Circuit Court for Baltimore City
Case No. 116111002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 603

September Term, 2017

CARL COOPER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 28, 2018

Appellant, Carl Cooper, was convicted by a jury in the Circuit Court for Baltimore City of attempted first degree murder of an unknown person, first degree assault of Martha Gilliard, first degree assault of Hogan McGill, three counts of use of a firearm in the commission of a crime of violence, three counts of reckless endangerment, wearing, carrying and transporting a handgun, discharging a firearm in the City of Baltimore, and illegal possession of a regulated firearm. Appellant was sentenced to an aggregate sentence of 60 years, the first five years without the possibility of parole.

On appeal, appellant presents the following questions for this Court's review:

> 1. Did the trial court err by admitting two statements made by appellant through recorded calls from a correctional facility?
>
> 2. Is the evidence legally insufficient to sustain appellant's conviction for attempted first degree murder of an unknown person?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 1:00 p.m. on February 22, 2016, Sergeant Robert Himes, a member of the Baltimore City Police Department, was driving in his patrol vehicle near the Walbrook Junction Shopping Center in southwest Baltimore. An unidentified citizen approached him and reported a shooting. Sergeant Himes drove to the shopping center and found an elderly female on the ground, suffering from a gunshot wound to the forehead and another wound to her left leg. As the officer was treating the female's injuries, he observed an elderly man who also was bleeding from an apparent gunshot wound. The

victims later were identified as siblings, Martha Gilliard (age 92) and Hogan McGill (age 82).

After medics arrived, Sergeant Himes canvassed the area and learned that a nearby Rite Aid pharmacy had surveillance equipment, which recorded simultaneously on numerous cameras from different vantage points.[1] The video, which did not include audio, depicts a black, heavyset male carrying a white bag and wearing a dark jacket, light blue jeans, black boots, and a white shirt. He is shown at the top of the video, and another unidentified black male is seen at the bottom of the video. Both men are seen approaching from different directions on a sidewalk in front of several stores at the shopping center. When the man at the top of the screen sees the other man, he points an object at him, and the man then turns and runs away. Other nearby individuals then start to scatter, and the man at the top of the screen appears to have an unobstructed line of sight toward the unidentified man at the bottom of the screen.

In quick succession, small clouds of smoke can be seen near the outstretched hand of the man at the top of the screen. The man at the bottom of the screen escapes, and the heavyset male at the top of the screen flees, running in the opposite direction from that of the second man. The man at the top of the screen, i.e., the apparent shooter, subsequently is seen walking away from the scene, and his face becomes clearly visible on a separate surveillance camera mounted on the other side of the parking lot.

[1] The video from the time of the shooting was played for the jury during trial. Still photographs also were prepared from the video and admitted into evidence.

Baltimore City Police Officer Jamil Shakir received a photo reproduced from the surveillance video, and he recognized the individual as a person known by the nickname "Ant Man." Officer Shakir identified appellant in court as that individual, and he testified that other photographs from the area near the time of the shooting also depicted appellant.

Approximately two days later, news about this shooting was broadcast on the local Baltimore news, and a press release was posted on Facebook. When Soniae Chobanian saw the replay of the video on the news, she immediately recognized appellant, who previously had rented a room in her house. Ms. Chobanian went to the police station and identified a photograph of appellant as the person she saw on the news reports. On cross-examination, when asked whether she had tried to collect an award from Crime Stoppers for turning in appellant, she testified that she did not attempt to do so because she was aware that appellant's wife already had "turned him in and talked to the police the day of whatever happened."

The police recovered eight cartridge casings from the crime scene. A firearms expert opined that these eight .40 caliber Smith & Wesson cartridge casings were fired from the same unknown firearm. The parties stipulated that appellant was prohibited from possessing a regulated firearm.

Additional facts will be included, as necessary, in the following discussion.

DISCUSSION

I.

Appellant contends that the circuit court erred by admitting statements that he made in two recorded telephone calls between him and his wife, Yolanda Cooper, while he was incarcerated. Appellant argues that the calls were hearsay, and they were not admissible as statements against penal interest. He further argues that the admission of his statement in the second call was inadmissible as a confidential marital communication between spouses.

The State contends that the court properly admitted recordings of telephone calls appellant made from jail. It asserts that the calls were admissible both as statements of a party opponent and as statements against penal interest. The State argues that appellant failed to preserve his contention that the admission of the second call was admissible as a confidential marital communication, and in any event, the argument is without merit because appellant and his wife were aware that the phone call from the jail was being recorded, and therefore, the communication was not confidential.

When the State offered the calls into evidence, defense counsel objected:

> My objection [is] that there's no admission of guilt. It's not any declaration against any penal interest. It's not an exception to the hearsay rule. Jail calls are monitored and listened to and at the State's disposal. I don't understand – I object to the purpose in which they will try to get it in. They are trying to go around the back door to get in evidence that would otherwise be spousal privilege.
>
> The State knowing that they can't call Yolanda Cooper [is] trying to go through the back door to get, I guess, the fact that my client believes she

> went down there and circled his picture. He doesn't really, can't say that the State can prove that that's what happened. They can't.
>
> And then the same for the other calls. "Just, I wouldn't be in this shit if it wasn't for Yolanda. She went up there and circled my fucking face."

