Circuit Court for Prince George's County
Case No. CT180175X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2175

September Term, 2018

RAY ANTHONY HAMLET

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 17, 2019

Convicted by a jury by the Circuit Court for Prince George's County of two counts each of armed robbery, robbery, and second degree assault, and one count of theft of property with a value of less than one thousand dollars, appellant, Ray Anthony Hamlet, presents for our review three questions:

1. Did the court abuse its discretion in denying Hamlet's motion for mistrial?

2. Did the court err in allowing one of the victims to testify regarding her level of certainty as to her identification of Hamlet?

3. Did the court abuse its discretion in permitting one of the victims to identify a person on a surveillance video recording as Hamlet?

For the following reasons, we shall affirm the judgments of the circuit court.

Facts and Proceedings

At trial, the State called Tayshawn Morgan, who testified that at approximately 7:00 a.m. on September 24, 2017, she arrived at her job at a Dollar General store in Suitland. At approximately 8:00 a.m., Morgan opened the doors to the store. Approximately three to five minutes later, a man whom Morgan identified in court as Hamlet entered the store carrying a bookbag. Morgan noted that Hamlet was African-American, "dark skinned," "[i]n his fifties," and wearing a "blue-collared shirt and black pants." Morgan's co-worker, Petra White, asked Hamlet "to bring his bag up front," because the store's "policy is that all bags have to be dropped off at the register." Hamlet "pulled . . . what looked like a gun out of the bag and pointed it at" Morgan and White. Hamlet, who "was yelling and very aggressive," "direct[ed] everyone to come to the front and not to move." After the customers complied, Hamlet "threw the bag at [Morgan] and told [her] to fill it up."

As Morgan "filled the bag from the safe," Hamlet told her to "hurry up." Hamlet then "came around the back" of the counter, pointed the gun at the back of Morgan's head, and "told [her] to hurry up, fill it up, [and that she] had 15 seconds to live." Morgan could not "tell [the] kind of material" from which the gun was made, but "[i]t felt very heavy."

Hamlet subsequently exited the store, and Morgan called 911. Morgan then went outside and "saw the weapon" that Hamlet had used "laying on the ground by the icebox." Morgan testified that "when this was going on, [she was] looking right at" Hamlet, and had "a good look at his face" when "he came in and also while he was pointing" the gun.

The State next called White, who also identified Hamlet as the assailant. White testified that when Hamlet pointed the gun at her, she "ran to the third register" and "pressed the . . . alarm." White then "ran in the office[,] shut the door[,] and got on the phone." White called a company known as "Iverify" and asked "them to dispatch the police," and then called the store's manager and told him that the store was being robbed. While White was in the office, Hamlet slammed his body against the office's door "two or three times." Hamlet then retrieved the bag of money, which contained approximately $700, and departed.

White followed Hamlet out of the store "[t]o see which way he went." White saw the weapon "on the ground by the ice chest," and saw a second man, whom White knew to be a panhandler, "[s]itting on his bicycle across from [a] Subway." White then saw Hamlet "running on the sidewalk going towards" a street known as Shadyside Way. White got in her car and followed Hamlet. White saw Hamlet turn onto Homer Avenue, go into some bushes, and retrieve a bicycle. Hamlet "got on [the] bicycle" and rode "around in circles"

in "the middle of the street." As White attempted to take a picture of Hamlet, he "pointed his hand . . . like a gun" at her. Hamlet rode his bicycle to the parking lot of an elementary school, where the "bicycle broke, [Hamlet] fell off, and the money spilled on the ground." The panhandler, who had followed White, "got the bag and ran" behind the school, followed by Hamlet. White was then approached by a police officer, whom she told what had happened.

The State also called Prince George's County Police Corporal Decatur Thompson, who testified that on the day of the offenses, he was called to the Dollar General to investigate the robbery. Corporal Thompson was told that the suspect was "a black male wearing dark pants [and a] Metro shirt," "carrying a black bookbag and armed with a handgun" or "a handgun/rifle type of gun." The corporal was subsequently informed that two other officers "possibly had eyes on the suspect between Homer and Heron Avenue," which were "behind the Dollar General" toward "the field by Suitland Elementary School." Corporal Thompson left the store and went to an apartment complex near the school.

When Corporal Thompson arrived at the complex, he saw a "guy matching the description[] come out from behind a brown Ford Explorer." The corporal identified Hamlet in court as the man who emerged from behind the vehicle. Corporal Thompson exited his vehicle and advised Hamlet that he was under arrest. Hamlet "started to go down to the ground as if he was going to comply and give up," but then "pushed up off [the corporal] and the ground and started running between the cars." As Hamlet "started to run out to the parking lot," Corporal Thompson "was able to grab hold of him."

Discussion

I.

