

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0866

September Term, 2015

IN RE: CHERILYN C.

Nazarian,
Reed,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 25, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Cherilyn C., a juvenile, was found to be involved in the theft of goods from a Wal-Mart store and adjudicated a delinquent minor. Although initially charged with theft between \$100 and \$1,000, in the nature of retail theft, Cherilyn was found delinquent on the lesser charge of theft under \$100 in the Circuit Court for Worcester County, sitting as a juvenile court.

In her timely appeal, Cherilyn raises the following questions, which we have recast:

- I. Did the trial court properly admit testimonial evidence describing what was depicted on the video surveillance tape?
- II. Was the evidence sufficient to support a finding of theft under \$100?

We hold that the court abused its discretion in allowing testimonial description of the events captured on video without an adequate showing of the unavailability of the video recording. Because the court's verdict was based chiefly on the testimonial description by a non-eyewitness to the alleged theft, we shall reverse the finding of delinquency.

BACKGROUND

The genesis of the theft charge was an incident that occurred at a Wal-Mart store in Berlin, Worcester County, on March 7, 2014. The store's asset protection officer, Dino Magnone, detained Cherilyn and her companion after observing them bag items at the self-checkout counter that they had not paid for. Deputy Allison Herrman of the Worcester County Sheriff's Office responded to the Wal-Mart and met in the asset protection office with Magnone, Cherilyn, and the other person. As a result, charges were filed.

On June 15, 2015, Cherilyn appeared before the Circuit Court for Worcester County, sitting as a juvenile court, for an adjudicatory hearing. Herrman, the State's only witness, testified that Magnone showed her the surveillance video of the self-checkout registers from two different angles. Because the video tape was not available in court, Herrman recited to the court what she had observed in her earlier viewing at the store. Apparently, the tape remained in Magnone's possession and was unavailable on the day of trial, as he was on extended medical absence. It is unclear from the record whether Herrman ever obtained a copy of the video, nor was the prosecutor aware of its location. Herrman testified that, in such cases, she regularly requests copies of surveillance video from the store and then provides copies to the State's Attorney's office.

Cherilyn's counsel objected when the State asked Herrman to describe what she observed in her viewing of the video, on the grounds of the best evidence rule and hearsay.¹ The court overruled the objection and allowed the testimony, ruling that the nature of the evidence would go to its weight rather than its admissibility. In so doing, the court acknowledged that the exceptions to the best evidence rule probably did not contemplate unavailability of evidence due to the medical absence of an employee.

Aside from Herrman's testimony describing the video, the State entered two photos into evidence: (1) a picture of all the items that had not been paid for and (2) a still, taken

¹Appellant has not pursued her hearsay objection in this appeal.

from the video, of two people exiting through the outer doors with a shopping cart containing Wal-Mart bags.

Herrman described these as the first of two sets of doors – the first leading to the cart return area and a second set of doors to the parking lot. Herrman described the items in the inventory photo to be valued at “Hundreds [of dollars] total,” but did not provide an exact value calculated by Wal-Mart. Herrman also made an in-court identification of Cherilyn as one of the individuals present in the asset protection office when she arrived, and identified Cherilyn as one of the individuals in the still photo, by reference to her clothing. Herrman identified the shopping cart in the still photo as the same cart present at the asset protection office when she arrived.

The court found the evidence sustained a finding that Cherilyn committed the theft, although it found that the still photo showing the two individuals exiting the self-checkout counter was not a reliable identification of Cherilyn. Rather, the court relied on Herrman’s testimony and identification, “based on [Herrman’s] watching the entire transaction” on the video. The court found that Herrman’s testimony was too general to place the value of the goods taken at over \$100, and ruled instead that Cherilyn committed the theft of less than \$100. At the conclusion of the adjudicatory phase, the court conducted a disposition hearing.

DISCUSSION

I. Best Evidence challenge

Cherilyn first argues that Herrman’s testimony, based on her viewing of the video, violated the best evidence rule, as the video itself was not offered into evidence, and no exception to the rule was met. *See* Md. Rule 5-1002.

