Circuit Court for Baltimore County
Case No. C-03-CR-19-002504

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 713

September Term, 2020

FRANCIS JOSEPH MALLY, JR.

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 30, 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.

On the morning of June 23, 2019, Keith Snyder was bludgeoned in the head while drinking outside a liquor store with appellant Francis Joseph Mally, Jr. After the State presented recordings of Mally making incriminating statements to police regarding the incident, a jury in the Circuit Court for Baltimore County convicted him of second-degree assault. Mally, who received an executed sentence of eight years, challenges the admission of those recordings. He presents the following question for our review:

> Did the motions court err by denying [his] motion to suppress police officer body-worn camera recordings obtained in violation of the wiretap statute?

We agree with the suppression court that the challenged videos were not subject to Maryland's Wiretap Act because the recorded conversations were not sufficiently private to meet the definition of "oral communications" governed by that statute. *See* Md. Code (2006, 2013 Repl. Vol., 2020 Supp.), § 10-401(13)(i) and § 10-402(c)(11) of the Courts & Judicial Proceedings Article ("CJP"). Because the court did not err in admitting the challenged body-worn police camera videos, we affirm Mally's conviction.

BACKGROUND

In the early morning hours of June 23, 2019, Keith Snyder encountered Mally outside of a Royal Farms store on Eastern Boulevard in Middle River. Having consumed alcohol and argued with his wife earlier in the evening, Snyder was sitting on the curb when Mally, who was carrying a red cane-like pole, approached him. Although Snyder did not know Mally, the two men struck up a friendly conversation.

Together, they walked about a quarter mile to Captain's Café, a bar and liquor store where Snyder bought Bacardi rum and cranberry juice. For a while, the two men sat in the

parking lot drinking and talking. Eventually a younger man with a shaved head, whom Snyder did not know but Mally did, came out of the store and began talking to them. This younger man made Snyder feel uneasy.

According to Snyder, his next memory was waking up in the hospital with "a split forehead, and then a slit in the back of [his] head[,]" which would require ten stitches and another ten staples. After the attack, Snyder "came to[,]" and called his wife, but he "couldn't explain where [he] was[,]" so he called 911. Apparently, emergency services were able to locate Snyder by tracking his cell phone. Snyder did not know who assaulted him.

When police responded to the scene, they found Snyder "bleeding from his head." Nearby, there was "a large amount of blood," a pair of eyeglasses, "a piece of [a] broken bottle," and "a metal stick" matching the description of the red "cane" or "pole" Mally had carried.

As Baltimore County Police Officer Anthony DiPerna awaited the arrival of crime scene technicians, Mally approached and spoke to him, indicating he was looking for his glasses. Officer DiPerna discerned that Mally was "probably intoxicated." The officer did not see any blood on Mally or on the "stick" left at the scene.

A recording captured on Officer DiPerna's body-worn camera showed the officer asking Mally what happened, and who had hit Snyder with a bottle. Mally denied hitting anyone with a bottle, but suggested that "one of the people out here hit him 'cause they didn't like what he did." Mally explained that he had been laying down to take a nap when someone "came up and snatched the eye glasses off [his] face." Inferentially, Mally

indicated that someone had attacked Snyder in response to Snyder taking Mally's eyeglasses.

On June 25, 2019, Mally was arrested on unrelated charges and taken to the Essex police station. When Mally exited the interview room, he entered the hallway "processing area" of the precinct. The acting shift commander, Sergeant Jeffrey Lipscomb, conducted a "routine interview" to assess whether it would be appropriate to house Mally in a holding cell for the general inmate population. In Sergeant Lipscomb's body-worn camera video of this interaction, another officer was present as the sergeant first asked mental health questions, then made remarks in "friendly conversation" unrelated to the pending charges. Without prompting, Mally stated, "Motherf**ker put his hands on me, I have a right to f**k him up bad. I came close to killing the man. I wasn't bothering anybody. Shouldn't go around putting his hands on people."

The Suppression Motion

Before trial, Mally moved to suppress the incriminating recordings of his statements to Officer DiPerna at the crime scene, and to Sergeant Lipscomb during booking.[1] The State and the defense stipulated that neither officer advised Mally that he was being recorded. Mally argued that both recordings violated the requirement in Maryland's Wiretap Act that requires notice to the individual being recorded.

[1] Mally also moved to suppress a statement he made to Detective Jason Gensel while at the Essex police station. Mally does not challenge the suppression court's denial of his motion to suppress that statement. Accordingly, our review is limited to Mally's statements to Officer DiPerna and Sergeant Lipscomb.

