

Circuit Court for Prince George's County
Case No. CT 17-0798X

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2111

September Term, 2017

JOVON BRANCH

v.

STATE OF MARYLAND

Wright,
Graeff,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: December 12, 2018

*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.

On November 22, 2017, a jury sitting in the Circuit Court for Prince George’s County convicted appellant, Jovon Branch, of theft relating to a home invasion on August 30, 2016, as well as robbery and conspiracy to commit home invasion relating to a home invasion on September 13, 2016. The court sentenced appellant to five years’ imprisonment on the theft conviction, 15 years,’ consecutive, on the robbery conviction, and 25 years,’ concurrent, on the conviction for conspiracy to commit home invasion, all but 15 years suspended.

On appeal, appellant presents the following question for this Court’s review:

Was the denial of [a]ppellant’s motion to sever reversible error as to his theft conviction?

For the reasons set forth below, we answer this question in the negative, and therefore, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with crimes related to three home invasions that occurred on August 30, September 8, and September 13, 2016. The facts relevant to each incident are summarized below.

I.

August 30, 2016

At approximately noon on August 30, 2016, Herbertha Jones and her husband, Tamba Biango, returned to their apartment located on Warner Ave. in Hyattsville after

running several errands.¹ Mr. Biango parked the car and ran to the apartment to use the bathroom. Ms. Jones, whose knee was hurting at the time, walked slowly behind him.

As Ms. Jones descended the stairwell to the apartment, two men walked passed her down the stairs toward the basement. When she reached the apartment door, the men ran back up the stairwell and held her at gunpoint. One of the men, who had a tattoo, held a handgun, and the other had a gun that looked “[l]ike an AK-47.”

Ms. Jones screamed. Her husband ran out of the apartment to check on her, and the men immediately held him at gunpoint. The men forced the couple inside the apartment and told them to lie down on the floor. After several minutes, the suspects discovered Mr. Biango’s brother, Mohamed Koroma, in the restroom, removed him at gunpoint, and forced him to lie on the floor.

The men ransacked the apartment. One of them poured out the contents of Ms. Jones’ purse on the floor and picked up items of value, including the keys to her Toyota RAV4. The other man directed Mr. Biango to surrender his keys to the RAV4 and his wallet, which contained, among other things, credit cards, \$500 in cash, and photo identification.

Before leaving the apartment, the men took the couple’s iPhones and forced them to divulge their phone passwords. After the men left, the couple discovered that they had stolen Ms. Jones’ RAV4.

¹ Mr. Biango referred to Ms. Jones, at times, as Herbertha McCauley. We will refer to her as Ms. Jones throughout this opinion.

On September 16, 2016, Ms. Jones, Mr. Biango, and Mr. Korma positively identified appellant in a photo array as one of the men who participated in the August 30 home invasion. The photograph of appellant that they selected showed appellant with a visible neck tattoo. Mr. Biango also made a positive photo array identification of Mr. Parker, the other man involved in the home invasion.²

II.

September 8, 2016 Home Invasion

On September 8, 2016, in the early afternoon, Christopher Campbell heard knocking at the front door of his home located on Walker Mill Road in Capitol Heights. He walked to the door, peered outside a window, and saw an individual wearing a yellow construction hat and vest at his porch. Assuming the person to be a Pepco employee, Mr. Campbell opened the door. The suspect then forced his way into the house, pointed a shotgun at Mr. Campbell's face, and ordered Mr. Campbell to lie on the floor.

Two additional suspects entered the home from a back door, and another entered the front door. Among the three suspects who entered the home after the man with the shotgun, one had what appeared to be an Uzi submachine gun, another had what appeared to be an AK-47 styled firearm with a wooden handle, and the third had a black handgun. One of the suspects also had a neck tattoo.

The suspects demanded that Mr. Campbell give them money. Mr. Campbell directed them to \$500 on the kitchen counter, the only cash in his possession. In addition

² Ms. Jones and Mr. Biango also made in-court identifications of appellant as one of the assailants in the home invasion.

to the money, the suspects stole a laptop and two pairs of shoes. The suspects also demanded that Mr. Campbell surrender his car keys, but he could not locate them.

