UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1692

September Term, 2015

MARQUEL GAFFNEY

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: September 21, 2016

On July 31, 2015, a Baltimore City jury convicted Marquel Gaffney of first-degree murder, attempted murder, possession of a handgun by a prohibited person, two counts of use of a handgun in a crime of violence, and two counts of wearing, carrying, or transporting a handgun. On September 23, 2015, the trial court sentenced Gaffney to life imprisonment plus 85 years.

Gaffney filed this timely appeal, alleging a denial of his constitutional right to a public trial, an errant omission by the trial court to give a requested instruction to the jury, and insufficiency of the evidence.

For the reasons that follow, we shall affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

During the early morning of July 31, 2014, Baltimore City Police Officer Jose Morales and another officer were working patrol on the midnight shift in the Western District. At around 1:00 a.m., Officer Morales heard a gunshot and drove his police car northbound on Monroe Street towards the sound. The officer saw a person standing in the middle of the street, firing a handgun. He stopped his vehicle approximately two car-lengths away from the gunman, who looked directly at the vehicle as it arrived, allowing Officer Morales to identify him as Gaffney, whom he knew from the neighborhood. As Officer Morales got out of his vehicle, Gaffney looked directly at him again and then fled on foot. The officer chased Gaffney, who at one point again looked back directly at Officer Morales. Gaffney was able to elude capture.

Upon returning to the scene of the shooting, Officer Morales found Ronald Goins lying on the ground, suffering from gunshot wounds. Another shooting victim, Dominic Tales was found roughly one block away.

Dominic Tales died as a result of his gunshot wounds. Ronald Goins, visited later in the hospital by a homicide detective, offered very little information as to what had occurred. The police found no handgun near the area of the shooting or in the areas where the chase took place.

At the time, Officer Morales had eight years of experience working the midnight shift in the Western District. He regularly made efforts to become familiar with the residents of the area, keeping a binder containing photographs of people with whom he had come in contact. The officer had known Gaffney for over one year and had interacted with him on multiple occasions. During that time, he had printed job applications for Gaffney.

Roughly three hours after the shooting took place, Gaffney was spotted with three other men. The police arrested and questioned all four men. Gaffney was charged with various crimes related to the shooting.

At trial, the defense called five witnesses, one of whom was Ronald Goins. Goins testified that he had known Gaffney since they were young and that Gaffney had not been the gunman. According to Goins, the gunman had approached Goins and Tales and had drawn a gun. As Goins and Tales tried to run, he said, the gunman shot at both men. Goins testified that he had seen the gunman in that neighborhood, but did not know his identity.

Another witness, Sheldon Jacobs, testified that he had been with Tales as Tales was dying and that Tales had said that he had seen the shooter, but didn't know who he was.

Gaffney's girlfriend testified that, at or around the time when the shootings occurred, she had been communicating with him on FaceTime (she said that she could see him in his bedroom) and on the telephone (when her iPad lost power). Another acquaintance testified that Gaffney had called her twice after midnight that evening, and the phone bills from Gaffney's residence showed two calls to her number after 1:00 a.m. that evening.

Gaffney testified that Tales and Goins were both friends of his and that he did not shoot either man. He also testified that he had been communicating with numerous friends via telephone and FaceTime from his home at around the time of the shootings. According to Gaffney, he went to the scene of the shootings only after hearing from a friend that something had happened.

After all evidence had been presented, Gaffney moved for a judgment of acquittal. The trial court denied the motion.

QUESTION PRESENTED

Gaffney's brief raises three questions, which we have restated as follows:

1. Did the temporary exclusion of Gaffney's brother from the courtroom represent an infringement upon Gaffney's constitutional right to a public trial?

2. Did the trial court exercise proper discretion in declining to give a requested instruction involving cross-racial identification?

3. Was the evidence legally sufficient for the jury to find Gaffney guilty of the crimes with which he was charged?

DISCUSSION

I. Right to a public trial

Gaffney contends that the court violated his constitutional right to a public trial when a sheriff temporarily removed Gaffney's brother from the courtroom for using his cell phone in violation of courtroom protocol. We disagree.

