Circuit Court for Montgomery County
Case No. 131074

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2081

September Term, 2017

JOSE HERNAN QUINTANILLA

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: May 22, 2019

A jury in the Circuit Court for Montgomery County convicted appellant Jose Hernan Quintanilla of two counts of robbery. The court sentenced him to eight years concurrent for each conviction. On appeal, he asks one question:

> Did the trial court abuse its discretion in allowing a police officer to identify appellant on a surveillance video?

We answer in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Chelsea Young used the website "OfferUp" to buy an item of used furniture from Michelle Mejia.[1] To complete that transaction, Ms. Young drove to Ms. Mejia's apartment on Boysenberry Drive in Gaithersburg at approximately 7:00 p.m. on November 28, 2016. She testified that, as she and Ms. Mejia were loading the furniture into her car, three men approached. One of the men, who was holding a gun, leaned on the trunk; another was behind him; and the third was near the passenger door. The man with the gun held it "onto the side of the car," asked for her "debit number," and then told her to "empty her pockets." After she took her phone from her pocket and gave it to him, he told her, "[W]e want your credit cards and debit cards." She opened the driver's side door of her car, and the man near the passenger door entered the car and took her wallet, which contained cards and cash. Ms. Mejia also gave her phone to the man with the gun.

After the men left, Ms. Young and Ms. Mejia went inside Ms. Mejia's apartment and called the police. In that phone call, which was played in court, Ms. Young

[1] "OfferUp" is a website where users can sell and purchase goods from someone and then arrange to meet in person to complete the transaction. Ms. Young referred to the item as a shelf; Ms. Mejia referred to it as a dresser.

described the assailants as "three African-American males in sweatshirts and masks." She described the man with the gun as "light-skinned, [with] a beard, facial hair, [and a] black hoodie." At trial, she described that man as "taller" than the others, in his "late 20s [or] early 30s," with "a sporadic beard," and "light-skinned." He wore a sweatshirt with the hood up and "a military green [] canvas jacket over it." During the robbery, he stood as close as a foot away from her. She identified appellant as that man.

Ms. Mejia testified that, on November 28, she was selling an item of furniture to Ms. Young, who came to her apartment to pick it up. As they loaded it into the trunk of Ms. Young's car, three men walked past them, and then returned and asked if they had any money. One of them "pulled out" a gun, which, at some point, he pointed at her, and demanded their phones and anything else of value. She gave them her phone, but the men were aggravated because she and Ms. Young didn't have more to give them. They looked inside Ms. Young's car and, after accidentally pressing the horn, they ran off. She described the man with the gun as "light-skinned" and "mixed or African-American," and wearing a green jacket. She was not asked to make an identification in court.

Officer Drew Abamonte responded to the call to police and spoke to Ms. Young about the robbery. Later that evening he learned that her ATM card had been used at a nearby Exxon gas station at the Lakeforest Mall. He contacted the gas station and

eventually obtained video surveillance footage from the night of November 28 and made still photographs from that video.[2]

Officer Sean Wade also responded to Boysenberry Drive to take pictures and process the scene for fingerprints. A fingerprint lifted from inside Ms. Young's car was not appellant's.

Detective Scott Sube was accepted at trial as an expert in cell phone networks and cell tower mapping. He testified that appellant's phone was mapped near Lakeforest Mall around 5:00 p.m. on November 28.

On the second day of trial, the State called Detective Lieblich. He testified that, on November 29, 2016 at approximately 2:40 a.m. (about eight hours after the robbery), while assisting in an unrelated investigation, he interviewed appellant at Suburban Hospital for about 15 minutes. Appellant, purportedly the victim of an assault, was uncooperative with Detective Lieblich's attempts to obtain information. According to Detective Lieblich, the room where the interview took place was well-lit, and he got a "good look" at appellant. Detective Lieblich identified appellant as the man whom he interviewed.

