

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0630

September Term, 2015

JAMES EDWARD SMITH

v.

STATE OF MARYLAND

Graeff,
Friedman,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: September 9, 2016

*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.

After a jury trial in the Circuit Court for Prince George’s County, James Edward Smith, appellant, was convicted of robbery, conspiracy to commit robbery, second-degree assault, and theft of property having a value of less than \$1,000. He was sentenced to incarceration for a term of fifteen years, with all but ten years suspended, for the robbery, and a consecutive term of fifteen years, suspended, for conspiracy to commit robbery. For sentencing purposes, the remaining counts merged into the robbery conviction. This timely appeal followed.

QUESTIONS PRESENTED

Smith presents the following four questions for our consideration:

- I. Must the conviction and sentence for “robbery” be vacated because the jury’s verdict may have been based on a finding that Smith committed the crime of accessory after the fact to robbery, a crime with which Smith was not charged, or on a finding that Smith committed the crime of robbery as an accessory after the fact, a crime which does not exist?
- II. Did the circuit court err by permitting Detective Lin to narrate what he saw on a surveillance video?
- III. Did the circuit court abuse its discretion by denying Smith’s motion to transfer jurisdiction to the juvenile court for trial and disposition?
- IV. Did the circuit court abuse its discretion by denying Smith’s motion to transfer jurisdiction to the juvenile court for disposition after trial in adult court?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

Shortly after midnight on August 22, 2014, Anthony Reed exited the metro station in Suitland and began the ten minute walk to his home. He was using earphones connected

to his cell phone and was engaged in a conversation with a friend when he saw a group of “young kids,” including three “guys” and two girls, walking in his direction. One of the guys, later identified as Smith, was dressed all in black, wore glasses, and had short hair. As Reed walked down a path alongside the Census Bureau building toward Suitland Road, Smith broke away from the group and walked behind him.

Reed started to run toward a shopping center, but Smith and the two other guys in the group ran up and surrounded him. The two guys grabbed Reed’s arms while Smith told Reed “to come up off of it” and rifled through his pockets. Smith pressed something toward Reed’s chest, which Reed “really thought” was “a gun,” although he did not see a weapon. Smith and the two guys took Reed’s cell phone, wallet, and backpack, which contained a Kindle, a lunch bag, a Redbox movie rental, and a pay stub. Smith asked Reed for his “PIN.” When Reed refused to give him the number, Smith punched him in the jaw.

Reed reported the incident to the police. A couple of hours later, Reed was called to the police station to identify suspects and pick up his cell phone, wallet, backpack, and other property that had been taken from him. Police showed Reed a photographic array from which he identified Smith as the person who grabbed him, took his backpack, and punched him. Reed did not identify any other person involved in the incident.

At trial, Reed reviewed his cell phone records from August 2014, identified the last number he called prior to the incident, and identified phone numbers he was not familiar with and did not call. Reed also viewed surveillance video from the Suitland Metro Station and identified himself and “this gentleman right here,” an apparent reference to Smith, in the footage.

On the day of the incident, Prince George’s County Police Detective Ken Lin obtained and reviewed Reed’s cell phone records for the month of August 2014. Thereafter, the detective responded to 8201 Birdsong Drive in Fort Washington, where the homeowner consented to a search of the house. During the search, Detective Lin found Smith and Delonta Walker in an upstairs bedroom with Reed’s cell phone, backpack, Kindle and other property.

Smith testified on his own behalf. On August 21, 2014, when he was seventeen-years-old, Smith attended a party at a community center from 8 or 9 p.m. until about 11:30 p.m. After the party, he walked along a pathway near the Census Bureau building towards the Suitland Metro Station. He was alone, but was walking ahead of a group of people who had also left the party. At one point, he “crossed paths” with Reed, who was walking towards him.

At some point, a friend of Smith’s, Delonta Walker, approached Smith and asked how he was getting home. Smith responded that his foster mother was picking him up near the Branch Avenue metro station. Smith borrowed Walker’s cell phone and called his foster mother. Eventually, plans were made for Walker to spend the night at Smith’s house.

Smith denied taking anything from Reed and claimed that as he and Walker approached the Suitland Metro Station, Walker handed him the backpack. He also believed that the cell phone he used to call his foster mother belonged to Walker. Smith viewed the surveillance video from the Suitland Metro Station and acknowledged that he was the person in the video carrying a backpack.

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

DISCUSSION

I.

