

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2167

September Term, 2017

VINCENT BAREFOOT

v.

STATE OF MARYLAND

Meredith,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: September 28, 2018

A jury, in the Circuit Court for Baltimore City, convicted Vincent Barefoot, appellant, of first-degree murder, conspiracy to commit first-degree murder, use of a firearm in the commission of a crime of violence, and wearing, carrying, or transporting a handgun. Barefoot was sentenced to a term of life imprisonment for the conviction of first-degree murder, a consecutive term of life imprisonment for the conviction of conspiracy to commit first-degree murder, and a consecutive term of 20 years' imprisonment for the conviction of use of a firearm in the commission of a crime of violence. In this appeal, Barefoot presents the following questions for our review:

1. Is the evidence sufficient to sustain the conviction for first-degree murder?
2. Is the evidence sufficient to sustain the conviction for conspiracy to commit first-degree murder?
3. Whether the circuit court abused its discretion in allowing the State to reopen its case to introduce evidence?

Finding the evidence sufficient and no abuse of discretion, we affirm the judgments of the circuit court.

BACKGROUND

Barefoot was arrested and charged following the shooting death of Tayvon Cokley in the 100 block of North Eutaw Street in Baltimore. At trial, the victim's grandmother, Bernadine Pinkney, testified that, on the morning of the shooting, she and the victim were at the University of Maryland Hospital¹ visiting the victim's brother, who was scheduled

¹ The University of Maryland Hospital is located on South Greene Street, approximately three-tenths of a mile southwest of the location where the shooting occurred.

for surgery later that day. According to Ms. Pinkney, the victim left the hospital around 12:00 p.m. to go to Lexington Market.²

The State then showed the jury video footage captured by two cameras that were mounted outside of the Hippodrome Theater on North Eutaw Street. In one of the videos, the victim, Tayvon Cokley, can be seen walking toward the intersection of West Fayette Street and North Eutaw Street at approximately 12:49 p.m. on the day of the shooting. As the victim crosses Fayette Street heading toward the 100 block of North Eutaw Street, two men, one wearing a zipped-up jacket and black hat, later identified as Barefoot, and the other wearing a gray cap, later identified as Derrick Jackson, can be seen walking south on Eutaw Street and heading toward the intersection at Fayette Street.³ At the time, the two men were walking side-by-side in the street's far-right travel lane, adjacent to a car that is parked along the street's right-hand curb. As the two continue walking down Eutaw, the video demonstrates that Barefoot removed his right hand from his jacket pocket and then positioned himself behind Jackson.

After the victim reaches the northwest corner of the intersection, he can be seen turning and walking east across Eutaw Street, just in front of the parked car that Barefoot and Jackson had been walking next to. Once there, the victim is encountered by Jackson, at which point Jackson can be seen looking directly at the victim, who is right in front of him. At the same time, the video shows that Barefoot lunged forward and pointed his right

² Lexington Market runs adjacent to North Eutaw Street and is located approximately 300 feet north of where the shooting occurred.

³ Barefoot and Jackson were tried together.

arm at the victim, who then ran east across Eutaw Street and away from the two men. The video then shows Barefoot turning, pointing his right arm at the victim, and taking several steps in the victim's direction.

Meanwhile, Jackson watched Barefoot's encounter with the victim and then jogged south across Fayette, all the while glancing back toward Barefoot. The video then shows Barefoot putting his right hand in his jacket pocket and then jogging in the same direction as Jackson, who continued jogging south along Eutaw Street while continually looking behind him. Barefoot continued to jog closely behind Jackson, at which point the two go off-camera.

