Circuit Court for Baltimore City
Case No. 11834001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 936

September Term, 2019

LIONEL PERRY

v.

STATE OF MARYLAND

Reed,
Gould,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: September 1, 2020

*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.

Lionel Perry ("Appellant") filed a motion for a new trial in the Circuit Court for Baltimore City after a jury convicted him of reckless endangerment. The circuit court denied the motion and sentenced Appellant to five years of imprisonment. Appellant raises one question on appeal, which we have rephrased for clarity:[1]

> I. Did the trial court abuse its discretion in denying Appellant's motion for new trial?

For the following reasons, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In connection with the non-fatal shooting of Daniel Battle ("Battle") on October 17, 2018, the State charged Appellant with attempted murder, assault, reckless endangerment, and seven related weapons offenses, including wearing, carrying, and transporting a handgun on the person, possession of a firearm following a disqualifying conviction, and discharging a gun within the City of Baltimore. The jury acquitted Appellant of all charges except for reckless endangerment. Prior to trial, Battle died of causes unrelated to the shooting. Chante Fenner ("Fenner") was the only eyewitness to the shooting to testify at trial.

Fenner testified that she had known Appellant for over 12 years. They had "something like" a relationship and had been sexually involved on a couple of occasions.

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[1] Appellant presents the following question:

> Did the trial court err or abuse its discretion in denying the motion for new trial, where newly discovered evidence clearly indicated that the jury was misled by the sole eyewitness?

Appellant sometimes gave Fenner money when she needed it. A few days before the shooting, Fenner testified that Appellant gave her $600 so that she would not be evicted from her home. Appellant then became angry when Fenner denied his request for sex, and he demanded that she return the money. Fenner told Appellant that she would pay him $300 that week, and $300 the following week.

Fenner explained that the next day, Appellant called her at work and demanded immediate repayment. When Fenner replied that she would not receive her paycheck until later that week, Appellant "started fussing" at her, called her a "bum," and accused her of "using him" and "playing games." Fenner elaborated that Appellant repeated that he wanted his money and said that he was on his way to her place of employment. Fenner told Appellant to "chill out," and said that she would give Appellant his money but asked him to meet her somewhere else. Appellant told Fenner that he would go to her mother's house instead.

A little while later, Fenner testified that while she was on her way to meet Appellant, she received a call from her sister, who was at her mother's house. Fenner could hear Appellant in the background, "yelling" that he wanted his money and asking where Fenner was. Fenner's sister assured Appellant that Fenner was on her way and asked him to "chill out[,]" and then said to Fenner, "hold on, sis. I'm about to fight." Fenner noted that when she arrived at her mother's home, no one was there except for her sister and her sister's boyfriend. Her sister had scratches on her face and wanted to know what Fenner had "[gotten] her into."

As Fenner started to explain the situation, Battle, Fenner's uncle, arrived, having been alerted by neighbors that there was a group of people at the house, and that a fight had broken out. As Battle walked up to the house and onto the porch, a group consisting of about five women and three men, including Appellant, walked up behind him. Fenner stated that Appellant was "just standing there yelling" that he wanted his money and that he was not leaving until he got it. Fenner explained that she saw that Appellant had a gun, as did one of his companions, explaining:

[PROSECUTOR]: Did you see anybody with guns?

[FENNER]: I did, too.

[PROSECUTOR]: Okay. Who did you see with guns that day?

[FENNER]: [Appellant] and another guy.

Fenner asked Battle to come inside the house because she "didn't want anything to happen."

At that point, Fenner testified that Appellant's female cousin, who had arrived with Appellant, pulled Fenner's sister out of the house and began fighting with her. When Fenner tried to intervene, Appellant hit Fenner in the face and spit on her. Fenner explained that she started fighting with two other women who were with Appellant. While Fenner and her sister were fighting outside, Battle exited the house through the back door and walked away. According to Fenner, when Battle realized that there were guns on the scene, he "was trying to leave" because he "wasn't protected." Fenner stated that she saw "a guy" walking toward Battle with a gun and then saw Battle "tussling" with "the tall guy," who had a gun in his hand. Battle then started running.

Fenner testified that "[w]hen [Battle] started running, the first two shots went off, everybody got down[.]" She did not see who fired the first two shots because she "ducked" and started running into the house. Fenner explained that just as she reached the door of the house, a "third shot went off[,]" and she heard Battle say, "I'm hit."[2] She started going toward Battle, who was leaning on a car. Fenner then saw Appellant walk up behind Battle and shoot him, striking him in the arm. Fenner identified Appellant as the person who shot Battle during an interview she gave to police the same day as the shooting.