Smith challenges his conviction for robbery on the ground that the trial court erroneously instructed the jury on accomplice liability and accessory after the fact. He contends that, as a result of those instructions, it cannot be determined whether the jury convicted him of robbery as a principal, as an accessory after the fact, or on an improper accessory after the fact to robbery theory. Alternatively, Smith seeks to have his sentence for robbery vacated on the ground that it is illegal. These arguments are without merit.

Although Smith casts this issue as one involving an infirm verdict, his complaint is essentially about jury instructions to which he failed to lodge an objection. At trial, the judge instructed the jury on accomplice liability and accessory after the fact. Smith did not lodge any objection to those instructions as required by Maryland Rule 4-325(e), which provides:

[n]o party may assign as error the giving or 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.

As Smith did not lodge any objection to the accomplice liability or accessory after the fact instructions, his complaint about those instructions is not preserved properly for our consideration.

Although we possess the discretion to review an unpreserved issue for plain error, we decline to do so in this instance. The error complained of is neither ““compelling, extraordinary, exceptional, [nor] fundamental”” to assure Smith a fair trial. *See Conyers v. State*, 354 Md. 132, 171 (1999) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)).

In addition to challenging the jury instructions, Smith contends that his conviction for robbery should be vacated because (1) he was not charged with being an accessory after the fact and (2) robbery under the theory or modality of being an accessory after the fact is not a crime. As a result, his conviction and sentence for robbery is illegal because it cannot be determined whether he was convicted of a crime with which he was not charged or a crime that does not exist. We view these contentions as a claim that the jury’s verdict was ambiguous.

Smith’s arguments regarding ambiguity in the verdict were not preserved properly for our consideration. Maryland Rule 4-323(c) requires a party challenging a ruling or order to make “known to the court the action that the party desires the court to take or the objection to the action of the court.” In Maryland, it is well established that “[u]ntil the case is removed from the jury’s province the verdict may be altered or withdrawn by the jurors, or by the dissent or non-concurrence of any one of them.” *Smith v. State*, 299 Md. 158, 168 (1984). Further, “[w]hile the case is still within the province of the jury, the court may permit them to reconsider and correct the verdict, provided nothing be done amounting to coercion or tending to influence conviction or acquittal.” *Id.* In *Heinze v. State*, the Court of Appeals held that when a jury’s verdict “is ambiguous, inconsistent, unresponsive, or otherwise defective,” the trial court may “call the jury’s attention to the defect” and

“direct them to put the verdict in proper form either in the presence of the court or by returning to their consultation room for the purpose of further deliberation.” *Heinze*, 184 Md. 613, 617 (1945); *see also Rice v. State*, 124 Md. App. 218, 222 (1998) (if the defendant believed there was any ambiguity in the jury’s verdict, it was “incumbent upon [him] to make that known” before the jury was discharged).

In the case at hand, Smith failed to seek clarification or raise the arguments he makes on appeal before the jury was discharged. Had he done so, the trial judge would have had an opportunity to correct any error that might have arisen. Because Smith did not object below, any claim of error he might have had has been waived. Md. Rule 8-131(a).

Even if the issue of ambiguity in the verdict was properly before us, Smith would fare no better because there was no evidence from which the jury reasonably could have found that he acted as an accessory after the fact. Our review of the transcript, instructions, and verdict sheet convinces us that the verdict was unambiguous and that the instruction on accessory after the fact was superfluous and harmless beyond a reasonable doubt. The evidence showed that Smith grabbed Reed, took his backpack, and hit Reed in the jaw. The State alleged that Smith was a principal in the robbery. The prosecutor argued that Smith and the two other guys he was with “came together, they robbed together, they left together.” No one argued that the jury should convict Smith because he acted as an accessory after the fact and there was no evidence to support such a theory. The judge instructed the jury that an accessory after the fact must know that a crime was committed and assist the offender with the intent to hinder or prevent the offender’s arrest, prosecution, or trial. There was no evidence that Smith knew Walker had committed a

crime or that Smith agreed to carry the backpack to prevent Walker’s arrest, prosecution, or trial. The record clearly excludes the possibility that the jury found Smith to be an accessory after the fact or that it convicted him of robbery on an improper accessory after the fact theory. Accordingly, the instruction on accessory after the fact was superfluous and any error in giving it was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976).

II.

