Circuit Court for Washington County
Case No. C-21-CR-18-752

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 756

September Term, 2019

DUSTIN MICHAEL LEE CAVANAUGH

v.

STATE OF MARYLAND

Berger,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 26, 2020

*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 bench trial in the Circuit Court for Washington County, Dustin Cavanaugh ("Appellant") was convicted of willfully intercepting a wire communication in violation of the Maryland Wiretap Act. The trial court found Appellant not criminally responsible and ordered him committed to the Maryland Department of Health for treatment. In this appeal, Appellant presents a single question for our review:

I. Was the evidence adduced at trial sufficient to sustain the conviction?

For reasons to follow, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was arrested and charged with violating the Maryland Wiretap Act, specifically, § 10-402 of the Criminal Procedure Article of the Maryland Code, which prohibits a person from willfully intercepting any wire, oral, or electronic communication. Md. Code, Cts. & Jud. Proc. § 10-402(a)(1). Appellant elected a bench trial and agreed to plead not guilty pursuant to an agreed statement of facts. At that bench trial, the State read the following facts into the record:

> Had this matter proceeded to trial the State would have shown that on September 25th, 2018, [Appellant] placed a call to Rhonda Will at the Hagerstown Housing Authority in Washington County, Maryland. The State would have shown that he recorded that phone call without the consent of Ms. Will. The State would have shown that at no point during the phone call did the defendant tell Ms. Will that he was recording the conversation.
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> The State would have proven that shorting [sic] after the phone conversation [Appellant] posted the recording of that phone conversation to his YouTube page under the username, xsquader[.] After that, officers from the Hagerstown Police Department seized [Appellant's] cellphone along with other devices pursuant to a search and seizure warrant and found a copy of that same phone call recording on his cellphone along with a cellphone program or application that records phone calls.

> Testimony would have shown that this application does not come standard with [Appellant's] phone. So, he would have had to seek it out and affirmatively download it and that this recording was not done pursuant to a law enforcement exemption. Ultimately, the State would have proven that Mr. Cavanaugh willfully recorded the telephone call he had with Ms. Will on September 25th, 2018 without her knowledge of or consenting to the recording. That he used an electronic device, specifically an application on his cellphone to record the conversation and that Mr. Cavanaugh is not a communications common carrier nor does he fall under the law enforcement exception and that all events occurred in Washington County, Maryland.

The trial court thereafter found Appellant guilty of intercepting a wire communication. Defense counsel then asked the court to find Appellant not criminally responsible, explaining that Appellant had a recognized condition that caused him to record conversations for fear of not being able to recall the conversations later. The court accepted that proffer and found Appellant not criminally responsible.

DISCUSSION

A. Parties Contentions

Appellant contends that the evidence adduced at trial was insufficient to sustain his conviction. He asserts that the State failed to show that he "intercepted" a wire communication pursuant to § 10-402 of the Courts and Judicial Proceedings Article. He also argues that, even if the State made such a showing, the cell phone he used to intercept the communication was "an excluded device" under the statute. The State submits the evidence was sufficient and that the statutory language and legislative history of the Wiretap Statute evince an intent to cover the issue raised by Appellant. Additionally, the State maintains that Appellant's recording of his telephone conversation with Ms. Will was an "interception," and the telephone exception does not apply in this case.

B. Standard of Review

"The test of 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)). That standard applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witnesses accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "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.'" *Darling v. State*, 232 Md. App. 430, 465 (2017) (citations and quotations omitted) (emphasis in original). In making that determination, "[w]e 'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). Further, "[w]e defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal*, 191 Md. App. at 314 (citations omitted).

As for our interpretation of the relevant statutory scheme, we begin with "the well-established cannon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Holmes v. State*, 236 Md. App. 636, 651-52 (2018)

(quoting *Seal v. State*, 447 Md. 64, 70-71 (2016)), *cert. denied*, 460 Md. 15. "'If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose,' our inquiry as to the legislative intent ends ordinarily and we apply the statute as written, without resort to other rules of construction." *Agnew v. State*, 461 Md. 672, 679 (2018) (quoting *Harrison-Solomon v. State*, 442 Md. 254, 265 (2015)). "If, however, the language is ambiguous, we move on to examine case law, the structure of the statute, statutory purpose, and legislative history to aid us in ascertaining the intent of the General Assembly." *Holmes*, 236 Md. App. at 652 (citations omitted). "Additionally, statutes should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory." *Id.* (citations and quotations omitted). That said, "[i]n construing a statute, we avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense." *Bellard v. State*, 452 Md. 467, 482 (2017) (citing *Wagner v. State*, 445 Md. 404, 417-19 (2015)).

