Circuit Court for Baltimore City
Case No. 817208006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1390

September Term, 2017

KEITH WHITAKER

v.

STATE OF MARYLAND

Wright,
Graeff,
Davis, Arrie W.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: May 17, 2018

* 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.

On August 23, 2017, Appellant was tried and convicted by a jury (Jones, J., presiding) in the Circuit Court for Baltimore City of theft between $1,000 and $10,000. Appellant was sentenced to incarceration for three years, with all but 18 months suspended and probation for three years.

Appellant filed the instant appeal, in which he posits the following questions for our review:

1. Did the trial court err in admitting an impermissible out-of-court statement?
2. Did the trial court err when it struck a juror for cause without a reasonable basis to do so?
3. Did the trial court err in admitting surveillance video footage after the prosecutor failed to adequately authenticate it?

FACTS AND LEGAL PROCEEDINGS

Karen Wagner testified that she was playing poker at the Horseshoe Casino on Friday, March 10, 2017, from approximately 1 a.m. to 8 a.m. When Wagner went to cash out, she noticed that $3,500 in cash was missing from her purse. Wagner reported the missing money to casino security that same day and, two days later, she filed a report with the police.

Charles McCreedy, head of security at the Horseshoe Casino, testified to the casino's video surveillance system. He explained that the casino has over 1,600 surveillance cameras that run 24 hours a day, 7 days a week. The footage from the surveillance cameras is saved for up to 14 days; however, if an incident is reported, footage

from specific cameras at specific dates and times can be saved. The video surveillance system allows staff to compile and save footage from multiple cameras.

During McCreedy's direct examination, the State moved to introduce Exhibits 1 and 2, a single DVD disc containing two digital files comprised of a compilation of footage from several surveillance video cameras from the early morning hours of March 10, 2017. Defense counsel objected on the grounds that McCreedy could not adequately authenticate the compilation because he was not involved in the process of selecting and downloading the footage. The trial court overruled the objection and State's Exhibits 1 and 2 were admitted into evidence.

The video clips showed a man entering the casino, playing poker at a table, cashing out his chips, exiting the casino, and then getting into a car in the garage and driving off screen. The footage showed that the man was seated to the right of Wagner at the poker table.

The prosecutor elicited testimony from McCreedy that the casino rewards card that corresponded to the man seated next to Wagner was registered to Appellant. Defense counsel objected on the grounds that McCreedy gathered that information from an Incident Report that he did not author. The trial court overruled the objection.

Detective Eugene Molinaro testified that, after Wagner reported the theft to him, he contacted the casino's security office. Over defense objection, Detective Molinaro testified that the casino Incident Report identified Appellant as the suspect. Detective Molinaro reviewed the surveillance footage the casino had saved and then prepared a statement of

probable cause.

During closing arguments, the prosecutor argued to the jury that, where the surveillance video showed Appellant reaching under the poker table, the jury could infer that he was reaching for Wagner's purse. There was no footage that showed Appellant handling Wagner's purse. In response, defense counsel pointed out that the footage showed Appellant taking additional cash from his shoe while cashing out; accordingly, defense counsel argued that, when he was reaching under the table while playing poker, he was simply retrieving the money he kept in his shoe.

The jury convicted Appellant of theft between $1,000 and $10,000.

DISCUSSION

I.

Appellant's first contention is that the trial court erred in admitting an impermissible out-of-court statement. Specifically, Appellant alleges that McCreedy's "testimony regarding a portion of the casino's Incident Report [] was authored by Chris Johnston[.]" According to Appellant, this out-of-court statement was not subject to any hearsay exception and is, therefore, inadmissible. Appellant also asserts that the statement from the Incident Report that identified him was testimonial and required Johnston's in-person testimony, not McCreedy's. In addition, Appellant has filed a Motion to Correct Omission in the Record, seeking to include the Incident Report in the appellate record.

The State responds that Appellant's "claims were not preserved and, in any event, are unfounded." The State asserts that the grounds Appellant provided for his objection to

McCreedy's testimony were that the State was asking him to identify the man on the video, that McCreedy did not have personal knowledge of the incident report and that he did not prepare the report himself. According to the State, Appellant is limited to those grounds on appeal.

