Circuit Court for Baltimore City
Case No. 118094010-011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 197

September Term, 2020

ANTHONY ALSTON

v.

STATE OF MARYLAND

Arthur,
Friedman,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: December 6, 2021

A jury in the Circuit Court for Baltimore City convicted Anthony Alston, appellant, of first-degree murder and first-degree arson. The court sentenced him to life imprisonment for first-degree murder and a consecutive term of 20 years' imprisonment for first-degree arson.

On appeal, appellant presents three questions for our review, the first of which we have rephrased slightly:

1. Did the trial court err in admitting evidence of a murder other than the murder charged, and was the jury instruction regarding that evidence sufficient?

2. Did the trial court err in allowing defense counsel to continue to represent appellant after counsel announced that he had agreed to disbarment?

3. Was the evidence insufficient to support appellant's conviction for arson?

Finding neither error nor abuse of discretion by the trial court, we shall affirm.

BACKGROUND

At approximately 2:00 a.m. on February 27, 2018, the burned body of Shamar Poole was discovered during a fire at a vacant apartment building at 1238 East Belvedere Avenue in Baltimore. The assistant medical examiner determined that the manner of Poole's death was homicide, noting that Poole had suffered multiple blunt force trauma injuries to the back of the head and neck, and possible strangulation. The assistant medical examiner opined that Poole was likely deceased at the time of the fire, as there was no evidence of soot in his airways, carbon monoxide in his blood stream, or other evidence of smoke inhalation. Captain Mike Roth of the Baltimore City Fire Department's Fire Investigation Bureau, an expert in fire origin and cause investigation, determined that the fire damage at

1238 East Belvedere Avenue originated in the stairwell leading to the basement of the building and involved a male victim, who had sustained fire damage to the body. Based on testing results of debris samples collected at the scene of the fire, it was Captain Roth's expert opinion that the fire was "incendiary," *i.e*, an arson, intentionally started using gasoline.

Lavia Pittman testified that Poole had called her on February 26, 2018 and asked her for a ride. According to Pittman, Poole had told her that they would be "going somewhere and . . . coming right back." Pittman recalled that Poole had received two telephone calls during their drive. In the first phone call, Poole had stated that he would "be back in like 20 minutes," and in the second call, he told the caller that he was "on his way." Pittman and Poole arrived at Glenhaven Road at approximately 1:40 p.m. Poole exited the car and said "I'll be back[.]" When Poole did not return to the car as expected, Pittman tried unsuccessfully to reach him on his cell phone. Pittman waited in the car for one to three hours, honking the horn several times. Pittman ultimately drove away, thinking that something was not right, and contacted Monique Lofton, Poole's sister.

At approximately 9:00 p.m. that night, Pittman returned to Glenhaven Road with Lofton and Jamal West, Poole's best friend. Pittman identified 1224 Glenhaven Road as the house she believed that Poole had visited. Pittman and Lofton knocked on the door of the house while West went to the back of the house. West observed a light on in the kitchen but no activity inside the house. When West returned to 1224 Glenhaven Road later that night, he viewed a man inside the house and decided to contact police.

Based on information provided by Lofton and Pittman, Baltimore Police Detective Sandra Forsythe obtained a search warrant for 1224 Glenhaven Road. Inside 1224 Glenhaven Road, police recovered several items, including a black vest containing two store receipts; one from Family Dollar Store and the other from Rite Aid. Fingerprint analysis of the Family Dollar receipt resulted in a match to appellant's fingerprints. Analysis of fingerprints on a Doritos bag and a Mr. Clean bottle found in the house also matched appellant's fingerprints.

Luminol testing of the living room walls and floor of the residence showed luminescence, indicating the presence of blood. DNA analysis of blood stains found on the living room walls revealed that Poole was the major male contributor of the DNA profile. Analysis of blood and epithelial cells found on a scrub brush, bat, and extension cord in the home concluded that Poole was the single source of those DNA profiles. DNA testing of blood stains found on a pair of jeans in the home revealed that Poole was the major male contributor. Testing of the waistband of those jeans, however, yielded a DNA profile in which appellant was the major male contributor.

