Circuit Court for Prince George's County
Case No. CT151078X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1563

September Term, 2016

DARRELL EUGENE PERRY

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie, W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: May 3, 2018

This case arises out of the November 2014 stabbings of two acquitances, Emory Hursey and Jonathan Tomlinson at the Local Celebrity Banquet Hall in Landover. Hursey died from blood loss resulting from his stab wounds, but Tomlinson, who was stabbed in the neck, survived. After a jury trial in the Circuit Court for Prince George's County, Darrell Eugene Perry, appellant, was convicted of second-degree assault. He was sentenced to ten years' imprisonment, with all but five years suspended, and three years of probation on release. Appellant timely appealed and presents the following questions for our consideration:

I. Did the trial court err in allowing a police officer to identify the Appellant on a surveillance video?

II. Did the trial court err in allowing the prosecutor to argue to the jury during closing argument that, while Jonathan Tomlinson was on the witness stand, he looked over at the Appellant "a lot"?

For the reasons that follow, we shall affirm.

FACTUAL BACKGROUND

On March 17, 2015, Tomlinson testified before a grand jury that while attending a party at the banquet hall, Perry threw a drink in Hursey's face and the two began to fight. Perry wrestled Hursey and stabbed him in the stomach. When Tomlinson tried to pull Perry off of Hursey, Perry stabbed Tomlinson in the neck.

On the morning of the first day of trial, Tomlinson told the prosecutor and Prince George's County Police Detective Victoria Tyler that he "made a mistake earlier on" by identifying Perry as the person who stabbed him and Hursey. He claimed that he did so "out of being vindictive and in the malice of [his] heart."

At trial, Prince George's County Police Detective Dennis Windsor testified that on March 17, 2015, while he was in the Prince George's County Courthouse on "other business," he encountered Detective Tyler, who asked him to show a photographic array to Tomlinson, who was also in the courthouse. Detective Windsor agreed and, shortly thereafter, showed Tomlinson an array consisting of six photographs. According to Detective Windsor, Tomlinson identified Perry, the person shown in photograph number 3, as "Debo," the man who stabbed him and Hursey. Tomlinson wrote the date, time, and his signature on the photograph as well as the words, "[t]hat's him right there Debo that stabbed Emory Hursey and me." That photograph was admitted into evidence.

Detective Windsor showed Tomlinson another photograph that was also admitted into evidence. Tomlinson identified "Debo" in that photograph and drew an arrow pointing to him. Tomlinson also drew another arrow, next to which Detective Windsor wrote, "was next to Debo/to left." Tomlinson wrote his initials on that photograph.

At trial, Tomlinson testified that he did not remember the events that took place on the night of November 15-16, 2014, and did not recall the testimony he gave before the grand jury. He stated that everything he told the police and the grand jury had been made up because he was "vindictive, out of the malice of [his] heart, because [his] best friend got killed." Tomlinson acknowledged that, on March 17, 2015, police showed him a photographic array and that he identified the person in photograph number 3 as the person who stabbed him. He claimed, however, that he used the game "eeny, meeny, miney, mo" to select that photograph and "didn't even look at the photograph" when he signed it. Tomlinson admitted that his signature and initials were on the photograph, but denied

writing the words that identified the person in the photograph as "Debo," the man who stabbed him and Hursey.

Tomlinson was also shown another photograph on which his initials and signature were written along with an arrow and the words "that's Debo." Tomlinson acknowledged his initials and signature, but denied writing "that's Debo." A redacted portion of Tomlinson's grand jury testimony was admitted into evidence.

Prince George's County police recovered video recordings from surveillance cameras at the Local Celebrity Banquet Hall. Some of those recordings, and still photographs made from them, were admitted into evidence. Over objection, Officer David Delancour of the District of Columbia Metropolitan Police Department, who was not involved in the investigation into the stabbing, viewed a portion of the surveillance video from the banquet hall and testified that he recognized Perry, whom he had known for several years from his police beat in the southeast area of the District of Columbia. Even after Officer Delancour was transferred to another area, he encountered Perry "quite frequently" when he returned to the neighborhood. Overruling the objection, the trial court stated:

> In response to counsel's first argument as to the identification and explaining how he knows him. If I were to take your argument as true, in every situation where an officer knows someone unless they have a personal connection, the Court would have to find that the prejudice outweighs the probative value. I don't think that's what the case law is.
>
> I do think you are correct in the Court – State has to be very careful as to how to explain any prior knowledge. It can't relate to prior contacts, criminal contacts. But the State says this officer is going to testify that he knows this Defendant

> from his duties, specifically working the beat, no criminal contact, no charges, no police or committed, anything. He is an officer interacting with the citizens regularly and some of the citizens he interacted with are this Defendant. I do not find that testimony is inconsistent with the law and is permissible.