After one of the suspects made a phone call, a fifth suspect entered the home. He stepped on Mr. Campbell's arm and "th[rew] stuff around" the home. When he finished searching, all five suspects fled out the back door of the house. Mr. Campbell reported the incident to the police two days later.³ On September 13, 2016, he made a positive identification of appellant and Mr. Parker as men involved in the home invasion.

III.

September 13, 2016 Home Invasion

In the morning hours of September 13, 2016, Carroll Chambers was asleep in a basement bedroom of his home located on Rolling Dale Way in Capitol Heights. He awoke to the sound of glass breaking and people talking in the upstairs kitchen of his home. He called 911 and grabbed his wallet and car keys. When the men approached Mr. Chambers' room, he threw his phone under his bed. The men, later identified as appellant and Mr. Parker, kicked open the door to Mr. Chambers' bedroom.

³ Mr. Campbell stated that he recognized one of the suspects as an employee for DuraClean, who had serviced his home six months prior to the incident. He explained that, initially, he intended to seek revenge against the employee, but two days after the home invasion occurred, he decided to call the police.

One of the men hit Mr. Chambers over the head with a black handgun, grabbed the keys to Mr. Chambers' truck, and rifled through the bedroom dresser. Mr. Chambers observed that one of the suspects, appellant, had tattoos.⁴

Officers Roberto Martinez and John Bischoff were the first to arrive on the scene following the 911 call. Officer Bischoff observed a man wearing a utility vest open and slam the front door. Appellant and Mr. Parker proceeded to the second-floor deck at the back of the house, where Officer Martinez observed them ready to jump. When Officer Martinez ordered them to put their hands in the air, the two ran back into the house. Officer Martinez radioed for backup. When the backup arrived approximately five minutes later, the officers established a perimeter around the house.⁵

At some point, appellant and Mr. Parker returned to the second-floor deck. Appellant surrendered.⁶ Mr. Parker jumped off the deck, ran, and subsequently was apprehended by officers inside a large drainage pipe.

Inside Mr. Chambers' home, officers recovered a pair of black gloves from the kitchen trash can and a "traffic vest" from the pantry floor. Outside, officers observed a black Toyota RAV4 idling in front of the home, inside of which was a black bag containing

⁴ Sergeant Thomas Bunce of the Prince George's County Police Department testified that appellant had tattoos on his arms and neck.

⁵ Officers Bischoff testified that there were approximately 10-15 officers at the address.

⁶ After searching appellant's person, officers recovered Mr. Chambers' car keys.

an AK-47 styled firearm and ammunition. After running a search of the VIN number, the police determined that the vehicle belonged to Ms. Jones.

Officers also seized cellphones from appellant and Mr. Parker during the process of their arrest, and their cellular records revealed that the two had been in the proximity of Warner Ave. around noon on August 30, 2016, and in the proximity of Walker Mill Rd. in the early afternoon of September 8, 2016.

The police subsequently determined that DNA and fingerprints found in the interior of the RAV4 were from Mr. Parker and appellant. Mr. Parker's DNA was found on the AK-47 styled firearm recovered from the black bag.

On May 30, 2017, a grand jury in Prince George's County returned a 27-count indictment, charging appellant with numerous offenses, e.g. robbery, theft, and conspiracy to commit home invasion, related to the three home invasions. On October 3, 2016, appellant filed a Motion to Sever, requesting that the court try the offenses related to each home invasion at separate trials.

At a hearing on the motion on November 3, 2017, counsel indicated that there were three incidents, separated by nine miles, within a 10-day period. The State argued that, in addressing mutual admissibility, and whether the evidence was admissible to show identity or common scheme, temporal proximity, both in the location and the time, was important. The crimes were "similarly linked" based on the style of the guns used, an "AK-47-style gun," that one man in each case had a tattoo, that in each case the victims were forced to lay down at gunpoint, and that the offenders took the victim's car key.

In declining to grant the Motion for Severance, the circuit court stated, as follows:

[O]ffenses may be joined even if they're separate incidents where they're same or similar—the same are charged as separate counts where they're same or similar. I believe there is sufficient similarity between all these cases such that evidence of the first home invasion could be used in the third—in the case of the third home invasion; that evidence in the second home invasion could be used in the third home invasion; evidence of the first home invasion could be used in the second home invasion such that it would be not economical in terms of time to try all of the cases separately when the jury would hear about each of these incidents in each separate trial if trials were to be held separately. So [appellant's] motion to sever the cases is denied.

