Circuit Court for Charles County
Case No. 08-K-15-001211 IN

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1436

September Term, 2016

RYAN GREGORY HOWARD

v.

STATE OF MARYLAND

Kehoe,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: November 14, 2017

Following a jury trial in the Circuit Court for Charles County, appellant Ryan Gregory Howard ("Howard") was convicted of conspiracy to commit first degree burglary and conspiracy to commit theft. The two convictions were merged for sentencing purposes and Howard received a sentence of ten and one-half years imprisonment.

On appeal, Howard raises two issues for our consideration:

> I. Whether the circuit court erred by permitting certain "gut feeling" testimony and related evidence from one of the robbery victims.
>
> II. Whether the circuit court erred by denying Howard's motion for judgment of acquittal.

For the reasons stated herein, we shall affirm.

FACTS AND PROCEEDINGS

We set forth the facts in the light most favorable to the prevailing party below. During the afternoon of October 22, 2015, a burglary occurred at the Blush home at 5201 Briscoe Farms Road in Charles County, Maryland. Douglas and Wendy Blush resided in the home, along with their son, Nicholas Blush. Douglas Blush returned home at 4:30 p.m. to discover several items missing from his home. A large metal combination safe had been stolen from the Blush home's basement, along with its contents including a variety of firearms and ammunition. Other missing items included a collection of presidential coins; a small safe containing passports, birth certificates, $20,000 cash, and jewelry; an Xbox 360 video game system; and a plastic container full of loose change.

Officer Ronald Walls responded to the Blush home on the day of the burglary. Officer Walls recorded the items reported stolen by the Blush family, inspected the areas

of the home from which the items had been taken, and spoke with members of the Blush family. Nicholas Blush gave Officer Walls the name of Ryan Howard as a potential suspect. Officer Walls passed along all of the information he had gathered to the detective assigned to investigate the burglary.

Nicholas[1] was previously acquainted with Howard and the other individuals involved in the burglary. Nicholas knew Howard and Joseph Davis through friends. Nicholas had also purchased heroin from Howard.[2] During the morning on the day of the burglary, Nicholas was at work at Wentworth Nursery when he received a telephone call or text message from Howard asking him to go out to lunch.[3] Howard agreed, and Howard and Davis picked Nicholas up from work in Howard's black Nissan Maxima. Thereafter, Howard, Davis, and Nicholas had lunch at the McDonald's across the street from Wentworth Nursery.

After lunch, Nicholas returned to work. At some point that afternoon, one of Nicolas's parents contacted him at work to inform him about the burglary. At trial, Nicolas was asked during direct examination whether anything had "come to mind" about his conversation at lunch after he found out about the burglary. Defense counsel objected to

[1] Because Nicholas Blush and his parents share a surname, we refer to Nicholas by his first name for the purposes of clarity and out of no disrespect.

[2] Nicholas explained he purchased heroin from Howard who himself got the heroin from Christopher David.

[3] On cross-examination, defense counsel inquired of Nicholas whether he first called Howard on the day of the burglary to make lunch plans. Nicholas responded, "I'm not too sure."

the question, and the court overruled the objection. Nicholas answered, "Not too much. I just kinda had a gut feeling." Nicholas further explained the basis for his gut feeling, testifying that he found it odd that Howard had asked him about what time he was getting off work and what he was doing after work. Nicholas further testified that he attempted to telephone Howard after he arrived home that afternoon, but Howard did not answer.

Nicholas testified that he gave the name of a potential suspect to Officer Walls, but he did not remember which name he had provided. Nicholas explained that he was "not quite exact sure of the first name [he] gave" but that "[i]t was one of the three" of Howard, Davis, and a third individual, Christopher David. When asked what led him to provide the name to Officer Walls, Nicholas responded, "Everything that occurred in the day and then I just had a gut feeling." Defense counsel did not object to this testimony. Nicholas further testified that part of what led him to provide the name to Officer Walls was text communication he had with his friend, Nate Cooksey. Nicholas did not testify as to the contents of his communications with Cooksey.

During cross-examination, defense counsel raised Nicholas's earlier testimony about his "gut feeling" that Howard, Davis, and David were involved in the burglary in the following exchange:[4]

> [DEFENSE COUNSEL]: Okay. So you are saying that you thought [Howard] was involved . . . gut feeling . . . along with the other two, is that correct? It was a gut feeling?
>
> [NICHOLAS]: Yes, sir.

