Circuit Court for Washington County
Case No. C-21-CR-19-000450

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 926

September Term, 2020

HAROLD SMITH

v.

STATE OF MARYLAND

Gould,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: September 14, 2021

In the Circuit for Washington County, Harold Smith, the appellant, was convicted in a bench trial of driving while under the influence of alcohol ("DUI") and related traffic offenses. After sentence was imposed, he noted this appeal, raising three questions for review, which we have rephrased slightly:

> I. Did the trial court err by admitting into evidence Smith's unredacted driving record?
>
> II. Did the trial court err by admitting into evidence Smith's hospital records when they were not properly authenticated?
>
> III. Did the trial court violate Smith's federal and state constitutional rights of confrontation by admitting into evidence Smith's lab results when the person who drew his blood and the analyst who analyzed his blood did not testify at trial?

For the reasons that follow, we shall affirm the judgments.

FACTS AND PROCEEDINGS

Shortly after midnight on March 2, 2019, Dylan Way, a motorist on Leitersburg Pike in Washington County, noticed a red Jeep Cherokee lodged against a fence off the side of the road. Its airbags had deployed. Way called "911" and told the dispatcher that, in his opinion, the Jeep had driven "off the road." He later identified Smith as the driver of that Jeep.

When Way first encountered the Jeep, Smith was sitting in the driver's seat. As Way approached to see if Smith needed assistance, Smith exited the vehicle, "apologized, and then walked down the street."

Trooper Daniel Rishell, of the Maryland State Police, received a call that there had been a single-vehicle accident and responded to the scene. Upon arriving, he saw Smith

"laying on the ground" in the snow, wearing only a tee shirt, shorts, and black tennis shoes. Trooper Rishell approached Smith and asked whether he was okay. Smith responded with an obscenity, asked the trooper "to pull his finger," and finally called the trooper a "clown" and a "dummy."

Emergency Medical Technicians ("EMTs") arrived, helped Smith off the ground, and put him in an ambulance. The EMTs and Trooper Rishell asked him some questions. While doing so, Trooper Rishell "started to detect a strong odor of an alcoholic beverage coming from [Smith's] breath as he spoke." Smith told the EMTs that he had had "six Rolling Rock beers" to drink. The EMTs recovered a set of keys from Smith's pocket that went to the Jeep that was lodged against the fence.

After Smith informed the EMTs that he had high blood pressure, he was transported to Meritus Medical Center. During that trip, Trooper Rishell asked Smith whether he would submit to a horizontal gaze nystagmus test. Smith refused. Smith arrived at the hospital and immediately was assessed by Christopher Bjork, M.D., at about 1 a.m. Smith was seen to be highly intoxicated, randomly yelling the names of politicians, and was acting aggressively. At 1:30 a.m., he was admitted to the hospital, and at 1:50 a.m. Dr. Bjork ordered blood to be drawn for a number of tests, including one to determine blood alcohol concentration ("BAC"). The blood was drawn five minutes later.

Smith's aggressive behavior included attempting to hit a member of the hospital staff, kicking a security guard, and also kicking a State trooper in the torso.[1] At 2:05 a.m., Trooper Rishell and another trooper read Smith a DR-15A advice-of-rights form and asked whether he would consent to have his blood drawn. He refused. The BAC test came back later, showing a BAC of 0.28.

In the District Court of Maryland for Washington County, Smith was charged with two counts of second-degree assault and a host of traffic offenses, including driving under the influence of alcohol ("DUI"), driving while impaired by alcohol ("DWI"), and driving without a license.[2] After Smith demanded a jury trial, the case was transferred to the Circuit Court for Washington County.

Ultimately, Smith waived his right to a jury trial and elected to be tried by the court. (At the time, jury trials were suspended due to the COVID-19 pandemic). At the conclusion of the one-day trial, the court found Smith guilty of DUI, DWI, driving without a license, negligent driving, and failure to obey a traffic control device.[3] The court

[1] That trooper, identified in the record only as "Trooper Schmidt," did not testify at trial.

