Circuit Court for Baltimore City
Case No. 112325021

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 797

September Term, 2021

THOMAS PRESTON

v.

STATE OF MARYLAND

Beachley,
Shaw,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: June 16, 2022

Following a jury trial in the Circuit Court for Baltimore City, Thomas Preston, appellant, was convicted of possession of a regulated firearm after being convicted of a disqualifying crime and wearing, carrying or transporting a handgun on his person. The court sentenced appellant to fifteen years' imprisonment with all but the first five years suspended, to be served without the possibility of parole, followed by three years of supervised probation. On appeal, appellant presents a single question for our review, which we have rephrased: Did the trial court err in admitting evidence of statements made in a recorded jail telephone call?

Finding no error, we affirm.

BACKGROUND

At trial, Detective Joseph Wiczulis of the Special Enforcement Section[1] of the Baltimore Police Department testified that, on October 30, 2012, he was patrolling a high crime area in the 1300 block of North Lucerne Avenue in Baltimore in an unmarked police vehicle with Detective David Ciotti and Detective Sergeant Daniel Salefski. As the vehicle approached an alley, Detective Wiczulis observed an individual, later identified as appellant, standing in the doorway of a vacant building. The detective observed appellant "reach[] his right hand . . . to the front of his waistband and remove[] a dark-colored object from his waistband." Appellant "then proceeded to reach inside the dwelling." Given the

[1]The Special Enforcement Section is "a plainclothes enforcement unit" within the Eastern District of the Baltimore City Police Department "that focuses on narcotics and firearms and repeat offenders."

size and shape of the object, and the location in "a high violence area," Detective Wiczulis suspected that the object was "some kind of contraband, either a handgun, pellet gun, something along those lines."

As Detectives Ciotti and Wiczulis exited the vehicle, appellant ran eastbound into the alley. Detective Wiczulis entered the vacant home, approximately twenty-five feet away, and investigated the area where he saw appellant place the dark object. "[J]ust inside the doorway to the vacant dwelling," within an open breaker box, he "observed a dark color . . . blue steel revolver with . . . brown grips."[2]

Detective Ciotti testified that on October 30, 2021, he was in a vehicle with Detective Wiczulis and Detective Sergeant Salefski when Detective Wiczulis alerted them that he saw an individual "stash a gun." Detective Ciotti exited the vehicle and pursued appellant into the alley, where appellant was apprehended.

Detective Wiczulis further testified that he conducted a follow up investigation that entailed listening to phone calls appellant placed from jail on a recorded line. Over appellant's objection, a portion of one of the calls was admitted into evidence and played for the jury.

Appellant testified that earlier in the day on October 30, 2021, he had been in the area where "the same police that arrested me, they stopped me, searched me, and they told me they didn't want to see me again, so I went in the house." Later that same day, appellant

[2] James Wagster, a firearms examiner for the Baltimore City Police Department, testified that the recovered revolver was operational.

was walking on Lucerne Avenue on his way to see his probation officer, when he saw the police vehicle approach and the doors open. Appellant claimed that he "ran because they told me they didn't want to see me again." Once appellant saw that one of the police officers was chasing him, he stopped running.

Appellant was searched and placed in handcuffs in the backseat of the police car. He was advised that the police would conduct a search of the alley, and if no contraband was found, he would be released. Appellant observed Sergeant Salefski remove a board from the back door of a vacant house and enter the house. Appellant testified that Sergeant Salefski searched inside the house for thirty to forty-five minutes before exiting the house with a gun. Appellant denied ever touching the gun or knowing that it was located inside the house.

The jury convicted appellant of possession of a regulated firearm after being convicted of a disqualifying crime and wearing, carrying or transporting a handgun on his person. On July 14, 2021, the court entered a consent order, permitting appellant to file a belated notice of appeal. Appellant's belated notice of appeal was filed on August 3, 2021.