Prior to the selection of the jury, Hamlet moved in limine to exclude evidence that, as Corporal Thompson attempted to arrest Hamlet, he "attempted to disarm" the corporal. The prosecutor explained that when Corporal Thompson attempted to arrest Hamlet, he

> starts fighting [the corporal], starts resisting. They get into a physical altercation. Corporal Thompson reported that [Hamlet] was at some point reaching for his firearm, was also striking him, gouging his eyes, fighting him pretty hard, and that Corporal Thompson in the midst of that . . . had to OC spray [Hamlet] in order to try to get control of [him].

Defense counsel argued that the evidence should be excluded for three reasons: the evidence was not relevant, the evidence concerned "another bad act" and was thus prohibited by Rule 5-404(b),[1] and "the relevance it has is heavily outweighed by the danger for unfair prejudice" in violation of Rule 5-403.[2] Following argument, the court stated: "Truthfully, the only part that I'm going to not allow is the attempt to disarm the officer. Everything else that that officer wants to say about his efforts to arrest [Hamlet], I'm going to allow."

During Corporal Thompson's testimony, the following colloquy occurred:

> [PROSECUTOR:] When you were trying to put [Hamlet] in handcuffs and arrest him, what did he do at that point?
>
> [CPL. THOMPSON:] He kept fighting. He kept resisting.

[1]Rule 5-404(b) states: "Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith."

[2]Rule 5-403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"

[PROSECUTOR:] You said he kept fighting you. What exactly was he doing?

[CPL. THOMPSON:] He was grabbing my neck, pulling on my shirt, attempted to rake my eyes. He was grabbing for my weapon.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: That's stricken. You are to disregard that statement.

[DEFENSE COUNSEL]: May we approach, Your Honor?

THE COURT: I said they are to disregard the statement. It's stricken. Move on. Next question.

[DEFENSE COUNSEL]: Your Honor, we are asking for –

THE COURT: Excuse me?

[DEFENSE COUNSEL]: May we approach then, please?

(Counsel approached the bench, and the following ensued.)

[DEFENSE COUNSEL]: Your Honor, at this point we ask for a mistrial.

THE COURT: And I'm denying it because I struck the testimony.

[DEFENSE COUNSEL]: But Your Honor ruled pretrial it wasn't supposed to come in, and he said it anyway.

THE COURT: I don't see where that is – or rises to the level of inadmissible evidence, but I didn't allow it, so, therefore, I struck it, told them to disregard it, which is what you are supposed to do when something comes in they're not supposed to hear. But I don't believe it would ever rise to the level of manifest necessity.

Following the close of the evidence, the court instructed the jury, in pertinent part: "The following things are not evidence, and you should not give them any weight or consideration; . . . any testimony that I struck or told you to disregard." The court further

instructed the jury: "If after an answer was given I ordered that the answer be stricken, you must disregard both the question and the answer."

Hamlet contends that the "trial court abused its discretion in denying [the] mistrial motion," because "the court's curative instruction was inadequate to cure the prejudice from Corporal Thompson's testimony." The State counters that "the issue is not preserved for review" (capitalization and boldface omitted), because "during trial, defense counsel did not renew the objection on the basis of . . . Rule 5-403." Alternatively, the State contends that "Corporal Thompson's testimony was not unfairly prejudicial and did not necessitate a mistrial." (Capitalization and boldface omitted.)

Assuming, *arguendo*, that Hamlet's contention is preserved, we agree with the State that Corporal Thompson's testimony did not necessitate a mistrial. "In determining whether to grant a mistrial, courts should consider

> whether the reference . . . was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; and whether a great deal of other evidence exists."

Jackson v. State, 230 Md. App. 450, 467-68 (2016) (internal citations and brackets omitted). In reviewing whether a trial court abused its discretion in failing to grant a mistrial in response to impermissible testimony, we also consider whether "the trial court immediately sustained [an] objection to the question and struck it," whether the defendant requested a curative instruction, and whether, following "the presentation of evidence," the

court instructed the jury to "give [no] weight or consideration" to "testimony that [the court] struck or told [the jury] to disregard[.]" *Id.* at 468 (quotations omitted).

Here, Corporal Thompson's reference to whether Hamlet "was grabbing for [the corporal's] weapon" was a single, isolated statement. The reference was not solicited by the prosecutor, but was instead an inadvertent and unresponsive statement. In light of the fact that Hamlet was charged with committing offenses against not Corporal Thompson but Morgan and White, the corporal was not the principal witness upon whom the entire prosecution depended, and Corporal Thompson's credibility was not a crucial issue. The State presented a great deal of other evidence, including lengthy and detailed testimony by Morgan and White. Immediately after Corporal Thompson made the challenged reference, the court effectively sustained defense counsel's objection to the reference and struck it, and defense counsel did not request a curative instruction. Finally, following the close of the evidence, the court effectively instructed the jury to give no weight or consideration to testimony that the court struck or told the jury to disregard. We conclude that, in light of these circumstances, the court's instruction was adequate to cure any prejudice that may have resulted from the challenged reference, and hence, the court did not abuse its discretion in denying Hamlet's motion for mistrial.