[2] In addition, Smith was charged with failure to display his driver's license to a uniformed police officer, driving on a revoked license, driving on a suspended license, driving on a license suspended for failure to pay child support and fines, negligent driving, failure to obey a traffic control device, failure to remain at the scene of an accident involving bodily injury, failure to notify the owner of an unattended vehicle of property damage, and failure to provide his insurance information.

[3] The court found Smith not guilty of the assault charges and of failure to display his license on demand, failure to remain at the scene of an accident involving bodily injury, (continued)

sentenced him to three years' incarceration, with all but 18 months suspended, for DUI, a consecutive one-year term for driving without a license, all suspended, as well as fines and court costs. This timely appeal followed.

We shall include additional facts as necessary to our analysis of the issues.

DISCUSSION

I.

Smith contends the trial court erred by admitting into evidence his unredacted driving record because it contained his "extensive history of irrelevant prior convictions for motor vehicle offenses during the past" two decades. He asserts the information in his record was so prejudicial that "his conviction was a foregone conclusion."

The State counters that, even if we were to assume the trial court erred by admitting the unredacted driving record into evidence, the error was harmless beyond a reasonable doubt. The State asserts that there is a presumption that a judge presiding in a bench trial understands not to consider inadmissible evidence, such as that contained in the unredacted driving record in this case. That presumption was borne out, the State maintains, by the fact that the judge granted Smith's motion for judgment of acquittal on two counts of second-degree assault and several traffic offenses. Moreover, the State asserts, the judge expressly stated that he "did not look back and look through the details [of the driving record] earlier."

failure to notify the owner of an unattended vehicle of property damage, and failure to provide his insurance information.

In *McCallum v. State*, 81 Md. App. 403, 419 (1990), *aff'd on other grounds*, 321 Md. 451 (1991), we held that a trial court had committed reversible error in admitting into evidence, in a jury trial, the defendant's unredacted driving record, which included "an extensive list of prior motor vehicle violations" that only served "to show [the defendant's] propensity to commit such infractions." Here, Smith offered a redacted copy of his driving record into evidence, but the court declined to admit it, instead opting to admit, over objection, the unredacted record. Smith correctly points out that the unredacted driving record contains numerous prior, irrelevant violations. Clearly, the court erred in allowing the unredacted driving record to come into evidence. Accordingly, we must determine whether that error was harmless.

The test for harmless error in Maryland criminal cases was stated in *Dorsey v. State*, 276 Md. 638 (1976), and has been repeated (and applied) countless times since:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that 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.

Id. at 659 (footnote omitted).

This appeal, however, is from a bench trial. As we observed in *Nixon v. State*, 140 Md. App. 170, 189 (2001), there is a "clear distinction" between bench trials and jury trials

in assessing whether a trial court error is harmless.[4] In reviewing a conviction following a jury trial, we must be able to declare, beyond a reasonable doubt, that the error had no influence on the jury's verdict. *Dorsey*, 276 Md. at 659. On review following a bench trial, however, "the issue is whether or not the judge relied on improper evidence" and we give deference to "a trial judge's specific statement on the record that the court was not considering certain testimony or evidence."[5] *Nixon*, 140 Md. App. at 189 (citing *Williams v. Higgins*, 30 Md. 404, 407 (1869)).

Here, there is nothing to rebut the presumption that the trial judge knew and followed the law, *i.e.*, that in deciding the matters before him he did not rely upon portions of Smith's driving record that were irrelevant. Moreover, the record makes clear that the trial judge in fact did not rely upon those parts of Smith's driving record. In announcing the verdict, the judge made no mention of the driving record whatsoever. Immediately afterward, in response to the prosecutor's assertion that Smith was subject to an enhanced sentence as a repeat offender, the judge said that he "did not look back and look through the details [of the driving record] earlier." We give deference to the "specific statement on

[4] In *Williams v. Illinois*, 567 U.S. 50 (2012), Justice Alito, in a plurality opinion announcing the Court's judgment, similarly observed that "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Id.* at 69 (Alito, J., plurality op.) (quoting *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam)).