Appellant next contends that the trial court erred in permitting Detective Lin to narrate what he saw on a video recording obtained from a surveillance camera at the Suitland Metro Station. Detective Lin testified that, on the recording, he observed appellant and Walker entering the metro station and appellant carrying Reed’s backpack. He also stated that twelve minutes elapsed from the time of the robbery to the time appellant and Walker were recorded by the surveillance camera. Appellant contends that the trial court erred in admitting Detective Lin’s testimony because he had no personal knowledge of the robbery, there was no evidence that he was more likely to correctly identify appellant from the video than the jury, and his testimony was irrelevant lay opinion testimony that was not helpful to the jury.

This issue is not properly before us. Detective Lin identified Smith as the person in the video recording on two occasions at trial. Although defense counsel lodged an objection to the detective’s identification of Smith prior to the time the video recording from the metro station surveillance camera was played for the jury, there was no objection to the detective’s identification of Smith when the video was actually played. By failing

to lodge an objection, Smith waived his prior objection to the detective’s identification of him as the person in the recording. *DeLeon v. State*, 407 Md. 16, 31 (2008) (citing *Peisner v. State*, 236 Md. 137, 145-46 (1964)).

Even if this issue was properly presented for our consideration, we would conclude that any error in admitting Detective Lin’s testimony was harmless beyond a reasonable doubt. Smith acknowledged that he carried the backpack into the Suitland Metro Station. He testified on direct examination that as he and Walker approached the Suitland Metro Station, Walker handed him the backpack. On cross-examination, and without objection, Smith responded in the affirmative when asked if he was the person carrying the backpack in the video. As a result, even if Detective Lin’s testimony identifying Smith as the person in the video was admitted erroneously, such error was harmless beyond a reasonable doubt. *Dorsey*, 276 Md. at 659.

III.

Smith was born on March 1, 1997, and was 17 years- and 5 months-old when the offenses with which he was charged were alleged to have occurred. Prior to trial, he filed a motion to transfer jurisdiction to the juvenile court for trial and disposition pursuant to § 4-202 of the Criminal Procedure Article, which provides, in relevant part, as follows:

(b) *When transfer allowed.* – Except as provided in subsection (c) of this section, a court exercising criminal jurisdiction in a case involving a child may transfer the case to the juvenile court before trial or before a plea is entered under Maryland Rule 4-242 if:

(1) the accused child was at least 14 but not 18 years of age when the alleged crime was committed;

(2) the alleged crime is excluded from the jurisdiction of the juvenile court under § 3-8A-03(d)(1), (4), or (5) of the Courts Article; and

(3) the court determines by a preponderance of the evidence that a transfer of its jurisdiction is in the interest of the child or society.

Md. Code Ann., Crim. Proc. (“CP”) § 4-202(b).

The Department of Juvenile Services (“DJS”) conducted a waiver study and recommended that Smith’s case be retained in the adult system. Following a hearing, Smith’s motion was denied.

Smith contends that the circuit court abused its discretion in denying his motion to transfer jurisdiction to the juvenile court. Specifically, he argues that the court did not give appropriate consideration to his age and amenability to treatment. We disagree and explain.

In determining whether a transfer to juvenile court is appropriate, the court must consider five factors: (1) the age of the child; (2) the mental and physical condition of the child; (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children; (4) the nature of the alleged crime; and (5) the public safety. CP § 4-202(d). The court must consider each factor and weigh them in relation to one another, although it need not resolve each factor in favor of the party requesting transfer in order to grant the waiver. *See In re Appeal No. 646*, 35 Md. App. 94, 95-96 (1977). The disposition of a motion to transfer jurisdiction to the juvenile court is committed to the sound discretion of the trial court and will not be disturbed on appeal unless that discretion has been abused. *King v. State*, 36 Md. App. 124, 128 (1977). Under the abuse of discretion standard of review, we will disturb a court’s ruling only if it is “well removed

from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.” *Gray v. State*, 388 Md. 366, 383 (2005) (internal quotations omitted).

A. Consideration of Smith’s Age

In addressing Smith’s age, the court found:

Number one, the age of the child. In this case the defendant’s age is 18 at this time, and he was 17 and some months, I believe, at the time of the offense. He was 17 and almost a half – 17 and five months. As such, this factor weighs in favor of him being treated as an adult.

Smith contends that “[a]ge is more than a matter of chronology,” and that the court erred in failing to consider testimony that his thinking, learning, and behavioral capacities were that of a much younger person, that “his criminal behavior should not be interpreted as it would be in a typically developing person,” and that his “judgment and problem solving skills are those of a child, not an adolescent.” This contention is without merit.

There is no indication in the statute that consideration of anything more than chronological age was required. Even if such a consideration was required, any failure to mention it when discussing Smith’s chronological age was harmless because the factors he claims should have been considered were included in the second required factor, which covered Smith’s mental and physical condition.