C. Analysis

Interception

Appellant's first argument revolves around a perceived distinction between "intercept" and "record" in the relevant statute. He contends that, in order to prove he violated § 10-402 of the Courts and Judicial Proceedings Article, the State was required to prove that he "intercepted" his phone call with Ms. Will on September 25, 2018. He asserts, however, that the State only established that he "recorded" that conversation. He maintains that that showing was insufficient because the statute uses the words "intercept"

and "record" in distinct contexts, which, according to Appellant, means that the two terms are not synonymous. He contends, therefore, that his act of "recording" his conversation with Ms. Will was insufficient to show that he "intercepted" the communication.

"The Maryland Wiretap Act, codified in Title 10, Subtitle 4 of the Maryland Code, Courts and Judicial Proceedings (Cts. & Jud. Proc.), governs the interception and disclosure of wire oral, or electronic communications." *Agnew*, 461 Md. at 679-80 (quotations omitted). "The Wiretap Act 'was designed with a two-fold purpose: 1) to be a useful tool in crime detection and 2) to assure that interception of private communications is limited.'" *Id.* at 681 (quoting *State v. Maddox*, 69 Md. App. 296, 300 (1986)). To that end, the Act "protects persons in Maryland from surveillance by outlawing unauthorized non-consensual interception of wire, private oral, and electronic communications." *Fearnow v. Chesapeake Potomac Telephone Co. of Maryland*, 342 Md. 363, 367 (1996). "The Wiretap Act also directs when and by whom such non-consensual interceptions may be authorized and the exact manner in which authorization may be given[.]" *Id.*

As part of the Maryland Wiretap Act, the General Assembly enacted § 10-402 of the Courts and Judicial Proceedings Article, which provides, in pertinent part, that "it is unlawful for any person to … [w]illfully intercept, endeavor to intercept, or procure any other person to intercept, any wire, oral, or electronic communication[.]" Md. Code, Cts. & Jud. Proc. § 10-402(a)(1). The statute defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Md. Code, Cts. & Jud. Proc. § 10-401(10).

The statute defines "wire communication" as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception[.]" Md. Code, Cts. & Jud. Proc. § 10-401(18).

In construing that section, we have determined that "[a] telephone conversation is a 'wire communication' within the meaning of the Wiretap Act." *Boston v. State*, 235 Md. App. 134, 144 (2017), *cert. denied* 457 Md. 664. We have also determined that "[t]he meaning of 'intercept' under the Wiretap Act encompasses electronic recording." *Id.* at 145. Thus, electronically recording a private telephone conversation is generally considered a violation of the Act. *See Deibler v. State*, 365 Md. 185, 199-200 ("[T]he interception of [an oral] conversation anticipates an aural interception – hearing the conversation directly *or making a recording* of it that can be listened to simultaneously or at a later time[.]") (emphasis added).

Md. Code, Cts. & Jud. Proc. § 10-402 does permit certain "authorized interceptions" of telephone conversations, such as when a law enforcement officer, or someone acting on the officer's behalf, lawfully records a telephone conversation as part of a criminal investigation. *See generally* Md. Code, Cts. & Jud. Proc. § 10-402(c)(1) to (11). In addition, the statute permits a person to record a telephone conversation "where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act[.]" Md. Code, Cts. & Jud. Proc. § 10-402(c)(3).

Aside from those enumerated exceptions, none of which is applicable here, it is unlawful for a person to record a telephone conversation, even when that person is a party to the conversation. In short, "a party to a telephone conversation does *not* take the risk that another party, not acting as, or under the direction of, a government agent, will record and divulge the contents of the conversation, for, absent prior consent of the party, such recording and divulging is clearly prohibited and, indeed, if done willfully, constitutes a criminal offense." *Perry v. State*, 357 Md. 37, 61 (1999) (emphasis in original). "Given that prohibition, participants in a telephone conversation may ordinarily rely on the fact that their conversation will *not* be surreptitiously recorded[.]" *Id.* (emphasis in original).

Against that backdrop, we hold that the evidence adduced at trial was sufficient to show that Appellant intercepted a wire communication in violation of § 10-402. The evidence established that Appellant electronically recorded his private telephone conversation with Ms. Will using an application installed on his cell phone. In so doing, Appellant acquired the contents of a wire communication through the use of an electronic device. Both this Court and the Court of Appeals have previously determined that such an act, *i.e.* using electronic equipment to surreptitiously record one's telephone conversation, constitutes an "interception" under the Maryland Wiretap Act. *E.g. Agnew*, 461 Md. at 684-85; *Seal*, 447 Md. at 68, 84; *Maddox*, 69 Md. App. at 299. Accordingly, the evidence was sufficient to sustain Appellant's conviction.