Baltimore City Police Officer Thomas Jefferson Gross testified that, at approximately 1:00 p.m. on the day of the shooting, he was on foot patrol in the 100 block of North Eutaw Street when he heard approximately six or seven gunshots. Gross then observed "a bunch of people running" and an individual, later identified as the victim, Tayvon Cokley, "crossing the street, running between the buildings, hitting the side of the wall and then coming to a finish right in front of the garage doors." After taking cover, Officer Gross observed that the victim had fallen and was "laying on his face." Officer Gross approached the victim and, after determining that the victim had stopped breathing and had no pulse, began CPR. The victim was ultimately pronounced dead, the cause of death being multiple gunshot wounds to the head, back, chest, thigh, and hand.

The police later found seven bullet casings lying in the street at the 100 block of North Eutaw Street, in the same area where the two suspects could be seen on video

approaching the victim before fleeing the scene. A bullet and a bullet fragment were also found near where the victim ultimately collapsed. James Wagster, a firearms technician with the Baltimore City Police Department, testified that all seven shell casings found at the scene had been fired from the same weapon.

T.J. Smith, chief of media relations for the Baltimore City Police Department, testified that, following the shooting, he obtained images of the two suspects from the video footage and distributed those images to various news and media outlets. Lamoore Barefoot, appellant's mother, testified that, following the shooting, she was contacted by the Baltimore police and asked to come to the police station because her "son had supposedly shot somebody." Ms. Barefoot testified that, after arriving at the police station, she was shown "a video" and asked to identify her son, which she did. The State then showed Ms. Barefoot the portion of the video that showed the two suspects running away from the scene. Ms. Barefoot identified her son, appellant, as the individual wearing the zipped-up jacket and black hat.

Denise Hargrove, Derrick Jackson's girlfriend, testified and identified Jackson as the man who could be seen in the video running just ahead of Barefoot following his encounter with the victim. Ms. Hargrove explained that, on the day of the shooting, she had a doctor's appointment at 16 South Eutaw Street and that Jackson had accompanied her to that appointment. According to Ms. Hargrove, as she and Jackson were entering the building where her doctor's office was located, Jackson stated that he was "going to go to the market to get something to eat." After Jackson left, Ms. Hargrove entered the building

to await her appointment. A short time later, Jackson returned and informed Ms. Hargrove that “they were shooting.” Jackson then remained with Ms. Hargrove for the remainder of her appointment.

Ms. Hargrove further testified that, following her appointment, she and Jackson parted ways but that, approximately a week or two later, Jackson contacted her and told her that “he wanted to turn himself in.” Ms. Hargrove then drove to Jackson’s location “so he could turn himself in.” Although Ms. Hargrove could not remember Jackson’s exact location, she stated that it was “about three to four hours” from Baltimore. Ms. Hargrove also stated that Barefoot was with Jackson when she got to Jackson’s location and that Barefoot accompanied them back to Baltimore.

After the State rested its case and the jury retired to deliberate, the court received a note from the jury stating: “The Hippodrome Box Office video is corrupted on the flash drive and can’t be played. Can we get the file on a new drive?” After the State attempted to fix the corrupted file, it informed the court that the portion of the video showing the suspects fleeing the scene was inoperable. Defense counsel then moved for a mistrial. The State responded by asking the court for permission to reopen the State’s case so that it could reauthenticate a copy of the video and then have that video played for the jury in court. The court ultimately ruled as follows:

So according to Rule 4-326 ... it’s an abuse of the trial court’s discretion to refuse the jury the opportunity to review the videotape as it deliberated.

* * *

In light of the fact that the vendor is available to testify tomorrow as to the authenticity of the copy that he made and provided all counsel in June of this year, the court is going to grant – to deny the motion for a mistrial [and] grant the State’s motion for – to reopen the case[.]

* * *

The character of the evidence in this case is such that it is fair for the defense to argue the authenticity of the corrupted, then uncorrupted, and now corrupted or maybe uncorrupted evidence. In order to remedy that and ensure that both Defendants have a fair trial and know that there is a duplicate of this evidence, the Court finds that it would be appropriate to reopen this case although these are unusual circumstances, to allow the vendor to come in, authenticate the duplicate copy, which was in Evidence Control at [the Baltimore Police Department], and allow for that to be played to the jurors in the courtroom.