On cross-examination, defense counsel called Fenner's identification of Appellant into question by asking her "what… if" another witness had described the shooter as "skinny with skinny legs," a physical description that Fenner agreed did not apply to Appellant.[3] Fenner responded that if there was another shooting suspect, "[h]e [was] probably the one who shot [Battle] first[,]" and then said that "[Battle] was shot twice by two different people." Fenner was extensively cross-examined about statements she made in a video-recorded interview that she gave to police the day of the shooting.[4] Defense counsel also attacked Fenner's credibility by drawing the jury's attention to various inconsistencies between her statements to police and her trial testimony, focusing heavily on a portion of Fenner's interview in which she apparently stated that she did not see a gun

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[2] Fenner did not say whether she saw who fired the third shot.

[3] No other eyewitness to the shooting was called by the State or by the defense.

[4] Fenner's recorded interview was not admitted into evidence and is not otherwise part of the record before us.

in Appellant's possession when he was on the porch of the house, but that Battle and her sister "may have" seen a gun. Fenner conceded that she told police she did not see Appellant with a gun, but maintained that her trial testimony was correct, explaining that she may have been "overwhelmed" when she gave the interview, and that, when she said that others may have seen the gun, she "actually [saw] it with [her] own eyes and [was] trying to put it in their eyes."

Police interviewed Battle at the hospital, but he was unable to give a description of the shooter and said that he had never seen Appellant before. Three shell casings, a bullet fragment, and a cell phone belonging to Appellant were found at the scene.

According to one of the detectives who interviewed Appellant some time after the shooting, Appellant initially denied any knowledge or recollection of the incident.[5] As the questioning went on, however, Appellant admitted that he was present. He said that he had loaned Fenner money and that, when Fenner failed to repay the loan as promised, he "gave the situation" to his female cousin, because he "would not do anything to a woman."[6]

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[5] Appellant's recorded interview was admitted into evidence and was played for the jury, but it was not transcribed for the record, and it is not otherwise part of the record before us.

[6] The quoted language is not directly attributable to either Appellant or the detective. Rather, it is how defense counsel and the prosecutor phrased questions to the detective as he testified, each time asking whether Appellant had either made the statement or had agreed with it, and each time getting an affirmative response. For example:

> [DEFENSE COUNSEL]: When [Fenner] said she wasn't going to pay it, I gave the situation to my cousin. Do you remember [appellant] saying that?
>
> [DETECTIVE]: Yes.

Appellant admitted that he brought other people along as a "witness intimidation thing." Appellant stated that he was only present for two minutes, then left because he was "not supposed to be around that type of stuff." Appellant told police that he returned to the area, after hearing gunshots, to make sure nothing had happened to his cousin.

After deliberations, the jury convicted Appellant of reckless endangerment, while acquitting him of attempted murder, assault, and all weapons-related charges. Within ten days of the verdict, Appellant filed a motion for a new trial, based in part on "newly discovered evidence" that Fenner's testimony was perjured.[7] Attached as an exhibit to the motion was an email that the prosecutor sent to defense counsel several hours after the verdict, stating as follows:

> When informing Ms. Fenner of the verdict, sentencing date, and other issues, we ended up talking about the second guy with the gun. While I can't remember her exact language, she told me that she'd learned about him after talking with Mr. Battle in the hospital, who gave her the full background on what'd happened. The impression I had from the conversation was that she hadn't actually seen the guy with the gun herself, though I quickly wrapped up the conversation at that point.

Appellant asserted that Fenner's "startling admission" was important because she had testified at trial that she saw both the defendant and another man with guns. Appellant argued that he was entitled to a new trial because:

> If the jury believed that [Appellant] did not have a gun (as evidenced by his acquittal on any firearms related counts), but instead had convinced another man to come to the location with a gun . . . this deception on the part of [Fenner] would have played a material and persuasive role in the jury's decision to convict [Appellant] of reckless endangerment.

[7] As alternative grounds for the motion, Appellant also asserted that he was entitled to a new trial because the evidence was insufficient to sustain the conviction for reckless endangerment. Appellant does not challenge the sufficiency of the evidence on appeal.

The State opposed the motion for a new trial, asserting that the alleged perjury was not newly discovered evidence. The State maintained that the discrepancy between Fenner's testimony and the interview she gave to police on the day of the shooting (where she identified Appellant as the person who shot Battle, and did not mention a "second shooter") was known at the time of trial. The court denied the motion following a hearing, stating, "I don't believe [Fenner] did commit perjury. I believe she was inconsistent, but no one cross-examined her about it." This appeal followed.

