UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2221

September Term, 2014

REGINALD MYRON JOHNS

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Kenney, James A. III
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 10, 2015

Following a jury trial in the Circuit Court for Prince George's County, Reginald Myron Johns, was convicted of possession of cocaine and crack cocaine with the intent to distribute and operating a vehicle with an inoperable brake light. The court sentenced Mr. Johns to a term of twenty years with all but six years suspended. On appeal, he presents two issues, which we have reworded:

> 1. Did the trial court properly exclude portions of Johns's testimony regarding a May 16, 2012 traffic stop as inadmissible hearsay?
>
> 2. Did the trial court abuse its discretion in excluding a traffic stop citation as a discovery sanction?

We conclude that the trial court erred in excluding Johns's testimony about the earlier traffic stop and that the error was not harmless. We will reverse the judgment of the trial court.

Background

Because Johns does not challenge the sufficiency of the evidence, we will limit our discussion of the facts to those necessary to provide context for the issues raised in this appeal. *See, e.g., Joyner v. State*, 208 Md. App. 500, 503 n. 1 (2012).

Appellant's criminal convictions arose out of a traffic stop that occurred on May 22, 2012. The heart of this appeal relates to the circuit court's exclusion of evidence relating to a different traffic stop that occurred about a week earlier, on May 16. Johns argues the charges against him were brought by the police in retaliation for his refusal to

act as an informant. Johns asserts that the excluded evidence relating to the May 16 incident supports his defense.

At trial, the State called Corporal Robert Layton of the Prince George's County Police, one of the officers who arrested Johns on May 22. He testified to the following:

On May 22, Layton observed a black Cadillac approaching a stop sign with all of its brake lights inoperable save for the center light. He got into his police vehicle and pulled the car over. Subsequently, he smelled the odor of marijuana emitting from the vehicle, and ordered Johns, the sole occupant of the vehicle, to step out of the car. After searching Johns, he found a plastic bag containing crack cocaine. Johns was placed in police custody. He further testified that he had never seen Johns at the location of the arrest prior to May 22.

At both the trial and appellate levels, Johns contends that Corporal Layton testified falsely. He asserts that Corporal Layton had previously stopped him at the same location on May 16 to ask him to work as an informant for the police. Corporal Layton threatened to "find ways to bring pressure on him and to convict him" if Johns refused to be an informant. Johns alleges that he refused to do so and, on May 22, the police carried out this threat by planting the drugs on him as retribution and then arresting him. In order

to substantiate his claims, Johns sought to introduce into evidence a copy of the citation[1] issued to him as a result of the May 16 traffic stop.

The State anticipated this defense during trial and made a motion in limine asking the Court to exclude any evidence pertaining to the May 16 incident. The State contended that: (1) any testimony by Johns regarding Corporal Layton's statements to Johns on May 16 would be inadmissible hearsay; (2) what occurred at the May 16 traffic stop was irrelevant; and (3) the trial court should not admit the May 16 citation because Johns failed to disclose it during discovery.[2] The State argued that the citation should be excluded as a sanction.

Appellant's counsel responded that the evidence related to the May 16 traffic stop was relevant because it was pertinent to Johns's primary defense—that the drugs were planted on him on May 22 as retribution for his refusal to act as an informant. Regarding

[1]At trial, the prosecutor stated that the document in question was not a citation without further explanation. The document is not in the record transmitted to this Court.

[2]Rule 4-263(e)(6) states:

> **Disclosure by Defense**. Without the necessity of a request, the defense shall provide to the State's Attorney:
>
> . . . .
>
> (6) *Documents, Computer-Generated Evidence, and Other Things*. The opportunity to inspect, copy, and photograph any documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the defense intends to use at a hearing or at trial.

the State's hearsay argument, Johns's counsel stated that the statements would not necessarily be hearsay:

> At the very least—while these officers may have said this with the . . . idea of only impressing on [appellant] that he needed to cooperate, and it may not actually be true, the fact is, it did have the effect on [appellant] at least of making him very fearful . . . .

The court declined to exclude the evidence related to the May 16 incident on relevancy grounds. However, it granted the motion to exclude the traffic citation as a discovery violation sanction. The court cited two reasons for excluding the evidence. First, the court concluded that the State was unable to rebut the evidence based on the fact that the officer's name on the citation was scratched out and the State had no time to track which officer actually issued the citation. Second, it noted that the case had been scheduled for trial on three previous occasions and received three prior continuances. Under these circumstances, the court decided that excluding the evidence was appropriate.