The prosecutor asked Detective Lieblich if he could identify appellant in a still photograph of the video surveillance footage, identified as State's Exhibit No. 21:

[2] The gas station manager George Kim testified after Officer Abamonte that he provided the police with video surveillance footage from the night of November 28, 2016 and that footage was the State's Exhibit No. 17. He further explained that the time log on the video was off by about an hour. It was his responsibility to adjust the time on the system, but he had not done so. The trial court subsequently admitted State's Exhibit No. 8, which was a shorter, edited compilation of that video footage.

[Prosecutor]: Okay. I'm going to show you State's Exhibit No. 21. Do you see [appellant] in this exhibit?

[Defense Counsel]: Objection.

[The Court]: Basis?

[Defense Counsel]: Your Honor, the detective has just testified about his interview with [appellant]. That should be the only portion of this. And he has already indicated the defendant sitting here is the person that he interviewed. Anything after that is simply speculation on his part.

[The Court]: All right. Overruled.

Detective Lieblich identified appellant in the photo as "the one in the black jacket entering the door." Without objection, he subsequently identified appellant in photo exhibits Nos. 13, 14, 18, 19, and 20 and video exhibit No. 8.

DISCUSSION

Contentions

Appellant contends that the trial court abused its discretion by permitting Detective Lieblich to identify appellant from the surveillance video and still photos taken from the video because his identification constituted inadmissible lay opinion testimony under Maryland Rule 5-701 and *Moreland v. State*, 207 Md. App. 563 (2012). He argues that, because Detective Lieblich was not substantially familiar with appellant, the identification was "simply speculation." And, noting that his identification was the only evidence implicating appellant in the robbery besides Ms. Young's identification, and that the prosecutor "explicitly relied on the detective's testimony identifying appellant . . . in closing argument," its admission was not harmless beyond a reasonable doubt.

The State responds that appellant's contention was not properly preserved for appellate review. But, even if it was, the trial court did not abuse its discretion in permitting Detective Lieblich to render his opinion about whether appellant was the person in the surveillance video and photos. In addition, the State argues that any error was harmless because the jury, in the absence of the detective's testimony, could have determined whether the person in the photos and video was appellant. In other words, any error in admitting the testimony would not have influenced the verdict.

Standard of Review

We have explained:

> The admissibility of evidence ordinarily is left to the sound discretion of the trial court. Md. Rule 5-104(a) ("[p]reliminary questions concerning ... the admissibility of evidence shall be determined by the court...."). We will not disturb a trial court's evidentiary ruling unless "the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Decker v. State*, 408 Md. 631, 649 (2009). A court's decision is an abuse of discretion when it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Gray v. State*, 388 Md. 366, 383 (2005).

Moreland v. State, 207 Md. App. 563, 568-69 (2012) (quotations and citations omitted).

Analysis

Preservation

We first address the preservation argument, to which appellant did not respond. The State asserts that appellant's argument on appeal differs from the grounds on which he objected at trial. There, he objected that the detective's identification was "simply speculation," that is, "not based on personal knowledge." The State, citing *Gutierrez v.*

State, 423 Md. 476 (2011), and *Boyd v. State*, 399 Md. 457 (2007), asserts that any grounds for objection not stated by the objecting party are deemed waived. In addition, citing *DeLeon v. State*, 407 Md. 16 (2008), and *Klauenberg v. State*, 355 Md. 528 (1999), it argues that appellant, who did not request or receive a continuing objection, failed to object to the subsequent identifications of appellant made by Detective Lieblich.

Maryland Rule 4-323(a) provides, in pertinent part:

> An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.

This rule and the case law interpreting it "reflect the long established Maryland practice that a contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence." *Boyd*, 399 Md. at 475-76.[3] "[T]he only exceptions to the principle that a general objection is sufficient are where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and 'where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence.'" *Id.* at 476 (quoting *von Lusch v. State*, 279 Md. 255, 263 (1977)).

[3] In both *Boyd*, 399 Md. at 473-74 (where the trial court's vague references to the pretrial hearing did not amount to a specific ground for objection), and *Gutierrez*, 423 Md. at 488 (where defense counsel objected to any testimony as to the defendant's gang involvement), the Court of Appeals determined defense counsel's objections to be general objections rather than specific ones.