Following a jury trial, appellant was convicted of theft relating to the first home invasion, acquitted on all charges relating to the second home invasion, and convicted of robbery and conspiracy to commit home invasion related to the third home invasion. This appeal followed.

DISCUSSION

Appellant contends that the “denial of [his] motion to sever was reversible error.” In particular, he asserts that the joinder of the first and second incidents was erroneous, and therefore, the theft conviction should be vacated.⁷

The State contends that evidence admitted at the first and second home invasions was mutually admissible under the identity exception. Specifically, it asserts that the home invasions shared several distinctive features that assisted in identifying appellant as one of the assailants, including: (1) the use of an AK-47 styled gun; (2) distinctive features of the assailants, including that one assailant had a tattoo and that Mr. Parker was identified as an assailant in each incident; and (3) in each home invasion, the victims were ordered to the

⁷ Appellant does not challenge the joinder of the third home invasion for good reason, given that the RAV4 stolen in the first incident was found at the third incident, which involved an AK-47 styled firearm.

ground, and the assailants demanded the car keys. The State further argues that, even if the joinder of the offenses was improper, any error was “harmless beyond a reasonable doubt,” and therefore, reversal of appellant’s convictions is not warranted.

I.

Joinder of Offenses

The issue of joinder or severance is governed by Maryland Rule 4-253, which “contemplates two distinct joinder/severance situations: defendant joinder and offense joinder.” *State v. Hines*, 450 Md. 352, 368 (2016). Under Rule 4-253(b), a trial court may order a joint trial of separate but related offenses in a single trial when the defendant “has been charged in two or more charging documents.” When determining whether to grant a motion to sever, the court must first “determine whether evidence that is non-mutually admissible as to multiple offenses or defendants will be introduced.” *Hines*, 450 Md. at 369. If so, the “judge must determine whether the admission of such evidence will cause unfair prejudice to the defendant who is requesting a severance.” *Id.* When the issue is raised in the context of offense joinder in a jury trial, the admission of non-mutually admissible evidence creates a presumption of prejudice, which requires the judge to grant severance. *Id.* at 371–74.

In cases involving offense joinder, the separate charges against the same defendant amount to “other crimes” evidence, and in determining mutual admissibility, the court must determine whether the “other crimes” evidence regarding the other charges would be admitted at a trial of a single charge. *Bussie v. State*, 115 Md. App. 324, 333 (1997). Here,

the only issue appellant raises is whether evidence of the second incident would have been admissible in a trial of the first incident.

We agree with the State that the evidence of the second home invasion was admissible in a trial of the first incident to prove identity. In *State v. Faulkner*, 314 Md. 630, 637–38 (1989) (quoting *Cross v. State*, 282 Md. 468, 473 (1978)), the Court of Appeals observed that “evidence of other offenses may be received under the identity exception,” if it shows, for example:

(g) that the defendant had on another occasion used the same alias or the same confederate as was used by the perpetrator of the present crime;

(h) that a peculiar *modus operandi* used by the defendant on another occasion was used by the perpetrator of the crime on trial;

(i) that on another occasion the defendant was wearing the clothing worn by or was using certain objects used by the perpetrator of the crime at the time it was committed[.]

Accord Emory v. State, 101 Md. App. 585, 610–11 (1994), *cert. denied*, 337 Md. 90 (1995).

Here, several of these factors are present. Both incidents involved a home invasion, several miles and less than 10 days apart, where two males, one with tattoos and one carrying an AK-47, ordered the victims to the ground at gunpoint and forced them to give the assailants their key. These facts, taken together, showed a distinctive *modus operandi*. See *Faulkner*, 314 Md. at 639 (shared characteristics in each offense that are “unremarkable” in isolation can amount to a “specific *modus operandi*” when “considered as a whole”).

