UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0887

September Term, 2014

PATRICK F. FLEMING

v.

STATE OF MARYLAND

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: August 11, 2015

Patrick Fleming, appellant, was convicted, by a jury sitting in the Circuit Court for Worcester County, of disorderly conduct. The court imposed a suspended sentence of sixty days' imprisonment, along with two years of supervised probation, and ordered Fleming to pay a $500 fine and $155 in court costs. This appeal followed.

Fleming raises the following questions for our review:

I. Did the trial court err in refusing to consider four, supplemental, pretrial motions that it deemed to have been untimely filed?

II. Was the evidence sufficient to sustain appellant's conviction for disorderly conduct?

For the reasons which follow, we shall affirm the judgments of the court.

FACTS AND PROCEEDINGS

In the early morning hours of August 10, 2013, Vincent Caravello called the front desk of the Princess Bayside Hotel, where he had rented a room, to ask that one of his guests, Fleming, be forced to leave. At 1:45 AM, Dominick Steiner, one of the hotel's security officers, was sent to Caravello's room to respond to the call. When Steiner arrived outside the room, he could hear that people were inside arguing loudly and yelling profanities. Subsequently, he was let into the room by Caravello, who stated that he wanted Fleming to be removed. Caravello advised Steiner that Fleming was drunk and looking to fight the other occupants of the room. Steiner asked Fleming to gather his belongings and leave, Fleming refused. At that point, Steiner told Fleming that if he did not leave the room, then the police would be called, Fleming still refused. Approximately five minutes later,

Officers Andrew Beck and Matthew Stead, of the Ocean City Police Department,[1] responded to the room; they had heard the shouting of profanities as they approached. When they entered the room, Officer Stead saw Fleming "aggressively" "pointing and shouting profanities" as he stood over Caravello, who was laying on a bed. Officer Stead smelled the scent of alcohol coming from Fleming and when he attempted to engage him, Fleming continually shouted over the officer. Despite Officer Stead's repeated requests for Fleming to produce some identification and leave the room, Fleming did not comply. Instead, Fleming yelled profanities at Officer Stead and stated that "he [knew] his rights and . . . [wanted] a judge[.]" Subsequently, Officer Stead grabbed Fleming by the arm in an attempt to remove him from the room, Fleming resisted the officer and continued to refuse to comply with requests that he leave the room. At some point, the officers succeeded in getting Fleming to leave the room, however, Fleming continued to shout profanities at the officers while in the hallway. While this was occurring, there were three other individuals in the hallway, two who "star[ed] wide-eyed" at the situation and one who stated that Fleming's actions were making him "uncomfortable." The officers then placed Fleming under arrest for disorderly conduct. The arrest was not without incident; Fleming resisted the officers'

[1]At trial, both officers testified that they were only seasonal employees of the Ocean City Police Department.

attempts to put handcuffs on him and so they had to brace him against a wall in order to do so. Later, Fleming was formally charged with one count of disorderly conduct.[2]

On the day of Fleming's trial, immediately before it was to commence, Fleming, who proceeded *pro se*, raised several motions. The subjects and relevant substance of the motions were as follows:

> **Motion 1.**
>
> **Motion to Dismiss Disorderly Conduct offense Due to unavailability of the accuser victim, thereby violating the Due Process Clause and Confrontation Clause (Rule 4-252(d)).**
>
> **Stated Grounds**: The Statement of Probable Cause contains hearsay by an out-of-court and irretrievable declarant. A guilty conviction cannot be predicated on the disturbance of a person whom the government could have and should have taken reasonable steps to preserve their identity and availability for cross-examination under oath. The failure to ensure reasonable due process for Defendant would violate the fundamental rights contained in the Confrontation Clauses and Due Process Clauses embodied in the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution and the Maryland Constitution's Declaration of Right[s] pursuant to Art. 2, Art. 21 (Rights of the Accused) and Art. 24 (Due Process).
>
> Absent a few narrow exceptions to these fundamental Constitutional Rights not applicable to the instant matter, few if any cases exist whereas [*sic*] the government served as both enforcer and surrogate for the accuser or victim. This would set a dangerous precedent for allowing police to be both the accuser of a crime and the sole witness without producing an actual complainant or victim.
>
> * * *

[2]Fleming was also charged with one count of possession of a controlled dangerous substance, however, that charge was nolle prossed at trial.

Motion 3.

