Circuit Court for Howard County
Case No. C-13-CR-22-000257

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 49

September Term, 2023

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ANTHONY MAURICE TARPLEY

v.

STATE OF MARYLAND

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Beachley,
Ripken,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Beachley, J.

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Filed: April 16, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Anthony Tarpley was convicted by a jury in the Circuit Court for Howard County of second-degree rape, third-degree sex offense, and other related charges. Mr. Tarpley noted this timely appeal and presents the following question for our review:

> Whether the trial court erred in admitting lab results from a sexual assault forensic exam kit despite an inadequate chain of custody and discovery of an unidentified foreign swab found therein?

We hold that Mr. Tarpley failed to preserve this issue for appellate review, and accordingly affirm.

## BACKGROUND

Mr. Tarpley was charged with second-degree rape, two counts of third-degree sex offense, and various other charges related to allegations that he performed sexual acts on an eight-year-old girl. The victim was examined at a hospital within hours of the assault, where a nurse conducted a sexual assault forensic examination, including swabbing various areas of the victim's body for DNA samples. Each of the swabs was separately packaged and each package was labeled with the specific part of the body that was swabbed. All packages were then placed in a single sealed envelope (the "SAFE kit") and stored in an evidence locker. The envelope was then transported to a laboratory for testing. When the SAFE kit arrived at the laboratory, it had "a small tear in the outer packaging," which was sealed with clear tape by a technologist before the kit was tested. When the laboratory tested the samples, the envelope contained a swab labeled "perianal swab." The test results from this swab were included in the laboratory's report.

During trial, Ashley McAree, the nurse who gathered samples from the victim for

the SAFE kit, testified that she did not remember collecting a perianal swab, and her notes did not reflect that a perianal swab was collected. Immediately before the DNA analyst was called to testify, Mr. Tarpley moved to exclude the report detailing the test results from the SAFE kit. In a hearing outside the presence of the jury, defense counsel sought exclusion of all the DNA evidence, arguing that the existence of the unaccounted-for perianal swab indicated that the SAFE kit had been compromised. Counsel alternatively argued that, if the court was not inclined to exclude the entire report, the court should at least redact those portions of the report concerning the perianal swab. The prosecutor, after objecting to Mr. Tarpley's proposal to exclude all the swabs, proffered "two options[.]" The State first suggested that Nurse McAree could be recalled as a witness for additional questioning concerning the issue raised by the defense. As a second option, the State indicated it would agree with Mr. Tarpley's alternative proposal to exclude the perianal swabs as well as "any questions on the perianal swabs." The court ultimately adopted Mr. Tarpley's alternative proposal to exclude admission of the perianal swab, stating, "Well, at this juncture, I think the [d]efense argument is well-founded, there is no reference to a perianal swab, and in fact the nurse affirmatively indicated that she did not do a perianal swab. So the perianal swab would not be admitted." Defense counsel then requested that the DNA report be redacted to exclude any reference to the perianal swab: "Well, I would ask that it be redacted with what Your Honor is [r]uling. *And I would raise any other objection at the appropriate time*." (Emphasis added).

After the State redacted the report in accordance with the court's ruling, it called the

DNA analyst, Kristiana Kuehnert, to testify. Ms. Kuehnert confirmed that the redacted report was "a fair and accurate representation of the testing that [she] completed." The State then moved for admission of the redacted report:

> [THE STATE]: At this point, State moves State's Exhibit 20 into evidence, Your Honor.
>
> [DEFENSE COUNSEL]: *No objection*.
>
> THE COURT: All right, 20's admitted.

(Emphasis added). No objections were raised during Ms. Kuehnert's testimony about the test results.

The next witness was Kathryn Korecki, a serologist who also examined the SAFE kit. At one point in her testimony, she stated that she performed tests on samples "E02, E04, E05, E06, and E07." Defense counsel objected to the mention of "sample E06" because that sample referred to the perianal swab. Consistent with the court's prior ruling, Ms. Korecki was instructed outside the presence of the jury not to mention anything about sample E06. After the jury returned, Ms. Korecki confirmed that she performed a "second read" to confirm the analysis of another serologist. As Ms. Korecki was testifying about the results of her tests as reflected in the redacted report, defense counsel raised the following objection:

> [DEFENSE COUNSEL]: Defense preemptively objects, just in light of what we discussed at the bench.
>
> . . .
>
> I only want to make sure that now . . . because your question asks her to just read the names of the samples that she is not going --

[THE STATE]: But they are . . . they are crossed out she cannot even read it --

[DEFENSE COUNSEL]: Oh good!