When the trial court requested a basis for the objection, appellant's counsel responded: "[T]he detective has just testified about his interview with [appellant]," "[t]hat should be the only portion of this," and "he has already indicated the defendant sitting here is the person that he interviewed . . ." That the detective should only testify as to his interview with appellant is hardly more than a general objection to the detective's identification of appellant based on State's Exhibit No. 21. On the other hand, counsel's subsequent statement that "[a]nything after that is simply speculation on his part" could be understood as an objection that "the detective's opinion was not based on his personal knowledge," and could be considered impermissible lay testimony.

As to the subsequent identifications without objection, the Court of Appeals has held that Maryland Rule 4-323(a) "requires the party opposing the admission of evidence to object each time the evidence is offered by its proponent." *Klauenberg*, 355 Md. at 545; *see also DeLeon*, 407 Md. at 31 ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection."). Of course, it could be argued that an objection to the subsequent identifications would have most likely been futile because the trial court had already ruled against his initial objection and the subsequent photographs were from the same surveillance video footage from the gas station on that evening. *See Watson v. State*, 311 Md. 370, 372 n.1 (1988) (finding that an additional objection was unnecessary to preserve error where the trial judge had already reiterated his pretrial ruling immediately before the admission of the challenged evidence); *cf. Livingstone v. Greater Wash. Anesthesiology & Pain Consultants, P.C.*,

187 Md. App. 346, 362 (2009) (in the context of a litigant's failure to renew an objection to jury instructions after instructions were given, "under certain well-defined circumstances, when the objection is clearly made before instructions are given, and restating the objection after the instructions would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of [Md. Rule 2-520(e)].").

We will exercise our discretion under Rule 8-131 and assume that this issue was properly preserved for appellate review.

The Police Officer's Lay Witness Identification

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.

In *Washington v. State*, 179 Md. App. 32 (2008), *rev'd on other grounds*, 406 Md. 642 (2008), we explained generally that "[t]he requirement that the lay opinion testimony be helpful to the trier of fact precludes a lay witness from offering conclusions and inferences that the jury is capable of making on its own when analyzing the evidence," and that "a lay witness is not qualified to express an opinion about matters which are either within the scope of common knowledge and experience of the jury or which are

peculiarly within the specialized knowledge of experts."[4] *Id.* at 55-56 (internal citations omitted). The application of the rule is "no different" when the testimony is offered by a police officer. *Warren v. State*, 164 Md. App. 153, 168 (2005).

In assessing the admissibility of a witness's testimony explicitly identifying as the defendant an individual shown in a photograph or video, we are guided by *Moreland v. State*, 207 Md. App. 563 (2012). In *Moreland*, the image of the perpetrator of an armed bank robbery was captured on the bank's surveillance video. The detective investigating the robbery contacted Eric Owens, a police officer who was not involved in the investigation, about a possible suspect. Over objection, the trial court allowed Owens to testify that, "after viewing the bank's surveillance video . . . it was his opinion that [Moreland] was one of the people shown," but it prohibited him from being identified to the jury as a police officer and from appearing in his uniform. *Id.* at 568. At trial, Owens testified he had known Moreland for 40-45 years, that they grew up and went to school together, and that he refers to him as his "cousin," even though they aren't related by blood. *Id.* at 567. He also testified that he had last seen Moreland four or more years prior to the trial, and, during that time, Moreland looked to have lost 20-25 pounds, did not look healthy, and appeared to be paralyzed. *Id.*

[4] In *Washington*, we addressed whether the trial court had improperly allowed a police officer, who was not present at the shooting at issue, to make an identification of the defendant in the video. We determined that there had been no identification because the State "stopped short of asking the detective whether the individual . . . was appellant." 179 Md. App. at 60. In this case, Detective Lieblich was asked to, and did, identify appellant in the photos and video.