Motion to Dismiss Disorderly Conduct Offense due to the Disorderly Conduct Statute . . . being unconstitutionally vague and ambiguous (Rule 4-252(d))

Stated Grounds: The statute is unconstitutionally vague, ambiguous, not narrowly drawn and limited to define and punish specific conduct, not carefully drawn so as not to unduly impair liberty of expression, and places unbridled power and arbitrary discretion to its enforcers therefore the statute on its face is violative of the following articles of the Maryland Constitution: Art. 2 (obligation to establish, amend, and enforce laws pursuant to the U.S. Constitution); Art. 8 (Separation of Powers) the purpose of which is "*an attempt to preserve individual liberty in response to tyrannical leadership throughout history*" (see footnote 3 Md. Const.); Art. 10 (Freedom of Speech and Debate); Art. 24 (Due Process); Art. 40 (Freedom of Press and Speech), "*[allowing citizens] . . . to speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that privilege."* (the "abuse" thereof subject to arbitrary discretion); and Art. 42 (*"That the provisions of the Constitution of the United States, and of this State, apply, . . . and departure therefrom, or violation thereof . . . is subversive of good Government, and tends to anarchy and despotism."*; and violative of the First and Fourteenth Amendments of the U.S. Constitution pursuant to Chaplinsky v. New Hampshire, 315 US 568 . . . holding that . . . *"It is now clear that 'Freedom of speech and freedom of press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action."* Lovell v. Griffin, 303 U.S. 444, 450 . . .

Further, a conviction under this statute without requiring the accuser(s) to be available for cross examination under oath by the accused would be violative of the Due Process Clauses and Confrontation Clauses of the Md. and U.S. Constitution[s].

* * *

> **Motion 4.**
>
> **Motion to Dismiss Disorderly Conduct . . . Offense and failure to provide a Bill of Particulars.**
>
> **Stated Grounds:** Defendant has made several formal and informal attempts to obtain information necessary to his defense. These attempts included emails, phone calls, discovery motions, and pretrial motions stating the purpose and necessity for Defendant to prepare his defense and trial strategy thereto. . . .
>
> * * *
>
> **Motion 5.**
>
> **Motion to Dismiss for Failure to have a Speedy Trial**
>
> **Stated Grounds:** Defendant has made good faith efforts to resolve this matter and had his motions been reviewed, it is likely this matter would've been dispensed with sooner.

(emphasis in original).

The court directed the clerk to file Fleming's motions, but declined to consider them because they were "not timely filed pursuant to the Maryland Rules."

After trial commenced, and after the close of the State's case, the following colloquy occurred with respect to Fleming's motion for judgment of acquittal:

> [FLEMING]: At this time I would like to submit my motion, a motion for acquittal on insufficient grounds to sustain a conviction and along with the items that we discussed earlier today.
>
> [THE COURT]: What items are those?
>
> [FLEMING]: The entry and the seizure and the removal and that led to the arrest of [*sic*] disorderly conduct and the unavailability of the actual accused,

> my accuser . . . the person sitting on the bench who said they felt uncomfortable. They could have taken their name, they should have taken their name, and that person could be here today for me to confront them.

The motion was denied.

Thereafter, Fleming gave the following testimony as to the events in question:

> I checked into the hotel with [Caravello] and two other gentlemen. That afternoon when I arrived they requested my photo identification, a credit card, I was issued a keycard along with the other three guests. And I paid [Caravello] in cash, there was no way for all four of us to put four credit cards in at one time to become the sole ruler of the room. I subsequently registered at that hotel again and there was no way to register four people all at once online which is how [Caravello] rented the room, it was done online.
>
> I was involved in an altercation with Caravello, that's why I was distressed, visibly angry, and I did feel it was unfair that [Caravello] was using that technicality to throw me out of the room. And it just seemed unfair patently and I was very upset about it.
>
> I do not believe [Caravello] . . . was actually disturbed and there's no way of really verifying that to know in my opinion beyond a reasonable doubt if that person was disturbed.

On cross-examination, Fleming admitted that, prior to the incident in question, he "drank some beers" at a nearby night club. Subsequently, during redirect examination, Fleming asserted that although Officer Stead had asked him if he wished to "press charges" against Caravello, due to the altercation that had occurred, he declined.

Following the close of all the evidence, Fleming did not renew his previous motion for judgment of acquittal. Ultimately, the jury found Fleming guilty of disorderly conduct.

Additional facts will be provided below.

DISCUSSION

I

Fleming contends that the court erred by denying his pretrial motions on the ground that they were untimely. He asserts that although his motion regarding a *Miranda* suppression issue may have been untimely, under Maryland Rule 4-252(b), his four other motions were permitted to be raised any time before trial under Rule 4-252(d). As such, Fleming insists that he "was entitled to have the trial court consider four of his supplemental motions, on their merits."