DISCUSSION

A. Parties' Contentions

According to Appellant, evidence that Fenner admittedly "lied under oath about what she actually saw, and that she was merely repeating hearsay" was discovered after the jury returned its verdict. Appellant asserts that if the jury had known that Fenner "admittedly lied about seeing a second shooter," they would not have found him guilty of reckless endangerment.[8] Appellant submits that the jury was misled by Fenner's trial testimony and therefore, the trial court abused its discretion in denying his motion for a new trial.

The State contends that the evidence in question was not newly discovered because Fenner's testimony about "another guy" with a gun besides Appellant, was inconsistent with her statement to police, and therefore, "there was information available to defense

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[8] Appellant claims that Fenner "admitted to the prosecutor that she did not actually see . . . Appellant shoot anyone." We see no support for that assertion in the portion of the record appellant cites to, or in any other part of the record.

counsel that could have led him to discover," prior to the verdict, that Fenner's testimony was not based on her personal knowledge. The State further contends that Appellant failed to demonstrate a substantial possibility of a different outcome at trial had the jury heard that Fenner only learned about the presence of a second armed individual after speaking with Battle.

B. Standard of Review

Appellant filed his motion for a new trial pursuant to Md. Rule 4-331(a), which provides that: "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." "This decision is ordinarily reviewed under the abuse of discretion standard[.]" *Williams v. State*, 462 Md. 335, 344 (2019). "Generally, abuse of discretion is the appropriate standard because the decision to grant or deny a motion for new trial under Md. Rule 4-331(a) depends so heavily upon the unique opportunity the trial judge has to closely observe the entire trial, complete with nuances, inflections, and impressions never to be gained from a cold record[.]"[9] *Id.* at 344-45 (citation and internal quotation marks omitted). "To reverse the denial of a new trial on appeal, when utilizing the abuse of discretion standard, the reviewing court must find that the 'degree of probable prejudice [was] so great that it was an abuse of discretion to deny a new trial.'" *Id.* at 345 (citing *Merritt v. State*, 367 Md. 17, 29 (2001)).

C. Analysis

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[9] The denial of a motion for a new trial may be reviewed under a harmless error standard when an alleged error is committed during the trial that, through no fault of the moving party, is not discovered until the trial has concluded. *Williams*, 462 Md. at 345.

"The list of possible grounds for the granting of a new trial by the trial judge within ten days of the verdict is virtually open-ended." *Love v. State*, 95 Md. App. 420, 427 (1993) (citations omitted). "If timely discovered within ten days of a verdict, newly discovered evidence may be urged as one of the standard reasons for granting a new trial 'in the interest of justice'" under Md. Rule 4-331(a).[10] *Isley*, 129 Md. App. at 631-32. "In order for the newly discovered evidence to warrant a new trial, the trial judge must find it to be both material and persuasive such that '[t]he newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected.'" *Campbell v. State*, 373 Md. 637, 666-67 (2003) (quoting *Yorke v. State*, 315 Md. 578, 588 (1989)).

The word "evidence," as it applies to a motion for new trial based on newly discovered evidence, "necessarily means testimony or an item or thing that is capable of being elicited or introduced and moved into the court record, so as to be put before the trier of fact at trial." *Hawes v. State*, 216 Md. App. 105, 134 (2014). "It goes without saying that something that is not 'evidence' cannot be 'newly discovered evidence.'" *Id.*

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[10] A party may also file a motion for new trial based on newly discovered evidence pursuant to subsection (c) of Md. Rule 4-331, which "exists for the exclusive purpose of providing a more extended period of one year within which newly discovered evidence may be urged upon a trial judge as a reason for granting a new trial." *Isley v. State*, 129 Md. App. 611, 632 (2000), *overruled on other grounds, Merritt v. State*, 367 Md. 17, 24 (2001). In a motion for new trial filed under subsection (c), however, the moving party must also establish, as a threshold issue, that the newly discovered evidence could not have been discovered by due diligence in time to move for a new trial within the ten-day limit in subsection (a) of the Rule. *Id.*

Here, the alleged newly discovered evidence is the prosecutor's admittedly inexact recollection of what Fenner said during their post-verdict discussion. We fail to see how such hearsay would be admissible at trial. Consequently, what Appellant argues is newly discovered evidence is not evidence in the first place, and, therefore, cannot be newly discovered evidence.

Had Appellant's motion for new trial been supported with evidence that conceivably could have been presented for consideration by the trier of fact, for example, a sworn or recorded statement from Fenner to the effect that she did not actually see a second armed individual, we would continue with our examination of whether that evidence was indeed "newly discovered" and, if so, whether there was a significant possibility that the evidence would have affected the verdict. But, as Appellant identified no such evidence, there is no basis upon which we could conclude that the denial of the motion for a new trial was an abuse of the court's discretion, and our analysis ends here.

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