Circuit Court for Carroll County
Case No. C-06-CR-19-000553

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 738

September Term, 2021

JOSHUA M. JOHNSON

v.

STATE OF MARYLAND

Berger,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: May 16, 2022

Following a bench trial in the Circuit Court for Carroll County, Joshua Johnson ("Johnson") was found guilty of robbery, second-degree assault, and theft of property with a value greater than $100 but less than $1,500. The court sentenced Johnson to ten years' incarceration, with all but five years suspended, to be followed by five years of probation. Johnson now appeals contending the circuit court's application of the reasonable doubt standard was erroneous. For the reasons to follow, we shall affirm the circuit court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts are largely irrelevant to the issue raised in this appeal. For context in understanding the trial judge's pronouncement of the verdict, however, we set forth an abbreviated factual summary.[1]

On October 17, 2017, Jennifer Downing ("Downing") was working an evening shift as a cashier at a 7-Eleven convenience store located on Liberty Road in Eldersburg, Carroll County. That evening, while Downing sat in a back room folding pizza boxes, she noticed on a surveillance video camera display that a customer had entered the store with his face completely concealed. Although she suspected that the person intended to rob the store, Downing went to the front anyway because her cell phone was there, and there was no telephone in the back room where she had been. As Downing anticipated, the man claimed to have a gun and demanded the money from the cash register as well as money stored

[1] *See Teixeira v. State*, 213 Md. App. 664, 666 (2013) (setting forth the underlying facts in "summary fashion" because they were not relevant to the issues raised on appeal).

beneath the register. She complied with his demand, and he fled the store, running across Liberty Road in the direction of a nearby housing development.

After the robber fled, Downing called the police. Law enforcement officers from the Carroll County Sherriff's Department and the Maryland State Police responded to the scene and established a perimeter. Within that perimeter, they encountered Johnson, who was wearing "a cutoff sleeveless shirt and shorts," which the officers deemed "peculiar" because the weather that night was "really cold." They asked to search the backpack Johnson was carrying, but he refused. Johnson gave the officers his information, and the officers then permitted him to go on his way.

Police officers subsequently discovered a nearby dumpster containing a black coat matching the description of the assailant's clothing given by Downing. A K-9 was trained on the scent of the coat and tracked that scent to a nearby house.[2]

During the investigation, a detective contacted Johnson's probation agent and learned that Johnson had lived at the address where the K-9 had alerted. The detective went to that address and interviewed two residents, Catherine Miller ("Miller"), and her mother, the homeowner. At the time of the robbery, Miller and Johnson were romantically involved, but subsequently they ended their relationship.

[2] The K-9's handler testified to the process by which a K-9 is trained on a scent and tracks that scent. The officer testified that he used the armpit of the coat recovered from the dumpster as the "scent article" for the K-9 to perform the track. The officer further testified to the tracking behavior presented by the K-9 as well as the route tracked by the K-9 leading to the house.

According to Miller, Johnson called her the night of the robbery and told her that he was "hiding in the woods" and that he had been questioned by police about the robbery of the 7-Eleven. Cell phone records subpoenaed by the police confirmed Miller's account.

Further investigation led police to subpoena Johnson's Google account.[3] Police discovered that, shortly before the robbery, Johnson had conducted incriminating searches on the internet, including "the best way to rob a store."

In July 2019, Johnson was indicted for robbery, assault in the second degree, and theft of property having a value of at least $100 but less than $1,500. The case proceeded to a bench trial in the Circuit Court for Carroll County. The State called the investigating officers, Downing, and Miller to testify. Johnson called his then-fiancé to testify that they had been together earlier that evening. Johnson also testified and maintained that he did not rob the convenience store.

After hearing the evidence, the court announced its verdict. It began by discussing the different standards of proof required including preponderance of the evidence and clear and convincing evidence. It then discussed the burden of proof in criminal cases, stating:

> Then comes proof beyond a reasonable doubt and to a moral certainty which applies to criminal cases. That is the highest level of proof to be proven and it requires the evidence to be such that when considered in the—what the evidence as opposed to the proposition, it carries more force or influence upon the Judge or if present, a jury such that they would act upon the

[3] An officer testified that he had learned of Johnson's email address, which was a Google account, through discussions with Johnson's probation officer. The investigating officer obtained a search warrant for that email account and searches associated with the account because from his "training, knowledge and experience [as] a computer crimes investigator, [he] knew that Google will oftentimes have information pertaining to their accounts," including search history.

evidence in the course of their normal personal or business affairs of a major nature.