With respect to the crime scene video, the prosecutor and defense counsel jointly proffered to the suppression court that

> Officer DiPerna is at the crime scene, he's there to secure the scene, and as he is standing there, he observes an individual. Ultimately, this Defendant comes back to the location. He is equipped with body-worn camera, that body-worn camera does engage as in the audio engages prior to walking up to Mr. Mally.
>
> Officer DiPerna approaches Mr. Mally, general greeting, "Hey, Buddy. What's up? What happened here tonight?" Makes statements. At no time during their conversation, which lasts roughly five to seven minutes, does Officer DiPerna say you're being audibly and visually recorded.
>
> While still there, Officer Moser then comes up at a different location. . . .
>
> The conversation between Mr. Mally and Officer DiPerna and Officer Moser are very similar in nature as to the context of those conversations, your Honor, asking about, "What . . . happened here tonight?" What went on, you know, what happened in this situation.

The State further proffered that when the officers

> arrive[d], they see the victim who is injured at the location. He has lacerations on his head. They're trying to ascertain at that time what occurred. Ultimately the victim is transported via ambulance to the hospital, and there's further investigation done at the hospital at that time. There were no suspects. Some general descriptions were given of a suspect at that time, and they were, again, trying to secure the scene to find out and get some more information.

In support of Mally's motion to suppress that recording, defense counsel argued "that the body camera video evidence would be inadmissible, but . . . concede[d] that things that the officer heard my client say could be admissible." Counsel also acknowledged that this was not "a constitutional event," but primarily a statutory challenge "subject to any applicable hearsay that might come as objections that I can make during trial[.]" In defense

counsel's view, "[t]here's a statute" that "says how police officers can use body camera and how they can't. This officer didn't do that," so "this is a violation of the statute."

The prosecutor, citing the "two-prong test" outlined in *Malpas v. State*, 116 Md. App. 69 (1997), argued that Mally had neither an objective nor subjective expectation of privacy in his communication with Officer DiPerna. The prosecutor noted that Mally spoke to Officer DiPerna in a public parking lot where police officers and other people could have overheard the conversation, and that Mally "didn't pull the officer to the side" and "wasn't speaking in hush[ed] tones." Accordingly, the State asserted that because there was no expectation of privacy, the wiretap statute should not apply.

Based on the joint proffer and statutory argument, the suppression court denied Mally's motion to suppress his statement to Officer DiPerna at the crime scene, finding that

> [o]fficers are at a scene, in a public place, where there had been an assault. Based on the proffer and information provided to the Court, the Defendant comes back to that location that's being preserved by the officers where I recollect, based on the proffer or, at least, perhaps, the State's recitation of facts, that there's broken glasses there. Allegedly the Defendant comes back to pick up his glasses.
>
> The officers activate their body worn cameras, you're in a public place talking to police officers. I don't see how there is any -- I don't see how there is any subjective expectation of privacy in that setting. You're on the street, you're talking to an officer. If I walk up to a police officer and ask him directions -- him or her -- I have no expectation of privacy at all. So, as to the crime scene body-worn camera, that's admissible.

With respect to the recording made by Sergeant Lipscomb during booking at the

police station, defense counsel and the prosecutor again "agreed to just play the video[.]"[2] In that recording, Sergeant Lipscomb spoke to Mally, saying, "Come here, I wanna talk to you for a minute. Are you from around here?" and explained, "I'm the shift commander." After Mally identified himself, Sergeant Lipscomb stated that he remembered talking to Mally before when Mally had a "previous emergency evaluation" which required Mally to go to the hospital to see a doctor. Mally responded by saying that he did not feel well, and Sergeant Lipscomb replied that he hoped Mally would feel better, and advised Mally that "we're gonna eventually take you over to the correctional officer shortly." Mally agreed with Sergeant Lipscomb's statement "I know you don't wanna hurt yourself or anybody else, right?"

At that point, Sergeant Lipscomb asked another officer visible in the recording whether he wanted to "keep" Mally "down here" or "put him in jail[.]" After the unidentified offer responded, "It's up to you[,]" Mally stated that he preferred to stay "right here." Lipscomb next addressed Mally, observing, "I see you got the meal" and "we gotta quit meeting like this." Mally responded, "Motherf**ker put his hands on me the other night and got f**ked up bad. I was gonna kill him if I had to. I wasn't bothering the motherf**ker, and he put his hands on me."

After the clip concluded, the suppression court noted for the record that "in the video you can't see Sgt. Lipscomb, except towards the end you just see his cheek, but there's

[2] Apparently, Sergeant Lipscomb had fallen ill and was unable to appear in court for the suppression hearing.

another uniformed officer there" who "clearly has a camera on his collar." The court "suspect[ed] Sgt. Lipscomb was wearing his in the same fashion."