The following day, exact copies of the videos shown during trial were admitted into evidence and shown to the jury. The jury then retired to the jury room to deliberate. At some point, the jury sent a note to the court asking: “Can we get the original Hippodrome thumb drive back?” After the jury clarified that it wanted to view the video “in slow motion/frames,” the court called the jury back into court and replayed the video, with portions of the video being shown, at the jury’s request, in slow motion and/or frame-by-frame. Barefoot was ultimately convicted.

DISCUSSION

I.

Barefoot first argues that the evidence is insufficient to sustain his conviction of first-degree murder. In so doing, Barefoot concedes that “the evidence in this case is

sufficient to prove that [he] intended to kill or seriously injure [the victim.]” Barefoot maintains, however, that the evidence was insufficient to prove that he acted with premeditation. Barefoot argues that the video, which was the only evidence linking him to the crime, shows that the “shooting occurred in a matter of seconds,” that “there was no time for deliberation and premeditation,” and that the shooting was a “spontaneous and immediate act.” Barefoot further argues that the fact that the victim was shot multiple times “was certainly a factor for the jury to consider” but “was not sufficient on its own to satisfy the State’s heavy burden.”

The State responds that sufficient evidence was adduced at trial to support the jury’s conclusion that Barefoot acted in a deliberate, premeditated, and willful manner. The State notes that Barefoot had a gun in his possession as he walked toward the victim, that Barefoot stood behind Jackson in approaching the victim (thus concealing his presence), and that Barefoot pulled the gun from his pocket and fired directly at the victim. The State further notes that Barefoot turned and continued firing as the victim fled and that Barefoot, despite firing seven shots amongst a crowd of people, managed to hit only the victim. The State avers that, from those facts, a reasonable factfinder could conclude that Barefoot acted with premeditation when he murdered the victim.

“The test of appellate review of evidentiary sufficiency is 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.’” *Donati v. State*, 215 Md. App. 686, 718 (2014) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)).

That same standard applies to all criminal cases, “including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witnesses accounts.” *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, “[t]he test is ‘not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.’” *Painter v. State*, 157 Md. App. 1, 11 (2004) (citations omitted) (emphasis in original). In making that determination, “[w]e ‘must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.’” *Donati*, 215 Md. App. at 718 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). In so doing, “[w]e defer to the fact finder’s ‘opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]’” *Neal*, 191 Md. App. at 314 (citations omitted).

Section 2-201(a)(1) of the Criminal Law Article of the Maryland Code provides that “[a] murder is in the first degree if it is ... a deliberate, premeditated, and willful killing [.]” For a murder to be premeditated, “the law requires only that ‘the defendant have conscious knowledge of the intent to kill (deliberate), and that there be time enough for the defendant to deliberate, *i.e.*, time enough to have thought about that intent (premeditate).’” *Wood v. State*, 209 Md. App. 246, 322 (2012) (citations omitted). In other words, premeditation is established when the design to kill precedes the killing “by an appreciable length of time, that is, time enough to deliberate.” *Bryant v. State*, 393 Md. 196, 215 (2006)

(citations and quotations omitted). Premeditation “may be instantaneous ... as long as there is sufficient time for the trier of fact to determine that the purpose to kill ‘was the product of a mind fully conscious of its own design[.]’” *Wood*, 209 Md. App. at 322 (citations omitted). “If the killing results from a choice made as a consequence of thought, no matter how short the period between the intention and the act, the crime is characterized as deliberate and premeditated.” *Wagner v. State*, 160 Md. App. 531, 565 (2005). “Ordinarily, premeditation is not established by direct evidence. Rather, it is usually inferred from the facts and surrounding circumstances.” *Hagez v. State*, 110 Md. App. 194, 206 (1996).