However, the State maintains that, even if Appellant's claims have been preserved, they fail upon their merits. The State argues that the Incident Report was not admitted into evidence. Therefore, the State maintains that "the only testimony referencing the incident report was limited to whose rewards card was used in a particular seat at the poker table." Citing *State v. Norton*, 443 Md. 517 (2015), the State maintains that the Report was not formal, was not created for "the primary purpose of accusing a targeted individual of engaging in criminal conduct" or the "alternative" test under *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

Furthermore, the State opposes Appellant's Motion to Correct the Omission in the Record, arguing that the Incident Report was not made part of the trial record and that McCreedy's testimony was limited to identifying the owner of the rewards card that was used by the individual seated next to Karen Wagner.

In a reply brief, Appellant addresses two points from the State's response. First, Appellant asserts that the pending Motion to Correct the Omission in the Record should be granted. According to Appellant, "the Incident Report does not present any new evidence that was not already presented by the parties at trial" and asserts that an affidavit is not required. Second, Appellant contends that he has preserved his claims for our review.

Citing *Pitt v. State*, 152 Md. App. 442 (2003), Appellant argues that, although the word "hearsay" was not specifically not used during the objection at trial,

> it is clear from [] comments that the bases for [objections] to Mr. McCreedy identifying Mr. Whitaker as the owner of the rewards card seated beside the complainant were that Mr. McCreedy's testimony was hearsay and that its admission denied Mr. Whitaker's right of confrontation as guaranteed by the Sixth Amendment to the U.S. Constitution and Article 21 of the Md. Declaration of Rights.

Appellant also asserts that it is clear from her response to the objection that the prosecutor "understood the bases for trial counsel's objection[,]" and that any ambiguities should be resolved in his favor.

Amended Motion to Correct Omission in the Record

> On motion or on its own initiative, the appellate court may order that a material error or omission in the record be corrected. The court ordinarily may not order an addition to the record of new facts, documents, information, or evidence that had not been submitted to the lower court.

Md. Rule 8-414(a).

> A party seeking correction of the record shall file a motion that specifies the parts of the record or proceedings that are alleged to be omitted or erroneous. A motion that is based on facts not contained in the record or papers on file in or under the custody and jurisdiction of the appellate court and not admitted by all the other parties shall be supported by affidavit.

Md. Rule 8-414(b)(1).

"Maryland Rule 8–414(a) does not permit supplementation of an appellate record with evidence not presented to the trial court." *Shih Ping Li v. Tzu Lee*, 210 Md. App. 73, 95–96 (2013) (providing parenthetical from *Beyond Sys. v. Realtime Gaming Holding Co., LLC,* 388 Md. 1, 11 n. 9 (2005), noting that the Court of Appeals "den[ied the] motion to

supplement the record '[b]ecause the evidence at issue was not erroneously omitted from the record transmitted from the Circuit Court, and [appellant] does not seek to correct any error contained in the record'").

In the instant case, there is no allegation that the Motion concerns an error or omission in the record; rather, Appellant seeks to supplement the appellate record with the Incident Report, a new document that had not been submitted to the circuit court. Furthermore, there was no accompanying affidavit, as required under Md. Rule 8–414(b)(1). Therefore, we deny Appellant's Amended Motion to Correct Omission in the Record.

Preservation

"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 8–131(a).

"The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." MD. RULE 4–323(a). Therefore, "[i]f a general objection is made, and neither the court nor a rule requires otherwise, it 'is sufficient to preserve all grounds of objection which may exist.'" *State v. Jones*, 138 Md. App. 178, 218 (2001) (quoting *Grier v. State*, 351 Md. 241, 250 (1998)).

"But, when particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds and will be deemed to have waived any ground not stated.'" *State v. Jones*, 138 Md. App. 178, 218 (2001)

(quoting *Leuschner v. State*, 41 Md. App. 423, 436 (1979)).

During the direct-examination of McCreedy, the following colloquy occurred:

[PROSECUTOR]: And so, after the fact, if an incident occurs, is there a way for the casino to check those records and determine whose card was used a particular time at a particular location?