To address an issue of first impression, the *Moreland* Court looked to *Robinson v. Colorado*, 927 P.2d 381 (Colo. 1996). In *Robinson*, the perpetrator of a convenience store robbery was captured on surveillance video. Based on a previous encounter with him, one of the investigating detectives was permitted to testify that the robber in the video was Robinson.[5] On appeal, Robinson contended that the detective was not "intimate[ly] familiar" with his appearance about the time of the robbery and was in no better position than the jury to identify him in the video. *Id.* at 383-84.

The *Robinson* Court held that "a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Id.* at 384. To be able to testify, the lay witness "need only be personally familiar with the defendant, and the intimacy level of the witness'[s] familiarity with the defendant goes to the weight to be given to the witness'[s] testimony, not the admissibility of such testimony." *Id.* In other words, "although the witness must be in a better position than the jurors to determine whether the image captured by the camera is indeed that of the defendant," that does not mean that the witness must "be 'intimately familiar' with the defendant," or that the defendant had "changed his appearance." *Id.* According to the *Robinson* Court, this was the majority rule, and, although a minority of

[5] That detective "had previously arrested Robinson on charges which did not result in convictions." 927 P.2d at 382 n.1. Information about the prior arrest was not admitted at trial.

jurisdictions has disfavored admitting such identifications, none have adopted a per se rule excluding them. *See id.* at 382-83 (citing cases).

Determining "the reasoning of the Colorado Supreme Court" and "the majority rule on this issue [to] be sound," we held that "Owens's lay opinion testimony 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." *Moreland*, 207 Md. App. at 573. We explained:

> Owens had substantial familiarity with the appellant and intimate knowledge of his appearance prior to the time of the robbery, having known him for 40 to 45 years. That long-term relationship made Owens better able to identify the appellant in the video recording and still photographs than the jurors would be. His years of familiarity with the appellant also provided a basis for his testimony that the appellant's appearance had changed between the time of the robbery and the trial, including that he had lost weight and was exhibiting the physical symptoms of a paralysis that he had not exhibited before. Owens's testimony was rationally based on his own perception of the appellant over a 40–to 45–year period and was helpful to the jury for a clear understanding of the change in the appellant's appearance. The fact that Owens had not seen the appellant in four years went to the weight of his testimony, not its admissibility.

Id. at 573.

Appellant contends that *Moreland* requires the testifying lay witness to have "substantial familiarity" with the defendant. We are not persuaded that the same degree of familiarity that Owens had in *Moreland* is necessarily required for admissibility in this case. *Robinson* held that lay witness identification is admissible where there is "*some basis* for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." 927 P.2d at 384 (emphasis added). Moreover, the

facts of *Robinson* demonstrate that a lesser degree of "personal familiarity" with the defendant could be "sufficient to be helpful to the jury." *Id.* The *Robinson* Court explained that the detective had "had previous 'face-to-face' contact with Robinson" when he had arrested him, and, although he was not "intimately familiar with Robinson, his personal familiarity was sufficient to be helpful to the jury." *Id.*

In this case, as in *Robinson*, Detective Lieblich had met appellant face-to-face in the course of his police work. To be sure, it had only been on one occasion at Suburban Hospital during the course of an unrelated investigation, but in that encounter Detective Lieblich got a "good look" at appellant in a well-lit room for about 15 minutes. *See United States v. Jackson*, 688 F.2d 1121 (7th Cir. 1982) (holding that lay opinion testimony identifying the defendant was helpful, where the witness had only seen the defendant one time at a Christmas party); *see also United States v. Henderson*, 68 F.3d 323, 326 (9th Cir. 1995) ("Instead of any particular amount of sustained contact, we require a lay witness to have sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful."). Considering the fact that the still photos of the video footage are of hardly professional quality, and that Detective Lieblich had the opportunity to speak with and observe appellant within a few hours of when the video surveillance footage was recorded, we are persuaded that there was some basis to conclude that Detective Lieblich would be more likely than the jury to be able to identify appellant and that his identification would be helpful to the jury. The circumstances surrounding that encounter go to weight and not admissibility. Therefore, we hold that

Detective Lieblich's encounter with appellant was sufficient contact with him to permit the photo identification and that the trial court did not abuse its discretion in permitting it.

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