

Circuit Court for Baltimore City
Case No. 116250004

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1171

September Term, 2018

SHAWN BATTEN,

v.

STATE OF MARYLAND,

Friedman,
Shaw Geter,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: October 4, 2019

*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

This appeal arises from the conviction of appellant, Shawn Batten, in the Circuit Court for Baltimore City for (1) attempted second degree murder, (2) attempted armed robbery, (3) first degree burglary, and (4) use of a firearm in the commission of a crime of violence. The court sentenced Batten to 60 years in prison. Batten brings this timely appeal and presents the following question for our review:

1. Did the court abuse its discretion in giving the jury a flight instruction?

For the reasons set forth below, we affirm the judgment of the circuit court.

BACKGROUND

On July 25, 2016, at approximately 3:00 p.m., the victim, Stephanie Rice, was awakened by noises coming from downstairs in a rowhouse she was subleasing on South Rose Street. She went to investigate and encountered appellant, his wife, and their son. Appellant's wife indicated that they were subcontractors and explained their job was to place items inside of the house. Appellant had entered the residence using a code to retrieve a key stored in the rear lockbox. Appellant and his wife left the residence after talking to Rice. Rice's landlord later explained to her that he had contracted with appellant's wife to move the furniture.

Later that night, an armed, masked-male intruder entered Rice's residence. He demanded money and drugs from Rice and struck her with his gun. Rice managed to run out of the house screaming. When she saw her assailant running away from the house, she chased him. He then turned around and fired two shots, both missing her. Rice returned

to the residence and called the police, who arrived and interviewed her in the early hours of July 26.

Based on Rice’s statement and after a brief investigation, the police obtained an arrest warrant for appellant. On August 5, 2016, police went to appellant’s home to execute the warrant. Officers observed him exit the residence, get into his truck, and drive away. Two police cars pulled behind him, and a third car pulled in front of his truck. Appellant then made an abrupt turn, sped up, and a chase ensued. After hitting an embankment, appellant jumped out of his vehicle and ran. Police eventually caught and arrested him. A search of his truck revealed, among other things, a gun that was later identified as the weapon used during the July 25 incident.

At trial, the State was permitted to play portions of the August 16 jail call appellant had with his wife. During the call, appellant expressed his concern about the gun charge stating that “It ain’t no way around this gun charge.” There was also a conversation about appellant’s brother and a plan to have him falsely claim responsibility for the gun. Appellant stated, “There’s only one way around that gun case, and—and my brother said he would take it if, if—when, when he writes the affidavit.”

Appellant testified in his defense and admitted he went to Rice’s house the day before the incident with his wife as a subcontractor. Regarding his flight from the police, he explained that “[he] tried to get away. . . because a female got killed not too long ago by some police.” Appellant then clarified that he ran from the police because “[he] had a

gun in the truck and [he] didn't want to get shot.” On cross-examination, he stated that he ran because he was afraid of the police and that he did not want to be shot.

Over the course of two days, the court discussed the jury instructions it intended to give with counsel. The court asked the attorneys if they had reviewed the jury instructions. The court then asked whether counsel had any objections, and defense counsel responded that she objected to the “other crimes evidence instruction.” The court overruled the objection, concluding that the instruction was appropriate. The court and the attorneys further discussed that defense counsel had objected to the flight instruction on a prior day, off the record. Counsel then noted her objection but did not further articulate. The court subsequently gave the flight instruction to the jury stating:

A person's flight immediately following the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with evidence – with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of flight, then you must decide whether the flight shows a consciousness of guilt.

After the jury was instructed, the court called the parties to the bench and asked whether there were “[a]ny additional requests or exceptions from the defense.” Defense counsel stated: “I’ll rely on the prior exceptions, the exceptions that I . . . indicated.” The court responded that her “exceptions” were “noted.”

STANDARD OF REVIEW

A trial judge's decision whether to give a jury instruction is reviewed under the abuse of discretion standard. *Thompson v. State*, 393 Md. 291, 311, 901 (2006). Maryland

Rule 4-325 sets forth the procedural requirements. The Rule provides, “The court, 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.” Rule 4-325(c). “[T]he decision whether to give a jury instruction ‘is addressed to the sound discretion of the trial judge,’ unless the refusal amounts to a clear error of law.” *Preston v. State*, 444 Md. 67, 82 (2015) (citations omitted). In determining whether a trial court has abused its discretion we consider whether “(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.” *Bazzle v. State*, 426 Md. 541, 548 (2012) (citation omitted).

DISCUSSION

I. The trial court did not abuse its discretion in giving a flight jury instruction.

Maryland Rule 4-325(e) sets forth the requirements for preserving a jury instruction issue for appellate review:

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 4-325(e). “The principle reason for this standard is to enable the trial court to correct any inadvertent error or omission in the oral charge, as well as to limit the review on appeal to those errors which are brought to the trial court’s attention.” *Sergeant Co. v. Pickett*, 283 Md. 284, 288, 388 (1978). Appellant argues the flight instruction objection

was properly preserved for this Court’s review. The State conversely argues the grounds for appellant’s objection were never placed on the record. Consequently, the issue was not preserved because Rule 4-325(e) requires a distinct and specific reason be stated. As noted, defense counsel did make a general objection but did not provide the judge with a theory or basis for consideration. Thus, the issue was not properly preserved.