[MCCREEDY]: Yes. If there's ever a time where there's a question, then we can call, you know, either some of the systems we can run ourselves and surveillance, other systems we call that department and we can tell them a time frame and a particular gaming seat and they can say, this is the card that was being used at that time.

[PROSECUTOR]: Okay. And when an incident occurs, is there any document that is generated by your team to memorialize that incident?

[MCCREEDY:] It is possible to print out the records if necessary.

[PROSECUTOR]: Okay. But is there any report generated based on each event?

[MCCREEDY]: Yes. We do what's known as a surveillance incident report, where we simply say what happened in the video and what our findings were.

[PROSECUTOR]: And is that report from the regular course of business in the casino's business?

[MCCREEDY]: Yes. We do it for any incident.

[PROSECUTOR]: And to your knowledge, was any individual—I'm going to draw your attention to the screen. The individual seated at the bottom center of this video, so to the right of the individual in the purple sweatshirt, to your knowledge was any investigation undertook [sic] by the casino to determine who was seated in that seat at approximately 5:45 in the morning on the 10th?

[MCCREEDY]: Yes. According to the report, a security supervisor—

[APPELLANT'S TRIAL COUNSEL]: Your Honor, objection.

(Counsel and the defendant approached the bench and the following occurred:)

[APPELLANT'S TRIAL COUNSEL]: Your Honor, she's referencing a report that has not been introduced into evidence. Furthermore, we believe she is about to ask for an identification of the individual on the video, even though this witness has absolutely no personal knowledge, he was not present. The incident report that [the prosecutor] is referencing was, in fact, done by I believe a C. Johnson [sic], it was not done by this individual.

THE COURT: Is that—

[PROSECUTOR]: And, Your Honor, Mr. McCreedy has testified that he is the custodian of records for the surveillance department of the casino. He has testified that the report was made at or near the time of the event and that it was made by a surveillance person with knowledge of the incident. It was made and kept in the course of regularly conducted business of the casino.

I intend to elicit testimony, that based on the report, Mr. McCreedy is able to determine that the person whose card was being used at that time, at that table, at that seat, was the defendant's card. I do not intend to have Mr. McCreedy identify the defendant as the person seated at the table, but rather that his card was being used at the table, through his knowledge and background as custodian of records for the surveillance department of the casino.

Additionally, the reason I don't seek to enter the report itself into evidence is that it has other information that I don't think—to the extent that it is admissible as a business record, I'm not sure at this point if it is or not, but I don't think that—

THE COURT: So you're not trying to admit the report into evidence, just use it—

[PROSECUTOR]: I'm just having him testify that, based on the report, which is a record kept in the regular course of business, he was able to determine that a person whose card was being used in that seat at that time was the defendant.

THE COURT: Anything further?

[APPELLANT'S TRIAL COUNSEL]: Your Honor, I would argue that, for all intents and purposes, that would be an identification, and that he has no personal knowledge, and once again he's not the one who wrote the report, or pulled the database.

THE COURT: How is that an identification? Why wouldn't your argument be what, [sic] somebody took his card and used it?

> [APPELLANT'S TRIAL COUNSEL]: And that could potentially be a defense theory, but however, that bell was rung and heard by the jury, you know, they're going to view this as an identification.
>
> THE COURT: All right. So the objection is overruled, but the limitation will be, that his testimony is with regard who [sic] the card belongs to, not the—
>
> [PROSECUTOR]: Yeah, not an identification.
>
> THE COURT: Correct.
>
> [PROSECUTOR]: That's all I intend to do.
>
> THE COURT: Okay. So your objection is overruled, thank you.
>
> (Whereupon, counsel and the defendant returned to their prospective trial tables and the following occurred in open court:)
>
> THE COURT: The objection is overruled.
>
> [PROSECUTOR]: The objection is overruled. Mr. McCreedy, are you able to determine whether an investigation was done by your team as to whose total rewards card was used at about 5:45 in the morning on the l0th of March at this seat?
>
> [MCCREEDY:] Yes, the report shows that it was a Keith Whitaker.
>
> [PROSECUTOR]: So the person whose total rewards card was used at that spot was Keith Whitaker?
>
> [MCCREEDY:] Yes.