To be sure, as appellant notes, there were differences between the first and second home invasion, including: (1) the presence of two suspects during the first home invasion

and five during the second; (2) the assailants in the second home invasion wore utility vests, whereas the suspects in the first home invasion did not; and (3) the first home invasion occurred at an apartment, whereas the second occurred at a house. That there were differences in how the two home invasions were conducted, however, does not preclude a finding of mutual admissibility, given the number of similarities. Based on the totality of the circumstances, we conclude that the two home invasions were sufficiently similar to infer a *modus operandi*.

Lebedun v. State, 283 Md. 257 (1978), upon which appellant relies, is distinguishable from this case. In that case, the Court of Appeals held that the joinder of two robberies that occurred within three days of each other was improper despite similarities between them, including that the perpetrators in each incident: (1) were “two white males” of similar height and weight; (2) wore “red ski caps”; (3) took “money and drugs” that they put into a cloth bag; (4) and advised their victims “to be cool.” *Id.* at 281. The Court stated that there “was nothing particularly unusual or distinctive about red ski caps” or that the perpetrators were of similar height and weight. *Id.* Although the Court acknowledged that placing the money in a cloth bag and advising the victims to “be cool” came “much closer to a pattern of conduct,” it concluded that these similarities could not justify joinder absent a closer proximity in time between the two robberies. *Id.*

Here, by contrast, at least one of the similarities, the use of the AK-47 styled firearm at both home invasions, was sufficiently distinctive. And in this case, there was not just a generic description of the assailants; appellant and Mr. Parker were identified in each incident. *See People v. Houston*, 444 P.2d 91,102 (1968) (co-defendant’s presence at each

of the offenses is a distinctive factor that had “great probative value on the issue of identity”). These factors, in addition to the other factors discussed, support the inference that appellant was the person involved in each offense. Because the evidence in the second incident was admissible in the first incident, the court did not err in denying the motion to sever. *See Garcia-Perlera v. State*, 197 Md. App. 534, 548 (2011) (“[I]f the evidence is deemed mutually admissible, then ‘any judicial economy that may be had will usually suffice to permit joinder unless other non-evidentiary factors weigh against joinder.’”) (quoting *Conyers v. State*, 345 Md. 525, 556 (1997)).

II.

Harmless Error

Even if, assuming arguendo, the evidence from the first and second home invasions was not mutually admissible, we agree with the State that reversal of the theft conviction is not warranted. As the Court of Appeals has explained “[e]rrors that are ‘trial errors’ as opposed to ‘structural errors,’ are ordinarily subject to harmless error analysis.” *Stoddard v. State*, 423 Md. 420, 438 n. 3 (2011). And counsel for appellant conceded at oral argument, properly, that the improper joinder of offenses at a single trial is not a structural error.

The standard of review for harmless error in a criminal case is well-settled:

“[W]hen an appellant, in a criminal case, establishes error, unless a 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, such error cannot be deemed ‘harmless’ and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.”

Devincentz v. State, 460 Md. 518, 560 (2018) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

In *Bussie*, 115 Md. App. at 338, this Court made clear that, in the circumstance where the trial court erred in failing to grant a motion to sever, we need not reverse unless there is “identifiable prejudice.” In that case, where the circuit court erred in failing to sever, this Court held that the error did not prejudice Bussie regarding drug charges where he “admitted to the drug crimes during trial.” *Id.* at 339. Given the lack of prejudice, we held that reversal of the drug conviction was not warranted. *Id.* at 339–40.

Similarly, here, even if the joinder of the first two home invasions was improper, given the jury’s verdict, it clearly did not prejudice appellant. The jury acquitted appellant of all offenses related to the second home invasion. And it acquitted him of all offenses related to the first home invasion, other than the theft of the RAV 4. This indicates that the jury accepted defense counsel’s argument that there was not sufficient evidence to show that appellant was involved in the first home invasion, and his fingerprints and DNA found in the vehicle on the date of the third incident showed only that appellant was in the vehicle that day. We agree with the State’s assertion:

Because the jury acquitted [appellant] of all home invasion charges related to the first and second home invasions and because the jury found [appellant] guilty of theft based on evidence unrelated to the second home invasion, there is no reasonable possibility that any error in the admission of evidence related to the second home invasion contributed to [appellant’s] theft conviction.

Thus, even if it was error in failing to sever the offenses, it was harmless error that does not warrant reversal of appellant’s theft conviction.

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