[5] This does not mean that the standard to establish harmless error is different in a bench trial as compared to a jury trial. Rather, it means that generally it is easier for the State to meet its burden to show that an error is harmless beyond a reasonable doubt in a bench trial, especially where, as here, the judge expressly disclaims taking the erroneously admitted evidence into consideration.

the record" by the judge that he did not consider the inadmissible details of Smith's driving record. *Id.* Finally, the judge acquitted Smith of six of the charges, which hardly lends support to his assertion that the erroneous admission of the unredacted driving record rendered his conviction "a foregone conclusion." The trial court's error was harmless beyond a reasonable doubt.

II.

Smith contends the trial court erred in admitting into evidence his hospital records. He claims that, "due to the lack of identification of the individuals who actually drew [his] blood, who performed the testing, and who analyzed the results, the custodian of records had no basis by which to know whether the person(s) who made the records actually had the requisite knowledge." Therefore, he asserts, "the records were not properly authenticated as business records and should not have been admitted."

The State counters that this issue is not preserved for review because at trial Smith objected based on an alleged violation of his right to confrontation, not on lack of proper authentication. In the alternative, the State maintains that Smith misconstrues the requirements for authentication of business records and that the custodian's testimony at trial more than satisfied the applicable procedural requirements.

We begin with preservation. On September 10, 2019, Smith was served with the State's notice of intent to introduce at trial his certified medical records as

self-authenticated business records, under Rule 5-902(b).[6] At the time of trial, that Rule provided, in relevant part:

> **(b) Certified Records of Regularly Conducted Business Activity.**
>
> (1) *Procedure.* Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803 (b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence, (A) the proponent (i) notifies the adverse party of the proponent's intention to authenticate the record under this subsection and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

On January 22, 2020, well beyond the five-day limit provided by the Rule, Smith filed a written objection to the State's notice of intent, asserting that the records the State wished to introduce "were received, prepared, obtained, and/or kept under circumstances which do not satisfy standards of authenticity," do not "meet the standards of Maryland Rule 5-803(b)(6)," and therefore are "inadmissible as a condition precedent to self-authentication." Five days later, the circuit court issued a written order overruling Smith's objection.

[6] The Court of Appeals has adopted a new version of Rule 5-902, effective October 1, 2021. *See* 207th Rules Order, dated Jul. 8, 2021 (available at https://www.mdcourts.gov/sites/default/files/rules/order/ro207.pdf) (last visited Aug. 31, 2021). All versions of the rules cited in this opinion are those in effect at the time of Smith's trial.

At trial, the State called John Gregory Newby, M.D. as an expert witness. He was under contract with Meritus Health to conduct "oversight of the clinical laboratories as well as . . . diagnostic activities that a pathologist would perform," such as "interpretation of laboratory tests, reading anatomic pathology samples, making diagnoses therefrom, and overall oversight and administration of the laboratory services for Meritus Health." After Dr. Newby explained the protocols for a medically indicated blood draw and analysis, the State sought to move Smith's hospital records into evidence. The records were accompanied by a certification, executed under penalty of perjury by the hospital's custodian of records, Beverly Heath, stating:

> (a) that I am duly authorized to certify medical records for Meritus Medical Center, and Urgent Care Antietam Health;
>
> (b) that the records attached hereto are true and correct copies of the records pertaining to the above referenced patient, and;
>
> (c) that, said records were prepared at or near the time of the occurrence of the matters set forth therein, by, or from information transmitted by, a person with knowledge of these matters, and;
>
> (d) that, all records were made, kept, and maintained in the course of regularly conducted business activity and by the regularly conducted business activity as a regular practice.