We hold that sufficient evidence was presented at trial from which a reasonable factfinder could have concluded beyond a reasonable doubt that Barefoot committed first-degree murder. When viewed in a light most favorable to the State, the evidence supports the inference that, just prior to the shooting, Barefoot and Jackson had been walking south on Eutaw Street in a direct line to the victim, who was walking north, and, at that time, Barefoot was in possession of a gun. The evidence further showed that Barefoot, after positioning himself behind Jackson, approached the victim and, with clear purpose, fired a gun at the victim, causing the victim to flee. *See Baker v. State*, 332 Md. 542, 569 (1993) (holding that “the jury could properly draw an inference of a premeditated and deliberate intent to kill from the evidence that [the defendant] walked up to [the victim] in a mall parking lot, placed a handgun up against her head and then pulled the trigger.”). As the victim fled across Eutaw Street, Barefoot turned, took at least one step in the victim’s

direction, and fired again. *See Bryant*, 393 Md. at 216 (“[A] delay between firing a first and second shot ‘is enough time for reflection and decision to justify a finding of premeditation.’”) (citations omitted).

In sum, Barefoot fired approximately seven shots, five of which struck the victim. *See Braxton v. State*, 123 Md. App. 599, 658 (1998) (finding the evidence of premeditation sufficient where “three out of the four shots fired at [the victim] were directed at a vital part of the body.”). After the shooting, Barefoot calmly jogged away from the scene while keeping his gun hand in or near his jacket pocket. *See Thomas v. State*, 397 Md. 557, 575 (2007) (“A person’s behavior after the commission of a crime may be admissible as circumstantial evidence from which guilt may be inferred.”) (citations omitted). From those facts, a reasonable inference can be drawn that Barefoot’s decision to kill the victim was not, as he suggests, “the immediate offspring of rashness and impetuous temper,” but rather the result of a choice made as a consequence of thought. Thus, sufficient evidence was presented such that a reasonable fact-finder could have concluded beyond a reasonable doubt that Barefoot made the conscious decision to kill the victim and that an appreciable amount of time had passed between the intention and the act.

II.

Barefoot next argues that the evidence is insufficient to support his conviction of conspiracy to commit first-degree murder. Barefoot maintains that, although he and Jackson “were together when the shooting occurred, they ran together and were arrested together, those facts do not speak to any agreement to commit the crime before it occurred.”

Barefoot also maintains that, for the same reasons discussed previously, the evidence is insufficient to establish that he and Jackson had the specific intent to kill the victim with willfulness, deliberation, and premeditation.

The State responds that Jackson’s decision to leave his girlfriend’s doctor’s appointment, coupled with the fact that he was seen with Barefoot a short time later, suggests that the two planned to meet prior to the shooting. The State also notes that, at the time of the shooting, Jackson “stood in front of Barefoot and shielded him from [the victim’s] view” and that Jackson “did not duck for cover” when the shooting began. Finally, the State notes that Jackson and Barefoot fled the scene together and later “reunited and remained together outside of Maryland.” According to the State, the “concurrence of actions between Jackson and Barefoot before, during, and after the murder, provided a reasonable basis for the jury to conclude that they had conspired to murder [the victim.]”

“A criminal conspiracy is the combination of two or more persons, who by some concerted action seek to accomplish some unlawful purpose, or some lawful purpose by unlawful means.” *Hall v. State*, 233 Md. App. 118, 138 (2017) (citations omitted). “The agreement at the heart of a conspiracy ‘need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design.’” *Carroll v. State*, 428 Md. 679, 696-97 (2012) (citations omitted). “To be found guilty of conspiracy, the defendant ‘must have a specific intent to commit the offense which is the object of the conspiracy.’” *Porter v. State*, 455 Md. 220, 254 (2017) (citations omitted). “When the object of the conspiracy is the commission of another crime, as in conspiracy to commit murder, the

specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to that agreement, the intent to assist in some way in causing that crime to be committed.” *Mitchell v. State*, 363 Md. 130, 146 (2001). Regarding the evidence required to establish a conspiracy, we have stated:

In conspiracy trials, there is frequently no direct testimony, from either a co-conspirator or other witness, as to an express oral contract or an express agreement to carry out a crime. It is a commonplace that we may infer the existence of a conspiracy from circumstantial evidence. If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may, but need not, infer a prior agreement by them to act in such a way. From the concerted nature of the action itself, we may reasonably infer that such a concert of action was jointly intended. Coordinated action is seldom a random occurrence.