[4] The ellipses appear in the original transcript and do no indicate any omissions.

> [DEFENSE COUNSEL]: You had no proof and no evidence . . . just what you heard?
>
> [NICHOLAS]: Yes, sir.
>
> [DEFENSE COUNSEL]: Okay.

Immediately thereafter, on redirect, the prosecutor asked Nicholas, "What is it that you heard?" Defense counsel objected, and a bench conference was held. The prosecutor argued he should be able to elicit testimony from Nicholas about the basis of his "gut feeling" because the door had been opened by defense counsel's question about Nicholas having "no proof and no evidence." The prosecutor argued that the information Nicholas heard would have been otherwise irrelevant but that it had become relevant when the basis for Nicholas's gut feeling had been attacked on cross-examination. The circuit court agreed with the State and permitted Nicholas to answer the question. When asked again what he had heard, Nicholas did not reference any particular communications. Rather, Nicholas responded, "Everybody was giving me information that I was texting and calling. And, then on top of that them picking me up from lunch earlier in the day and the questions they were asking me."

It was later that Nicholas actually mentioned the contents of the text communications that led him to suspect that Howard, Davis, and David were involved in the burglary. Nicholas testified that he learned via text message "[t]hat Christopher David was trying to sell a firearm" and Howard "has something to do with this." Defense counsel lodged no objection to this testimony. Nicholas further testified that he learned that

Howard "was a part of [the burglary] and was trying to find people to buy the firearms" that had been stolen from the Blush residence.

Patrick Johnson, a childhood friend of Blush and Howard, was another witness for the State. Johnson testified that he had a telephone conversation with David about a shotgun. Cooksey was with Johnson at the time of the telephone call. Johnson testified that David asked him if he "knew anybody that would want a shotgun." Johnson later learned that Cooksey had shared the content of the conversation with Nicholas.

Codefendant Joseph Davis testified pursuant to a plea agreement with the State. Davis described the details of the burglary and the extent of Howard's involvement. Davis testified that he, Nicholas, and Howard had lunch on the day of the burglary. According to Davis, the lunch was arranged at Nicholas's request. After lunch, Howard and David had a telephone conversation during which they agreed to burglarize the Blush home. Howard and Davis met up with David and, thereafter, the three went to the Blush home. Davis did not recall meeting at a car wash.

Davis testified that Howard acted as a lookout during the burglary and also accompanied David into the Blush residence to bring items to the door for Davis to load into his black Mazda. Davis recalled loading various items into the Mazda, including a coin collection, Xbox video game system, and a large safe, which Davis estimated weighed approximately two hundred pounds. After the burglary, Davis, David, and Howard returned to David's home. Approximately three hours after the burglary, Davis, David, and Howard went to a Food Lion to use a Coinstar machine for the purpose of cashing

approximately $200 in loose change. Davis testified that the loose change cashed in at the Coinstar came from his home and not from the burglary.

Davis testified that his cut from the burglary included the Xbox, a .45-caliber Smith & Wesson firearm, and the set of presidential collector coins. Davis testified that Howard's cut was based upon an arrangement that David would sell certain firearms and then return certain proceeds to Howard.

The State further presented evidence from Detective John Riffle, the lead investigator on the case. Detective Riffle spoke with Nicholas at the Blush home the day after the burglary about his statement identifying Howard as a suspect. Thereafter, Detective Riffle went to the nearest Coinstar machine located at a nearby Food Lion. He explained that he visited the Coinstar machine because it was his experience that burglars will often quickly trade change for cash. The transaction history for the machine indicated that one exchange occurred on the day of the burglary for just over $200.00. Detective Riffle obtained the surveillance footage for that transaction, which depicted a black male and two white males exchanging coins carried in "a bag of some sort." Detective Riffle testified that he recognized one of the white males as "consistent with" a photograph of Howard, and Nicholas later identified the three men in the surveillance video as Howard, Davis, and David. The surveillance video was admitted into evidence and played for the jury.[5]

[5] Detective Riffle obtained additional surveillance video footage from a residence approximately three-tenths of a mile from the Blush home. The footage showed a silver Buick, consistent with David's car as identified by Davis, driving toward the Blush home

Police searched the homes of Howard, Davis, and David pursuant to warrants. No stolen property was found at Howard's home. The .45-caliber Smith & Wesson firearm was found at Davis's home. Most of the remaining firearms were recovered from David's apartment, along with the knob from a safe and various types of ammunition for the stolen firearms.