Now, it does not require proof beyond all doubt. Or to a perfect mathematical certainty. It only requires proof that would be sufficient for a reasonable person to act on a major business matter or personal matter. I tend to think of it like a puzzle. When you get a puzzle out and you dump it on the table, you start with the pieces. And if you can get more than half of the pieces put together, you are past your first level of proof which is the preponderance of the evidence.

And if you get about 75 or 80 percent of the pieces, you are clear and convincing. But you don't have to get to 100 percent of the pieces to be beyond a reasonable doubt to a moral certainty. There can be odd pieces somehow in the box that don't belong to the puzzle, there could be some pieces missing and it still can meet the standard of proof.

The court then went on to detail its findings:

We start with the testimony of Catherine Miller. I find her credible in most respects. She describes a coat possessed by [Johnson]. She talks about phone calls she got from [Johnson] on the date and roughly the time of the incident where she is told that he has been questioned about the 7-Eleven having just been robbed and he is hiding in the woods.

We then get to Ms. Downing. She doesn't add a great deal to the situation. She proves the existence of a robbery, there is no question really about that in the evidence. But she does authenticate the video from the store and how [Johnson] was dressed and so on, and we have prints of that in evidence. Then we get the dog handler. The dog handler finds or is [led] to a coat and a glove in a dumpster across the street from the 7-Eleven so robbed and he obtains a sample from the clothing which is used by the dog to track the scent of someone who was wearing it. And that scent leads to 6310 Oak Hill Drive and the woods behind it and also an adjoining property. But it leads there and if we back up to Catherine Miller's testimony, we then have a situation where [Johnson] at that time lives in there with Ms. Miller and her mother.

Then the investigation continues and I find the dog, the evidence about the dogs sniffing and all credible. That there was and it did lead to that house. I mean, and the woods behind it. We then get to the investigators and how they handle all this. Now, the Defense with some legitimacy criticizes the fact [] that we have a [G]oogle search and a telephone roster. I find that

> the two—the records—the business records that come into evidence—those two sources are admissible. I indicate that the telephone calls corroborated by Catherine Miller and the [G]oogle search to a site about how to rob a convenience store.
>
> ***
>
> And the issue then becomes is there sufficient evidence produced to convict [Johnson] beyond a reasonable doubt and to a moral certainty of robbery?
>
> And I have gone through the evidence again, notice the proximity of the properties and the dumpster across the street where the coat is found and the glove and everything the State has. And I think the evidence is sufficient to establish a case of robbery beyond a reasonable doubt and to a moral certainty. I do not find [Johnson] or his fiancé credible in the issues that they testified to.
>
> Therefore, he is guilty of all three counts.

The court sentenced Johnson to ten years of incarceration, with all but five years suspended, to be followed by five years of probation. This timely appeal followed.

ISSUE PRESENTED

Johnson raises one issue for our review: Did the trial court err by applying an incorrect definition of the proof beyond a reasonable doubt standard? For the reasons we explain below, we discern no error and thus shall affirm the circuit court's judgment.

STANDARD OF REVIEW

Appellate review of a bench trial is governed by Maryland Rule 8-131(c), which provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

The clearly erroneous standard of Rule 8-131(c) "does not, of course, apply to legal conclusions." *State v. Neger*, 427 Md. 582, 595 (2012) (citation and quotation omitted). "For legal conclusions, we conduct a non-deferential review." *Id.*; *accord Tribbitt v. State*, 403 Md. 638, 644 (2008) (observing that an appellate court reviews "de novo the trial court's relation of [its factual findings] to the applicable law") (citation and quotation omitted).

DISCUSSION

Johnson contends that the trial judge applied an incorrect standard of proof, effectively denying his right to be found guilty only upon proof beyond a reasonable doubt. Specifically, Johnson argues that the trial court's omission of the phrase "without reservation" from the description of the reasonable doubt standard indicates that the trial judge did not apply the correct legal standard, and therefore Johnson maintains his convictions must be reversed. In support of his contention, Johnson cites a number of cases[4] where a judge's misstatements concerning the burden of proof in a jury trial required reversal. He argues that the same standard for correctly instructing a jury on the definition of the reasonable doubt standard should be applicable in bench trials.

The State counters that the circuit court "applied the correct burden of proof in reaching its verdict."[5] The State points out that the trial judge contrasted the reasonable

[4] *E.g.*, *Ruffin v. State*, 394 Md. 355 (2006); *Wills v. State*, 329 Md. 370 (1993); *Himple v. State*, 101 Md. App. 579 (1994).

