Circuit Court for Baltimore County
Case No. 03-K-16-006263

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1347

September Term, 2017

DANNEY FORBES

v.

STATE OF MARYLAND

Wright,
Alpert, Paul E.
(Senior Judge, Specially Assigned),
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: September 19, 2018

Danney Forbes, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore County of first-degree assault and carrying a weapon openly with the intent to injure.[1] Appellant raises a single question for our review: "Did the circuit court commit reversible error by allowing a police officer to testify that he believed appellant assaulted the alleged victim based on his interview with a person at the crime scene who did not appear as a witness?" For the reasons that follow, we shall affirm the judgments.

FACTS

Shortly after midnight on October 23, 2015, appellant and Robinson were at a tavern, the Gray Manor Inn, in Dundalk. The two knew each other from the neighborhood, and although Robinson testified that they were not friends, appellant testified that they were. By all accounts, appellant approached Robinson, who was sitting at the bar, and greeted him. Robinson responded gruffly, stating that he had nothing to say to him. In response, appellant repeatedly asked him, "[W]hat did I ever do to you[?]" At some point, Robinson called appellant a "punk bitch" and the two began to draw attention to themselves as their verbal argument escalated. At this point, their version of events diverged.

According to Robinson, the bar manager told them to leave, and he was directed to the front door and appellant was directed to the back door. Upon exiting, Robinson stood by the front window of the take-out section of the bar, smoking a cigarette and texting a friend. At some point, he heard someone walk up behind him and, as he moved to let the

[1] *See* Md. Code Ann., Crim. Law, § 3-202 (first-degree assault) and § 4-101(c)(2) (carrying a weapon openly with the intent to injure). Appellant was sentenced to a 20-year term of imprisonment for assault and a concurrent three-year term on the weapon charge.

person pass, he turned and saw appellant swing a baseball bat that connected with his head. Robinson fell to the ground where appellant continued to hit him with the bat. Greg Catramandos, who knew both Robinson and appellant from the neighborhood but had never spoken to either of them, testified that while standing in the carryout section of the bar, he heard the sound of a baseball bat hitting something. He turned and looked through the window, which was tinted so he could see out but those outside the bar could not see in, and saw appellant outside the window beating Robinson with a bat as Robinson lay on the sidewalk, less than two feet from where Catramandos stood. Appellant hit Robinson about five times. When Catramandos ran outside and yelled for appellant to stop, appellant stepped back and said, "I didn't hit – I didn't – he started it." Appellant jumped into his truck and sped away. Catramandos testified that he did not see any injuries to appellant nor did he see Richardson hit appellant.

According to appellant and his two witnesses, while Robinson and appellant were raising their voices at the bar, Robinson hit appellant in the head with his fists as appellant turned away from the bar and started to walk away. Appellant was knocked to the ground, and Robinson continued to hit him. Patrons of the tavern separated the men and both were asked to leave – Robinson by the front door and appellant by the back door.

According to appellant, he left through the back door and walked to his truck, which he sat inside of for several minutes trying to calm down and wiping the blood off his face. When he then drove around to the front of the tavern to leave, he saw Robinson talking on his cell in front of the tavern. Appellant drove toward him and asked, "What the hell was that all about?" Robinson turned his back on him. Appellant put his truck in park behind

the cars parked head first in front of the tavern. He then exited his truck and stood next to it, waiting for Robinson to get off his cell phone. When Robinson did, appellant again asked him: "[W]hat the hell was all that about?" Twice Robinson told him to get the "F out of my face," and appellant eventually turned to get back in his truck. Robinson then charged him, first pinning him to his truck and then trying to wrestle him to the ground. Appellant grabbed a baseball bat from the bed of his truck and hit Robinson several times until he felt safe. He then got into his truck and drove away. Appellant admitted that he had a 2012 conviction for felony theft, and a 2008 and a 2005 conviction for second-degree burglary.