Detective Riffle recovered text messages from Howard's phone from the day of the burglary. The recovered text messages indicated that, after Howard had lunch with Davis and Nicholas, Howard asked David to meet him and Davis at a car wash. After learning this information, Detective Riffle obtained surveillance video footage from a Dairy Queen across the street from the only nearby car wash. On the video, a black Mazda consistent with Howard's car could be seen arriving at the car wash at 1:04 p.m., and a silver Buick consistent with David's car arrived at the car wash at 1:23 p.m. The two cars left the parking lot together approximately two minutes later.

We shall set forth additional facts as necessitated by our discussion of the issues on appeal.

DISCUSSION

I.

Howard's first contention is based upon Nicholas's "gut feeling" testimony. Howard raises various arguments as to why this testimony was improper. Howard asserts that Nicholas's "gut feeling" testimony was based exclusively on inadmissible hearsay and,

at 1:58 p.m. on the day of the burglary. It also showed the same vehicle leaving the area at 2:11 p.m. This footage was also played for the jury.

therefore, did not qualify as admissible lay opinion testimony. Howard further asserts that Nicholas's subsequent testimony about the text messages he received from Cooksey (which Howard contends were the exclusive basis for the "gut feeling" testimony) was inadmissible hearsay. Howard additionally alleges that Nicholas's testimony about Cooksey's text messages violated the Confrontation Clause of the Sixth Amendment. As we shall explain, Howard's arguments are unpreserved, and, alternatively, unpersuasive.

A. Lay Opinion Testimony Under Maryland Rule 5-701

Howard first argues that Nicholas's testimony about his "gut feeling" constituted inadmissible lay opinion testimony pursuant to Md. Rule 5-701. Pursuant to Md. Rule 5-701, the testimony of a lay witness "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." Howard asserts that Nicholas's "gut feeling" was based exclusively on text messages he had received from Cooksey and, therefore, Nicholas's testimony is inadmissible as a matter of law. *See Smith v. State*, 182 Md. App. 444, 491 (explaining that "lay opinion testimony based on the hearsay statements of witnesses" is not admissible).

First, we address the State's preservation argument and set forth the context within which Nicholas first referenced his "gut feeling":

> [PROSECUTOR]: Did anything come to mind about your conversation at lunch after you found out your house was burglarized?
>
> [DEFENSE COUNSEL]: Objection.

THE COURT: No that's fine. Overruled.

[NICHOLAS]: Not too much. I just kind of had a gut feeling.

The question that prompted the "gut feeling" testimony did not call for inadmissible evidence. Arguably, defense counsel should have moved to strike the testimony if counsel sought to preserve an argument that the reference to Nicholas's "gut feeling" constituted improper lay opinion testimony. *See Holmes v. State*, 119 Md. App. 518, 523 (1998) ("An objection must be made when the question is asked, or, if objectionable material comes in unexpectedly in the answer, then at that time by motion to strike.").

Regardless, any objection to the "gut feeling" testimony was waived when identical testimony was offered a second time without any objection or motion to strike from defense counsel. Approximately four transcript pages later, Nicholas referred to his "gut feeling" about the burglary a second time:

> [PROSECUTOR]: Okay. Now, without telling me exactly why . . . I don't want the why out . . . what led you to giving that name [of a suspect] to Officer Walls?
>
> [NICHOLAS]: Everything that occurred in the day and then I just had a gut feeling.

Defense counsel did not lodge an objection to the prosecutor's question or to Nicholas's response.

Because defense counsel did not object to the admission of the same evidence at another point during the trial, any objection to the "gut feeling" testimony was waived. The Court of Appeals has held that when a party objects to evidence, and that objection is overruled, the objection is "waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). *See*

also Williams v. State, 131 Md. App. 1, 26 (2000) ("When evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection."). By failing to lodge a timely objection to Nicholas's testimony about his "gut feeling" the second time it was offered, defense counsel failed to preserve his objection to the first instance of "gut feeling" testimony. Accordingly, this issue is not properly before us on appeal.[6]

B. Text Message Testimony

Howard further asserts that the circuit court erred by permitting Nicholas to testify about the text messages he received from his friend, Nate Cooksey, because the testimony constituted inadmissible hearsay. "Hearsay" is defined as "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." Md. Rule 5-801(c). Hearsay is generally inadmissible

[6] Howard points to *Blanks v. State*, 406 Md. 526 (2008), for the proposition that an objection is not required as long as the objecting party has made clear to the trial court precisely which material to which it counsel is objecting. In our view, the precise basis for defense counsel's objections was not so overwhelmingly clear that future objections were excused.