In the instant case, Appellant clearly provided the grounds for his objection at trial. Consequently, he must be limited to those grounds on appeal. *Jones, supra.* In support of his objection, Appellant provided the following grounds: "I would argue that for all intents and purposes that would be an identification, and that he has no personal knowledge, and once again he's not the one who wrote the report, or pulled the database." Appellant

acknowledges that he did not use the word "hearsay" but contends that "it is clear from [] comments that the bases for [the] objections to Mr. McCreedy identifying Mr. Whitaker as the owner of the rewards car seated beside the complainant were that Mr. McCreedy's testimony was hearsay and that its admission denied Mr. Whitaker's right of confrontation as guaranteed by the Sixth Amendment[1] to the U.S. Constitution and Article 21 of the Md. Declaration of Rights." We are unpersuaded.

Appellant cites *Pitt*, *supra*, which held that, in that case, the substance of the objection was sufficient to preserve the claim on appeal. In *Pitt*, the defense counsel offered the following grounds in support of the objection to the admission of a list of missing property into evidence:

> Your honor, I must—my first problem is that him [sic] and his wife prepared the list. I don't know [to] what extent he prepared, his wife prepared. I have a problem with the list compiled by two people, only one has testified.
>
> Also, the list contained values, he said something speculative. Exactly what the value is is speculative. I can't cross-examine his wife with regard to the value she put on the items, she has not testified. So I object to this coming in, at this point.

152 Md. App. at 463–64.

As the above excerpt illustrates, the grounds for objection, in *Pitt*, referenced a confrontation issue; two people compiled the list, only one testified and it was indeterminable who compiled which portions. Specifically, counsel stated that he was unable to cross-examine one of the individuals.

[1] Made applicable to the States *via* the Fourteenth Amendment.

Unlike *Pitt*, the grounds for the objection in the instant case only specify an identification, that the person testifying does not have "personal knowledge" about the Incident Report and that another individual created the Report. Appellant did not mention the ability to cross-examine, *vel non*, or confrontational issues. In fact, nothing about the substance of the objection indicates that Appellant was preserving a claim that his right to confrontation had been denied. Accordingly, we hold that Appellant's claim has not been preserved for our review.

II.

Appellant next contends that the trial court erred when it struck a juror for cause without a reasonable basis to do so. According to Appellant, "[b]y deciding not to ask Juror No. 4057 follow up questions to clear up the juror's equivocation, the trial court lacked a reasonable basis to strike the juror for cause; thus the trial court's ruling to strike Juror No. 4057 for cause constituted an abuse of discretion."

The State responds that the trial court properly exercised its discretion to strike a prospective juror for cause. The State maintains that "Juror No. 4057 stated a clear bias against police officers and answered that whether she could be fair and impartial in rendering a verdict 'depends on the degree of the police side.'"

A potential juror may be struck from a particular jury, *inter alia*, "[f]or good cause shown, by a trial judge on a challenge by a party[.]" MD. CODE ANN., CTS. & JUD. PROC. § 8–404(b)(2)(ii). *See also*, MD. RULE 4–312(e) ("A party may challenge an individual qualified juror for cause.") "As a general rule, a juror may be struck for cause only where

he or she displays a predisposition for or against a party 'because of some bias extrinsic to the evidence to be presented.'" *Wyatt v. Johnson*, 103 Md. App. 250, 264 (1995) (quoting *Miles v. State*, 88 Md. App. 360, 375 (1991)). "In evaluating a juror's potential bias, the court must assess whether the juror could give fair and impartial consideration to the evidence and reach a just conclusion." *Id.* (citing *King v. State*, 287 Md. 530, 535 (1980)). "The court's decision to strike a juror for cause will not constitute a ground for reversal absent an abuse of discretion." *Id.*

In the instant case, the following colloquy occurred at the bench during jury selection:

> THE CLERK: 4057.
>
> THE COURT: Good morning, how are you?
>
> JUROR NO. 4057: Fine.
>
> THE COURT: You indicated that you or an immediate family member had been the victim of a crime, convicted of a crime, had pending criminal charges, was a witness for the State or defense, or have been incarcerated within the last five years. Can you share your response?
>
> JUROR NO. 4057: Victim of a crime.
>
> THE COURT: What kind of crime?
>
> JUROR NO. 4057: Assault.
>
> THE COURT: Was anybody ever arrested?
>
> JUROR NO. 4057: Yes.
>
> THE COURT: And were they convicted?