Lauren Anderson, the manager at the banquet hall on the night of the stabbing, testified that she saw someone "throw" a table up. When she realized that a man was on the floor and had been stabbed, Anderson turned on the lights and started to get people out of the building. As she walked toward where the table had been turned over, she saw a man wearing red pants and a hoody push a lady and "walk fast" trying to get out of the building. She did not get a good look at his face. Anderson identified herself in the surveillance video pointing out to security guards the man wearing the red pants.

We shall include additional facts as necessary in our discussion of the questions presented.

DISCUSSION

I. Lay Witness Identification

A. Parties' Contentions

Perry contends that the trial court abused its discretion in permitting Officer Delancour to identify him on the surveillance video because that testimony constituted an inadmissible lay opinion. Specifically, Perry argues, as he did at trial, that identification by a police officer could lead jurors to believe that he had "engaged in some kind of wrongdoing where he would draw this officer's attention" or that he was subjected to an investigation into "some other crime or situation." In addition, Perry maintains that the video recording was "relatively obscure" and the faces of the individuals shown were not

clear. Even if the trial court did not abuse its discretion in admitting Officer Delancour's identification, Perry asserts that any probative value that evidence might have had was outweighed by the danger of unfair prejudice and should not have been admitted.

The State counters that Officer Delancour's status as a police officer does not preclude his testimony because he worked a "beat" in Perry's neighborhood for several years and knew Perry from that experience, not from an arrest or other interaction arising from a crime. We agree and explain.

B. Standard of Review

We have explained the standard of review of a trial court's decision regarding the admission of evidence as follows:

> Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). A trial court abuses its discretion only when "no reasonable person would take the view adopted by the [trial] court," or "when the court acts 'without reference to any guiding rules or principles.'" *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)).

Baker v. State, 223 Md. App. 750, 759 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 708-09, *cert. denied*, 438 Md. 143 (2014)).

C. Analysis

1. Officer Delancour's Status as a Police Officer

Pursuant to Maryland Rule 5-701[1], a lay witness may testify to those opinions or inferences which are rationally based on his or her perception and "helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue." The Rule, which was based on the analogous Federal Rule of Evidence 701[2] , generally permits a lay witness to testify about "'the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences[.]'" *Ragland v. State*, 385 Md. 706, 717-18 (2005) (quoting *Asphundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196-98 (3rd Cir. 1995)). As the Court of

[1] Maryland Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which 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.

[2] Federal Rule of Evidence 701 provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Appeals recognized, one of the "quintessential" examples of permissible lay witness testimony is the "'identification of an individual[.]'" *Id.* at 718.

We had occasion to consider the admissibility of identification testimony by a lay witness who happened to be a police officer in *Moreland v. State*, 207 Md. App. 563 (2012). In that case we held that the trial court did not abuse its discretion in admitting the testimony of a lay witness who identified Moreland in a surveillance video showing several people perpetrating a bank robbery. *Id.* at 573. The witness, who was employed as a police officer but was not involved in the investigation of the subject bank robbery, had known Moreland for 40 to 45 years and had grown up with and gone to school with him. *Id.* at 567-68. Relying on *Robinson v. Colorado*, 927 P.2d 381, 382 (Colo. 1996), we held that the witness's identification of Moreland constituted lay opinion testimony that "was not based on speculation or conjecture, and did not amount to a mere conclusion or inference that the jury was capable of making on its own." *Id.* at 573. In reaching that conclusion, we noted that the witness had a substantial familiarity with Moreland and "intimate knowledge" of his appearance prior to the time of the robbery. *Id.* Because of their long-term relationship, the witness was "better able to identify [Moreland] in the video recording and still photographs than the jurors would be." *Id.*