With respect to the timeliness and content requirements for motions before the trial court, Rule 4-252 provides, in pertinent part:

> (a) In the circuit court, the following matters shall be raised by motion in conformity with this Rule and if not so raised are waived unless the court, for good cause shown, orders otherwise:
>
> (1) A defect in the institution of the prosecution;
>
> (2) A defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense;
>
> (3) An unlawful search, seizure, interception of wire or oral communication, or pretrial identification;
>
> (4) An unlawfully obtained admission, statement, or confession; and
>
> (5) A request for joint or separate trial of defendants or offenses.
>
> (b) A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c), except when discovery

> discloses the basis for a motion, the motion may be filed within five days after the discovery is furnished.
>
> * * *
>
> (d) A motion asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time. Any other defense, objection, or request capable of determination before trial without trial of the general issue, shall be raised by motion filed at any time before trial.
>
> (e) A motion filed pursuant to this Rule shall be in writing unless the court otherwise directs, shall state the grounds upon which it is made, and shall set forth the relief sought. A motion alleging an illegal source of information as the basis for probable cause must be supported by precise and specific factual averments. Every motion shall contain or be accompanied by a statement of points and citation of authorities.

Moreover, in *Denicolis v. State*, 378 Md. 646, 660 (2003), the Court of Appeals explained:

> Rule 4-252(e) requires that a motion . . . "state the grounds upon which it is made" and "contain or be accompanied by a statement of points and citation of authorities." The obvious and necessary purpose of that requirement is to alert both the court and the prosecutor to the precise nature of the complaint, in order that the prosecutor have a fair opportunity to defend against it and that the court understand the issue before it.
>
> . . . *If a motion fails to provide either a factual or legal basis for granting the requested relief, it cannot be granted*. Recognizing the time constraints under which defense counsel and *pro se* defendants often operate, however, some courts have routinely overlooked the impermissible generality of such motions and have permitted the defendant to make the complaint more specific at, or in preparation for, a hearing on the motion. Although that practice is not what the Rule anticipates and is not to be encouraged, we have not disturbed the discretion of the trial courts to permit defendants to supplement unsupported allegations in the motion at or before the hearing, at least where the State is

> not unduly prejudiced by being called upon to respond immediately to allegations of which it had no prior notice.

(Emphasis added).

In this case, the trial court denied the motions on the basis that they were untimely. Although most of the motions in question were not "mandatory motions" that would have been subject to the timeliness requirement in Rule 4-252(b), we are persuaded that they, nonetheless, should have been denied because they did not sufficiently state legal or factual bases on which they could have been granted. Md. Rule 4-252(e); *see Elliott v. State*, 417 Md. 413, 435 (2010) ("'[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm.'") (quoting *Robeson v. State*, 285 Md. 498, 502 (1979)).

In "Motion 1," Fleming merely asserted, in pertinent part:

> The Statement of Probable Cause contains hearsay by an out-of-court and irretrievable declarant. A guilty conviction cannot be predicated on the disturbance of a person whom the government could have and should have taken reasonable steps to preserve their identity and availability for cross-examination under oath.

For those reasons, he claimed that his rights of due process and confrontation were being violated. Fleming, however, did not identify the "hearsay" statement with which he took issue and did not make any argument, or cite any authority, which spoke to the conclusion that "hearsay" in a statement of probable cause required pretrial dismissal of a

charge of disorderly conduct. Moreover, Fleming's motion did not contain argument or authority with respect to why the rules on hearsay or his rights under the Confrontation Clause would have been triggered before the State had presented any evidence against him. *See* Md. Rule 5-801(c) ("'Hearsay' is 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."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) ("[T]he right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination . . . [it] does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.") (Citation omitted).[3]

In "Motion 3," Fleming contended that the disorderly conduct statute was "unconstitutionally vague, ambiguous, not narrowly drawn and limited to define and punish specific conduct, not carefully drawn so as not to unduly impair liberty of expression, and places unbridled power and arbitrary discretion to its enforcers[.]" In support of that claim, Fleming merely cited various portions of the Maryland and United States constitutions, of which he claimed the statute ran afoul. The motion did not contain any argument which specified the statutory language Fleming believed to be vague or ambiguous, nor did it

[3] Fleming also made his confrontation argument at trial. *See* page 5-6 *supra.*

contain any argument as to how the statute's wording allowed for overly broad construction and application.