Indeed, defense counsel may have made a strategic decision not to object to the "gut feeling" testimony. Defense counsel inquired as to the basis of Nicholas's "gut feeling" on cross-examination, commenting that Nicholas had "no proof and no evidence" to support his "gut feeling."

Furthermore, assuming *arguendo* that this issue was properly before us, we observe that the State raises several compelling arguments as to why Nicholas's testimony was not improper. Contrary to Howard's argument on appeal, Nicholas testified that the text messages he received were not the sole basis for his "gut feeling." Rather, the questions Howard and the other codefendants asked Nicholas during lunch also contributed to Nicholas's suspicions.

unless it satisfies a particular exception. Md. Rule 5-802. ("Except as otherwise provided by [the Maryland] rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."). A trial court has no discretion to admit inadmissible hearsay, and we review the determination of whether evidence is hearsay *de novo*. *Bernadyn v. State*, 390 Md. 1, 8 (2005).

The State asserts that defense counsel failed to preserve the appellate issue relating to Nicholas's testimony about the Cooksey text messages. "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). A contemporaneous objection is required to preserve the issue for our review. Md. Rule 4-323(a).

The challenged testimony was produced during the State's redirect examination, after the court overruled defense counsel's objection and permitted the prosecutor to inquire as to what Nicholas heard that formed the basis for his "gut feeling." As discussed *supra*, Nicholas mentioned the text messages he received from Cooksey as part of what had led to his "gut feeling." The prosecutor sought to admit photographs of the text messages into evidence, but defense counsel objected. The court sustained the objection.

Thereafter, the prosecutor asked Nicholas questions about the content of the text messages. The following exchange occurred:

> [PROSECUTOR]: So, through the text messages is the information that you learned. What information did you learn on the text messages?
>
> [NICHOLAS]: That Christopher David was trying to sell a firearm.

* * *

[PROSECUTOR]: So, what information did you learn regarding [Howard] and these text messages as it relates to your burglary?

[NICHOLAS]: That he had something to do with this.

[PROSECUTOR]: Okay. And, that came from your conversations with Nate [Cooksey]?

[NICHOLAS]: Yes, ma'am.

[PROSECUTOR]: Okay. In fact, Nate told you that he did and he gave the guns to Chris to sell, . . .

[NICHOLAS]: Yes, ma'am.

[PROSECUTOR]: . . . correct?

[NICHOLAS]: Yes, ma'am.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sus . . . .

[DEFENSE COUNSEL]: She just read the text message. Move to strike.

THE COURT: Say that again. I didn't hear the last part of what you said.

[DEFENSE COUNSEL]: Move to strike, Your Honor. She just read the text message which you kept out.

[PROSECUTOR]: I didn't read the entire text message.

THE COURT: Well, I . . . I'm not sure, but I'm going to sustain the objection. These are statements from someone else. If they come in some other way we'll do that. Let's . . . let's go somewhere else.

[PROSECUTOR]: Alright. Specifically, Mr. Blush, the question posed is what information did you learn about Ryan Howard as it relates to your burglary?

> [NICHOLAS]: That he was a part of it and was trying to find people to buy the firearms.
>
> [PROSECUTOR]: Your Honor, I have nothing further.

(Ellipses in original.)

The record reflects that defense counsel lodged only a single objection, to the verbatim reading of a text message. This objection was sustained. Defense counsel did not, at any point, object to Nicholas testifying generally about the information he learned from the text messages. Accordingly, Howard's argument with respect to Nicholas's testimony about what he learned from the text messages is unpreserved for appellate review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *Fowlkes v. State*, 117 Md. App. 573, 588 (1997) ("Cases are legion in the Court of Appeals to the effect that an objection must be made to each and every question, and that an objection prior to the time the questions are asked is insufficient to preserve the matter for appellate review.") (internal quotation and citation omitted).[7]

[7] Assuming *arguendo* that this issue was preserved, we again observe that the State has presented compelling arguments as to why the challenged testimony was not hearsay because it was not offered for the truth of the matter asserted. Indeed, references to out-of-court statements "are not necessarily hearsay." *Jarrett v. State*, 220 Md. App. 571, 582 (2014). An out-of-court statement is not hearsay "if it is not being offered for the truth of the matter asserted." *Handy v. State*, 201 Md. App. 521, 539 (2011) (quotation omitted). The State further presents a persuasive argument with respect to the Confrontation Clause issue, asserting that the challenged testimony does not constitute testimonial hearsay.