In light of Officer Delancour's familiarity with Perry over several years, the court had a factual basis for concluding that Officer Delancour was more likely to identify correctly the person depicted in the video than the jurors. The record reveals that the prosecutor adhered to the trial court's directive to limit the testimony about Officer Delancour's familiarity with Perry to prior non-criminal encounters. That Officer

Delancour happened to be a police officer had no bearing on the issue of whether he was more likely than the jury to identify Perry correctly in the surveillance video. The fact that Officer Delancour knew Perry over the course of several years, and not decades, as with the witness in *Moreland*, did not warrant the exclusion of his testimony. His level of familiarity with Perry went to the weight of the testimony, not its admissibility. *See Moreland*, 207 Md. App. at 572 (and cases cited therein). The same is true with respect to the brief amount of time in which Perry appears on the video. We find no abuse of discretion in the trial court's decision to permit Officer Delancour's testimony.

2. Clarity of the Video

The second ground for Perry's objection to Officer Delancour's testimony, that the video recording was "relatively obscure" and the faces of the individuals shown were not clear, was specifically addressed by the trial court. In response to Perry's objection, the trial judge viewed the video outside the presence of the jury, but from the location in the courtroom where the jury viewed them, to determine if they were "clear." Defense counsel argued that the full face of the subject in the video was not visible and "the scene is not clear from either the video or from the still photo from the video." According to defense counsel, the video was "so obscure that the officer [was] no better suited than the jury to make an identification." The court disagreed, stating that "it certainly doesn't look like my television when I'm watching HBO, but it clearly to me is not obscure." The court went on to state:

> The defense quoted hopelessly obscure and of such poor quality of [sic] not to be of assistance to the fact finder or so obscure and so of poor quality that an individual looking at it

> wouldn't be able to pick out somebody that they may or may not know.
>
> But the purpose of me viewing it was to specifically address the defense's motion that the video was obscure, that it wasn't clear and it was of such poor quality that it wouldn't be helpful to the Court. I have to say, I've done that. I sat over there and watched it. I don't find that to be true. For that reason, that motion, based on that motion as well, the motion to preclude the testimony is denied.

The trial court clearly considered Perry's objection, viewed the video, and determined that it was not so obscure or of such poor quality that it would not be helpful. That finding was not an abuse of discretion.

3. Probative Value of the Video Versus the Danger of Unfair Prejudice

Perry's final contention is that even if Officer Delancour's identification of Perry was permissible under Md. Rule 5-701 and *Moreland*, "it was nonetheless inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice." This contention is without merit.

Perry argues, as he did at trial, that the danger of unfair prejudice arose from the fact that Officer Delancour knew him from prior contact as a police officer in the District of Columbia. The trial judge rejected that argument, stating:

> If I were to take your argument as true, in every situation where a police officer knows someone unless they have a personal connection, the Court would have to find that the prejudice outweighs the probative value. I don't think that's what the case law is.

Both the State and the court recognized, however, that the State had to be very careful in presenting Officer Delancour's prior knowledge of Perry to the jury. The State

agreed that Officer Delancour's testimony would be limited to the fact that he knew Perry from working his beat in the District of Columbia. The prosecutor stated:

> The mere fact that he is a police officer does not – to me, does not in any way factor into improper acts. Police interact with citizens everyday [sic]. The mere fact that he is a police officer does not mean that the Defendant has done something wrong. It's going to be clear. He worked the beat. He is in the neighborhood.
>
> As far as, like [defense counsel] said, witnesses who know the people in the videotape are permitted to give opinion as to who that person is. The officer's lay opinion is not an expert in any way because he is familiar with this person. He knows him. Officer Delancour is actually going to say there is another person on the tape he recognizes. He is going to show about 15 seconds of the exit of the entrance [sic] and he is going to say, that's Shanice, one of the birthday girls and that's, the Defendant, Darrell Perry. He has known the Defendant three years, known him from working the beat. That's going to be it.

The trial judge specifically directed that Officer Delancour's prior knowledge of Perry could not relate to prior criminal contacts, stating:

> I do think [defense counsel is] correct in the Court – State has to be very careful as to how to explain any prior knowledge. It can't relate to prior contacts, criminal contacts. But the State says this officer is going to testify that he knows this Defendant from his duties, specifically working the beat, no criminal contact, no charges, no police or committed, anything. He is an officer interacting with the citizens regularly and some of the citizens he interacted with are this Defendant. I do not find that testimony is inconsistent with the law and is permissible. And the State understanding by it's [sic] own acknowledgment what it intends to ask.