In considering the second required factor, the court took into account that, developmentally, Smith was younger than his chronological age. The court reviewed the DJS report, took into account Smith’s thinking, learning, and behavioral capacities, and specifically found that “[i]t is true that there are some considerations the Court must give

regarding the defendant’s mental and physical condition. The Court does agree with the Department of Juvenile Services that, as a result, this factor weighs in favor of him being treated as [a] juvenile.” The DJS report, which the court considered, included information that Smith “can be impulsive and often does not think before acting[,]” that he “displays poor decision making skills and needs improvement communicating with adults[,]” that in terms of peer relationships Smith was a follower, and that he was identified as a special education student when he was in the eighth grade. Thus, any failure by the court to consider that Smith was “younger” than his chronological age was harmless because that factor was considered by the court when assessing Smith’s mental and physical condition.

B. Smith’s Amenability to Treatment

As for Smith’s amenability to treatment, the court found:

The third factor that the Court must consider is that the child’s amenability to treatment in a facility or being treated by the juvenile system, and this Court finds that he is not. The Department of Juvenile Services clearly stated that there are no in-state services, that they are merely speculating as to whether there are out-of-state services that would be at the beck and call of another jurisdiction.

He is now 18. He has had the benefit of several cases that were resolved at in-take, then he has had cases where he was on probation. I agree with the State. His behavior escalated.

Also, counsel indicates that he was never in a residential treatment facility and that the Department’s report on this is wrong. The Department’s report says what the defendant told them. It says the defendant also reported being placed at Kids Peace Residential Treatment Facility. So, he told them that. It wasn’t that the Department or, at least, the report does not say they did an investigation. They based it on his own statements to them. So, I don’t know what that is, but, clearly, he did receive services from them or, at least, he believes he did.

In light of all of that, I do not believe that he is amenable to treatment in a juvenile system.

Smith maintains that the court improperly found that he “received meaningful treatment at the Kids Peace Residential Treatment Facility” because there was no evidence about the substance of the services he received there or about how those services relate to his amenability to treatment. Our review of the record convinces us that the court did not find that Smith “received meaningful treatment at the Kids Peace Residential Treatment Facility,” but merely recognized that the DJS report quoted Smith as reporting that he had been placed at that facility. The court concluded that either Smith received services from that facility “or, at least, he believes he did.”

Smith also takes issue with the court’s finding that Smith’s potential for acceptance into an out-of-state residential treatment facility was speculative. He points to testimony that DJS “was able to locate two out-of-state residential treatment programs” for which he was eligible. Testimony from the State’s witnesses indicated that Smith’s acceptance into out-of-state facilities would be at the discretion of the facilities, that most residential facilities are for youth age 13 to 17, and that “due to the fact that there was a handgun involved” some residential treatment programs would not take Smith. This evidence supported the court’s conclusion that the availability of out-of-state facilities to treat Smith was uncertain.

Smith further argues that the judge failed to consider the gap between his needs and the services he received in the past. We disagree. “The burden of demonstrating that the waiver requested should be granted is carried by the party initiating it, *i.e.*, the juvenile.”

In re Ricky B., 43 Md. App. 645, 648 (1979) (citing *Kennedy v. State*, 21 Md. App. 234, 240 (1974)). The judge clearly considered Smith’s needs and the services he had received in the past, but was not persuaded that any juvenile treatment program was likely to be available to him.

Finally, we note that Smith’s reliance on *In re Johnson*, 17 Md. App. 705 (1973), is misplaced. In that case, we determined that the trial court was unduly influenced by the nature of the offense and either failed to consider the element of amenability to rehabilitation, or did not give it proper weight. *In re Johnson*, 17 Md. App. at 712. That is not the situation here. It is clear from our review of the record that the trial judge properly considered all of the statutory factors and, based upon consideration of those factors, properly exercised its discretion in denying Smith’s motion to transfer jurisdiction to the juvenile court for trial and disposition.

IV.

Smith next contends that the trial court abused its discretion in denying his motion to transfer jurisdiction to the juvenile court for disposition after his trial in the circuit court, a process referred to as pre-sentencing reverse-waiver. Transfer of a case at sentencing is governed by CP § 4-202.2, which provides, in relevant part:

(a) *In general.* – At sentencing, a court exercising criminal jurisdiction in a case involving a child shall determine whether to transfer jurisdiction to the juvenile court if:

(1) as a result of trial or a plea entered under Maryland Rule 4-242, all charges that excluded jurisdiction from the juvenile court under § 3-8A-03(d)(1) or (4) of the Courts Article do not result in a finding of guilty; and

(2)(i) pretrial transfer was prohibited under § 4-202(c)(3) of this subtitle; or

(ii) the court did not transfer jurisdiction after a hearing under § 4-202(b) of this subtitle.