The Sixth Amendment to the United States Constitution guarantees the right to a public trial. U.S. Const. amend. VI, cl. 1. However, the right to a public trial is not absolute, and some courtroom closures may not trigger constitutional scrutiny. *Robinson v. State*, 410 Md. 91, 102 (2009); *Watters v. State*, 328 Md. 38, 46 (1992). In particular, trivial or *de minimus* closures do not offend Sixth Amendment protections. *Kelly v. State*, 195 Md. App. 403, 427 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 563 U.S. 947 (2011).

In *Kelly* the defense moved for a mistrial after a sheriff asked a number of people, including the defendant's father, to leave the courtroom during voir dire because the courtroom was extremely overcrowded. *Id.* at 411-15. The trial court denied the motion, pointing out that there hadn't been enough room for all the potential jurors to be seated. *Id.* at 416.

On appeal, Kelly argued that the trial court "did not adequately balance" its interests in "maintaining order in the courtroom and looking after the comfort of its occupants" with his "constitutional right to a public trial." *Id.* at 412. In considering

Kelly's contention, this Court evaluated whether the closure had been *de minimus* by looking at several factors, including "the length of the closure, the significance of the proceedings that took place while the courtroom was closed, and the scope of the closure, *i.e.*, whether it was a full or partial closure." *Id*. at 421-22.

In *Kelly* we observed that the shorter the duration of the closure, the more likely it is "to be held to be trivial or *de minimus* and not deserving of constitutional protection." *Id*. at 422. "Although the length of time, by itself, is not dispositive, courts have found that a courtroom closure of less than an hour was *de minimus*." *Id*. (citing *Peterson v. Williams*, 85 F.3d 39, 41, 42, 44 (2d Cir. 1996); *United States v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994); *People v. Bui*, 183 Cal. App. 4th 675, 686-87, 689 (Cal. Ct. App. 2010)). On the other hand, "[w]hen the closure is for an entire day or longer . . . courts have declined to classify the closure as *de minimus*." *Id*. at 423. When the closure "is for a period over an hour, but less than an entire day, courts have reached conflicting results." *Id*. "[T]he significance of the proceedings that took place while the courtroom was closed is an important factor." *Id*. at 424. Moreover, some courts have distinguished between partial closures, involving only a certain person or persons, and total closures. *Id*. at 426.

In *Kelly* the defendant's father and others were kept outside the courtroom for between two and three hours. *Id*. at 427. Because the length of this closure fell in the "greater than one hour, less than a full day" range, we looked to factors other than the duration of the closure alone. In determining that the closure was *de minimus*, we

reasoned that the closure was a partial one, because it lasted for only a portion of the voir dire process and did not take place during the actual selection of the jury. *Id*. at 428.

Here, a sheriff removed Gaffney's brother because he used his cell phone in violation of courtroom protocol. After a recess, Gaffney objected to his brother's forced absence from the courtroom, thereby bringing it to the court's attention. After inquiring as to the reason for the sheriff's action, the court allowed the sheriff to keep Gaffney's brother out of the courtroom for the rest of the day. The parties agreed that Gaffney's brother could return to the courtroom the following day, on the condition that he do so without his cell phone.

The framework used in *Kelly* leads us to conclude that the closure before us was *de minimus* and that it does not trigger constitutional concerns.

First, Gaffney's brother was asked to leave the courtroom at 3:04 p.m.; that day's proceedings ended at 4:11 pm. Therefore, the closure lasted for just one hour and seven minutes. Given that Gaffney's trial lasted five days, the duration of the closure is not significant.

Second, although the closure occurred during the evidentiary phase of trial when two witnesses testified, their testimony was peripheral to Gaffney's central defense, that Officer Morales had misidentified him as the gunman and that he had an alibi. One witness was an officer who had collected evidence at the crime scene. The second was the medical examiner. Their testimony was almost entirely undisputed; Gaffney hardly cross-examined them and made no mention of them in closing argument. These were not significant witnesses.