II.

During Morgan's testimony, the prosecutor asked: "[H]ow sure are you that [Hamlet] is the same person that put that weapon to your head on September 24th?" Defense counsel objected on the ground that the question constituted "[i]mproper

bolstering." The court denied the objection. Morgan subsequently stated: "I'm 100 percent sure."

Hamlet contends that the court erred in admitting the testimony, "because an eyewitness's statement of certainty is of so little probative value as to be misleading to a jury." We disagree. In *Mines v. State*, 208 Md. App. 280 (2012), the appellant challenged the trial court's admission of a victim's testimony "that he told the police he 'was a hundred percent sure' that [Mines] was the man who tried to rob him." *Id.* at 302. We rejected the contention on the ground that a "witness's degree of certainty is a proper consideration when evaluating his likelihood of misidentification." *Id.* (citations omitted). We reach a similar conclusion here. Morgan's degree of certainty was a proper consideration when evaluating her likelihood of misidentification, and hence, the court did not err in admitting her testimony.

III.

During Morgan's testimony, the State played a video recording taken by the Dollar General's surveillance camera system at the time of the offenses. As the recording played, the prosecutor asked Morgan: "[D]o you know who this person is up here?" Defense counsel objected, and when the court asked for the basis, counsel stated that "the video speaks for itself," and counsel did not "think that it's relevant for the witness to ID people in the video." The court overruled the objection. Morgan subsequently identified the person depicted in the recording as Hamlet.

Hamlet contends that the court erred in admitting the testimony, because it "was inadmissible under Rule 5-701."[3] The State counters that "the issue is not preserved for review" (capitalization and boldface omitted), because "defense counsel did not state this as a basis for her objection at trial." Alternatively, the State contends that Morgan's testimony "was clearly admissible" (capitalization and boldface omitted), because "she clearly was in a better position than the jurors to determine whether the man depicted in the surveillance video footage was" Hamlet. (Quotations omitted.)

We agree with the State that Hamlet's contention is not preserved. The Court of Appeals has stated that although "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," one exception is "where the trial court requests that the ground be stated." *Boyd v. State*, 399 Md. 457, 476 (2007). Here, defense counsel failed to specifically argue that the testimony sought by the State would violate Rule 5-701. Hence, counsel failed to preserve that ground for our review.

Assuming, *arguendo*, that Hamlet's contention is preserved, we agree with the State that the testimony was admissible. In *Moreland v. State*, 207 Md. App. 563 (2012), we found no error in the trial court's admission of testimony that an "image captured on [a bank's] surveillance video was that of the appellant[.]" *Id.* at 565. We relied upon the reasoning of the Colorado Supreme Court in *Robinson v. Colorado*, 927 P.2d 381 (Colo.

[3]Rule 5-701 states: "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."

1996), in which the Court adopted the conclusion of "a 'significant majority' of the courts that had addressed the issue . . . 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 the jury.'" *Moreland*, 207 Md. App. at 572 (citing *Robinson*, 927 P.2d at 382).

Here, Morgan testified that she observed Hamlet when he entered the store, that she could observe his race, skin tone, approximate age, and clothing, that Hamlet stood close enough to her to place a gun directly against her head, that Hamlet stood there long enough for Morgan to fill his bookbag with money, and that during the offenses, Morgan "look[ed] right at" Hamlet and had "a good look at his face." This testimony presented a basis for concluding that Morgan was more likely to correctly identify Hamlet from the surveillance video recording than the jury, and hence, Morgan's testimony was admissible.

Hamlet contends that *Moreland* actually "dictates . . . that the testimony be excluded," because unlike Morgan, the witness that identified Moreland had "known him for 40 to 45 years." *Moreland*, 207 Md. App. at 573. But, in *Moreland*, we agreed with the *Robinson* Court that "'the intimacy level of the witness'[s] familiarity with the defendant goes to the weight to be given the witness'[s] testimony, not the admissibility of such testimony,'" and "'although the witness must be in a better position that the jurors to determine whether the image captured by the camera is indeed that of the defendant, this [does not require] the witness to be intimately familiar with the defendant[.]'" *Moreland*, 207 Md. App. at 572-73 (citing *Robinson*, 927 P.2d at 384). We did not impose a minimum amount of time that an identifying witness must be familiar with a defendant in order to

identify that witness in an image captured by a camera, and hence, the court did not abuse its discretion in admitting Morgan's testimony.

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