The court also denied the State's motion to limit Johns's testimony but cautioned that Johns "can't get hearsay testimony from some officers," and stated that it would rule on the hearsay objections as they were raised by the State. Following the court's resolution of the State's motion, Johns took the stand. During his testimony, the circuit court sustained one objection from the State when Johns testified about the May 16 incident (emphasis added):

[Defense Counsel]:	Well, what happened at this point? What was—well, what happened?
[Johns]:	Well, the officer walked up to the car, and he—
[Defense Counsel]:	Speak up, please.
[Johns]:	*The officer walked to the car, and he asked me—*
[Prosecutor]:	*Objection.*
THE COURT:	*Sustained as to what the officer said.*
[Defense Counsel]:	I'm sorry?
THE COURT:	Sustained as to what the officer said. He was about to say, the officer said to me.
[Defense Counsel]:	Okay.

Appellant contends that the trial court erred in excluding both his testimony regarding Corporal Layton's statements to him on May 16 and the May 16 traffic citation. We will address each argument in turn.

Analysis

1. Hearsay

Appellant's first contention pertains to the court's exclusion of his testimony regarding Corporal Layton's May 16 statements. The court excluded Johns's testimony on the ground that the evidence constituted inadmissible hearsay.[3] Johns argues that his

[3]The court did not specifically sustain the objection on the grounds of hearsay, but (continued...)

testimony would not have been hearsay because he was not offering it to prove the truth of the matter asserted. Alternatively, he argues that even if the testimony was hearsay, it fell into the statement of intention exception to the hearsay rule, and should have thus been admitted.

The State argues that the court's exclusion of Johns's testimony on this matter was not reversible error on three grounds. First, it contends that Johns's argument is not preserved for our review. Second, it asserts that the evidence was hearsay, and that it did not fall into any exception. Third, it argues that even if the issue is preserved and the court erred in excluding the evidence, the error was harmless. We disagree with the State on all three counts.

1.1. Preservation

The State argues that Johns failed to preserve his hearsay argument for our review because his trial counsel did not proffer to the court the intended purpose or relevancy of Corporal Layton's out-of-court statements. It argues that the only relevancy argument offered was that the "jury might find it relevant." We disagree.

The State's preservation argument is based upon Maryland Rule 5-103, which states:

[3](...continued)
the court's earlier conversation with the attorneys implies that the objection was sustained on this ground; the court stated that "if [appellant] is trying to elicit hearsay statements, the Court will probably—if the State objects, the Court is going to sustain it."

> **(a) Effect of Erroneous Ruling**. Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
> . . .
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

Rule 5-103 serves two purposes. One is to allow for adequate review by appellate courts. "Without a proffer, it is impossible for appellate courts to determine whether there was prejudicial error or not." *Univ. of Maryland Med. Sys. Corp. v. Waldt*, 411 Md. 207, 235 (2009). The second is to encourage attorneys "to bring the position of their clients to the attention of the lower court at the trial, so that the trial court can pass upon and possibly avoid or correct any errors in the proceedings." *Braxton v. State*, 57 Md. App. 539, 549 (1984). Thus, unless readily apparent from the question itself or from the context in which the question is posed, "[w]here evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." *Sutton v. State*, 139 Md. App. 412, 452 (2001).

Johns made no formal proffer after the trial court sustained the State's objection. Nonetheless, we believe that Johns's counsel sufficiently proffered the substance and purpose of the information sought because he stated during the State's motion *in limine* that (emphasis added):

> [Appellant] is willing to admit when he takes the stand that prior to—a prior conviction, and *these officers said that they would find ways to bring pressure on him and to convict him if he were not to cooperate with them*.

We recognize that preservation is a close question. However, counsel did articulate that the statement was probative as to whether the police threatened Johns with retaliation if he failed to cooperate. Moreover, the trial court correctly viewed the issue as involving the hearsay rule when it noted that Johns "can't get hearsay testimony from some officers[.]" We will give Johns the benefit of the doubt and treat his appellate contention as preserved for review.

1.2. Did the Court Properly Exclude the Evidence?

Maryland Rule 5-802[4] requires that hearsay "*must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn v. State*, 390 Md. 1, 8 (2005) (emphasis in original; quoting Maryland Rule 5-802). Whether testimony is hearsay is a legal question which we review *de novo. Bernardyn*, 390 Md. at 8. Moreover, that an out-of-court declaration falls within an exception does not guarantee its admission—there may be reasons why the trial court could properly exclude it, for example, the statement could be cumulative, or unfairly prejudicial, or irrelevant. These

[4]Rule 5-802 states:

> Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible.

sorts of decisions lie within the discretion of the trial court and we will not find error absent an abuse of discretion. *Gordon v. State*, 431 Md. 527, 533 (2013). With this as background, we turn to the parties's contentions.

Appellant advances two arguments as to why the circuit court erred in excluding Johns's testimony. First, he argues that his testimony was not hearsay. Second, he argues that even if the evidence was hearsay, it was admissible under the statement of intent exception.