As noted, Appellant argues that "recording" and "intercepting" are not synonymous, and thus the evidence was insufficient, because the plain language of the Wiretap Act

"makes a distinction between 'intercept' and 'record.'" Appellant relies on § 10-402(c)(6), § 10-402(c)(11), and § 10-408(g)(1) as evidence of this purported distinction. A closer reading of those statutes reveals, however, that Appellant is mistaken.

Md. Code, Cts. & Jud. Proc. § 10-402(c)(6) permits, under certain circumstances, "law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation[.]" Md. Code, Cts. & Jud. Proc. § 10-402(6)(i). That statute further provides that "[c]ommunications under this paragraph may not be recorded and may not be used against the defendant in a criminal proceeding." Md. Code, Cts. & Jud. Proc. § 10-402(6)(ii). Similarly, § 10-402(c)(11) permits, under certain circumstances, a law enforcement officer "to intercept an oral communication with a body-worn digital recording device or an electronic control device capable of recording video and oral communications if … the oral interception is being made as part of a videotape or digital recording." Md. Code, Cts. & Jud. Proc. § 10-402(11)(ii). That statute defines "body-worn digital recording device" as "a device worn on the person of a law enforcement officer that is capable of recording video and intercepting oral communications." Md. Code, Cts. & Jud. Proc. § 10-402(6)(i). Finally, § 10-408, which governs interceptions permitted by *ex parte* orders, provides, in pertinent part, that "[t]he contents of any wire, oral, or electronic communication intercepted by any means authorized by this subtitle, if possible, shall be recorded on tape or wire or other comparable device." Md. Code, Cts. & Jud. Proc. § 10-408(g)(1). The statute also discusses the manner in which such recordings should be made and kept. *Id.*

Nothing in the above-quoted language indicates an intent by the Legislature to make a distinction between "intercept" and "record" such that the two terms are mutually exclusive. It is clear from their plain language that the statutes contemplate situations in which an authorized individual, *i.e.*, a law enforcement officer, uses a particular device, *i.e.*, a body wire, to intercept a communication that can also be recorded using the same or a different device. In other words, the statutes set forth certain parameters for circumstances in which a communication is, or can be, both intercepted and recorded. The statutes do not state, or even suggest, that "recording" and "intercepting" have different meanings, and they certainly do not suggest that Appellant's recorded conversation with Ms. Will did not constitute an intercepted wire communication pursuant to § 10-402. To hold otherwise would be contrary to the aforementioned case law, which makes clear that recording a telephone conversation without the requisite authority or consent is a violation of the Maryland Wiretap Act.

Finally, Appellant argues that Ms. Will, as a "public official," did not have a reasonable expectation of privacy in their phone call, which "further dulls any argument that the General Assembly intended to punish his actions." That argument is without merit, as "privacy is not relevant to determining a violation of the Wiretap Act when *wire* communication has been intercepted." *Fearnow*, 342 Md. at 376 (emphasis in original). Even so, there is nothing in the record to indicate that Ms. Will did not enjoy a reasonable expectation of privacy in her phone conversation with Appellant. *See Perry*, 357 Md. at 61

("[P]articipants in a telephone conversation may ordinarily rely on the fact that their conversation will *not* be surreptitiously recorded[.]") (emphasis in original).

Telephone Exception

Appellant argues that, even if his act of recording his phone conversation was an "interception" under the Maryland Wiretap Act, the evidence was nevertheless insufficient because the device he used to record the conversation, his cell phone, was an "excluded device" under § 10-401(8). Unfortunately, Appellant is wrong, again.

As discussed, the Maryland Wiretap Act defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Md. Code, Cts. & Jud. Proc. § 10-401(10). The statute defines "electronic, mechanical, or other device" as "any device or electronic communication other than:

> (i) Any telephone or telegraph instrument, equipment or other facility for the transmission of electronic communications, or any component thereof, (a) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of the service and used in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of its duties[.]

Md. Code, Cts. & Jud. Proc. § 10-401(8).

By its plain language, § 10-401(8) excludes from its definition of "electronic, mechanical, or other device" certain "equipment," including telephones. The statute expressly states, however, that in order for equipment to fall within that exemption "the

equipment must satisfy two criteria: (1) the equipment must be a telephone … instrument, equipment or other facility for the transmission of electronic communications, or any component thereof; and (2) the equipment must be used in the ordinary course of the subscriber's or user's business." *Schmerling v Injured Workers' Ins. Fund*, 368 Md. 434, 456-57 (2002) (quotations omitted). In other words, "[t]he exemption only applies if the equipment is telephone equipment … or a component thereof *and* if the use of the telephone equipment is for a valid business purpose." *Id.* at 438 (quotations omitted) (emphasis in original).