Appellant was arrested on March 15, 2018 and interviewed by Detective Forsythe. The audio and video recording of appellant's interview was played for the jury and admitted into evidence. Appellant informed Detective Forsythe that his children and their mother had been living at 1224 Glenhaven Road and they had moved to New York temporarily. Appellant acknowledged that he was at the 1224 Glenhaven house on February 26, 2018. He asserted, however, that he was not in the house long enough to "do anything" and that he did not know what happened at the house after he left at 12:30 p.m.

According to appellant, he had entered the house through the back door, walked into the kitchen and retrieved some marijuana he had stored there. When appellant heard a knock at the front door, he assumed it was the police looking for him on an outstanding warrant, so he took the marijuana and left through the back door. Once he saw that there were no police officers at the house, he returned to the house.

Appellant recalled that he had been to the Rite Aid and Dollar Store on February 26, 2018, and acknowledged that the individual in a surveillance photo from the Dollar Store was "probably" him and the receipt was "probably" his. Appellant also identified himself on the surveillance video from the Rite Aid store, where he admitted he had purchased some Ajax, trash bags, and gloves.

Appellant denied wearing gray jeans on February 26, 2018 and denied knowing why wet jeans were found in the house. He claimed that he never changed his clothes that day. Appellant stated that he did not know anything about the blood that was found on the sheets, baseball bat and extension cord in the house, nor did he know who cleaned up the house.

Kevin Smith, an inmate and self-described "jailhouse lawyer," testified that he met appellant while he and appellant were incarcerated and appellant was awaiting trial. Smith explained that appellant had asked him for help with his case, which appellant had described to him as "easy" because the police did not have any evidence except a receipt showing that he had purchased some cleaning supplies. Smith had advised appellant that without fingerprints or eyewitnesses, police had a circumstantial case. According to Smith, appellant told him that he had killed a drug dealer who was "real big" and that he had to

"struggle" to kill him. After the murder, appellant needed a friend's help to move the body. Appellant then purchased cleaning supplies.

According to Smith, appellant wanted Smith to have his phone number because he "just now beat one murder, and [he was] getting ready to beat this other one." Smith testified that he did not expect leniency from the State's Attorney's Office in exchange for his testimony, and the State's Attorney's Office had not intervened on his behalf in his trial.

Patricia Alston, appellant's mother, testified that in 2018, Alissa Goodman and the two sons she shared with appellant lived at 1224 Glenhaven Road. Goodman had since moved to New York to take care of her mother. Ms. Alston had a key to the Glenhaven home, which she used to unlock the house for police on February 27, 2018. Ms. Alston reviewed surveillance video from the Family Dollar and Rite Aid stores, and identified appellant on the videos exiting the stores.

Donneka Tate, a neighbor who lived at 1226 Glenhaven Road, identified appellant as her neighbor's boyfriend and someone she had seen at the 1224 Glenhaven house, on occasion, after her neighbor and children had moved. Tate recalled hearing a horn blaring continuously on the afternoon of February 26, 2018 and a dog barking at the 1224 Glenhaven house.

Agent Matthew Wilde of the Federal Bureau of Investigation analyzed historical phone records for appellant's cell phone and Poole's cell phone. Agent Wilde determined that Poole's cell phone traveled from West Baltimore to the Glenhaven Road address at approximately 1:52 p.m. Poole's cell phone records showed a call between his phone and

appellant's cell phone at 1:52 p.m. Poole's cell phone made no outgoing calls after 1:52 p.m.

