

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1699

September Term, 2015

STEPHON R. SUMMERS

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James A., III.,
(Retired, specially assigned),

JJ.

Opinion by Kehoe, J.

Filed: June 23, 2017

*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.

After a jury trial in the Circuit Court for Montgomery County, the Honorable Ronald B. Rubin, presiding, Stephon R. Summers was convicted of armed robbery, conspiracy to commit armed robbery, and identity fraud. He was sentenced to incarceration for a term of twenty years, to be served consecutively to any sentence he was then serving, for the armed robbery conviction, a consecutive term of twelve years for conspiracy to commit armed robbery, and a concurrent term of eight years for identity fraud. This timely appeal followed.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the trial court committed plain error in permitting the State to elicit a lay opinion that appellant was the person depicted in a picture derived from security footage. For the reasons set forth below, we find the trial court did not commit plain error and affirm its decision.

FACTUAL BACKGROUND

On the night of May 25, 2011, at about 11 p.m., Maria Tupac took the Metro from Dupont Circle in Washington, D.C., to the station in Rockville, Maryland, and walked across the street towards her apartment building. As she was walking, she noticed a blue Ford automobile pull up. A man got out of the car and approached her as she was about to enter her apartment building. Ms. Tupac described the man as having a “bigger” build, though not obese, and braided hair, in a “shorter length,” pulled up in a half-ponytail.

When Ms. Tupac asked the man what he wanted, he “tased” her in the chest with a stun gun. Ms. Tupac fell against the door, hit her head on the door frame, and slid down

to the ground. She was leaning against the door when the man tased Ms. Tupac again on the arm. At that point, another man exited the car and approached. Ms. Tupac described him as having lighter skin, short hair, and wearing a white tank top and jeans. The second man said, “Hurry up, someone’s going to come out.” He also tased Ms. Tupac—this time on her neck.

Ms. Tupac felt very weak, as if she was going to pass out. She screamed for help and told the men, “Please, take whatever you want.” The men took her purse, which contained, among other things, her cell phone, two credit cards, and her driver’s license, and drove off.

After knocking on several apartment doors, Ms. Tupac obtained the help of a neighbor and called 911. She had blisters on her tongue and burn marks on her body where she had been tased.

Police obtained information that, after the attack, someone attempted to use a credit card belonging to Ms. Tupac at a CVS drugstore in Clinton. Detectives obtained video footage of that transaction, from which they printed still photographs. Ms. Tupac identified two of the people in the photographs as the men who attacked her.

Detective Jeff Saleik of the Rockville City Police Department created a flier using the color photographs obtained from the CVS surveillance footage and distributed it to local news organizations and law enforcement agencies in Maryland, Virginia, and the District of Columbia. Detective Saleik was later contacted by Detective Antoine Weston of the District of Columbia’s Metropolitan Police Department, who gave him the names

of two possible suspects: appellant and Terrance Walker. Detective Weston knew appellant and had spoken to him on prior occasions. He was “100 percent” confident in his identification of appellant. Metropolitan Police Detective Jose Morales, who had met with appellant on prior occasions, also identified appellant and Walker in the flier and was “[v]ery confident” in his identifications.

Terrance Walker, who pled guilty to the May 25, 2011, robbery of Ms. Tupac, testified for the State. He viewed a still photograph taken from the CVS video footage and identified himself and appellant, whom he described as “his cousin.” Walker claimed that he took the stun gun from the home of appellant’s mother, that he used it to assault Ms. Tupac, and that appellant exited the car and pulled him off Ms. Tupac in an attempt to stop the robbery. He tried to use Ms. Tupac’s credit cards at the CVS, but they were declined.

Walker gave a recorded statement to the police, which was played at trial. In that statement, Walker claimed that appellant had offered to help him obtain money because Child Protective Services was going to “snatch the kids again if the electricity” was turned off. Appellant had a stun gun, which Walker thought belonged to appellant’s mother, and came up with the idea of using it to commit robberies. When the two men saw Ms. Tupac walking toward her apartment building, they decided to “go out there and . . . get her.” Both men exited the vehicle and approached Ms. Tupac. Appellant was “standing on top of” Ms. Tupac stunning her while Walker rummaged through her pocketbook in search of valuables.

At trial, Walker claimed that he had lied about the details of the robbery in his recorded interview with detectives because he did not want to be charged with the crimes. Walker pleaded guilty to the robbery and was sentenced to incarceration for a period of ten years to run concurrently with a sentence that he was already serving.

We shall include additional facts in our discussion of the issue presented.