Here, no evidence was presented that Appellant used his cell phone for a valid business purpose. Accordingly, the telephone exemption does not apply.

Even so, Appellant's use of an application installed on his cell phone to record his conversation with Ms. Will did not implicate the telephone exemption. This Court addressed a nearly identical situation in *Holmes v. State*. There, a parent used a voice recorder application installed on her cell phone to surreptitiously record a face-to-face conversation she had with her child regarding an incident of sexual abuse by the parent's boyfriend, Cloyd Holmes, who was ultimately charged as a result of the incident. *Holmes*, 236 Md. App. at 643, 646-47. Holmes thereafter sought to have the recording introduced into evidence at trial, but the trial court excluded the recording on the grounds that it violated the Maryland Wiretap Act. *Id.* at 647-48. Following his conviction, Holmes argued on appeal that the recording should have been admitted because the electronic device used to make it, a cell phone, was an excluded device under the telephone exemption. *Id.* at 652.

Citing § 10-401(8), Holmes maintained that it was "difficult to conceive of how [the parent's] use of a pre-installed app on her cell phone, to record a conversation with her daughter in the privacy of their home, is anything other than ordinary use of the device." *Id.* at 652. We disagreed:

> The "ordinary course" language that appellant has "cherry-picked" out of the definition of "electronic, mechanical, or other device" does not apply in this scenario. This is the so-called "extension line" exemption that is designed to ensure that recording on a "landline" phone "in the ordinary course of business," from an extension phone, does not qualify as interception of an oral communication. *See generally* [*Adams v. State*, 289 Md. 221, 227-29 (1981).] … Using a recording app installed on a cellular phone to record a face-to-face personal conversation is not using the *telephone* function of the device in "the ordinary course of business," as contemplated by this exclusion.
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> The ease and popularity of cell phone recordings does not suspend the protections afforded by the statute. The clear purpose of the Maryland Wiretap Act is to prohibit secret recordings of private oral communications, without regard to which device may be used to accomplish that task. To be sure, this provision of Maryland's wiretap law was enacted long before it was technologically possible to record private conversations with equipment as omnipresent, multifunctional, and compact as the modern cell phone. Yet we see nothing in the language or purpose of the statute to distinguish secret recordings made with the devices of yesteryear from those made with today's smart phones.
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> * * *
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> For these reasons, we agree with the trial court and the State that the statutory prohibition against surreptitious interception of private conversations applies to [the parent's] cell phone recording. Indeed, a contrary construction of the statute would effectively gut its core "declaration of … public policy" that "'a party to a … conversation does *not* take the risk that another party, not acting as, or under the direction of, a government agent, will record and divulge the contents of the conversation.'" *See* [*Seal*, 447 Md. at 73-74 (quoting *Perry*, 357 Md. at 61).]

Id. at 653-55 (emphasis in original).

The rationale we articulated in *Holmes* is wholly applicable to the circumstances of the instant case.[1] The telephone exemption was not implicated by Appellant's surreptitious recording of a private conversation using an app on his cell phone. Accordingly, the evidence was sufficient to sustain his conviction.

Appellant, in setting forth his argument, relies on language from *Martin v. State*, 218 Md. App. 1 (2014), wherein this Court stated that the Maryland Wiretap Act did not apply to text messages retrieved from a cell phone because "a cell phone is not a 'device,' under the Wiretap Act, as it specifically excludes 'telephone' from the statutory definition of 'electronic, mechanical, or other device[.]'" *Id.* at 19 (citations omitted). Regardless, Appellant's reliance on *Martin* is misplaced, as that case did not involve the use of a cell phone to record a private conversation. Moreover, the language quoted by Appellant was dicta and not part of this Court's main holding. *Id.* at 18-19. Finally, to the extent that the quoted language from *Martin* can be construed as suggesting that a cell phone necessarily constitutes an "excluded device" under the statute, such an inference has since been rejected by our holding in *Holmes*, which illustrates that using a cell phone to record a private conversation, as Appellant did here, is prohibited by the Maryland Wiretap Act. Therefore, we hold that neither of Appellant's arguments has merit and consequently, we affirm Appellant's conviction.

[1] Appellant argues that *Holmes* is inapposite because, unlike in his case, "the defense witness in *Holmes* was not prosecuted under § 10-402." We fail to see how that distinction is relevant, and Appellant provides no explanation or pertinent case law to support his claim. In fact, the case on which Appellant primarily relies, *Martin v. State*, was, like *Holmes*, decided in the context of a motion to exclude evidence and did not involve a prosecution under § 10-402. *Martin*, 218 Md. App. at 7, 13-20.

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