[5] The State does not contend that appellant's claim is unpreserved. We note that, in *Rivera v. State*, 248 Md. App. 170 (2020), we observed that Rule 8-131(c) requires an appellate (continued)

doubt standard with lesser burdens of persuasion (preponderance of the evidence and clear and convincing evidence) applicable in civil cases, indicating his understanding of the correct burden of persuasion. The State further asserts that the trial judge's misstatement of the correct standard was inconsequential because the judge was not attempting to explain the standard to a jury.

A defendant may be convicted of a criminal offense only upon proof beyond a reasonable doubt. *Ruffin v. State*, 394 Md. 355, 363 (2006). The beyond a reasonable doubt standard is "an essential component in any criminal proceeding." *Merzbacher v. State*, 346 Md. 391, 398 (1997). In instructing juries on the correct standards of proof, a trial court "must closely adhere to the approved pattern instruction on the presumption of innocence and reasonable doubt." *Ruffin*, 394 Md. at 357. Such close adherence to the pattern jury instructions ensures that "a criminal defendant's due process rights are protected and [] create[s] uniformity in criminal jury trials." *Id.* at 366. The constitutional standard for evaluating an instruction on reasonable doubt is whether it created "a reasonable likelihood

court, when reviewing a conviction in a criminal case tried without a jury, to address a claim that the evidence was insufficient, regardless of whether such a claim was raised below, *id.* at 179–81, but we held that a claim that the trial court had relied upon matters that were not in evidence in rendering its verdict was not preserved because the defendant had not objected on that basis when the verdict was rendered. *Id.* at 183. Under the reasoning of *Rivera*, we might very well have arrived at the same conclusion regarding the claim raised in this appeal, which is, like the claim deemed not preserved in *Rivera*, a claim of a defect in a verdict, rendered in a bench trial, other than a claim of evidentiary insufficiency. But we have not been asked to do so, and we decline, *sua sponte*, to extend *Rivera* to the circumstances of this case.

that the jury understood the instructions to allow conviction based on proof insufficient[.]" *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

The Maryland pattern jury instruction for reasonable doubt, MPJI-Cr 2:02, states in part: "Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief *without reservation* in an important matter in your own business of personal affairs." (emphasis added). The trial court in this case defined the standard for reasonable doubt as the "highest level of proof," which required the evidence to be such that it "carries more force or influence upon the Judge or if present, a jury such that they would act upon the evidence in the course of their normal personal or business affairs of a major nature."

We conclude that, notwithstanding the omission of the phrase "without reservation" in its definition, the trial court applied the correct standard for beyond a reasonable doubt. The purpose in closely adhering to the Maryland pattern jury instruction is to provide the jury with uniformity and consistency in the definitions of the burden of proof to ensure that the jurors understand the law and apply it correctly. *See Ruffin*, 394 Md. at 357. By contrast, for a bench trial, we recognize that "[t]rial judges are presumed to know the law and to apply it properly, unless we have reason to think otherwise." *Rainey v. State*, 252 Md. App. 578, 594 (2021) (citations and quotations omitted), *cert. granted*, 477 Md. 149 (2022). As the State points out, the court's omission of the phrase does not indicate that the application was in fact incorrect. Rather, the court here began by contrasting the reasonable doubt standard with lesser burdens of persuasion (preponderance and clear and convincing) applicable in civil cases. It explained the reasonable doubt standard in depth using a

detailed analogy. The court walked through the evidence presented and concluded that it found Johnson "guilty beyond a reasonable doubt and to a moral certainty." *See Victor*, 511 U.S. at 12 (explaining that "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.'").

We review the trial court's remarks in their entirety and are convinced that the court understood and applied the proper standard. To conclude otherwise, as Johnson urges, would require us to conclude, based upon an isolated phrase, that the trial court in this case did not understand one of the most basic legal principles applicable in every criminal trial.[6] We decline to do so, and we hold that Johnson has not rebutted the presumption that the trial judge knew the reasonable doubt standard and applied it properly. Here, the judge was not instructing a jury, and hence, we find Johnson's reliance upon cases such as *Ruffin*, *Wills*, and *Himple*, all of which concerned erroneous reasonable doubt instructions in jury trials, inapt.

Johnson alternatively argues that caselaw nonetheless exists to support reversal based on misstatements in bench trials. He cites two cases, *Thornton v. State*, 397 Md. 704 (2007), and *Lipinski v. State*, 333 Md. 582 (1994), in which a trial court, during a bench trial, applied an erroneous legal standard in finding a defendant guilty, and which ultimately were overturned on appeal. We summarize those cases briefly.