DISCUSSION

Appellant contends that the trial court committed plain error in permitting the State to elicit lay opinion testimony that appellant was the person depicted in the still photographs taken from the CVS security footage. Specifically, he maintains that neither Detective Weston nor Detective Morales had the requisite degree of substantial familiarity with appellant to offer the lay opinion that he was the man depicted in the photographs. Recognizing that there was no objection to the testimony of either detective, appellant asks us to exercise our discretion to grant plain error review. We decline to do so.

“Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which ‘vitally affect[] a defendant's right to a fair and impartial trial.’” *Malaska v. State*, 216 Md. App. 492, 524, *cert denied*, 439 Md. 696 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)). We should engage in plain error review only when we are confronted with an outcome-affecting error of such magnitude that it “seriously affect[s] the fairness,

integrity or public reputation of judicial proceedings.” *State v. Rich*, 415 Md. 567, 578 (2010) (quotation marks and citations omitted).

While we are not required to explain why we decline to exercise plain error review, we will do so in this case. We discern no error in the admission of the identifications made by Detectives Weston and Morales. Even if appellant had interposed an objection to the testimony of Detectives Weston and Morales, the trial court would not have abused its discretion in admitting their identifications of appellant.

The decision to admit lay opinion testimony rests soundly within the discretion of the trial judge. *Kelly v. State*, 392 Md. 511, 530 (2006), *cert. denied*, 444 Md. 640 (2015); *Norwood v. State*, 222 Md. App. 620, 642 (2015). A court’s decision constitutes an abuse of discretion only when it is “well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Dehn v. Edgecombe*, 384 Md. 606, 628 (2005) (internal quotation marks omitted) (quoting *North v. North*, 102 Md. App. 1, 13–14 (1994)).

Under Maryland Rule 5-701, a lay witness may testify to those opinions or inferences that are “(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.” The rationale for this standard is twofold: “the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge of the witness.” *State v. Payne*, 440 Md. 680, 698 (2014) (citation and footnote omitted).

In *Moreland v. State*, 207 Md. App. 563 (2012), we considered whether the trial court abused its discretion in admitting the lay testimony of Eric Owens, a police officer who was not involved in investigating the crime at issue, who identified Moreland in a still photograph obtained from surveillance video of a bank robbery. *Id.* at 566–67.

Owens testified that he had known Moreland for 40 to 45 years, that the two had grown up and gone to school together, and that although they were not related by blood, he referred to Moreland as his cousin. *Id.* at 567. In concluding that the trial court did not abuse its discretion in admitting Owens’ testimony, we held that ““a lay witness who has substantial familiarity with the defendant, such as a family member or a person who has had numerous contacts with the defendant, may properly testify as to the identity of the defendant in a surveillance photograph.”” *Id.* at 572 (quoting *Robinson v. Colorado*, 927 P.2d 381, 383 (Colo. 1996)). We further held that ““whether a lay witness’ prior contacts with the defendant are extensive enough to permit a proper identification is a matter of weight for the jury, not admissibility.”” *Id.*

The record before us makes clear that Detectives Weston and Morales had sufficient substantial familiarity with appellant based on their multiple past encounters with him. Detective Weston identified appellant in court. He first encountered appellant on June 10, 2011, when he and his partner spoke to him. Their conversation occurred in a “[b]rightly illuminated” room and they were approximately one-and-a-half to two feet apart from each other. Approximately one month later, Detective Weston and appellant spoke again for about an hour. They were about two to three feet apart from each other on

that occasion. Detective Weston received the flier prepared by Detective Saleik and identified the individuals depicted in it as appellant and Terrance Walker. Detective Weston was “100 percent” certain in his identification of Walker and appellant.

Detective Morales also identified appellant in court. He testified that he spoke with appellant on June 10, 2011 “on-and-off” for “about four to five hours,” and that appellant identified himself as Stephon Summers. Detective Morales described the room where they met as “well-lit” and stated that he was within two to three feet of appellant during the course of their conversation. Detective Morales also spoke to appellant on another occasion in 2011 for a period of about one to two hours. The lighting conditions and the distance between him and appellant were about the same on that occasion.

Clearly, the testimony of each detective was rationally based and premised on their personal knowledge. *See Payne*, 440 Md. at 698. Each had sufficient substantial familiarity with appellant, based on their multiple past encounters with him in well-lit environments and at close distance, to support their subsequent identifications of him in the photographs derived from the CVS surveillance footage. The intimacy level of the detectives’ familiarity with appellant went to the weight to be given to their testimony, not the admissibility of that testimony. Judge Rubin would not have abused his discretion by overruling a timely objection, had one been made.

**THE JUDGMENTS OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY ARE AFFIRMED; COSTS TO BE PAID
BY APPELLANT.**