The record shows that the prosecutor adhered to the trial court's directive and there was no suggestion that Officer Delancour's prior contact with Perry was in the context of

criminal activity. In this way, the trial court ensured that Perry was not unfairly prejudiced. Any suggestion that Perry was unfairly prejudiced is mere speculation. The trial court did not abuse its discretion in allowing Officer Delancour to identify Perry.

II. Closing Argument

During closing argument, the prosecutor stated to the jurors, "[y]ou may remember when Mr. Tomlinson sat in this chair. And I hope you probably saw it, almost every question, before he gave an answer he kept looking over there." Defense counsel objected on the ground that the prosecutor was arguing a fact not in evidence and that it was not true that after every question Mr. Tomlinson "looked over at the defense." The prosecutor countered that it was argument, that he saw Mr. Tomlinson looking over, and that it was the jury's memory that controls. The trial judge sustained the objection, commenting that "I did notice Mr. Tomlinson look over but not after every question he looked at the Defendant." Defense counsel asked that the prosecutor's comment be struck, and the court instructed the jurors "to disregard the last statement made by the assistant State's attorney." Immediately thereafter, the following occurred:

> [PROSECUTOR]: You recall Mr. Tomlinson testifying, he looked over a lot.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: The Judge read you a number of instructions and a couple of them I'm not going to delay it much longer by going over all of them. But one of the instructions that the Judge gave you, I'm just going to read it verbatim. You recall – you also recall that it was brought out that before this trial he made statements concerning subject

> matter of this trial, even though these statements were not made in this courtroom, you are – you may consider these statements as if they were made at this trial and rely on them as much or as little as you think proper.
>
> On March 17, 2015, Mr. Tomlinson appeared before the Grand Jury. Mr. Perry wasn't there. Mr. Tomlinson told the truth on March 17th and told exactly what happened at the Celebrity Banquet Hall.

A. Appellants' Contentions

Perry argues that the trial court erred in permitting the prosecutor to argue, during closing argument, that while Tomlinson was on the witness stand, he looked over at Perry "a lot." Perry argues that, although argument concerning the demeanor of a witness is proper, the record was not clear how often Tomlinson looked at Perry and did not support the State's contention that Tomlinson looked over at Perry "a lot." He further argues that the error was not harmless because Tomlinson's credibility played a "central role" in the case and the trial judge took no curative measures in response to defense counsel's objection. We disagree and explain.

B. Standard of Review

Maryland courts have consistently reaffirmed that the regulation of closing argument falls within the sound discretion of the trial court. *See Grandison v. State*, 341 Md. 175, 225, 670 A.2d 398 (1995). In that regard, the Court of Appeals has proclaimed:

> The inference of any impropriety occurring in closing arguments "must of necessity rest largely in the control and discretion of the presiding judge and an appellate court should in no case interfere with that judgment unless there has been an *abuse of discretion* by the trial judge of a character likely to have injured the complaining party."

Henry v. State, 324 Md. 204, 231 (1991) (quoting *Wilhelm v. State*, 272 Md. 404, 413 (1974) (emphasis in original)), *cert. denied*, 503 U.S. 972 (1992).

C. Analysis

There is no dispute that a closing argument "that asks the jury to consider the demeanor of a witness when testifying is proper." *Bryant v. State*, 129 Md. App. 150, 156 (1999). From the trial court's decision to sustain defense counsel's objection to the first remark, and its subsequent decision to overrule the prosecutor's revised argument, we can infer that the trial court found that the statement that Tomlinson looked over at Perry "a lot" was consistent with what occurred at trial. Indeed, as the State argues, the Court of Appeals has observed that:

> [t]he judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his [or her] finger on the pulse of the trial.

State v. Hawkins, 326 Md. 270, 278 (1992).

Even if the trial judge had erred in allowing the prosecutor's revised argument, we would be able to state, beyond a reasonable doubt, that such error did not influence the verdict. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (error is harmless if reviewing court, "upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]").

The record clearly reveals that Tomlinson was such an evasive and reluctant witness that the frequency with which the prosecutor said Tomilnson looked at Perry, was not a factor that had any effect on the outcome of this case.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.