Appellant's cell phone records placed his phone in the area of Glenhaven Road at the time of the 1:52 p.m. phone call with Poole. Cell tower records showed that appellant's phone used a cell tower in the vicinity of Glenhaven Road between 2:56 p.m. and 3:58 p.m. Between 3:46 p.m. and 3:58 p.m., appellant's phone used a cell tower south of the East Belvedere address. According to Agent Wilde's analysis, appellant's phone was located in the area of the East Belvedere address between 3:58 p.m. and 4:59 p.m., and again from 6:12 p.m., to 6:24 p.m. Records showed appellant's phone used the cell tower closest to the Glenhaven Road address between 6:56 p.m. and 7:54 p.m., and again at 8:46 p.m., 10:12 p.m., and 11:17 p.m. At 12:07 a.m. and 12:27 a.m. on February 27, 2018, appellant's phone used the cell tower near the East Belvedere location. Appellant's phone used the tower near the Glenhaven location at 12:12 a.m., 12:27 a.m., and 12:41 a.m. At 1:07 a.m. and 1:15 a.m., appellant's phone used the tower near the East Belvedere location for the final time that morning. After 1:25 a.m., appellant's phone moved from the area and did not return to the East Belvedere or Glenhaven areas.

DISCUSSION

I.

Evidence of prior bad acts

Appellant contends that the trial court erred in admitting Smith's testimony that appellant had told him that he had "beaten a murder charge" because the reference to a

separate murder charge constituted evidence of prior bad acts. Appellant further asserts that the trial court's special instruction to the jury was insufficient to rectify the error.

The State responds that appellant failed to preserve this issue for review, or alternatively, appellant waived this issue at trial. Even if not waived, the State contends that the trial court did not abuse its discretion in admitting the statement where the prosecutor was unaware that Smith intended to make the statement, and the special instruction, drafted by defense counsel, was sufficient to cure any resulting prejudice.

Smith testified that appellant had provided him with his phone number because, according to Smith, appellant had stated that he "just now beat one murder, and [he was] getting ready to beat this other one." Defense counsel asked to approach the bench and informed the court that there was no other murder charge against appellant and that Smith had testified to a statement for which the defense had no notice.

The court ruled that defense counsel could address the issue on cross-examination and indicated that the court would give a curative instruction, explaining:

> THE COURT: . . . But I think the way to handle it is through cross and then an instruction to the jury that there was never a second murder charge.
>
> [DEFENSE COUNSEL]: *Okay. That's fine.*
>
> THE COURT: Do you know what I mean?
>
> [DEFENSE COUNSEL]: *I understand.*
>
> THE COURT: Because there wasn't. Even if there was an attempted murder, I can instruct them that there was absolutely never another murder charge. Okay?
>
> [DEFENSE COUNSEL]: *Thank you.*

(Emphasis added.)

After the State and defense rested, the court and counsel reviewed jury instructions. Defense counsel reminded the court that a special instruction was needed to address Smith's inaccurate statement that appellant had been charged with murder or attempted murder. At the court's request, defense counsel drafted the following instruction and presented it to the court:

> "You have heard testimony from Kevin Smith regarding [appellant] have said he be having had beat a murder," [sic] in quotation marks. You are instructed to consider as proven that [appellant] has never been charged with a murder or attempted murder prior to the charges that are before you to consider.

The court slightly rephrased the proposed instruction and instructed the jury as follows:

> You heard testimony from Kevin Smith regarding [appellant] having said he beat a murder. You are instructed to accept as proven that [appellant] has never been charged with a murder or charged with attempted murder prior to the charge that is before you to consider.

Defense counsel did not object to the instruction as given based primarily on his submission.

Appellant's contention that the trial court erred in admitting evidence of a prior murder charge is not preserved for review. When the court ruled on appellant's objection, indicating that defense counsel could address the issue on cross-examination, defense counsel acquiesced to the court's ruling, stating, "Ok. That's fine." In response to the court's further question as to whether the defense understood the ruling, defense counsel responded, "I understand." By conceding to the trial court's ruling, appellant waived his

objection to that ruling. *See Berry v. State*, 155 Md. App. 144, 169 (2004) (holding that counsel's express agreement to court's ruling waived the issue for appellate review) (citing *Green v. State*, 127 Md. App. 758, 769 (1999)) (noting that "[b]oth the Court of Appeals and this Court have held that when a party acquiesces in the court's ruling, there is no basis to appeal from that ruling"); *accord Watkins v. State*, 328 Md. 95, 100 (1992) (holding that there was no basis for the defendant to appeal where he had acquiesced in the court's ruling), *overruled on other grounds*, *Calloway v. State*, 414 Md. 616 (2010).