(b) *Considerations.* – In determining whether to transfer jurisdiction under subsection (a) of this section, the court shall consider:

(1) the age of the child;

(2) the mental and physical condition of the child;

(3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children;

(4) the nature of the child’s acts as proven in the trial or admitted to in a plea entered under Maryland Rule 4-242; and

(5) public safety.

According to Smith, the circuit court abused its discretion in denying his motion for pre-sentencing reverse waiver because it failed to properly consider his age and amenability to treatment, gave “virtually no weight to any factors other than the nature of the offense and public safety, and “by appearing to find that [Smith’s] mental and physical condition weighed in favor of adult jurisdiction, when the court had previously found that this factor weighed in favor of juvenile jurisdiction.” We disagree.

The record clearly reveals that the trial court considered all of the required factors and properly exercised its discretion in denying Smith’s motion to transfer jurisdiction to the juvenile court for disposition, stating:

All right. Well, the statute requires that I consider the same factors that Judge Geter would have been required to consider in a transfer hearing. Presumably, Judge Rhodes did in the other case.

The age of the child. In this case, Mr. Smith is no longer a child. Mr. Smith was born March 1, 1997. That makes him 18 years old plus two – almost two-and-a-half months. At the time of the alleged offense here, the time of the offense here, he was 17 years and five months old.

The mental and physical condition of the child. Mr. Smith has been evaluated as having attention deficit hyperactivity disorder in the past, mood disorder, conduct disorder, adjustment disorder, major depressive disorder, oppositional confined disorder, all according to the records here. There is some reference to also some hypertension, childhood asthma. I shouldn't say – the reference is to previous or concerning his heart, high blood pressure, and risk of hypertension. So, I guess he's never been diagnosed as having hypertension. Seasonal allergies as well.

Amenability to treatment of the child – amenability of the child to treatment in an institution or program available to delinquent children. The Court does indicate, given Mr. Smith's age, the availability of programs is quite limited. That was written six months ago. And, obviously, he's six months older. I have to recognize that treatment options are limited through the Department of Juvenile Services for individuals 18 years and older.

Moreover, I find that he is not truly amendable to treatment. These reports indicate that extensive efforts have been made by numerous people to assist Mr. Smith with his problems and challenges.

He has a history of being suspended and expelled from school multiple times beginning in middle school. A history of problems including physical aggression, verbal aggression, insubordination, longstanding difficulties with managing anger, argumentative, and verbally aggressive both at school and home, history of altercations with others, all of which indicate to me he is not amenable to treatment in any institution, facility, or program available through the Department of Juvenile Services to the extent they would be able to find one who would take him.

The nature of his acts as proven in the trial. Well, that he's now been convicted of a robbery, second degree assault, theft, and conspiracy to rob, and his involvement was a primary in that being he was the one that is alleged to have or the evidence is that he is the one that took the belongings. He's the one that is communicating with the victim. He was the one who demanded the victim's [PIN] number when the victim did not give it to him. [sic] He's the one that punched the victim in the face knocking him to the ground.

So, he had a primary role in a strong-armed robbery, second degree assault, and conspiracy to commit robbery.

With regard to public safety, I find that the public safety is threatened by Mr. Smith’s actions there and his history of anti-social behavior, prior thereto.

So, for all these reasons, I am going to deny the request to transfer this case to the juvenile court for disposition pursuant to Criminal Procedure 4-202.2.

The trial court’s determination that Smith’s age and amenability to treatment weighed against pre-sentencing reverse-waiver was well within its discretion. At the time of sentencing, Smith was 18 years- and 2 months-old. There was evidence presented to show that “age is a big factor regarding whether or not [an out-of-state residential treatment facility] would admit him.” Moreover, in weighing Smith’s amenability to treatment factor, the court was free to consider that Smith was two months older than he was at the initial juvenile waiver hearing and to reach a different conclusion than that reached in the pre-trial waiver analysis conducted pursuant to CP § 4-202. The trial court clearly considered and weighed all of the required factors set forth in CP § 4-202(b), and we find no abuse of discretion in the court’s decision to deny Smith’s request for a pre-sentencing reverse-waiver.

**JUDGMENTS OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**