DISCUSSION

I. Preservation

Appellant asserts that he preserved his challenge to the admission of the jail call recording by raising a general objection when the call was played for the jury. He further contends that because the State sought admission of his statement as a tacit admission (also referred to as an adoptive admission), and the trial court admitted the statement on that

basis, the issue was "raised in" and "decided by" the trial court. He therefore contends that, pursuant to Rule 8-131(a), the issue is properly before this Court for review.

The State responds that appellant failed to preserve the argument he raises on appeal with respect to the admissibility of the jail call recording. Though appellant objected *in limine* to the admissibility of the call on hearsay grounds, the State argues that appellant did not object on that basis when the call was admitted into evidence. The State contends that appellant's objection at the time the call was admitted was confined to challenging the use of the typed transcription of the call as a demonstrative aid, and that defense counsel's statement "I still object" was not a general objection to the admission of the jail call recording. As we shall explain, we agree with the State that the substantive admissibility of the jail call was not preserved.

Prior to jury selection, the State moved *in limine* for the court to determine the admissibility of a portion of a jail call recorded while appellant was incarcerated. The State proffered that appellant had placed a phone call to a woman "who then place[d] a three-way call to another male" and that conversation between appellant and the unidentified male was admissible as non-hearsay. Appellant objected on grounds that 1) the use of the recording without the consent of the unidentified male speaker violated the Maryland wiretap rule[3] and 2) the statements of the unidentified male were hearsay. The prosecutor responded that the unidentified male's statements were necessary and admissible for

[3] Appellant does not raise this argument on appeal.

context and admissible as non-hearsay. Alternatively, the prosecutor argued that the statements were admissible under the exception to the hearsay rule for statements adopted as an adoptive admission. The court reserved ruling on the motion.

Before the prosecutor introduced the jail call recording into evidence, she requested the court's permission to use a typed transcript of the jail call as a demonstrative aid:

> [THE STATE]: . . . I was able to type up the transcription if I may provide copies to defense counsel, and may I approach, Your Honor, and I have a copy for the jurors as well.
>
> [DEFENSE COUNSEL]: I'm going to object to the jury being given a transcript, Your Honor.
>
> [THE STATE]: Well, it's demonstrative, Your Honor. I mean, it helps them, they don't have to take what --
>
> THE COURT: Here's what I'm going to do.
>
> [THE STATE]: -- is transcribed is true, but it helps them follow along.
>
> THE COURT: I will allow them to have it as the record is played, but I will take it away from them.
>
> [DEFENSE COUNSEL]: Well, Your Honor, my reason for objecting is this [is] one person's interpretation of what they heard on that tape, not the jury. So we're putting someone else's interpretation of what the words were that were said on the tape in front of the jury.
>
> [THE STATE]: And, Your Honor, transcripts are used at most times when recordings are played in front of the jury, transcripts are used --
>
> THE COURT: This is not my first case.

[THE STATE]: Right. So transcripts are used as a demonstrative aid[] and Your Honor can advise them that they do not have to take these words verbatim, they can listen to the tapes themselves and determine what they think is said, but this is just to aid them. So if Your Honor gives that instruction, this might not be -- you know, this one person's interpretation, it just aids in listening and then they can determine on their own what they really think it said or, I mean, that's the purpose of a demonstrative aide.

THE COURT: I think I'm going to overrule your objection, [defense counsel], and I will give that cautionary instruction. But I would take it away from them afterward.

When the State played the audio recording of the jail call for the jury, the court instructed the jury concerning use of the transcript, and defense counsel objected:

THE COURT: Okay. Members of the jury, the State will play this recording and the transcript that you'll be given is only one person's interpretation of the recording. That is the interpretation of the transcriber, which was [the prosecutor], correct?

[THE STATE]: Yes, Your Honor.

THE COURT: However, you have to place your own interpretation on it. And as I will tell you later, you can believe all, part [of] the testimony of any witness . . . . So the transcript is given to you for this immediate purpose of possibly identifying what is said, but you are the ultimate determiners of the fact as to what was said. [Defense counsel]?

[DEFENSE COUNSEL]: I still object, Your Honor.

