VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 24th day of February, 2022.

Present: All the Justices

Angelo Banks, Appellant,

against Record No. 201435
Court of Appeals No. 1844-19-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of the opinion that there is no error in the judgment of the Court of Appeals.

I. BACKGROUND

Around 1:45 a.m. on Saturday, August 5, 2018, Kyteirra Pretlow and her boyfriend Damian Mackenzie were shot and injured outside of Pretlow's apartment on Southlawn Avenue in Richmond. Pretlow and Mackenzie had been standing outside the apartment, looking at Mackenzie's phone, when Pretlow heard someone on the sidewalk say "what's up now." When Pretlow looked up, she saw a man standing on the sidewalk, shooting a gun at them. Mackenzie ran away, but Pretlow could not run because the man's bullets hit her back and leg. When the shooter left, Pretlow's mother came to her aid. Believing she was dying, Pretlow told her mother that "Broodie shot me."

Due to her wounds, Pretlow was hospitalized for two weeks, underwent surgery, had a metal rod put in her leg, had severe scarring, and began seeing a mental health therapist. Mackenzie, who had also been shot, was hospitalized for about five days. Detective Amira Sleem visited Pretlow in the hospital to investigate the shooting, and she showed Pretlow a

picture of Angelo Banks to inquire if Banks was the shooter. Pretlow confirmed that Banks was the shooter.

On August 29, 2018, a grand jury indicted Angelo Banks, also known as Broodie, for two counts of aggravated malicious wounding and two counts of use of a firearm during the commission of aggravated malicious wounding.

During the jury trial, Pretlow testified that she was able to get a good look at the shooter's face because her porch light was on and she had a two- to three-second window to look at him. Pretlow stated that she had seen Banks once or twice in person before, that she had seen his rap videos, and that she had seen his face on Instagram. She identified Banks at trial by his alias "Broodie" and testified that she was "[a] hundred percent" confident that he was the person who shot her.

After the Commonwealth rested, Banks called to the stand one of Pretlow's neighbors, who did not want to be identified by name (hereinafter, "the neighbor"). The neighbor testified that, on the night that Pretlow was shot, she saw two people in their neighborhood: an unidentified male and a man who looked like Banks. She testified that she thought the unidentified male was the shooter because she saw him walk towards Pretlow about two seconds before she heard gunshots. On cross-examination, the neighbor admitted that she did not see the unidentified male shoot anyone. She also stated that the man who looked like Banks walked towards the back side of the apartment, and she heard the gunshots a few seconds after she could no longer see him.

Banks also called his girlfriend, Alexis McCants, as a witness. McCants testified that around 10:00 p.m. on August 5, 2018, she dropped Banks off at a recording studio. She testified that she went back to the studio at 2:00 a.m., talked to Banks, but then left again because Banks was not yet finished; she eventually returned and picked him up at 4:00 a.m. McCants insisted she remembered that the morning she picked Banks up from the recording studio was August 6 because that day was her birthday. On cross-examination, the Commonwealth clarified that Pretlow was shot on the morning of August 5, 2018, and asked McCants if she understood that she was testifying to events that happened approximately twenty-four hours *after* Pretlow was shot. McCants answered yes.

The Commonwealth asked McCants if she had ever been convicted of a felony. McCants replied that she did not remember, prompting the Commonwealth to refresh her recollection with

a document. McCants confirmed that the document showed she had been convicted of a felony; the document was not offered or admitted into evidence. Banks did not object to this impeachment.

After the close of Banks' case-in-chief, the circuit court gave jury instructions, which included an instruction that the jury "may consider proof of a witness's prior conviction of a felony" as affecting that witness' credibility. Banks did not object to this jury instruction regarding the credibility of the witness.

The circuit court also gave a jury instruction regarding eyewitness identification (Instruction 10), the last sentence of which stated: "The testimony of one witness, if believed, is sufficient to prove identity beyond a reasonable doubt and to sustain a guilty verdict."