Appellant's contention that the special instruction to the jury was not adequate to remedy the prejudice created by the improper testimony is also unpreserved because appellant did not object to the jury instruction at the time it was given. *See Paige v. State*, 222 Md. App. 190, 200-01 (2015) (holding that appellant's failure to object resulted in a waiver of his challenge to the curative instruction). *See* Md. Rule 4-325(f) ("No party may assign as error the giving or the failure to give 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. Rule 2-517(c) ("a party [must], at the time the ruling or order is made or sought, make[] known to the court the action that the party desires the court to take or the objection to the action of the court").

Not only did defense counsel fail to object to the special instruction, he proposed the instruction that was given. Because appellant received the remedy he suggested, there is nothing for us to review on appeal. *See Somers v. State*, 156 Md. App. 279, 312 (2004) (explaining that "[h]aving sought and obtained the precise instruction he requested, [the defendant] cannot now be heard to complain that the language of the instruction was

prejudicial"). *See Klauenberg v. State*, 355 Md. 528, 545-46 (1999) (holding that defendant who had received the remedy for which he asked had no grounds for appeal) (citing *Ball v. State*, 57 Md. App. 338, 358-59 (1984)) (holding that the trial court committed no error where the defendant obtained the remedy he requested and asked for no further relief), *aff'd in part and rev'd in part on other grounds by Wright v. State*, 307 Md. 552 (1986). *Accord Hyman v. State*, 158 Md. App. 618, 631 (2004) (explaining that, because a defendant did not ask that an improper statement be stricken, a curative instruction given, or a mistrial granted, he had "effectively waived all other potential review on appeal").

II.

Alston's Right to Counsel

On the sixth day of trial, defense counsel disclosed to the court that he had, on the preceding day, agreed to disbarment, by consent, for "misconduct" and lack of "candor toward the tribunal." The disbarment was to be effective on September 3, 2019, following the conclusion of appellant's trial. Defense counsel did not provide details of the facts underlying his disbarment except to say that it did not involve a grievance from a client, attorney, or judge, but that it resulted from a "very contentious" situation in which he had made a decision to represent an individual with whom he was in a relationship and he had made a statement in a pleading that was found to be untruthful.

Before the court, defense counsel advised appellant of the disciplinary action and pending disbarment. Specifically, he told appellant that he had "the right to at least express a concern or a remedy you would want if you wish to, or you would have the right to retain

me to continue with you throughout this trial. That's completely your decision." Appellant responded that he wished for defense counsel to continue to represent him at trial.

Appellant contends that his right to counsel was violated because the trial court allowed defense counsel to continue to represent him following defense counsel's announcement of his disbarment. "Under both the Sixth Amendment [to the United States Constitution] and Article 21 of the Maryland Declaration of Rights, a criminal defendant is entitled to the assistance of counsel[.]" *Taylor v. State*, 428 Md. 386, 399 (2012). Appellant does not contend that his counsel was ineffective or that the pending disbarment affected in any way defense counsel's representation of him.

Appellant asks us to recognize that defense counsel's disbarment constituted a *per se* violation of his constitutional right to counsel. We see no basis on these facts for such a sweeping determination. The Court of Appeals has concluded that the representation of a criminal defendant by an attorney who is *suspended* from the practice of law does not constitute a *per se* violation of the right to counsel. *See Jones v. State*, 328 Md. 654, 659 (1992) (rejecting claim that defendant was deprived of counsel during his trial because his attorney had been suspended for nonpayment of annual client protection fee). Accordingly, there is no basis for finding a *per se* violation of the right to counsel here, where counsel remained properly licensed to practice law during appellant's trial. Defense counsel's scheduled disbarment following the conclusion of his representation of appellant did not render him unqualified to represent appellant or deprive appellant of his constitutional right to counsel.

III.

Sufficiency of Arson Evidence[1]

Appellant argues that the evidence was not sufficient to sustain his conviction for arson. He points out that there were no eyewitnesses and no physical or forensic evidence connecting him to the fire and no evidence placing him at the scene of the fire. He contends that the circumstantial evidence produced by the State amounted to pure speculation, insufficient to support his conviction.