Jones v. State, 132 Md. App. 657, 660 (2000).

Here, we hold that the sufficient evidence was adduced at trial from which a reasonable fact-finder could have concluded beyond a reasonable doubt that Barefoot and Jackson had conspired to commit first-degree murder. Just prior to the murder, Jackson had escorted his girlfriend, Ms. Hargrove, to her doctor’s appointment at 16 South Eutaw Street, which was only a few blocks away from the murder. Rather than accompany his girlfriend inside, however, Jackson left “to go to the market” and was seen a short time later walking with Barefoot south on Eutaw Street. From this evidence, a reasonable inference can be drawn that Jackson and Barefoot intended to meet prior to the shooting.

The evidence also showed that, although Barefoot and Jackson were initially walking side-by-side down South Eutaw Street, Jackson moved in front of Barefoot around

the same time that Barefoot appeared to remove his hand from his jacket pocket. Then, once Jackson reached the corner of West Fayette Street and North Eutaw Street, he appeared to engage (or at least look directly at) the victim just as Barefoot sprang forward from behind Jackson and started shooting. And, as the State notes, Jackson did not cower or immediately flee the scene when the shooting began; rather, Jackson casually jogged south on Eutaw Street, all the while looking back toward Barefoot. Thus, a reasonable inference can be drawn that Jackson not only knew that Barefoot was going to shoot the victim but that the two were acting in concert during the commission of the crime.

Lastly, the evidence showed that Jackson, rather than call the police or go back to check on the victim, fled the scene with Barefoot. Although Jackson did eventually tell Ms. Hargrove that he wanted to turn himself in to the police, he did not do so until a week or two after the murder. Moreover, Jackson and Barefoot were together when Ms. Hargrove drove the “three or four hours” to pick Jackson up so that he could turn himself in. From these facts, a reasonable inference can be drawn that Jackson and Barefoot either remained together following the shooting or agreed to meet at a predetermined location at some point prior to or after the murder.

In our view, Barefoot’s and Jackson’s actions prior to, during, and following the murder support a reasonable inference that the two had a “meeting of the minds” to accomplish the deliberate, premeditated, and willful murder of Tayvon Cokley. Thus, sufficient evidence was adduced from which a reasonable factfinder could conclude that Barefoot was guilty of conspiracy to commit first-degree murder.

III.

In his final claim of error, Barefoot argues that the circuit court abused its discretion in permitting the State, during jury deliberations, to reopen its case to reintroduce the video of the shooting, which the jury wanted to review but could not because it had become corrupted. Barefoot maintains that the court’s decision placed “distorted importance” and “undue emphasis” on the evidence. The State counters that the trial court did not abuse its discretion in light of the court’s limited options and the importance of the videos to the State’s case.

“To be sure, a trial court has broad discretion in allowing evidence out of order, and [it] may permit the State to reopen its case in chief, ‘so long as it does not impair the ability of the defendant to answer and otherwise receive a fair trial.’” *Wisneski v. State*, 169 Md. App. 527, 553 (2006) (quoting *Collins v. State*, 373 Md. 130, 142 (2003)). “Usually, whether the reopening of evidence impaired the defendant’s ability to receive a fair trial ‘is answered by reference to the State’s intention in withholding the evidence, *i.e.*, whether it did so [to] gain an unfair advantage from the impact later use of the evidence likely would have on the trier of facts[.]’” *Cason v. State*, 140 Md. App. 379, 391 (2001) (citations omitted). “To this end the judge must see whether the proposed evidence is merely cumulative to, or corroborative of, that already offered in chief or whether it is important or essential to a conviction.” *Wisneski*, 169 Md. App. at 555 (citations and quotations omitted). Other relevant factors include: “[w]hether good cause is shown; whether the new evidence is significant; whether the jury would be likely to give undue emphasis,