Smith's counsel objected, asserting that "we did file on behalf of Mr. Smith a demand for the presence of the chemist, the analyst, the phlebotomist, and any person in the chain of custody of the evidence," and "[w]e just found out that [Dr. Newby] is not the individual who tested the blood." The judge asked, "You don't have any objection on the records custodian issue that she mentioned?" Defense counsel replied, "I had filed my objections, but with all due respect they were overruled by the Court previously." Later,

defense counsel expressed a preference "to cross examine the person who actually drew the blood" and "the person who analyzed the blood." And further, defense counsel insisted:

> [T]his expert for the State, is someone who's never seen my client, did not draw the blood, did not analyze the blood, who's reading a report and [the prosecutor] wants you to infer from that that everything that he's talking about is reliable when he actually has no personal knowledge of any of it. He's just reading a report.

We agree with the State that the defense objection to the admission of Smith's medical records was based on confrontation, not authentication, as Smith now argues. Accordingly, this issue is not preserved. *See*, *e.g.*, *Klauenberg v. State*, 355 Md. 528, 541 (1999) (stating that "when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal").

Even if this issue were preserved for review, Smith would fare no better. "Generally, hospital records may be admitted under the business records exception to the hearsay rule." *State v. Bryant*, 361 Md. 420, 430 n.5 (2000). "In order for hospital records to be considered records of regularly conducted business activity, however, and therefore presumptively reliable and trustworthy, the records must be generated as part of the hospital's regular course of treatment—i.e., pathologically germane to the patient's care and not developed for the purposes of litigation." *Id.* (citations omitted).

Rule 5-806(b)(6) makes admissible (despite the hearsay rule) a "memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses"; "made at or near the time of the act, event, or condition, or the rendition of the diagnosis"; "by a person with knowledge or from information transmitted by a person with

knowledge"; "made and kept in the course of a regularly conducted business activity"; and "the regular practice of that business was to make and keep the memorandum, report, record, or data compilation." Rule 5-901(a) provides that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Certain types of evidence, such as certified records of regularly conducted business activity, may be self-authenticating. Md. Rule 5-902(b).

"The threshold of admissibility" for authentication is "slight." *Jackson v. State*, 460 Md. 107, 116 (2018) (citation omitted). We review a circuit court's decision that evidence is properly authenticated for abuse of discretion. *Donati v. State*, 215 Md. App. 686, 709, *cert. denied*, 438 Md. 143 (2014).

Here, the custodian of records averred by affidavit that the records in question were "true and correct copies" of Smith's medical records; that they "were prepared at or near the time of the occurrence of the matters set forth therein, by, or from information transmitted by, a person with knowledge of these matters"; and that they "were made, kept, and maintained in the course of regularly conducted business activity and by the regularly conducted business activity as a regular practice." This was more than sufficient to satisfy the State's "slight" burden to show that the records were what their proponent claimed them to be. *Compare with Bryant*, 361 Md. at 428-29 (holding that a toxicology report was not properly authenticated because the records custodian had failed to certify that it "was made at or near the time of the occurrence of the matters that it sets forth by a person with knowledge of those matters or that it was made and kept by the regularly conducted

business activity as a regular practice," and the purported certification had been made without an "oath subject to the penalty of perjury"). The trial court did not err in admitting the records as authentic.

III.

Smith last contends that his federal and State constitutional rights of confrontation were violated by the admission of the medical records documenting the results of his BAC test shortly after the accident when the phlebotomist who drew his blood and the laboratory analyst who tested his blood were not called to testify at trial.

The State counters that these medical records were not "testimonial hearsay," as that term has been used in case law interpreting the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny. According to the State, the blood alcohol test was ordered primarily for treatment purposes, and its potential evidentiary purpose was ancillary at best. Consequently, under the "primary purpose" test (which we shall discuss below), the evidence was not "testimonial hearsay."