The State counters that there was sufficient evidence from which the jury could infer that appellant killed Poole at 1224 Glenhaven Road and moved Poole's body to 1238 East Belvedere Avenue before starting the fire. The State contends that the cell phone tracking evidence was strong circumstantial evidence showing appellant's movements between the Glenhaven Road residence and the East Belvedere location. The State asserts that the jury could infer from the evidence that appellant tried to conceal Poole's murder by moving his body to 1238 East Belvedere Avenue and setting the fire to make it appear as though Poole's death was caused by the fire and to destroy any evidence of Poole's body.

The standard for reviewing the sufficiency of the evidence is "'whether[,] after reviewing 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.'"

[1] We agree with the State that appellant preserved his sufficiency claim as to the arson count. Appellant moved for judgment of acquittal at the close of the State's case, and because the defense did not offer any evidence, that motion was not withdrawn. Appellant was therefore not required to renew his motion after the defense rested. *Cf.* Md. Rule 4-324(c) (when a defendant introduces evidence in his defense following the denial of a motion for judgment of acquittal, his motion for judgment of acquittal is withdrawn).

Grimm v. State, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Tracy v. State*, 423 Md. 1, 12 (2011) (citation omitted). We, therefore, "defer to any reasonable inferences a jury could have drawn in reaching its verdict, and determine whether there is sufficient evidence to support those inferences." *Lindsey v. State*, 235 Md. App. 299, 311, *cert. denied*, 458 Md. 593 (2018).

The jury was instructed that in order to convict appellant of arson, the State was required to prove that "[appellant] set fire to or burned at least a part of a dwelling[,] and that the setting fire to or burning of the dwelling was willful and malicious."

In this case, the State produced evidence sufficient to permit a rational trier of fact to determine, beyond a reasonable doubt, that appellant willfully and maliciously set the fire at 1238 East Belvedere. The State's expert concluded that the cause of the fire was arson. If, as the jury seemingly concluded, appellant had murdered Poole,[2] appellant had a motive to start a fire to dispose of Poole's body and cover up the murder. We note that

[2] Appellant does not challenge the sufficiency of the evidence supporting his first-degree murder conviction.

"[s]howing that a defendant had a motive to commit a crime . . . helps to establish that he had the requisite *intent* to commit the crime." *Sewell v. State*, 239 Md. App. 571, 612 (2018) (quoting *Emory v. State*, 101 Md. App. 585, 606 (1994)).

The cell phone records and cell tower evidence showed appellant's phone located in the area of the Glenhaven address at the time of Poole's arrival and confirmed a contemporaneous phone call between appellant and Poole. The cell tower records further indicated that appellant had traveled between the Glenhaven and East Belvedere locations multiple times on the evening of February 26, 2018 and documented appellant's presence in the area of the East Belvedere address near the time of the fire. *See Hughes v. State*, 6 Md. App. 389, 396 (1969) ("evidence of the presence of the accused in the vicinity of the fire, whether before or after its occurrence, is always relevant to establish guilt"). The jury could have inferred from the cell phone and cell tower records that appellant had murdered Poole at the Glenhaven location before moving his body to the East Belvedere location and setting the fire, and we must construe that inference in favor of the State:

> Even in a case resting solely on circumstantial evidence … if two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence. The State is **NOT** required to negate the inference of innocence. It is enough that the jury must be persuaded to draw the inference of guilt.

Ross v. State, 232 Md. App. 72, 98 (2017) (emphasis in original). *See also Hughes*, 6 Md. App. at 394 (noting that proving arson is difficult because "burning is almost invariably done in a clandestine manner, so that the prosecution usually must depend on circumstantial evidence"); *Riggins v. State*, 155 Md. App. 181, 216 (2004)

("Circumstantial evidence may support a conviction when the circumstances, taken together, do not require the trier of fact to resort to speculation or mere conjecture.") (citation omitted).

Viewed in the light most favorable to the State, we are persuaded that there was sufficient evidence to sustain appellant's arson conviction.

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