prejudicing the party against whom it is offered; whether the evidence is controversial in nature; and, whether the reopening is at the request of the jury or a party.” *Cason*, 140 Md. App. at 391-92 (quoting *Dyson v. State*, 328 Md. 490, 502 (1992)).

Moreover, “a trial judge must exercise the utmost caution in reopening a case to allow the introduction of additional evidence after the jury has begun deliberating.” *Dyson*, 328 Md. at 502-03. As the Court of Appeals has explained:

A premium must necessarily be placed on preparation and diligence, and evidence which is simply the product of an afterthought, no matter how pertinent it may have been if timely offered, will not, except in the most extraordinary circumstances, be received at this late stage of the proceedings. There is, of course, the very strong probability that evidence offered at this point will be given undue emphasis or prominence by the trier of fact. Moreover, if the evidence is at all disputed or controversial, fair opportunity must be afforded for cross-examination and rebuttal. And it may be difficult, if not impossible, to permit effective argument concerning additional evidence without permitting an entire set of new closing arguments.

There will, of course, be those rare circumstances where this extraordinary relief should be granted. Where, for example, a party has painstakingly laid a proper foundation for the introduction of an exhibit and all parties have assumed it is in evidence, but because of an oversight it was not formally offered and received, a trial judge would not err in receiving the exhibit and sending it to the jury.

Id. at 503.

Here, the circuit court did not abuse its discretion in permitting the State to reopen its case to reintroduce the video of the shooting. Indeed, the jury had a right, pursuant to Maryland Rule 4-326, to have the video, which had been admitted into evidence, in the

jury room during deliberations. Md. Rule 4-326(b). Moreover, absent an express finding of good cause to exclude the evidence, it would have been an abuse of the court’s discretion to deny the jury’s request to have such evidence in the jury room. *Adams v. State*, 415 Md. 585, 589 (2010). And, given that the State could, and did, obtain an exact duplicate of the evidence in a timely manner, we cannot say that a finding of “good cause” to exclude would have been appropriate. Finally, defense counsel’s alternative option, *i.e.*, declaring a mistrial, would have been an extreme and frankly unwarranted remedy under the circumstances. *See State v. Hart*, 449 Md. 246, 276 (2016) (“The grant of a mistrial is considered an extraordinary remedy and should be granted only if necessary to serve the ends of justice.”) (citations omitted).

Critically, the evidence being offered was an exact duplicate of the video that had already been admitted into evidence and sent to the jury room during deliberations. Thus, the State was not admitting *new* evidence but rather was merely reintroducing evidence that had already been viewed by the jury during trial but had since become corrupted and could not be properly reviewed during deliberations. The State did not withhold the evidence or receive any unfair advantage in its admission, and Barefoot’s ability to answer the evidence and receive a fair trial remained unimpaired. Although it is possible that some additional emphasis resulted from the evidence’s readmission, such emphasis was neither distorted nor undue, mainly because the jury, not the court or the State, asked to see the video and because the video was already of vital import to the State’s case.

Furthermore, even if there was some residual emphasis that resulted from the evidence’s readmission, there is nothing in the record to suggest that Barefoot was prejudiced by having the video shown in court following the reopening of the State’s case. In other words, had the video not become corrupted, the record suggests that the jury would have reviewed the video in substantially the same fashion. We, therefore, hold that the trial court did not abuse its discretion in permitting the State to reopen its case to introduce the video of the shooting, which the jury wanted to review but, due to factors beyond anyone’s control, was unable to do so.

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