Third, the scope of the closure was narrow: it was a partial and temporary closure that involved only one person, who was not adhering to principles of courtroom protocol. It is not dispositive that the closure affected a family member, as the longer closure in *Kelly* also affected a family member, but was still held to be *de minimus*.

Consideration of these factors leads us to conclude that any closure here was *de minimus* and therefore did not violate Gaffney's Sixth Amendment right to a public trial.

II. Omission of jury instruction

Gaffney, who is African-American, argues that the trial judge abused his discretion by refusing to give a requested instruction regarding potential inaccuracies in cross-racial identification, i.e., the decreased ability of people of one race to recognize faces and facial expressions of people of another race.[1] We affirm the trial judge's exercise of his discretion not to give the requested instruction.

Maryland Rule 4-325(c) provides:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are

[1] The requested instruction is based on an instruction that Chief Judge David Bazelon proposed in his concurring opinion in *United States v. Telfaire*, 469 F.2d 552, 561 (D.C. Cir. 1972):

> In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your own experience, you may consider it in evaluating the witness's testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have greater difficulty in making a reliable identification.

> binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Rule 4-325(c) requires the trial court to give a requested instruction when a three-part test is met: (1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case (i.e., is generated by some evidence); and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given. *See Atkins v. State*, 421 Md. 434, 444 (2011); *Thompson v. State*, 393 Md. 291, 302-03 (2006); *Ware v. State*, 348 Md. 19, 58 (1997); *accord Grandison v. State*, 341 Md. 175, 211 (1995), *cert. denied*, 519 U.S. 1027 (1996). "The rule reflects our view that the main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict." *Atkins*, 421 Md. at 444 (citations and quotation marks omitted). "We review a trial court's decision whether to grant a jury instruction under an abuse of discretion standard." *Cost v. State*, 417 Md. 360, 369 (2010); *accord Gunning v. State*, 347 Md. 332, 348 (1997) (the decision whether to give a jury instruction "is addressed to the sound discretion of the trial judge").

In support of the request for an instruction on cross-racial identification, Gaffney's trial counsel cited *Smith and Mack v. State*, 388 Md. 468 (2005). In that case, the Court of Appeals, in a 4-3 decision, reversed the defendants' convictions because the trial court refused to allow the defense to comment on the difficulties of cross-racial identification during closing arguments. *Id*. at 470. On appeal, Gaffney argues that this case is similar

to *Smith and Mack* because the defendants in that case, like Gaffney, were identified by a single eyewitness.

Smith and Mack does not advance Gaffney's argument that the trial court judge erred in failing to issue an instruction on cross-racial identification. The *Smith and Mack* majority pointedly declined to consider whether the failure to issue the requested instruction amounted to an abuse of discretion. *Id*. at 478. On the issue of the instruction, the majority simply stated: "Because we hold that under the circumstances of this case, the trial judge erred in precluding the defendants from discussing cross-racial identification in their closing arguments and reverse the defendants' convictions, we do not reach the jury instruction question." *Id.* In short, *Smith and Mack* relates solely to restrictions on references to cross-racial identification during closing argument; it says nothing about whether a court, on request, may or must give an instruction about cross-racial identification.[2]

Although *Smith and Mack* did not decide the issue, this Court subsequently held that a trial court retains its discretion to decide whether to give or not to give a requested instruction about the difficulties of cross-racial identification. *Janey v. State*, 166 Md. App. 645, 662-63 (2006). In *Janey* we cautioned that because "there is a 'strong consensus among researchers . . . that some witnesses are more likely to misidentify

[2] In this Court's decision in *Smith and Mack v. State*, 158 Md. App. 673, 703-04 (2004), we held that the circuit court had not abused its discretion in prohibiting references to cross-racial identification in closing argument or in declining to instruct the jury about cross-racial identification. The Court of Appeals reversed the first part of that decision, but did not address the second.

members of other races than their own,' the trial judge must, upon request, consider whether an instruction is appropriate in the case." *Id.* at 665-66 (quoting *Smith and Mack*, 388 Md. at 482) (citation omitted). We also cautioned that the decision should not be interpreted to mean "that it is never appropriate to give such an instruction." *Id.* at 666. Nonetheless, on the facts of *Janey*, we found no abuse of discretion.