Defense counsel did not raise any further objections to Ms. Korecki's testimony concerning the redacted report.

A jury found Mr. Tarpley not guilty of one of the two counts of third-degree sex offense, but found him guilty of all other counts. Prior to sentencing, Mr. Tarpley moved for a new trial based in part on the admission of the redacted report. The court denied his motion. Mr. Tarpley was sentenced to 35 years' imprisonment for second-degree rape, and a concurrent 10 years' imprisonment for third-degree sex offense. The remaining convictions were merged for sentencing. He then noted this timely appeal.

**DISCUSSION**

Mr. Tarpley argues that the presence of the unexplained perianal swab "proved not only that the SAFE kit was not 'in substantially the same condition' as when Nurse McAree completed it, but also proved 'tampering'—inadvertent or not—which was never refuted." (Quoting *Amos v. State*, 42 Md. App. 365, 370 (1979)). He further argues that there was a break in the chain of custody for the SAFE kit because two individuals who handled the kit did not testify.

The State counters that Mr. Tarpley waived any objection to the admission of the DNA analysis and report when defense counsel stated that he had "[n]o objection" to the admission of the redacted report. We agree that the issue has not been preserved for our review.

Rule 4-323(a) provides that "[a]n 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." Where a court denies a motion *in limine* to exclude evidence, "the party seeking its exclusion must still object when the evidence is offered for admission at trial." *Huggins v. State*, 479 Md. 433, 447 n.7 (2022) (citing *Reed v. State*, 353 Md. 628, 643 (1999)). The purpose of renewing the objection is "to let the court know that the party still believes the evidence should be excluded, and gives the court the opportunity to make a more informed decision with the benefit of the evidence adduced since the initial ruling." *Id.* (citing *Reed*, 353 Md. at 643).

Here, the court redacted the report as requested by Mr. Tarpley at the motion hearing. By failing to object when the redacted report was admitted into evidence, Mr. Tarpley did not inform the court that he was still seeking to have the entire report excluded. When defense counsel subsequently stated that he had "[n]o objection" to admission of the report, the court may have reasonably assumed that counsel was satisfied with the court's adoption of counsel's request to redact the DNA report to exclude any evidence of the perianal swab, particularly since counsel advised the court at the conclusion of the motion hearing that he "would raise any other objection at the appropriate time." Additionally, defense counsel objected only to Ms. Korecki making any reference to the perianal swab; he did not object to her testimony confirming the results related to the other samples identified in the report. Not only did defense counsel fail to object to the admission of evidence concerning the other swabs in the SAFE kit, but his limited objection to Ms.

Korecki making any reference to the perianal swab again signaled to the court that he did not object to the court's ruling admitting the DNA report as redacted.[1] Mr. Tarpley's failure to raise any further objection to admission of the report persuades us that his challenge to the redacted report is unpreserved for appellate review.[2]

**JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

[1] Mr. Tarpley argued in his reply brief that his argument at the motion *in limine* preserved the issue for appellate review despite the lack of a contemporaneous objection because the court's ruling immediately preceded Ms. Kuehnert's testimony. Mr. Tarpley is correct that there is an exception to the contemporaneous objection rule based on temporal proximity of the ruling to the admission of evidence. As mentioned above, one of the purposes of the contemporaneous objection rule is "to let the court know that the party still believes the evidence should be excluded." *Huggins*, 473 Md. at 447 n.7 (citing *Reed*, 353 Md. at 643). The exception exists because "requiring . . . yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance." *Watson v. State*, 311 Md. 370, 372 n.1 (1988). However, in this case, Mr. Tarpley not only failed to object to the redacted report, he had suggested redaction as an appropriate compromise, and affirmatively stated that he had "[n]o objection," despite assuring the court he would "raise any other objection at the appropriate time." Under the circumstances present here, the exception to the contemporaneous objection rule based on temporal proximity is inapplicable.

[2] To hold otherwise would be prejudicial to the State because the State indicated that, if the court was inclined to exclude the entire report, it wanted to recall Nurse McAree as a witness to support authentication of the report. But because the State agreed to the court's acceptance of Mr. Tarpley's alternative proposal to redact the report, the State had no need to recall Nurse McAree for additional authentication testimony. In addition, the State notes in its brief that the test results for the perianal swab were "known at least to the prosecutors and defense counsel." We surmise that these test results could have conceivably bolstered the State's authentication argument concerning the entire report had the State not agreed to Mr. Tarpley's proposal to redact the report.