Ultimately, the suppression court ruled that "the wiretap statute" did not apply to the booking recording made by Sergeant Lipscomb based on its finding that Mally "is in, for all intents and purposes, somewhat of a public place" while he was at "a police station . . . with two officers," one of whom the video shows "clearly, absolutely clear on his collar has a tubular device which we all know to be body-worn camera." Because there was "no indication" that Mally "couldn't see that" and therefore "no indication at all that he ha[d] a subjective expectation of privacy in that environment[,]" the court agreed with the State that the "wiretap statute" did not apply.

DISCUSSION

Maryland's Wiretap Act, codified at CJP § 10-401 *et seq.*, prohibits the admissibility of certain unauthorized audio and video recordings of private conversations.[3] At issue here

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[3] Under CJP § 10-402,

> (a) Except as otherwise specifically provided in this subtitle it is unlawful for any person to:
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> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (2) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or

(continued . . .)

is the statutory exemption for recordings made by "body-worn digital recording devices," defined as "a device worn on the person of a law enforcement officer that is capable of recording video and intercepting oral communications." CJP § 10-402 (c)(11)(i). The statute provides, in pertinent part:

> (ii) It is lawful under this subtitle for a law enforcement officer in the course of the officer's regular duty to intercept *an oral communication* with a body-worn digital recording device . . . capable of recording video and oral communications if:
>
> 1. The law enforcement officer is in uniform or prominently displaying the officer's badge or other insignia;
>
> 2. The law enforcement officer is making reasonable efforts to conform to standards in accordance with § 3-511 of the Public Safety Article for the use of body-worn digital recording devices or electronic control devices capable of recording video and oral communications;
>
> 3. The law enforcement officer is a party to the oral communication;
>
> 4. *Law enforcement notifies, as soon as is practicable, the individual that the individual is being recorded, unless it is unsafe, impractical, or impossible to do so;* and
>
> 5. The oral interception is being made as part of a videotape or digital recording.

> (3) Willfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

Under CJP § 10-405, with specified exceptions,

> whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this subtitle.

CJP § 10-402(c)(11)(ii) (emphasis added). The Act defines an "oral communication" to "mean[] any conversation or words spoken to or by any person in *private* conversation." CJP § 10-401(13)(i) (emphasis added).

It is undisputed that neither Officer DiPerna nor Sergeant Lipscomb notified Mally that he was being recorded by their body-worn cameras. Instead, the contested issue in this case is whether they were required to do so given the nature and circumstances of those conversations. In Mally's view, the statutory provision allowing admission of body-worn camera footage "did not apply to the communications intercepted by Officer DiPerna and Sergeant Lipscomb" because neither officer notified him that they were recording him. Absent such notice, Mally contends, both recordings violated the wiretap statute and should have been suppressed. The State responds that no notice was required because "Mally's statements were not made 'in private conversation' and thus they did not qualify as 'oral communications' subject to the Wiretap Act" restrictions on body-worn camera recordings under CJP § 10-401(13)(i). The State alternatively argues that, even if the recordings were erroneously admitted into evidence, any such error was harmless beyond a reasonable doubt.

When reviewing the denial of a motion to suppress, we are limited to the facts developed at the hearing. *Whittington v. State*, 474 Md. 1, 19 (2021) (quoting *Kelly v. State*, 436 Md. 406, 420 (2013)). Considering the evidence in the light most favorable to the State as the prevailing party on the motion, we evaluate the suppression court's factual findings for clear error and make our own independent appraisal of admissibility by

applying the relevant law to the totality of the circumstances. *Gonzalez v. State*, 429 Md. 632, 648-49 (2012).

Applying these standards to the suppression hearing record summarized below, we consider Mally's challenges to the two recordings in turn.

Challenge to the Crime Scene Recording

Mally contends that the wiretap statute prohibits the admission of Officer DiPerna's video because it captured a "private conversation" during which "it was safe, practical, and possible" to notify him that he was being recorded. He acknowledges that his recorded conversation with Officer DiPerna in the Captain's Café parking lot took place in a public location and that the officer was displaying his body-worn camera in a manner that "would have been visible" to him. In Mally's view, even though "the environment in which a conversation takes place is certainly one factor in the analysis of whether that conversation is private, it is not dispositive" because "a private conversation can be had in a public place, and vice versa." He further rejects the notion that "all conversations with police officers [are] . . . public[,]" as the General Assembly "obviously contemplated" by enacting restrictions on "the circumstances under which law enforcement officers may legally intercept oral communications[.]" Mally argues that, "[m]erely because a device is capable of recording does not mean that it is always recording, and a civilian would have no reason to know departmental policy as to when officers should activate their body-worn cameras."