In this case, Gaffney asserts that the trial judge abused his discretion in declining to give an instruction on cross-racial identification, but he articulates no factual basis from the record to support that conclusion. From his argument, we can discern only that Gaffney's trial counsel based his request on a decision (*Smith and Mack*) that explicitly declines to state whether or when a court may or must give the requested instruction. On the basis of the arguments that Gaffney made to the trial judge, we see no abuse of discretion.

In his appellate brief, Gaffney raises the new argument that the court should have granted his instruction request because Officer Morales's identification of Gaffney was a "critical issue" in the case. In a concurring opinion in *Janey*, Judge Davis stated that he joined the majority because the conviction in that case "was not based solely on the eyewitness identification." *Janey*, 166 Md. App. at 669 (Davis, J., concurring). Indeed, in his opinion for this Court in *Janey*, Judge Meredith observed that the cross-racial identification was not a critical issue in that case and that identification was corroborated by another witness. *Id.* at 664. In this case, by contrast, Officer Morales was the State's sole eyewitness. In the trial court, however, Gaffney's counsel appears not to have cited

Janey or stressed the importance of the officer's role as the sole eyewitness. We cannot fault the trial judge for not considering an argument that Gaffney did not make.[3]

Finally, this is not a typical case of eyewitness identification, in which the witness identifies the defendant on the basis of a single, brief encounter. Officer Morales testified that he had known Gaffney for over a year and had interacted with him on multiple occasions. In view of the officer's familiarity with Gaffney as a result of their many encounters before the night of the crimes in this case, the trial judge did not abuse his discretion in declining to instruct the jury about problems in cross-racial identification.

III. Sufficiency of evidence

Gaffney contends that the evidence presented at trial was legally insufficient to sustain his conviction. In evaluating that contention, it is not our function or duty "'to undertake a review of the record that would amount to, in essence, a retrial of the case.'" *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Derr v. State*, 434 Md. 88, 129 (2013)). Rather, we review the evidence in the light most favorable to the State, giving due regard to the jury's findings of fact, its resolution of conflicting evidence, and its opportunity to observe and assess the credibility of witnesses. *Titus v. State*, 423 Md. 548, 557 (2011) (citations omitted). Our "concern is not whether the verdict is in accord with what appears to be the weight of the evidence, 'but rather is only with whether the

[3] In fact, from the dry appellate record, it is not entirely clear that the case even involves cross-racial identification. The only information we have about Officer Morales's race or ethnicity is that he is Latino, which the Census Bureau describes as "a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." http://www.census.gov/topics/population/hispanic-origin/about.html (last viewed Aug. 19, 2016).

verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (quoting *State v. Albrecht*, 336 Md. 475, 479 (1994)).

"Making this determination 'does not require [the appellate] court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *Dawson v. State*, 329 Md. 275, 281 (1993)) (further quotation marks omitted). Rather, the appellate court's role is limited to determining "'whether, after viewing 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.'" *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Gaffney correctly concedes (Brief at 18) that "a conviction may rest exclusively on the testimony of a single eyewitness." Moreover, Gaffney concedes that the State produced eyewitness testimony – the testimony of Officer Morales – that directly implicated him in the crimes. He argues, however, that there were "deficiencies" in the proof of identity. He points to the exculpatory testimony of one of the victims, Ronald Goins; his alibi defense; and discrepancies between Gaffney's appearance and the appearance of the gunman, as related by Officer Morales's partner to the police dispatcher.

Gaffney's argument is an invitation to reweigh the evidence, which we cannot and will not do. The jury had the opportunity to evaluate Officer Morales's eyewitness identification and Gaffney's attack on it, as well as the veracity of the various witnesses whom Gaffney called in his defense. The jury chose to credit Officer Morales's testimony and to discount or disregard the rest. Because the jury could have based its findings of guilt on Officer Morales's testimony alone (*see*, *e.g.*, *Branch v. State*, 305 Md. 177, 183-84 (1986)), we reject Gaffney's challenge to the sufficiency of the evidence.

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