The court overruled the objection, stating as follows:

> Your objection is noted. It ties him into the scheme of the State's case and the allegations of his participation in the crime and in so doing, the information tying to the news, the identification of him as the actor in perpetration of the crime.
>
> That under the circumstances the Court does believe that it is against penal interest . . . . The objection is noted, but overruled.[2]

The recordings of the phone calls were then played for the jury. The transcript of the recordings reflects that the participants to the calls were advised, prior to their conversation, that "[t]his call will be recorded and monitored."

In the first call, appellant stated to an unidentified listener: "[T]hey had my picture up on the news for like three or four days talking if anybody know who this person is, we want to talk to him. . . . She told them mother fuckers everything." The second phone call was to Ms. Cooper, and appellant stated: "You going down the mother fucking police station telling on me."

Appellant is correct that the statements were 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).

[2] The trial court did not address the appellant's argument referencing "spousal privilege" at this time. When the State called Ms. Cooper as a witness, however, and she invoked spousal privilege, the court found that the privilege applied, and it did not compel her to testify.

Generally, "[a] trial court has 'no discretion to admit hearsay in the absence of a provision providing for its admissibility.'" *Vielot v. State*, 225 Md. App. 492, 500-01 (2015) (quoting *Gordon v. State*, 431 Md. 527, 536 (2013)), *cert. denied*, 446 Md. 706 (2016); *see also* Md. Rule 5-802 ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible.").

The State argues that, although hearsay, the statements were admissible as statements of a party opponent. Maryland Rule 5-803(a)(1) provides that a "party's own statement," offered against that party, is "not excluded by the hearsay rule." *See Conyers v. State*, 345 Md. 525, 544 (1997) ("In Maryland, a statement by a party that is offered against that party is a hearsay exception."). As this Court has explained:

> To qualify for admission into evidence under this rule, the statement must have been "made, adopted, or authorized by a party or that party's agent or coconspirator"; it must be "offered in evidence against that party by an opposing party (it is not offered by the party who made the statement)"; and, "as with all evidence, the statement must be relevant to a material fact."

McClurkin v. State, 222 Md. App. 461, 483 (quoting 6A McLain, *Maryland Evidence*, § 801(4):1, at 333-34 (3d ed. 2013)), *cert. denied*, 443 Md. 736, *cert. denied*, 136 S. Ct. 564 (2015).

Here, appellant's statements met these requirements. It was a statement by appellant, offered by the State, and relevant to show appellant's guilt.[3] The statements

[3] The statement in the first call, that "they had *my picture* up on the news," indicated that the pictures from the surveillance camera depicting the suspected shooter were pictures of appellant. (Emphasis added). And in the second call, appellant accused his wife of

were admissible as a statement of a party opponent,[4] and we need not assess whether they also were admissible as statements against penal interest.

We turn next to appellant's contention that the second phone call was a confidential marital communication that should not have been disclosed to the jury. Assuming, arguendo, that the issue is preserved, it is without merit.

The privilege against disclosure of confidential marital communications generally "applies to all confidential communications that occurred during the marriage." *Ashford v. State*, 147 Md. App. 1, 60, *cert. denied*, 372 Md. 430 (2002). *Accord* Md. Code (2013 Repl. Vol.) § 9-105 of the Courts & Judicial Proceedings Article ("CJP") ("One spouse is not competent to disclose any confidential communications between the spouses occurring during their marriage"). Either spouse has "the right to preclude the disclosure of any confidential communications between the spouses." *Sewell v. State*, 236 Md. App. 96, 111, *cert. granted*, 459 Md. 400 (2018).

This Court recently has explained:

> Private discussions and exchanged information between spouses are confidential and protected by the privilege. *Blau v. United States*, 340 U.S. 332, 333, 71 S. Ct. 301, 302 (1951). Marital communications are presumed confidential, which qualifies them for the privilege. *State v. Enriquez*, 327 Md. 365, 372, 609 A.2d 343, 346 (1992). This presumption is rebuttable, however, when a party shows that "the communication was not intended to be confidential." *Id*. If this presumption has been thoroughly rebutted, the

"telling on me," which insinuated that he had committed a crime to be "told on" to the police.

[4] Although this was not the basis for the circuit court's ruling, a ruling can be affirmed when it is right for the wrong reason. *Green v. State*, 81 Md. App. 747, 755, *cert. denied*, 320 Md. 16 (1990).