Banks objected to "the language at the end" of Instruction 10, which was taken from an unpublished Court of Appeals opinion, on the basis that the language was vague and "not a model instruction." He also voiced the objection that the last sentence of Instruction 10 was just "dicta from a case." The circuit court overruled Banks' objections, stating that the last sentence of Instruction 10 was "a proper statement of the law."

The jury returned a guilty verdict on all charges and recommended a total sentence of 48 years' imprisonment. The circuit court entered a sentencing order which adopted the jury's verdict.

Banks subsequently filed a motion to supplement the record and a motion to stay or vacate the execution of his sentence, asserting that it had come to his attention that the Commonwealth improperly impeached McCants as a felon when, at the time of her testimony, she had not yet been convicted of a felony. In his motion to supplement the record, Banks averred that, at the time of Banks' trial, McCants had pled guilty to a felony, but only a deferred judgment had been entered, and she was not actually convicted on that felony charge until seven months after she testified at Banks' trial. Banks argued that even though he did not object when the Commonwealth cross-examined McCants, the ends of justice exception to the contemporaneous-objection rule required consideration of the documents evidencing the correct date of McCants' felony conviction as part of the record for the purpose of appeal. The circuit court denied the motions.

Banks filed a petition for appeal in the Court of Appeals, arguing, inter alia, that the circuit court erred in allowing Instruction 10 because the language of the instruction may have

misled the jury, and "it singled out one piece of evidence for special emphasis." Banks also claimed that the circuit court erred in denying his motion to supplement the record because it was highly prejudicial for the Commonwealth to impeach McCants based on an incorrect felony conviction, and McCants' impeachment likely influenced the jury's verdict.

The Court of Appeals denied Banks' petition for appeal in a per curiam order, explaining that Banks did not preserve his argument that Instruction 10 unfairly highlighted one witness' testimony because Banks had raised a different objection before the circuit court. The Court of Appeals further noted that Banks did not argue the ends of justice exception on appeal, and it declined to invoke that exception *sua sponte*.

Concerning the impeachment of McCants with the felony conviction, the Court of Appeals held that the ends of justice exception did not apply in regard to that alleged error because McCants conceded at trial that she had been convicted, Banks did not object, and Banks could have discovered evidence to the contrary if Banks had exercised reasonable diligence.

On reconsideration, a three-judge panel of the Court of Appeals denied the petition for appeal for the reasons stated in the per curiam order.

Banks appeals, and we granted two assignments of error:

I. The Court of Appeals erred in finding that the jury instruction issue was not preserved and did not satisfy the ends of justice exception. Specifically, Banks argued that the trial court erred in instructing the jury that the testimony of one witness was sufficient evidence.

II. The Court of Appeals erred in finding that the ends of justice exception does not apply in this case where the trial court denied a motion and allowed convictions to stand where the Commonwealth improperly impeached an alibi witness and suggested the witness was not credible based on inaccurate information.

II. ANALYSIS

A. Jury Instruction 10

We review the Court of Appeals' interpretations of the Rules of this Court de novo. *Bonnano v. Quinn*, 299 Va. 722, 729 (2021); *LaCava v. Commonwealth*, 283 Va. 465, 469–70 (2012). Further, "whether a jury instruction accurately states the relevant law is a question of

law that we review de novo." *Payne v. Commonwealth*, 292 Va. 855, 869 (2016) (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 228–29 (2013)).

Banks argues that the Court of Appeals erred in holding that he did not preserve his objection to Instruction 10 because, at trial, he specifically objected to the "language at the end" of Instruction 10, which pertained to the language that was taken from an unpublished Court of Appeals case. Banks insists that, instead of conveying a principle of law to the jury, the language at the end of Instruction 10 comments upon and singles out for emphasis a single piece of evidence. We disagree with Banks.

Rule 5A:18, like Rule 5:25, states the contemporaneous-objection rule: "No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Under this rule, "[a] party must state the grounds for an objection so that the trial judge may understand the precise question or questions he is called upon to decide." *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010) (internal quotation marks omitted).