Within minutes of the assault, several police officers responded to the tavern. Within an hour, the police found appellant's truck near his residence, which was about a five minute drive from the tavern. The engine hood was still warm and a silver baseball bat was lying in the passenger seat. Robinson testified that he woke up in the hospital the day of the assault with several abrasions to his head, three broken/missing teeth, and four broken ribs.

DISCUSSION

Appellant argues that the trial court committed reversible error when it allowed a responding police officer to testify that, based on his interview with the bar manager, the officer believed that appellant assaulted Robinson. Appellant argues that the testimony was inadmissible hearsay and that its admission violated the State and federal confrontation clauses. The State responds that appellant has not preserved his argument for our review.

The State also argues that even if preserved, there was no error, and alternately, even if preserved and admitted in error, the error was harmless.

During the direct examination of one of the first responding police officers, the following colloquy occurred:

> [THE STATE]: And when you arrived, who did you meet with when you got there?
>
> [THE WITNESS]: When I arrived, the first person I did speak with was Miss Crystal Kellner.
>
> [THE STATE]: Crystal Kellner --
>
> [THE WITNESS]: Who is a manager at the bar there.
>
> [THE STATE]: *And based on what she told you, what did you do next*?
>
> [THE WITNESS]: *Based on my interview with her, I believe the suspect, Danney Forbes, was the suspect in the case who had assaulted Mr. Richard Robinson –*
>
> [DEFENSE COUNSEL]: Objection. Objection.
>
> THE COURT: Based on what she said, what did you do?
>
> [THE WITNESS]: I was looking for Mr. Danney Forbes, searching the databases for him and looking for a maroon pickup truck, specifically an F-150 fleeing the area.

(Emphasis added).

Preservation

Md. Rule 4-323(a) provides: "An 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." Generally, "an objection must be made when the question is asked or, if the answer is objectionable, then at that time by

motion to strike." *Ware v. State*, 170 Md. App. 1, 19 (citations omitted), *cert. denied*, 396 Md. 13 (2006), *cert. denied*, 549 U.S. 1342 (2007). *See also Bruce v. State*, 328 Md. 594, 627-28 (1992) (stating that an immediate objection must be made when an objectionable question is asked or by an immediate motion to strike when the question is unobjectionable but the answer includes inadmissible and unforeseeable testimony), *cert. denied*, 508 U.S. 963 (1993) and *Ross v. State*, 276 Md. 664, 672 (1976) ("Unquestionably, a motion to strike out an answer is the correct action to take where an objection to a *proper* question is overruled but the answer is unresponsive or otherwise inadmissible[.]") (citation omitted and emphasis added).

Clearly, the question, "And based on what she told you, what did you do next?" is a proper question. Just as clearly, the officer's response, "Based on my interview with her, I believe the suspect, Danney Forbes, was the suspect in the case who had assaulted Mr. Richard Robinson" was unresponsive to the question asked. Given the above law, appellant has clearly failed to preserve his argument for our review because he did not ask the trial court to strike the testimony. Although the court rephrased the question, defense counsel was still under an obligation to ask the court to strike the testimony. Had appellant preserved his argument for our review, however, we would have found it without merit.

Hearsay/Confrontation clauses

"'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." Md. Rule 5-801(c). A statement that "is not offered for the truth of the matter asserted . . . is not hearsay and it will not be excluded[.]" Rule 5-801. Based on the above, "it is well

established that a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Graves v. State*, 334 Md. 30, 38 (1994) (citations omitted). However, "extrajudicial [non-hearsay] statements which explain police conduct, but nonetheless directly implicate the defendants, are excluded typically as overly prejudicial." *Morris v. State*, 418 Md. 194, 226 (2011).

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights both provide that in a criminal prosecution the accused shall enjoy the right to be confronted with the witnesses against him. The clauses are considered to be in *pari materia*. *Snowden v. State*, 156 Md. App. 139, 149 n.12 (2004) (citation omitted), *aff'd*, 385 Md. 64 (2005). The confrontation clauses prohibit the admission of testimonial statements by a non-testifying witness, unless that witness is unavailable to testify and the defense has had a prior opportunity to cross-examine the witness, *Crawford v. State*, 282 Md. 210, 214 (1978), the statement falls within a "firmly rooted" exception to the rule against hearsay, or the statement bears "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (citation and footnote omitted). Because the prohibition applies only when an "out-of-court statement constitutes testimonial hearsay", a statement does not violate the confrontation clauses if the statement is not offered to prove the truth of the matter asserted. *See Derr v. State*, 434 Md. 88, 106–07 (2013) (and cases cited therein), *cert. denied*, 134 S.Ct. 2723 (2014).