> "burden of establishing the element of confidentiality" falls on the claimant. *Ashford*, 147 Md. App. at 69, 807 A.2d at 771. Because of the disfavor with which the courts look upon the use of testimonial privileges at trial, "we resolve an ambiguity against the privilege, rather than in its favor." *Id*. at 70, 807 A.2d at 772. The presumption itself, however, is not ambiguous, but evidence introduced to rebut the presumption and/or subsequently establish confidentiality can lead to ambiguity.

Id. at 112.

As indicated, the presumption that a marital communication is confidential can be rebutted by showing "that the communication was not intended to be confidential, or was made to, or in the presence of a third party." *Coleman v. State*, 281 Md. 538, 543 (1977). "If the communication is made with the contemplation or expectation that a third party will learn of it, the confidential communication privilege does not apply." *Matthews v. State*, 89 Md. App. 488, 502 (1991). *See Master v. Master*, 223 Md. 618, 623-24 (1960) (rejecting father's claim that statement he made to wife was confidential where the statement was made in the presence of the couple's children, who were old enough to comprehend the statement). "The burden is not on the State to establish the presence of third persons; it is on the appellant to establish their absence." *Ashford*, 147 Md. App. at 69. *See Wong-Wing v. State*, 156 Md. App. 597, 610 n. 4 (2004) ("The disfavor with which the law looks on testimonial privileges dictates that we resolve an ambiguity against the privilege, rather than in its favor.").

In this case, both telephone calls clearly included the preliminary advisement to the participants that "[t]his call will be recorded and monitored." Thus, both parties were made aware that the conversation was not confidential. *See Mulligan v. State*, 6 Md. App. 600,

615 (1969) (concluding, under a prior version of the statute, that the admission made by Mulligan to his wife, while they were in the presence of the police at a police station, "was not a confidential communication . . . as it was made in the hearing of a third person."); Accordingly, the call was not a confidential marital communication. *See United States v. Ramsey*, 786 F.Supp.2d 1123,1126 (E.D. Va. 2011) (defendant's phone conversations with his wife while in prison were not confidential because "prisons routinely monitor inmate conversations."). The circuit court properly admitted the calls into evidence.

II.

Appellant next contends that the evidence was insufficient to sustain his conviction of attempted first degree murder of an unknown person because there was insufficient proof of premeditation. He argues that there was no direct proof of the gunman's intent, and no witnesses from the shopping center identified him.

The State contends that the evidence was sufficient to support appellant's conviction. It asserts that the surveillance video and other evidence showed that appellant fired at least eight shots at the intended victim, which shows premeditation. Moreover, it asserts that two witnesses "identified [appellant] as the shooter" from the surveillance footage, which was sufficient to identify appellant as the shooter.

In reviewing the court's finding that there was sufficient evidence to convict appellant of attempted murder, we apply well-settled principles of law:

> "The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. That standard applies to all criminal cases,

> regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone. Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence. This is because weighing the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact. Thus, the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder."

Scriber v. State, 236 Md. App. 332, 344 (2018) (quoting *Darling v. State*, 232 Md. App. 430, 465 (2017)).

In addressing the issue of sufficiency of the evidence here, we begin by observing that "the crime of attempt consists of a specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation." *Spencer v. State*, 450 Md. 530, 567 (2016) (quoting *State v. Earp*, 319 Md. 156, 162 (1990)). The offense that was attempted in this case was first degree murder. First degree murder can be established by evidence of "a deliberate, premeditated, and willful killing." Md. Code (2017 Supp.) § 2-201(a) of the Criminal Law Article ("CR"). It is well established that:

> For a killing to be "willful" there must be a specific purpose and intent to kill; to be "deliberate" there must be a full and conscious knowledge of the purpose to kill; and to be "premeditated" the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate. It is unnecessary that the deliberation or premeditation shall have existed for any particular length of time. Their existence is discerned from the facts of the case.

Tichnell v. State, 287 Md. 695, 717-718 (1980), *cert. denied*, 466 U.S. 993 (1984).

"[U]nder the proper circumstances, an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body." *Smallwood v. State*, 343 Md. 97, 104 (1996) (citations omitted). In addition, "[i]f the killing results from a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder." *Mitchell v. State*, 363 Md. 130, 148-49 (2001) (emphasis and citation omitted). "Indeed, a delay between firing a first and second shot 'is enough time for reflection and decision to justify a finding of premeditation.'" *Id.* at 148-49 (quoting *Hunt v. State*, 345 Md. 122, 161 (1997)).

Here, a surveillance video shows a person, identified as appellant, pointing an object at an unidentified male.[5] At that time, nearby individuals scatter, and the unidentified male ducks, turns, and runs away. Smoke is visible near appellant's hand as this occurs. Immediately thereafter, the man with the gun is seen fleeing the scene. Eight cartridge casings later were recovered in this same vicinity. Under these circumstances, the evidence was sufficient for a rational trier of fact to conclude that appellant willfully, deliberately, and with premeditation, attempted to kill the unidentified person shown in the shopping center surveillance video.

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

[5] As previously indicated, appellant's statements in the recorded jail calls indicated that he was the shooter caught on video.