Maryland Rule 5-801(c) provides our definition for hearsay, *viz*., "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Johns argues that his testimony regarding Corporal Layton's May 16 statements "were not offered to prove that the police did charge him (or intended to charge him) as they suggested on May 16—but, rather, to establish the threat itself . . . or to show the effect the officer's words had on Johns." This is not persuasive because Johns's state of mind wasn't at issue at trial. The State counters that the only relevancy of Corporal Layton's May 16 statements were to prove the truth of the matter asserted, namely that being that the police did charge Johns on May 22 as retribution for his refusal to cooperate as a police informant. The distinction that Johns seeks to draw between testimony to show that he *had perceived* that he was being threatened and testimony that he *had, in fact, been threatened* is

tenuous, at least upon the facts of this case. However, whether the testimony in question should be characterized as hearsay is irrelevant. In our view, the evidence was offered into evidence precisely to prove the truth of the matter asserted, namely that Corporal Layton intended to retaliate against Johns if the latter did not act as an informant. The dispositive question is not whether the proffered testimony was hearsay—it was—but whether the testimony was admissible under an exception to the general rule excluding hearsay—it was also. We explain.

The statement of intent exception for hearsay is described in Rule 5-803(b)(3):

> **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

A common application of this exception is to prove that the declarant's future action conformed with his statement of intent. *Copeland v. State,* 196 Md. App. 309, 315 (2010). "Under this exception, forward-looking statements of intent are admissible in order to prove that the declarant subsequently took a later action in accordance with that stated intent." *Nat'l Soc. of Daughters of Am. Revolution v. Goodman,* 128 Md. App. 232, 238, (1999)(citing *Farah v. Stout*, 112 Md. App. 106, 119 (1996)).

Johns sought to introduce evidence of Corporal Layton's May 16 statements to show that the officer's May 22 actions conformed with his statement of intent on May 16. According to Johns, on May 16, the officer told Johns that he intended to arrest him if he did not cooperate, and on May 22 he acted in conformance with this statement. As such, we conclude that Johns's testimony fell under the statement of intent hearsay exception and was admissible. This testimony, if credited by the jury, would have buttressed Johns's defense and should have been admitted at trial.

1.3. Harmless Error?

The State argues that, even if the trial court erred in excluding Johns's testimony, the error was harmless. The State's contention is based on a dashboard video recording of the officers' search and arrest of Johns on May 22. The State argues that the only relevancy of Johns's testimony was to provide context for Johns's allegation that the officers planted the drugs on him on May 22, and that "context was not critical on the facts of this case where the entire encounter between [appellant] and Corporal Layton was captured on video." We do not believe the error was harmless.

The standard for whether the error was harmless is not whether the testimony was "critical" but whether the additional evidence, beyond a reasonable doubt, would not have in any way influenced the jury's verdict. *Dionas v. State*, 436 Md. 97, 108 (2013). "'To say that an error did not contribute to the verdict is, rather, to find that error

unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.'" *Bellamy v. State*, 403 Md. 308, 332 (2008) (quoting *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir.1997)).

We have reviewed the recording and conclude that the State has failed to meet the heavy burden required for us to find harmless error.

The video evidence displays the officers' search and arrest of Johns. The critical portion of the video shows Corporal Layton shaking Johns's clothing and subsequently picking up a bag from off the ground. Johns concedes that the bag contained cocaine. But during the critical period, Corporal Layton was standing between Johns and the camera. The officer's back was facing the camera. His back and the trunk of Johns's car fully obscure the camera's view of the Corporal Layton's hands at the time while Johns's pants were shaken.

Certainly, a jury could have concluded that the bag was hidden in Johns's clothing. But a jury could also have concluded otherwise. We cannot conclude beyond a reasonable doubt that the additional context that would have been provided by Johns's testimony would have had no effect on the jury's verdict. We must reverse the convictions.

2. The Discovery Sanction

Our conclusion as to the first issue largely moots Johns's contention that the trial court abused its discretion in excluding the May 16 traffic citation. Johns produced the citation on the second day of trial without prior notice. The discovery deadline had expired long before the trial date. (Trial had been postponed on three previous occasions.) The State had every reason to assert unfair surprise, particularly because the State disputed whether the citation had in fact been issued on May 16 by Corporal Layton as Johns claimed. Further strengthening the State's argument was its (unchallenged) assertion that it would be difficult for the police to track down quickly who issued the citation and when the citation was issued because the signature on the citation was scratched out and the citation number was smudged to the point of illegibility. A trial court has broad discretion to choose what, if any, sanction is appropriate to impose for a discovery violation, *Cole v. State*, 378 Md. 42, 56 (2003), and the court did not abuse its discretion in this case. With that said, if this case is retried upon remand, the State can no longer claim unfair surprise.

THE JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ARE REVERSED AND THIS CASE IS REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.