Mally relies on *Malpas*, 116 Md. App. 69, to illustrate that the location where a conversation occurs does not define whether it is public or private. There, Malpas was charged with attempting to murder his neighbor, Craigie, who was in arrears on rent he

owed to Malpas's partner. *Id*. at 73-74. During Craigie's cross-examination, defense counsel impeached him with a tape player recording Malpas made when Craigie, during a phone conversation, "was yelling so loud that he could be heard in" Malpas's adjacent apartment. *Id*. at 75-76. This Court held that the intercepted conversation was admissible because it was not an unauthorized interception of an "oral communication" within the scope of the Wiretap Act given that Craigie "had no reasonable expectation that the content of his conversation was private." *Id*. at 84.

In reaching that conclusion, we applied "the two-pronged inquiry applicable to search and seizure cases[,]" asking first "whether Craigie exhibited an actual subjective expectation of privacy with regard to his statements[,]" then "whether that expectation is one that society is prepared to recognize as reasonable." *Id*. (internal quotation marks omitted) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)). We analyzed the record in light of the Supreme Court's observation that "what a person knowingly expresses to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* (quoting *Katz*, 389 U.S. at 351).[4]

Although Craigie was home at the time, we concluded, "what [he] chose to shout could not have been intended as words spoken in private." *Id*. Because Craigie could not reasonably have had an "expectation of privacy in statements made in his apartment that were shouted so loudly as to be overheard by persons in the adjacent apartment[,]" the

[4] We note that the Court of Appeals confirmed the applicability of the two-pronged inquiry from *Katz* in the context of the Wiretap Act in *Agnew v. State*, 461 Md. 672, 685 (2018).

intercepted statements were not made "in private conversation" even though they were uttered in a private place. *Id.*

Utilizing the same two-step analytical framework applied in *Malpas*, we hold that the suppression court did not err in ruling that Mally failed to establish that his "oral communication" with Officer DiPerna was made "in private conversation." As to the subjective expectation of privacy factor, we note that Mally returned to the parking lot outside the liquor store, which was an active crime scene where officers equipped with body cameras were investigating what had happened. Mally concedes, therefore, that the recording was made in a public place populated by uniformed police investigators.

"A subjective expectation of privacy is demonstrated by a showing that the person 'sought to preserve something as private.'" *Raynor*, 201 Md. App. 209, 218 (2011) (some internal quotation marks omitted) (quoting *Williamson v. State*, 413 Md. 521, 535 (2010)). Significantly, Mally made no such showing here. He did not testify or proffer that he actually believed his statements to the officer were private. Nor is there anything in their conversation to indicate that Mally intended his conversation to be private.

Based on this record, we hold that Mally did not meet his burden to show that he had a subjective expectation that the statements he made to Officer DiPerna were private. For that reason alone, the suppression court did not err in declining to suppress that evidence.

Even if Mally had claimed such an actual expectation, we are not persuaded it would be "one that society is prepared to recognize as 'reasonable.'" *Malpas*, 116 Md. App. at 84. No reasonable person would believe that Mally's statements to a police officer at a

crime scene were intended to be a private communication, especially where the person failed to indicate a desire to keep the communication private. Thus, we conclude that Mally had no reasonable expectation of privacy when he made his inculpatory statement in a public parking lot while police officers were investigating a crime he claimed to have witnessed.

Nor would we conclude that admitting Mally's statement to Officer DiPerna was prejudicial error, given that defense counsel expressly conceded that the officer could testify to what Mally said. *See generally Dorsey v. State*, 276 Md. 638, 652-53, 659 (1976) (error is harmless if "there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict[,]" such as when "erroneously admitted evidence has been cumulative").

Challenge to the Booking Recording

Lastly, turning to his conversation with Sergeant Lipscomb, Mally contends that this conversation qualified as an oral communication because it "had no investigatory purpose" and "[t]here would be no reason for a person to assume that this interaction would be recorded." We disagree.

Applying the same legal standards to the parties' proffer regarding this recording, the suppression court concluded that Mally voluntarily made this highly inculpatory statement at a time and place that afforded him no privacy. After Mally requested counsel, and while he was shackled in the hallway of a police precinct during the booking process, he volunteered to two uniformed police officers wearing visible body cameras that he almost killed Snyder in retaliation for touching him and taking his eyeglasses. We agree

with the suppression court that "there is no indication at all that he ha[d] a subjective expectation of privacy in that environment." *Cf. Meyer v. Texas*, 78 S.W.3d 505, 507 (Tex. App. 2002) (holding that arrestee had no expectation of privacy while alone in back seat of police car, when he blurted "out his thoughts and opinions in a way inconsistent with the notion that he wished to keep them private.").

Because Mally did not make this statement under the subjective and objectively reasonable belief that he was in private conversation with Sergeant Lipscomb, the suppression court did not err in ruling that the recording did not violate the Wiretap Act. Even if we were to assume error for purposes of argument, admitting the brief portion of the recording when Mally implicates himself would be harmless error given defense counsel's concession that "things that the officer heard my client say could be admissible." *See Dorsey*, 276 Md. at 659.

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