Circuit Court for Baltimore City
Case No. 119168007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 205

September Term, 2020

SETH SOOKTHAVAONG

v.

STATE OF MARYLAND

Shaw Geter,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: August 4, 2021

*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.

Following a jury trial in the Circuit Court for Baltimore City, Seth Sookthavaong, appellant, was convicted of first-degree assault. On appeal he contends that the court erred in admitting certain testimony from the victim's sister because it constituted inadmissible hearsay evidence. For the reasons that follow, we shall affirm.

At trial, the State presented evidence that appellant assaulted his roommate during an argument by punching him repeatedly until he lost consciousness. As a result of the assault, the victim suffered a traumatic brain injury and skull fractures, which required him to be hospitalized for over a week.

Joy Sivongxay, the victim's sister, testified at trial that she was in Las Vegas when the assault occurred. The State asked her: "What, if anything, did you hear about your brother while you were in Vegas?" Defense counsel objected on hearsay grounds and a bench conference ensued. At the bench conference, the State argued that what Ms. Sivongxay had heard on the phone call was "going to what she did next" and "it's the hearsay exception of effect on the listener." The court then asked for a proffer, and the State indicated that Ms. Sivongxay would testify that she had heard from the victim's girlfriend "that something had happened to her brother [ ] and that – I think she's going to say that she believed him to be in the hospital. As a result of hearing that information, she started calling different hospitals in Baltimore City." Defense counsel indicated that the proffered testimony "would be acceptable" if it was not "anything broad[er] than that." The court then overruled the objection. Thereafter, the following colloquy occurred:

> [PROSECUTOR]: What, if anything, did you hear about your brother [ ] while you were in Las Vegas?

> SIVONGXAY: I received a late phone call in the middle of the night while I was in Las Vegas. His girlfriend had called me in a panic saying that she had heard news that he had gotten beat up really bad, but she doesn't know where he is.

Defense counsel did not object to that testimony.

On appeal, appellant contends that Ms. Sivongxay's testimony constituted inadmissible hearsay. However, that issue is not preserved as defense counsel did not object to her testimony. *See* Maryland Rule 4-323(a) (stating that an "objection is waived" unless it is "made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent.").

Appellant contends that a contemporaneous objection was not required because defense counsel had just raised the hearsay issue during the bench conference. We disagree. Unlike *Watson v. State*, 311 Md. 370 (1988), upon which appellant relies, this is not a situation where "requiring [appellant] to make yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance." *Id.* at 372 n.1. Here, the court's decision to overrule the objection was based, at least in part, on defense counsel's concession that the State's proffer was "acceptable." Although defense counsel indicated that anything broader than the State's proffer might be objectionable, defense counsel did not identify what "broader" meant in that context. And in making its ruling, the trial court was not asked to consider what deviations from the State's proffer might exceed the scope of the defense counsel's concession. Rather, to the extent that defense counsel believed that Ms. Sivongxay's testimony was inconsistent with the State's proffer or went beyond what the court had ruled was admissible, it was

incumbent upon defense counsel to bring that to the court's attention by way of objection and a motion to strike. Because counsel did not do so, the issue of whether Ms. Sivongxay's testimony constituted inadmissible hearsay is not properly before us.[1]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[1] We note that even if the issue were preserved, and the challenged testimony constituted inadmissible hearsay, any error in admitting the testimony was harmless beyond a reasonable doubt. Ms. Sivongxay's testimony that she had heard that the victim had been "beaten up pretty bad" was cumulative of other evidence that was admitted at trial without objection including (1) the victim's testimony that appellant had assaulted him by punching him in the face multiple times; (2) Monireth Sountsaravont's testimony that he saw appellant hit the victim in the face with brass knuckles and that appellant bragged to him after the assault about beating the victim; and (3) a photograph taken during the altercation, which showed the victim bleeding on the ground while appellant was on top of him and holding him down. *See Carpenter v. State*, 196 Md. App. 212, 230-31 (2010) (error in admission of evidence is harmless when "the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded" (quotation marks and citation omitted)).