[6] Although he was addressing a different context—whether to notice plain error resulting from a trial judge's misstatement of the law—we are reminded of Judge Moylan's remark about a "slip of the tongue," which no one noticed at the time, and which had no effect on the outcome of the trial. *See Morris v. State*, 153 Md. App. 480, 521 (2003), *cert. denied*, 380 Md. 618 (2004).

Thornton was charged with first-degree murder and related offenses arising out of a stabbing. *Thornton*, 397 Md. at 709–10. He elected a bench trial. *Id.* at 710. When announcing the verdict, the trial court declared that "*one knows that by thrusting that knife out, even though if it was in the leg, it was going to inflict serious bodily harm on whomever was struck and when you inflict serious bodily harm, one of the possible consequences or probable consequences, rather, is death.*" *Id.* at 719 (emphasis in original). The court found that Thornton had lacked the specific intent to kill and had not acted with premeditation but found that malice was implied, and therefore found Thornton guilty of second-degree murder. *Id.* at 720.

Thornton appealed contending, among other things, that the trial court had erred in conflating the intent requirements of second-degree murder, based upon the intent to inflict such grievous bodily harm that death would be the likely result, and first-degree assault, based upon the intent to inflict serious bodily harm. *Id.* The Court of Appeals reversed. The Court determined that the trial court had erroneously applied a lessened "*mens rae* for second-degree murder of the intent-to-do-grievous-bodily-harm type." *Id.* at 737. Furthermore, the Court concluded that the trial judge had "erred in equating intent to do grievous bodily harm (second-degree murder) with intent to do serious physical injury (first-degree assault)." *Id.* at 739. The Court concluded that such mistaken conclusions of law shifted the burden and warranted reversal. *Id.* at 742.

Lipinski, an employee of a cleaning service, stabbed a woman employed at an office he had been hired to clean. *Lipinski*, 333 Md. at 584–85. During Lipinski's bench trial for first-degree murder, the trial court discussed premeditation, observing that there "have been

a number of Maryland cases that say that there is premeditation that occurs in an instant, literally an instant" and that it exists where "the decision to kill has been made before the killing." *Id.* at 586–87. The trial judge found Lipinski guilty of first-degree murder, declaring:

> The physical evidence supports the conclusion that the intention of the Defendant, his intention in both pulling out the knife and in the number of wounds, the location of the wounds, the location of where the wounds were struck, in the location, in the physical office, indicates to this Court that the Defendant formed in his mind before he struck the fatal blow the fully formed purpose to kill the victim.

Id. at 587.

Lipinski appealed, contending that the trial judge had applied an incorrect legal standard in determining that the killing was premeditated. *Lipinski v. State*, 95 Md. App. 450, 456–57 (1993), *rev'd*, 333 Md. 585 (1994). During the pendency of that appeal, the Court of Appeals clarified the legal standard for establishing premeditation. *Willey v. State*, 328 Md. 126 (1992). Agreeing with Lipinski that the trial judge had applied an incorrect legal standard, we vacated and remanded so that the trial judge could "consider the evidence in accordance with the standard enunciated by the Court of Appeals" in *Willey*. 95 Md. App. at 459.

After granting Lipinski's petition for writ of certiorari, the Court of Appeals reversed, ordered that the trial court's judgment be vacated, and remanded for further proceedings. *Lipinski*, 333 Md. at 592–93. Although the Court of Appeals disagreed with the remedy we ordered, it agreed that Lipinski's conviction was based upon an erroneous legal standard. *Id.* at 590–91. The Court acknowledged that the trial judge did not have the

benefit of its then-recent decision in *Willey* and that his "concept of the law was substantially the view at the time," but the Court nonetheless denied the State's cross-petition, which had asserted that the trial judge had applied the correct legal standard. *Lipinski*, 333 Md. at 587–90.

Thornton and *Lipinski* are distinguishable from the present case. In both *Thornton* and *Lipinski*, the trial court applied an incorrect definition of an element of a charged offense, to the detriment of the defendant. *Thornton*, 397 at 737, 739; *Lipinski*, 333 Md. at 590. The trial court in this case did not apply an incorrect standard, but rather omitted a phrase from the definition of the reasonable doubt standard. Moreover, as we have explained, that omission is of no consequence because we conclude that the judge in fact applied the correct standard.[7]

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[7] We do not for an instant mean to downplay the importance of the reasonable doubt standard. However, the record in this case does not lead us to conclude that the trial court failed to apply the correct standard.