Instruction 10 states:

> In evaluating an eyewitness identification, the opportunity and ability of the witness to view the criminal before and during the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation, are factors to be considered.
>
> The testimony of one witness, if believed, is sufficient to prove identity beyond a reasonable doubt and to sustain a guilty verdict.

The second paragraph is the disputed language in Instruction 10; it was taken from an unpublished Court of Appeals opinion that states:

> [The witness] testified that he had a clear look at appellant, spoke with him for eight minutes and saw appellant run toward and hit the victim. [The witness] clearly identified appellant both from the photo identification and in court as the man who robbed Scott. *The testimony of one witness, if believed, is sufficient to prove identity beyond a reasonable doubt and to sustain a guilty verdict*.

Henderson v. Commonwealth, No. 3017-99-1, 2000 WL 1808487, at *4 (Va. Ct. App. Dec. 12, 2000) (emphasis added). As we have previously held, it is within the province of the jury "to

accept the evidence of one witness and to reject that of the defendant and the other witnesses." *Ford v. Commonwealth*, 177 Va. 889, 892 (1941).

In this case, the Court of Appeals did not err when it refused to consider the circuit court's ruling to allow the second paragraph of Instruction 10 as a basis for reversal, because Banks' argument asserted on appeal—that Instruction 10 erroneously singled out one piece of evidence for special emphasis—was not stated with reasonable certainty at the time of the ruling. At trial, the only objections that Banks raised concerning Instruction 10 were that (1) it is "too vague"; (2) it is "not a model instruction"; and (3) it contains language at the end that is "dicta from a case." Banks argued that the language at the end of Instruction 10 amounted to mere dicta because the facts of the case from which the language was taken are distinguishable from the facts in the instant case—yet those distinctive facts were not similarly included in Instruction 10. At trial, Banks did not state an objection that Instruction 10 specifically emphasizes one piece of evidence. The contemporaneous-objection requirement prevents a party from making an argument for the first time on appeal. As a result, the Court of Appeals did not err in ruling that the jury instruction issue asserted on appeal was not properly preserved in the circuit court.

To attain the ends of justice, Rule 5A:18 allows the Court of Appeals to consider matters not properly preserved for appeal. Banks claims that the Court of Appeals erred in not applying the ends of justice exception. An appellate court must consider two questions "when deciding whether to apply the ends of justice exception: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice." *Williams v. Commonwealth*, 294 Va. 25, 27–28 (2017) (citation and internal quotation marks omitted).

We conclude that the Court of Appeals did not err in declining to apply the ends of justice exception because the failure to apply the ends of justice exception, in this instance, did not result in a grave injustice. We have previously refused to apply the ends of justice exception, when, regardless of error, the record demonstrated that no miscarriage of justice occurred. *Murillo-Rodriguez v. Commonwealth*, 279 Va. 64, 84 (2010).

The last sentence of Instruction 10 did not single out a piece of evidence for special emphasis, as alleged by Banks; it instead simply explains that if the jury believes one witness, it can return a guilty verdict based on that evidence alone. This is an accurate statement of the law because it is consistent with the jury's authority to accept the evidence of one witness and reject

that of other witnesses. Thus, because the circuit court did not err in granting Instruction 10, there is no evidence of any grave injustice which would result from the Court of Appeals' failure to apply the ends of justice exception, regarding the waiver of Banks' objection to Instruction 10.

In summary, the Court of Appeals did not err when it held that Banks' argument concerning Instruction 10 was not preserved for appeal or when it refused to apply the ends of justice exception to consider the circuit court's ruling regarding Instruction 10.

B. Impeachment of Witness

We review the Court of Appeals' interpretations of the Rules of this Court de novo. *Bonnano*, 299 Va. at 729; *LaCava*, 283 Va. at 469–70.

Banks argues that the Court of Appeals erred in ruling that the ends of justice exception does not apply to his alleged error concerning the purportedly improper impeachment of his alibi witness. He contends that it was improper for the Commonwealth to tell the jury that McCants' credibility could be questioned based on a felony conviction because McCants was not, in fact, a convicted felon at the time of Banks' trial. Consequently, Banks avers that the ends of justice exception requires the reversal of his convictions. Banks' arguments are without merit. We disagree that the ends of justice exception applies in this instance.