Assuming arguendo, the issue was preserved, we hold the trial court did not err when it gave the flight instruction. Further, any error in giving the instruction, was harmless.

We have consistently held that although “[f]light by itself is not sufficient to establish the guilt of the defendant,” *Sorrell v. State*, 315 Md. 224, 228, 554 (1989), it “is a factor that may be considered in determining guilt.” *Davis v. State*, 237 Md. 97, 105, 205 (1964). Accordingly, a flight instruction may be given not only where it appears that [the defendant] fled to avoid arrest after accusation of crime, but also where it may be inferred from the evidence that at the time of flight he knew he was or would be charged with the crime[.]” *Rice v. State*, 89 Md. App. 133, 143 (1991) (quoting DAVID E. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY §2.24, at 123 (2d ed. 1988)), *cert. denied*, 325 Md. 397 (1992).

The instruction is appropriate where “. . . the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: (1) that the behavior of the defendant suggests flight; (2) that the flight suggests a consciousness of guilt; (3) that the consciousness of guilt is related to the crime charged or a closely related

crime; and (4) that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.” *Thompson*, 393 Md. At 312.

Appellant argues the trial court abused its discretion in giving the flight instruction because it was not clear that his flight reflected guilt concerning the crimes with which he was charged. Appellant contends his flight from the police was because he feared facing significant jail time in a federal prison due to his possession of a gun and a possible conviction. He argues, therefore, the third *Thompson* inference was not met. Appellant points to the jail call with his wife in which he told her he feared a gun charge. The State argues appellant’s own testimony contradicts his appellate afterthought as appellant testified that he ran because “a female got killed not too long ago by some police” and he was afraid that the police would shoot him.

In *Thompson*, the defendant, was initially charged with offenses stemming from an attempted robbery in Baltimore City, during which the perpetrator fired a gun at three people, hitting one of them. *Thompson*, 393 Md. at 294–95. The police went to the scene of the crime, saw Thompson on a bicycle, and yelled for him to stop. *Id.* at 294. Thompson sped away, causing a chase. When police apprehended him, they found a large quantity of crack cocaine on him. Thompson was asked why he fled and he said it was because he had drugs on him. *Id.* at 299.

The trial court subsequently ruled that the drugs were inadmissible and dismissed the drug charges. *Id.* at 294–96. The trial ended in a partial verdict, but the state chose to retry Thompson on offenses concerning one of the victims. *Id.* at 296. During the second

[Defense Counsel]: And you were worried about getting convicted of that gun charge?

[Batten]: Yes.

[Prosecutor]: Objection.

[The Court]: Overruled.

[Batten]: Yes, I was.

[Defense Counsel]: And what did you want your brother to do?

[Batten]: I wanted my brother to claim responsibility for the gun so I wouldn't get time in prison.

In addition, appellant's jail call with his wife, in which he stated there was "no way around this gun charge" was plainly evidence before the jury. During the call, his wife stated ". . . I wanna believe you. But, you know. You knew if you got caught what you'd be facing. That gun should have been gone. Why were you still holding onto that gun?" Appellant also gave another reason for his flight, contending a female was recently killed by police and he was afraid of being shot by the police.

A Hobson's Choice is where a defendant is faced with giving a jury highly prejudicial and irrelevant information about other criminal activity as the motivation for flight and not the crimes charged. Here, appellant testified and placed the gun and incarceration issue squarely before the jury stating, "I wanted my brother to claim responsibility for the gun so I wouldn't get time in prison." By contrast, the appellant in

Thompson did not testify and no other evidence was presented of an independent basis for flight.

Here, the jury had several alternatives to consider in determining whether appellant's flight was evidence of consciousness of guilt for the crimes charged. They had evidence of his fear of a conviction, fear of incarceration, and fear of being shot by police. In essence, appellant was not faced with a Hobson's Choice and under these circumstances, it was not improper to give the flight instruction.

Harmless Error

“An error by [a] trial court is harmless only if a reviewing court ‘is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.’” *Harris v. State*, 458 Md. 370, 414 (2018) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). In order to establish harmless error, the State must show that the evidence was sufficient to convict, and the error was “unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.” *Bellany v. State*, 403 Md. 308, 332 (2008) (citation and quotation marks omitted).

Appellant argues that the State cannot demonstrate beyond a reasonable doubt the flight instruction did not influence the verdict. Conversely, the State argues that appellant suffered no prejudice from the instruction because the evidence was overwhelming.

In our review, the flight instruction did not play any role in the jury's verdict. Here, the evidence consisted of two shell casings recovered from the crime scene which matched the gun found in appellant's truck when he was arrested. Using historical cell site data, the

police tracked the movements of appellant's cell phone on the night of the incident. Additionally, the victim identified appellant as the perpetrator and as the person who was in her home the day before the incident. Appellant admitted he had access to the home and interacted with the victim the day before the incident. Finally, appellant testified that he gave away his gun to a man he knew from prison named Rome and that he accidentally dropped his cell phone in the car of a man named Ray, however, told no one about these individuals.

In sum, the evidence was so overwhelming that any error in giving the flight instruction was insignificant. We therefore affirm.

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