THE COURT: Aside from your objection, is there anything else you would have me add?

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: In terms of the use of that paper?

[DEFENSE COUNSEL]: No, Your Honor.

Maryland Rule 4-323(a) provides, in pertinent part, that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *See also* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court."). "Th[is] requirement of a contemporaneous objection at trial applies even when the party contesting the evidence has made his or her objection known in a motion in limine[.]" *Wimbish v. State*, 201 Md. App. 239, 261 (2011), *abrogated on other grounds by State v. Davis*, 249 Md. App. 217 (2021).

We agree with the State that appellant's objection to the admissibility of the recorded jail call was limited to the use of the prosecutor's transcription of the call as a demonstrative aid. The only time defense counsel raised an objection to the admission of the jail call itself was during the State's motion *in limine* before trial began. After opening statements, the court and counsel again discussed the recording of the jail call. The court indicated that it was inclined to allow the jury to hear the jail call, and then discussed the acoustics of the courtroom as far as the jury being able to understand what was being said in the recording. During that discussion, defense counsel stated, "I'm going to object to the jury being given a transcript." Significantly, no objection was made as to substantive

admissibility of the jail call recording itself. The State introduced the jail call during Detective Wiczulis's testimony. Defense counsel requested at that time that the record reflect the start and end times of the portion of the full recording that the State was going to play for the jury. Detective Wiczulis testified concerning this information. Immediately before the recording was played, the court instructed the jury about the transcript, after which defense counsel stated, "I still object, Your Honor." The colloquy between the court and counsel immediately before defense counsel's statement "I still object" focused solely on whether the jury could use the transcript of the recording as a demonstrative aid; no mention was made as to the jail call's substantive admissibility. Despite multiple discussions of the jail call during the trial, defense counsel never suggested, as he had at the pre-trial motion *in limine* hearing, that the recording was inadmissible hearsay. Accordingly, appellant failed to preserve the admissibility of the jail call for our review. *See Reed v. State*, 353 Md. 628, 637 (1999) (noting a party's obligation to object to the admission of evidence at the time it is offered).

II. Admissibility of the Evidence

Even if we were to assume that the admissibility of the jail call was preserved, we would nonetheless conclude that the jail call recording was properly admitted. The court admitted the following portion of the jail call as an adoptive admission:

> [UNIDENTIFIED SPEAKER:] I was about to say yo because we both made the move it was a dumb move you know what I mean I didn't make you do it but you know what I mean.
>
> [APPELLANT:] I know.

[UNIDENTIFIED SPEAKER:] I was scared as f*** too, I was in the house the whole time.

Appellant contends that the trial court erred in admitting the recorded jail call into evidence as an adoptive admission because the State failed to show that the statement was made under circumstances where he would have disagreed with the statement or shown that he unambiguously adopted the statement. Appellant contends that his statement, "I know," was akin to "conversational throat-clearing" similar to "uh huh, yeah, or other pleasantries" which could not reasonably amount to an unambiguous adoption of the speaker's statement. Appellant further contends that the conversation was at odds with the State's theory of the case that Detective Wiczulis observed one person, not two people, standing in the doorway of the home.

The State counters that the conversation reflected in the recorded jail call was properly admitted as an adoptive admission of appellant. Alternatively, the State argues that the recorded jail call was not hearsay because it was not relevant for its truth, but for the non-hearsay purpose of showing its effect on appellant.

The decision to admit evidence ordinarily lies within the control and sound discretion of the trial judge. *Gordon v. State*, 431 Md. 527, 535 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 7 (2005)). Because a trial judge has no discretion to admit hearsay that does not fit within an exception, we review *de novo* a court's legal determination of whether evidence is hearsay, and whether it is admissible under a hearsay exception. *Id.* We review for clear error any factual findings supporting the court's ruling as to the admissibility of hearsay evidence. *Id.*