II.

Howard further asserts that the circuit court erred by denying his motion for judgment of acquittal. Howard argues that no rational jury could have found, beyond a reasonable doubt, that a conspiracy was formed before the burglary. Howard further asserts that the testimony of co-conspirator Joseph Davis was insufficiently corroborated under Maryland law.

Critically, Howard did not argue before the circuit court that no rational jury could have found that a conspiracy was formed before the burglary. An appellant may not raise a sufficiency of the evidence argument that was not raised before the circuit court. *Poole v. State*, 207 Md. App. 614, 632 (2012). "It is well settled that appellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the refusal of the trial court to grant a motion for judgment of acquittal." *State v. Rich*, 415 Md. 567, 574 (2010) (internal quotation omitted). Pursuant to Maryland Rule 4-324, a defendant is required to "state with particularity all the reasons why the motion [for judgment of acquittal] should be granted." Md. Rule 4-324(a). "This means that a defendant must 'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient.'" *Arthur v. State*, 420 Md. 512, 522 (2011) (quoting *Starr*, *supra*, 405 Md. at 303). Appellate "review of a claim of insufficiency is available only for the reasons given by the appellant in his motion for judgment of acquittal." *Taylor v. State*, 175 Md. app. 153, 159 (2007).

On appeal, Howard's argument focuses on whether there was sufficient evidence that a conspiracy was formed before the burglary, emphasizing that the conspiracy must be

formed "prior to the commission of the crime." *See Jones v.* State, 8 Md. App. 370, 380 (1969). Before the circuit court, however, with respect to the sufficiency of the evidence for the conspiracy counts, Howard argued only that the indictment "allege[d] conspiracy with both Christopher David and Joseph Davis" and that there was "no proof [of] . . . a conspiracy between all three." Howard did not argue that there was no evidence of a conspiracy before the burglary. Accordingly, this issue is not properly before us on appeal.[8]

Finally, Howard asserts that the evidence was not sufficient to corroborate coconspirator Davis's testimony.[9] Under Maryland law, a defendant may not be convicted on the uncorroborated testimony of an accomplice. *In re Anthony W.*, 388 Md. 251, 263-64 (2005). Accomplice testimony must be corroborated by some independent evidence. *Id.* The Court of Appeals has explained, however, that "[n]ot much in the way of evidence corroborative of the accomplice's testimony [is] required." *Woods v. State*, 315 Md. 591, 616 (1989) (quotation omitted). The requirement is satisfied by "[o]nly slight corroboration." *Pinkney v. State*, 12 Md. App. 598, 603 (1971). "[T]he corroborative evidence need not be sufficient in itself to convict," but "it must relate to material facts tending either (1) to identify the accused with the perpetrators of the crime or (2) to show the participation of the accused in the crime itself." *Brown v. State*, 281 Md. 241, 244

[8] Again, we observe that the State presents a compelling argument as to why the evidence was sufficient to prove a conspiracy. We set forth some of the evidence *infra* in the context of our discussion of the corroboration of accomplice testimony.

[9] This issue was raised below, albeit in a very limited manner, when defense counsel argued that "the State's only evidence is . . . uncorroborated testimony of a Co-Defendant."

(1977). "If with some degree of cogency the corroborative evidence tends to establish either of these matters, the trier of fact may credit the accomplice's testimony even with respect to matters as to which no corroboration was adduced. That corroboration need not extend to every detail and indeed may even be circumstantial is also settled by our cases." *Id.*

In the instant case, corroborative evidence was presented through Nicholas's testimony about the lunch with Howard and Davis before the burglary, through surveillance video and text messages showing that Howard and Davis met at the carwash shortly before the burglary, through surveillance video showing Howard, David, and Davis exchanging coins for cash at a Coinstar machine shortly after the burglary, and through the recovery of various items of stolen property from the homes of David and Davis. In our view, this evidence is more than sufficient to satisfy the corroboration requirement. Accordingly, we hold that Davis's testimony was corroborated and, to the extent the issue is preserved, Howard's convictions were supported by sufficient evidence.

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