In "Motion 4," Fleming contended that he "made several formal and informal attempts to obtain information necessary to his defense" and that the State failed to provide him with a bill of particulars. Fleming did not specify the information he requested in the noted communications and did not refer to any responses, or lack thereof, from the State, adequate or not. Furthermore, he did not explain how his trial preparation was compromised by his requests for information going unfulfilled, and although he claimed not to have received a bill of particulars, he did not argue that he made a timely request for one. *See* Md. Rule 4-241(a).[4]

In Fleming's "Motion 5," he appears to have asserted that he was denied a speedy trial by virtue of the fact that although his motions were "good faith efforts to resolve this matter[,]" they were not reviewed and so his case was not "dispensed with sooner." In his motion he did not state which motions he was referring to, how it was that they did not receive appropriate review, or why such lack of review would constitute a denial of his right

[4] Section (a) states:

> Within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213(c), the defendant may file a demand in circuit court for a bill of particulars. The demand shall be in writing, unless otherwise ordered by the court, and shall specify the particulars sought.

to a speedy trial. More importantly, his motion did not include information regarding his assertion of his right to a speedy trial, the length of the purported delay, or any prejudice he suffered as a result of the same. *See Lloyd v. State*, 207 Md. App. 322, 327 (2012) (noting that the factors to be considered in determining whether an individual's right to a speedy trial was violated are: "(1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant.") (Citation omitted).[5]

In our assessment, each of the motions in question failed to assert a factual or legal basis by which they might have been granted, as required by Rule 4-252(e). Moreover, even if Fleming had provided more in the way of argument, we would find that none of his objections had legal merit. Accordingly, although denial of Fleming's motions on the ground that they were untimely may have been erroneous, we shall, nevertheless, affirm their denial by the circuit court. *Elliott*, 417 Md. at 435.

II

Fleming contends that "the entire content of [his] expressions [were] based on his grievance over the injustices he felt were being imposed upon him" and that "[those] grievances were punctuated by his excited utterances, in which he repeatedly used a single

[5] The State notes that Fleming asked for and obtained two postponements, prayed a jury trial, and then failed to appear on the first trial date because he was hospitalized. Such a record does not support a speedy trial claim.

expletive ('f***')." He asserts that when the subject expletive is "used alone and not as a conjunctive word, it is not necessarily obscene" and, while distasteful, it "is protected by the First Amendment and explicitly recognized as protected speech in *Cohen v. California*, 403 U.S. 15 (1971)." Moreover, Fleming claims that his words were not "incendiary, injurious, irreverent, insulting, lascivious, lewd, libelous, obscene, or profane" and that they "were not intended to nor did they incite violence, exhort a breach [of] the peace, appeal to prurient interests, nor were they 'fighting words.'" He also insists that he "was arrested for disturbing a person in their shared motel room" despite the fact that a "number" of people must be disturbed in order for actions to amount to disorderly conduct. As such, he requests reversal of the trial court's judgment of conviction. .

As a threshold matter, we note that Fleming's contentions regarding insufficiency of evidence were not preserved for our review. Maryland Rule 4-324 provides, in pertinent part:

> (a) A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.
>
> * * *
>
> (c) A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

Here, Fleming made a motion for judgment of acquittal after the close of the State's case; his motion was denied. Subsequently, Fleming offered evidence in the form of his own testimony. Fleming's presentation of a defense case constituted the withdrawal of his previous motion for judgment of acquittal. Md. Rule 4-324(c); Md. Code Ann. (2008 Repl. Vol.), § 6-104(a)(3) of the Criminal Procedure Article ("C.P.") ("If the defendant offers evidence after making a motion for judgment of acquittal, the motion is deemed withdrawn."). Given that Fleming did not renew, at the close of all the evidence, his earlier motion for judgment of acquittal, we must conclude that any claim of evidentiary insufficiency was waived and, thus, not preserved for appellate review.[6] *See Haile v. State*, 431 Md. 448, 464 (2013) ("'Together, [C.P. § 6-104] and [Md. Rule 4-324] have been construed to preclude appellate courts of this state from entertaining a review of the sufficiency of the evidence, in a criminal case tried before a jury, where the defendant failed to move for judgment of acquittal at the close of all the evidence.'") (quoting *Ennis v. State*,

[6]In addition, we note that Fleming's insufficiency argument with respect to the fact that the content of his speech was protected and, therefore, could not serve as the basis for a disorderly conduct conviction, was also unpreserved because it was raised for the first time on appeal. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); Md. Rule 4-324(a).

306 Md. 579, 585 (1986)). Accordingly, we decline to address Fleming's sufficiency challenge.

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