Circuit Court for Baltimore County
Case No. K-16-5389

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1986

September Term, 2017

EDWARD JEFFERSON

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 28, 2019

Following a jury trial in the Circuit Court for Baltimore County, Edward Jefferson, appellant, was convicted of second-degree assault and possession of a firearm after a disqualifying conviction. Mr. Jefferson raises two issues on appeal: (1) whether there was sufficient evidence to sustain his convictions, and (2) whether the trial court abused its discretion in refusing to propound a missing evidence instruction. For the reasons that follow, we shall affirm.

Mr. Jefferson first asserts that there was insufficient evidence to sustain his convictions. In reviewing the sufficiency of the evidence, we ask "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." *Ross v. State*, 232 Md. App. 72, 81 (2017) (citation omitted). Furthermore, we "view[ ] not just the facts, but 'all rational inferences that arise from the evidence,' in the light most favorable to the" State. *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Abbott v. State*, 190 Md. App. 595, 616 (2010)). In this analysis, "[w]e give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Potts v. State*, 231 Md. App. 398, 415 (2016) (quoting *Harrison v. State*, 382 Md. 477, 487-88 (2004)).

Viewed in a light most favorable to the State, the evidence at trial demonstrated that Mr. Jefferson slapped the victim in the face, pulled out a silver firearm, and then struck the victim in the head with the firearm multiple times. During a subsequent search of Mr. Jefferson's residence, the police located a silver handgun. The parties also stipulated that Mr. Jefferson had been previously convicted of a crime that prohibited him from possessing

a firearm. That evidence, if believed, was legally sufficient to support a finding of each element of second-degree assault and possession of a firearm after a disqualifying conviction beyond a reasonable doubt. Although Mr. Jefferson testified that he slapped the victim in self-defense, that he did not strike the victim with a gun, and that he found the handgun in a bag that he took from the victim during the altercation, the jury was free to disbelieve that testimony. Consequently, the State presented sufficient evidence to sustain his convictions.

Mr. Jefferson also contends that the court abused its discretion in refusing to propound a "missing evidence" instruction to the jury.[1] At trial, Detective Robert Easter testified that he submitted the firearm that was recovered from Mr. Jefferson's apartment for forensic testing to "attempt to extract any DNA around the barrel area." However, the DNA analyst who received the gun did not perform a serology or DNA analysis because the gun had been "contaminated" when it was test-fired by the Firearms Unit to determine its operability. Defense counsel argued that a missing evidence instruction was required because, but for the contamination of the firearm, forensic testing could have been performed to determine "if there was any DNA or blood on [the] firearm."[2] The court

[1] Although the record reveals that Mr. Jefferson asked the court to give a missing evidence instruction, the specific language of the instruction that he requested is not clear. However, such an instruction typically provides that where there is evidence that is peculiarly within the power of the State to produce but is not produced and its absence is not sufficiently accounted for, the jury may decide that the evidence would have been unfavorable to the State. *See Patterson v. State*, 356 Md. 677 (1999).

[2] In addition to claiming that the gun could have been tested for blood or DNA, Mr. Jefferson now asserts on appeal that it could also have been tested for the victim's (continued)

declined to give the instruction but noted that counsel was free to "argue [the issue of missing evidence] to the jury."

Generally, the decision to give a missing evidence instruction rests within the sound discretion of the trial court. *McDuffie v. State*, 115 Md. App. 359, 364-66 (1997). However, because a trial court normally does not need to instruct on the presence, or not, of factual inferences, a missing evidence instruction "generally need not be given" and "the failure to give such an instruction is neither error nor an abuse of discretion." *Patterson*, 356 Md. at 688 (1999); *see also Lowry v. State*, 363 Md. 357, 375 (2001) (holding that where trial court declined to give requested missing witness instruction but allowed defense to argue the inference to the jury during closing, "[t]hat is all to which petitioner was entitled."). Nonetheless, the Court of Appeals has held that in an "exceptional" case, a trial court may abuse its discretion by not giving a missing evidence instruction if the missing evidence is: highly relevant and "goes to the heart of the case"; the type of evidence that ordinarily would be collected and analyzed; and "completely within State custody." *Cost v. State*, 417 Md. 360, 380 (2010). However, in so holding, the Court of Appeals emphasized that trial courts are not required to give missing evidence instructions "as a matter of course,

fingerprints, which he claims could have supported his testimony that the gun belonged to the victim. However, he did not make this argument to the court when he requested the "missing evidence" instruction. In fact, he did not even make this argument to the jury during closing. Instead, he only contended that testing the gun for blood could have "proven, or disproven, the victim's claim that she was struck with a firearm." Therefore, this claim is not preserved, and we will not consider it for the first time on appeal. We note, however, that unlike the attempted DNA testing, there is nothing in the record indicating that either the State or Mr. Jefferson requested to have the gun tested for fingerprints, either before or after the ballistics testing occurred, or that the "contamination" of the firearm made such testing impossible.

whenever the defendant alleges the non-production of evidence that the State might have introduced." *Id.* at 382.

The logic that produced the holding in *Cost* does not apply to the facts here. Although the gun was in the sole custody of the State and is the type of evidence that would normally be analyzed, we are not persuaded that testing of the gun for DNA or blood could have resulted in the production of evidence that went to the heart of the case or would have been "highly relevant" to Mr. Jefferson's defense. If the gun had tested positive for blood or the victim's DNA, that would have been helpful to the State, not Mr. Jefferson, because it would have corroborated the victim's testimony that she was struck in the head with a firearm. On the other hand, the absence of blood or DNA on the gun would not have exculpated Mr. Jefferson, as any blood or DNA that was transferred to the firearm could have been easily removed by Mr. Jefferson between the time of the assault and the time the gun was recovered by the police. Moreover, there was significant other evidence inculpating Mr. Jefferson including: (1) the testimony of the victim and her friend regarding the incident; (2) Detective Easter's observations that the victim was bleeding from her head and that there was a pool of blood on the ground next to her when he arrived at the scene; (3) the fact that a track suit recovered from Mr. Jefferson's apartment, which matched the description of the outfit worn by Mr. Jefferson during the assault, tested positive for the possible presence of blood and contained a mixture of DNA belonging to an unknown male and female; and (4) the fact that a firearm was found hidden inside a pool table in Mr. Jefferson's apartment, which was sufficient to establish his possession of that firearm regardless of whether he used it in the assault. Finally, we note that, even if

testing of the gun did not reveal the presence of blood, the results of that test would have been cumulative of other evidence introduced at trial as the officer who tested the gun for operability testified that he did not observe any blood on the gun when he received it. Thus, in rendering its verdict, the jury was aware that there might not have been any blood on the firearm. We therefore hold that this is not an exceptional case where a missing evidence instruction was required. Consequently, the trial court did not abuse its discretion by declining to give one.

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