"The Sixth Amendment, applicable to the states through the Fourteenth Amendment, guarantees that, in 'all criminal prosecutions,' an accused 'shall enjoy the right . . . to be confronted with the witnesses against him[.]'" *Rainey v. State*, 246 Md. App. 160, 171, *cert. denied*, 468 Md. 556 (2020) (quoting U.S. Const. Amend. VI).[7]

[7] We note that the phlebotomist and the laboratory analyst are not in the same position under the Confrontation Clause, as Smith appears to assume. The phlebotomist is akin to a one who collects a DNA sample by applying a swab to a subject, rather than a forensic scientist who analyzes the DNA sample that has been collected. We are unaware of any decisions holding that an evidence technician is required to testify for confrontation (continued)

Article 21 of the Maryland Declaration of Rights provides a similar guarantee. *Leidig v. State*, ___ Md. ___, No. 19, Sept. Term, 2020, 2021 WL 3413163 (filed Aug. 5, 2021).

In *Williams v. Illinois*, 567 U.S. 50 (2012), the Supreme Court considered whether a forensic report contained testimonial hearsay so as to implicate the defendant's confrontation rights. The justices issued a plurality opinion by Justice Alito, a sole concurring opinion by Justice Thomas, and a dissenting opinion by Justice Kagan, leaving the Court fractured on the question. Justice Alito wrote in favor of a targeted accusation test, Justice Thomas wrote in favor of a formality criterion test, and Justice Kagan proposed a primary purpose test.

In *State v. Norton*, 443 Md. 517 (2015), the Court of Appeals, following the path created in *Young v. United States*, 63 A. 3d 1033 (D.C. 2013), held that a forensic report is testimonial if it satisfies Justice Kagan's primary purpose test and *either* Justice Thomas's formality criterion test *or* Justice Alito's targeted accusation test. However, during the pendency of the appeal in the case at bar, the Court of Appeals, in *Leidig*, adopted a new test for Maryland, under Article 21 of the Maryland Declaration of Rights, derived from Justice Kagan's dissent in *Williams*. Specifically, "a statement contained in a scientific

purposes, although, to be sure, her testimony may well be necessary to establish the chain of custody of the evidence. *See*, *e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) (noting that "it is not the case[] that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case"). Laboratory analysts, however, plainly fall within the scope of the Confrontation Clause, if they are a conduit for the admission of testimonial hearsay. We therefore must consider whether Smith's medical records that include the laboratory test results showing his BAC constituted testimonial hearsay.

report is testimonial if a declarant reasonably would have understood that the primary purpose for the creation of the report was to establish or prove past events potentially relevant to later criminal prosecution." *Leidig*, slip op. at 65.

The *Leidig* Court did not indicate whether its holding will apply retroactively, which is the ordinary situation, or prospectively, only to "similarly situated cases on direct appeal where the issue was preserved[,]" *Hallowell v. State*, 235 Md. App. 484, 505 (2018)(cleaned up), which happens when the Court announces a change in Maryland common law. It makes no difference in the case at bar, however. The test in *Norton* included what has become the *Leidig* test plus more. In either situation, therefore, the *Leidig* test must be satisfied. A medical report that does not satisfy the *Leidig* test cannot be "testimonial" under the more demanding *Norton* test.

Here, as we have recounted, Smith was transported to the hospital by ambulance after being involved in a motor vehicle accident. He appeared to be "marked[ly]" intoxicated. He arrived at 1:00 a.m. Dr. Bjork examined him and noted alcohol intoxication. In his summary of treatment, he expressed concern that, unless he could properly assess Smith's injuries, "it would not be safe for [Smith] to leave the hospital." Smith "was unable to walk . . . secondary to intoxication" and was so out of control that he was placed in a four-point restraint and sedated. Dr. Bjork signed the order to have blood drawn in order to obtain a number of tests, including one for BAC, at 1:50 a.m.; and the blood was drawn from Smith five minutes later. The physician's primary purpose in ordering the BAC was to obtain information needed to render medical treatment for Smith, not to "establish or prove past events potentially relevant to later criminal prosecution."

Leidig, slip op. at 65. We conclude that the evidence showed that under the primary purpose test, which was part of the prior test adopted in *Norton*, and is the new test adopted in *Leidig*, the medical records showing the BAC analysis were not testimonial hearsay. Accordingly, Smith's confrontation rights were not violated under federal or State law.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.