As noted above, an appellate court considers two questions "when deciding whether to apply the ends of justice exception: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice." *Williams*, 294 Va. at 27–28 (citation and internal quotation marks omitted). This exception is applied only "in very limited circumstances, including, for example, where the record establish[es] that an element of the crime did not occur, a conviction [was] based on a void sentence, [the] conviction [was] of a non-offense, and a capital murder conviction where the evidence was insufficient to support an instruction." *Id.* (quoting *Gheorghiu v. Commonwealth*, 280 Va. 678, 689 (2010)).

Assuming arguendo that the circuit court committed an error as alleged by Banks, the ends of justice exception does not apply in this instance. As stated above, we have previously refused to apply the ends of justice exception, when, regardless of error, there was no miscarriage of justice. *Murillo-Rodriguez*, 279 Va. at 84; *see also Gheorghiu*, 280 Va. at 689 (refusing to apply the ends of justice exception, when, regardless of error, the record demonstrated that the result of the trial would have been no different); *Brown v. Commonwealth*,

8 Va. App. 126, 131–32 (1989) (explaining that to warrant application of the ends of justice exception, there must have been a "clear miscarriage of justice," i.e., "the error clearly had an effect upon the outcome of the case" and "involve[d] substantial rights"); *Thomas v. Commonwealth*, 44 Va. App. 741, 752 (2005) (holding that the appellant must show that "a miscarriage of justice has occurred, not that a miscarriage might have occurred"); *Winslow v. Commonwealth*, 62 Va. App. 539, 546–47 (2013) ("To prevent the exception from swallowing the rule, Virginia courts applying the ends-of-justice exception require a defendant to present not only a winning argument on appeal but also one demonstrating that the trial court's error results in a grave injustice or a wholly inexcusable denial of essential rights.") (citation and internal quotation marks omitted).

In *Gheorghiu*, the defendant was convicted, inter alia, of several counts of credit card theft, and on appeal he sought the application of the ends of justice exception to reverse his convictions on the basis of improper venue. *Gheorghiu*, 280 Va. at 681, 683, 688. We held in *Gheorghiu* that, regardless of error, no grave injustice would result from the refusal to apply the exception because venue does not affect the merits of a trial and it is not an element of the crime necessary to sustain a conviction. *Id.* at 689. We reasoned that the defendant had not challenged the sufficiency of the evidence, thus the end result would be no different regardless of the venue in which the charges would have been prosecuted. *Id.*

In this instance, the ends of justice exception does not apply because, regardless of any error concerning McCants' impeachment on the basis of her felony conviction, Banks has failed to demonstrate that a clear miscarriage of justice has occurred. Like the defendant in *Gheorghiu*, Banks does not question the sufficiency of the evidence to support his convictions; he merely challenges the weight that the jury afforded McCants' testimony vis-à-vis Pretlow's eyewitness account. It is important to note in this instance that, in addition to impeaching McCants' testimony with her alleged felony conviction, the Commonwealth also impeached McCants' testimony on the basis of her romantic relationship with Banks and, perhaps more significantly, on her provision of an alibi that was for the wrong day. Further, even if McCants' testimony were believed and could be attributed to the same night when Pretlow and Mackenzie were injured, McCants did not account for Banks' location during the window of time when Pretlow and Mackenzie were shot. Even if McCants' testimony was not impeached at all, the elements of

the crimes were sufficiently supported by persuasive evidence that did not pertain to McCants' testimony.

Therefore, we conclude that the Court of Appeals did not err in declining to apply the ends of justice exception, as failure to apply it did not result in a grave injustice.

III. CONCLUSION

Accordingly, we affirm the judgment of the Court of Appeals.

This order shall be certified to the Court of Appeals and the Circuit Court of the City of Richmond.

A Copy,

Teste: 

Clerk