The State responds that this issue was not preserved because Cherilyn remained silent when the court suggested a recess to look for the video. However, this suggestion arose well after the court had allowed Herrman’s testimony into evidence. Further, it appears from the record that Herrman was not certain whether she sent a copy of the video to the State’s Attorney’s office, and the State implied that it had never seen or possessed the video. Because Cherilyn’s counsel clearly objected, on best evidence grounds, to Herrman’s testimony describing the video and because the suggestion of a recess to locate the video was made after the inadmissible testimony had been given, the State’s preservation argument is without merit.

We review rulings on the admissibility of evidence on an abuse of discretion standard. *Hopkins v. State*, 352 Md. 146, 158 (1998). Trial judges have broad discretion in the conduct of trials, including receiving evidence, and therefore we will reverse only if the trial court clearly abused its discretion. *Id.* (citing *Void v. State*, 325 Md. 386, 393 (1992), and *Robinson v. State*, 348 Md. 104, 121 (1997)).

The best evidence rule provides: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” Md. Rule 5-1002. The rules define “photograph” to include “still photographs, X-ray films, video tapes, and motion pictures.” Md. Rule 5-1001(b). Recognized exceptions to the best evidence rule are found in Md. Rule 5-1004, which provides in relevant part that the contents of a photograph may be proved by evidence other than the original if “[n]o original can be obtained by any reasonably practicable, available judicial process or procedure.” Md. Rule 5-1004(b).²

It is clear that the surveillance video at issue in this appeal falls within the scope of the best evidence rule, and that Herrman’s description of it is secondary evidence. Therefore, under Md. Rule 5-1004, the contents of the missing video could be proved by secondary evidence – Herrman’s testimony – only if the State could establish an exception based on subsection (b) — unavailability of the original.

The best evidence rule is a preference for original evidence; ultimately, secondary evidence of the contents of a writing or photograph is preferable to no evidence at all. Indeed, the exceptions to the rule make clear that there are often situations in which an original is unavailable due to its loss or destruction, its simple unobtainability, or its

² There is also an exception relating to originals that have been lost or destroyed. As Herrman testified that she might have sent a copy of the video to the State’s Attorney’s office, this exception might have been relevant to this matter. However, this issue was not raised below.

possession by an opposing party. *See* Md. Rule 5-1004. The trial court acts as a gatekeeper to ensure that the use of less reliable, secondary evidence is limited only to such situations. “The best evidence . . . must be produced, and secondary, or inferior, evidence is only admissible after a proper foundation has been laid, showing good and sufficient reasons for the failure to produce the primary evidence.” *Forrester v. State*, 224 Md. 337, 349 (1961). “Good and sufficient” reasons have included technological difficulties with playback of a video, *State v. Cabral*, 159 Md. App. 354, 385 (2004), and repeated searches of the clerk’s office for an executed search warrant form, *Thompson v. State*, 62 Md. App. 190, 212-13 (1985).

Here, the State failed to lay a sufficient foundation as to why the surveillance video was unavailable. Its only proffer was that Magnone, the custodian of the video, was on extended medical leave. Herrman testified that, despite Magnone’s absence for at least another month, she had another contact at the store. The State offered nothing further to explain any attempts it made to obtain the video from Magnone prior to his medical leave, or from Wal-Mart management. Although Herrman appears to have attempted to obtain the video through routine extrajudicial procedures, the State demonstrated no attempt to subpoena the Wal-Mart asset protection office for a copy of the video. Indeed, the discussion suggests that the prosecutor was unaware of the location of the video, or whether it had ever been seen in the State’s Attorney’s office.

Without an acceptable showing of the video's unavailability, the State did not meet the exception requirements of Md. Rule 5-1004(b). Indeed, the court acknowledged the failure – that an employee being out on sick leave is not within the contemplation of the exception – but nonetheless allowed the testimony.

II. Sufficiency of Evidence challenge

Cherilyn also argues that the evidence did not support a finding that she committed theft. We need not reach her second contention of error.

Because the finding of delinquency was based in large part on the inadmissible testimony of Herrman, *vis à vis* the surveillance video, we shall reverse the delinquency adjudication. Absent that testimony, the evidence would be insufficient to sustain a finding of involvement.

**JUDGMENT OF THE CIRCUIT COURT
FOR WORCESTER COUNTY
REVERSED. COSTS ASSESSED TO
WORCESTER COUNTY.**