We review a trial court's determination on the admission of evidence for abuse of discretion, *Hopkins v. Maryland*, 352 Md. 146, 158 (1998) (citations omitted), but whether evidence is hearsay or whether it violates the confrontation clauses is an issue of law that we review *de novo. Parker v. State*, 408 Md. 428, 436 (2009) (hearsay) (citations omitted) and *Snowden*, 156 Md. App. at 143 n.4 (confrontation clause).

We find *Zemo v. State*, 101 Md. App. 303 (1994), which concerned "course of an investigation" questions instructive. In that case we summarized the lead detective's testimony at Zemo's trial for breaking and entering, stating:

> [the detective] testified, over objection, that he received evidence about the crime from a confidential informant, that the informant's information put him on the trail of [Zemo] and other suspects, that other parts of the informant's information were corroborated and turned out to be correct, and that, acting on the informant's information, he arrested [Zemo].

Zemo, 101 Md. App. at 306. The State insisted at trial that the information was "not offered for the truth of the matter asserted" but only to explain why the detective "went where he went." *Id.* at 309 (quotation marks omitted). We reversed Zemo's conviction on appeal, stating: "[t]he only possible import of such testimony was to convey the message that the confidential informant 1) knew who committed the crime, 2) was credible, and 3) implicated [Zemo]" and that purporting to admit that testimony for a non-hearsay purpose in those circumstances violated both the Confrontation Clause and the rule against hearsay. *Id.* at 306. We characterized the testimony as a "sustained and deliberate line of inquiry that . . . had no other purpose than to put before the jury an entire body of information that was none of the jury's business." *Id.* We explained that "[t]he jury . . . has no need to

know the course of an investigation unless it has some direct bearing on guilt or innocence." *Id.* at 310.

Here, we do not believe that the responding police officer's testimony was admitted to prove the truth of the matter asserted -- that appellant committed an assault -- but, rather, to explain *briefly* what the officer did after gathering evidence at the tavern. Moreover, unlike *Zemo*, there was no "sustained and deliberate" line of questioning which served "no legitimate purpose," nor was the questioning intended to put before the jury the testimony of someone who was not testifying in this case. *Id.* at 305-06. Most importantly, however, the testimony was not prejudicial for the simple reason that the defense never disputed that appellant hit Robinson. *See Morris*, 418 Md. at 226. Defense counsel in both opening remarks and closing argument explained that appellant had hit Robinson with a baseball bat, and appellant testified that he hit Robinson with a baseball bat. To the extent that appellant suggests that he was forced to testify to rebut the inadmissible hearsay by the responding officer, his intimation is meritless. Defense counsel informed the jury in its opening statement, long before the responding officer took the stand, that appellant would testify that he assaulted Robinson, albeit in self-defense.[2] Accordingly, even if preserved, the trial court did not err in admitting the testimony.

[2] We note even if we were to hold that appellant's argument was preserved for our review and that the officer's testimony was admitted in error, the admission was harmless. To prevail in a harmless error analysis, the State must satisfy us "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." *Dorsey v. State*, 276 Md. 638, 659 (1976) (footnote omitted). *See also Bellamy v. State*, 403 Md. 308, 332 (2008) ("To say that an error did not contribute to the verdict is . . . to find that error unimportant in (continued)

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

relation to everything else the jury considered on the issue in question, as revealed by the record.") (quotation marks and citations omitted). Because appellant testified that he assaulted Robinson, viewing the officer's testimony in the context of the above law and the evidence admitted at trial, even if preserved and admitted in error, we are persuaded that any error was harmless beyond a reasonable doubt.