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. Though hearsay evidence is generally inadmissible, Rule 5-803(a)(2) provides an exception for statements "offered against a party and . . . of which the party has manifested an adoption or belief in its truth[.]" Rule 5-803(a)(2). An adoptive admission occurs when a person "remains silent in the face of accusations that, if untrue, would naturally rouse the accused to speak in his or her defense." *Key-El v. State*, 349 Md. 811, 817 (1998) (quoting *Henry v. State*, 324 Md. 204, 241 (1991)), *overruled on other grounds*, *Weitzel v. State*, 384 Md. 451 (2004). An adoptive admission has also been found in circumstances where a reasonable person who disagreed with the speaker's statement would have responded and disputed the statement. *See e.g.*, *Gordon*, 431 Md. at 548 (holding that there was sufficient evidence for the jury to conclude that Gordon's giving of his driver's license to the detective was an adoption or belief in the truth of the information listed on the license); *Darvish v. Gohari*, 130 Md. App. 265, 270, 279 (2000) (holding that "jurors were entitled" to consider adoptive admission where defendant did not dispute defamatory statements attributed to him about the plaintiff's dishonesty), *aff'd on other grounds*, 363 Md. 42 (2001); *Ewell v. State*, 228 Md. 615, 619–20 (1962) (statement was admissible where defendant made no protest in response to statement that "we just yoked a man").

In most situations, "a trial court's decision about whether a person made an adoptive admission will be factual[,]" particularly where "there are disputed facts about whether a

question was asked, what was said, and what words or non-verbal conduct were involved in reply." *Gordon*, 431 Md. at 539–40. In determining whether an adoptive admission was erroneously admitted at trial, we focus not on whether the evidence proved that the statement was, in fact, unambiguously adopted, but rather, "whether 'there is sufficient evidence from which a jury *could* reasonably conclude that the defendant unambiguously adopted another person's incriminating statement.'" *Id*. at 547 (quoting *Blackson v. United States*, 979 A.2d 1, 8 (D.C. 2009)).

First, we agree with appellant that the recorded conversation between appellant and the unidentified male was hearsay. The out-of-court statements of the unidentified male were offered by the State to show that he and appellant were "both" cognizant of their "dumb move" of stashing the handgun in the house. Appellant's response was offered to show that he had adopted the unidentified male's incriminating statement. The conversation was therefore inadmissible unless it qualified under the adoptive admission exception to the hearsay rule.

For a statement to be admitted as an adoptive admission, certain foundational requirements are required, specifically: whether the defendant heard and understood the other party's statement, whether the defendant had an opportunity to respond, and whether the circumstances were such that a reasonable person who disagreed with the statement would have refuted it. *Darvish*, 130 Md. App. at 278 (quoting *Key-El*, 349 Md. at 818–19). In this case, because the statements occurred during a recorded jail call, there is no uncertainty about the content of the conversation. Moreover, appellant knew, or should

have known, that the conversation was recorded, and as appellant points out, he also knew that his statements in the call could be used against him. Under these circumstances, the evidence supports a reasonable inference that a person in appellant's position who disagreed with the speaker's statements that "we both made . . . a dumb move" but "I didn't make you do it" and "I was scared" because "I was in the house the whole time" would have disassociated himself from the statements or disputed them. Appellant did neither. Rather, his response, "I know" suggested an understanding of—and possibly agreement with—the speaker's statements. Whether appellant's response amounted to an unambiguous adoption of the speaker's statement was a question for the jury to decide. *Gordon*, 431 Md. at 547 (quoting *Blackson v. United States*, 979 A.2d 1, 7 (D.C. 2009)).

Appellant's contention that the unidentified speaker's statements were at odds with the State's theory of the case that he was the only person observed in the doorway of the vacant home is not determinative of the admissibility of the statement. Again, it is the province of the jury, not the appellate court, to resolve any conflicting evidentiary inferences. *Neal v. State*, 191 Md. App. 297, 315 (2010). We conclude that the foundational requirements for an adoptive admission were established and the trial court did not err in admitting evidence of the recorded jail call, allowing the jury to assess whether appellant unambiguously adopted the statements in the call.

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