based on the above, the jury could have concluded that the weapon used by appellant was a rifle, which did not meet the definition of a handgun. Thus, the jury's acquittal on the handgun charge was not legally or factually inconsistent with a finding of guilt as to second-degree murder.

II.

Appellant argues that the trial court abused its discretion when it refused to instruct the jury on cross-racial identification. Appellant argues that such a instruction was necessary because the State's case relied on Garcia's identification, the only eyewitness to the crime. The State argues the trial court did not err because, among other things, the requested instruction was not generated by the evidence and the pattern jury instruction on identification that the trial court gave covered the instruction requested.

Md. Rule 4-325 governs jury instructions in criminal cases. Subsection (c) provides in pertinent part: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Md. Rule 4-325(c). It is long established that a requested instruction should be given when the following three criteria are met: "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in [the] instructions actually given." *Dickey v. State*, 404 Md. 187, 197-98 (2008)(citations omitted). In reviewing a trial court's decision to not give a particular requested instruction, "[t]he burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999)(citations omitted), *aff'd*, 362 Md. 77 (2000).

The Maryland appellate courts have held that the giving of a cross-racial identification instruction, like giving the pattern jury instruction on identification generally, is not mandatory but subject to a trial court's discretion. *Janey v. State*, 166 Md. App. 645, 661, *cert. denied*, 392 Md. 725 (2006). *Cf. Gunning v. State*, 347 Md. 332, 345 (1997)("We concur with those courts that have declined to adopt either of the rigid rules on the appropriateness of an identification instruction, and have instead held that the decision as to whether to give such an instruction lies within the sound discretion of the trial court."). Appellant argues that there have been "important developments in the law" since *Janey* and

directs our attention to *State v. Henderson*, 27 A.3d 872, 926 (N.J. 2011) which held, among other things, that a cross-racial identification should be given whenever cross-racial identification testimony "is a critical issue in the case." *But see State v. Allen*, 294 P.3d 679, 687 (Wash. 2013)(rejecting *Henderson's* holding on cross-racial identification instructions). The short answer to appellant's argument is *Henderson* is not the law in Maryland, and appellant has presented no change in the social science research since *Janey* to cause us to revisit this issue.

In refusing to give the requested cross-racial identification instruction, the court stated:

> And what I have learned in this case from [Garcia's] direct examination and on cross-examination, is that the difficulty that I viewed her identification, had more to do with fear and reluctance than it had to do with anything else. And I also, look at the fact that she's not recanting; she is not in here recanting an identification. Although, she didn't identify the person in the photo array initially, when she was questioned on, I believe, October 20, of 2011, and she explained that was because she did not want to be involved, and not because of anything to do with race.
>
> The next one, is, "A witness with no exposure to members of the subject race." There were no questions to her about, whether or not, she had ever – what her exposure level was, in this area, with this particular race, but she did indicate that she worked in this area five days a week, in this particular location[.] . . . And . . . that she has had contact, almost daily, with this defendant, and she indicated that you know, they spoke every day.
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> So that will give me an idea as to what her exposure is. And then number (4) "virtually, little, or no time to observe the offender or some combination thereof." She testified about her ability to observe the defendant; what she observed the defendant to do. And whether or not she had a clock

> on in saying that they took this length of time, but this was not just a moment, or a flash that she got a view of this particular person.
>
> And so I am not going to allow the cross-racial identification instruction. Certainly, you can make of it whatever you like in closing, but it will not come from the Court, as an instruction that they have to consider race. And so I am not going to give the instruction.

Given the law in Maryland, we find no abuse of discretion by the trial court in refusing to give a cross-racial jury instruction. We note at the outset that it is unclear whether Garcia was of a different race from appellant. Appellant assumes in his appellate brief that Garcia "was not [an] African-American" like him because he requested that the trial court give a cross-racial identification instruction and no one challenged his request on the basis that he and Garcia were not of different races. Nevertheless, even if Garcia was of a different race than appellant, there is no evidence that Garcia had difficulty identifying appellant because of his race. Rather, she clearly had difficulty identifying appellant because she was scared. Moreover, the instructions given adequately covered the circumstances presented. The court instructed the jury:

> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and the Defendant was the person who committed it. You have heard evidence about the identification of the Defendant as the person who committed the crime. You should consider the witness's opportunity to observe the criminal act and the person committing it, including the length of time the witness had to observe the person committing the crime, the witness's state of mind, and any other circumstance surrounding the event. You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, and the witness's credibility or lack of credibility as well as any other factors surrounding the identification.

> You have heard evidence that prior to this trial witnesses identified the Defendant by photo array. The identification of the Defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough to convict the Defendant. However, you should examine the identification of the Defendant with great care. It is for you to determine the reliability of any identification and give it the weight you believe it deserves.

Accordingly, we are persuaded that the trial court did not abuse its discretion in refusing to give the requested instruction. *Cf. Janey, supra* (holding that the trial court had not abused its discretion in denying appellant's request for a cross-racial identification instruction even though a corroborating identifying witness stated that he had difficulty identifying African-Americans); *Smith v. State*, 158 Md. App. 673, 704 (2004)(no error when trial court refused to give a cross-racial instruction where the defendants were convicted on the basis of the testimony of a single eyewitness, who was white, because there was nothing to suggest that race played a part in the identification and the instructions given were sufficient), *rev'd on other grounds*, 388 Md. 468 (2005).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.