JUROR NO. 4057: Yes

THE COURT: Was it domestic?

JUROR NO. 4057: Yes.

THE COURT: Are you still with that partner?

JUROR NO. 4057: No.

THE COURT: Okay. And then second, you responded to question number 11 indicating that you would give—be inclined to give either more or less weight to the testimony of a police officer, a witness for the prosecution or a witness for the defense. Can you share your response to that question?

JUROR NO. 4057: I believe police I would be more inclined less. [sic]

THE COURT: Less inclined?

JUROR NO. 4057: Uh-huh.

THE COURT: Against police officers.

JUROR NO. 4057: Uh-huh.

THE COURT: In light of your feelings about police officers not giving truthful testimony and you being the victim of an assault, *do you believe you could render a fair and impartial verdict* based on the facts, the law and the evidence in this case as it would be presented to you by the attorneys, which involves a theft case and police testimony?

JUROR NO. 4057: *It depends on the degree of the police side*.

THE COURT: Okay. Any additional questions from the State?

[PROSECUTOR]: No.

THE COURT: Defense?

MS. WARREN: No.

> THE COURT: All right. You can be seated, thank you very much.
>
> [PROSECUTOR]: The State would move to strike juror—
>
> THE COURT: Any objection to that motion?
>
> [PROSECUTOR]: —4057?
>
> [APPELLANT'S TRIAL COUNSEL]: We would object. She did not indicate that she would not be able to render a fair and impartial verdict.
>
> THE COURT: *So the challenge is she says it depends* and without us questioning her out even more, I think it's too equivocal, so the Court is going to grant the State's motion to No. 4057.

(Emphasis supplied).

Patently, the foregoing exchange illustrates that, when Juror No. 4057 was asked if she could be fair and impartial in rendering a verdict, her response was that it would depend. Clearly, the juror indicated that she could not be fair and impartial; rather, it would depend. Therefore, the trial court properly granted the State's Motion to Strike Juror No. 4057.

III.

Appellant's final contention is that the trial court erred in admitting surveillance video after the prosecutor failed to properly authenticate it. Citing *Washington v. State*, 406 Md. 642 (2008), Appellant argues that the State's witness, McCreedy, was unable to explain, during cross examination, "how footage from 1,600 cameras" was edited to one clip consisting of 20 minutes or why some footage is saved or kept. Appellant maintains that the State failed to lay an adequate foundation and that the footage was improperly

admitted. Appellant also asserts that this error was not harmless and that reversal is required.

The State's response is that the trial court properly exercised its discretion in admitting the surveillance video. According to the State, McCreedy properly testified to the process used by the casino in its surveillance department. Furthermore, the State maintains that McCreedy oversaw the employees in that department and the initial installation of the surveillance equipment. The State asserts that McCreedy testified in accordance with the "silent witness method" of authentication and was, therefore, sufficient to authenticate the footage and, therefore, the evidence was properly admitted.

> Maryland Rule 5–901(a), identical to the Federal Rule of Evidence 901(a), governs the authentication of evidence in both civil and criminal trials. Md. Rule 5–901(a) provides as follows:
>
> > "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."

Washington v. State, 406 Md. 642, 651 (2008).

"In order to satisfy the evidentiary requirement for authentication, the proponent of the evidence must show that the evidence is 'sufficient to support a finding that the matter in question is what its proponent claims.'" *Id.* (quoting MD. RULE 5–901(a)).

"A videotape is considered a photograph for admissibility purposes. It is admissible in evidence and is subject to the same general rules of admissibility as a photograph." *Id.* (citing *Dep't of Public Safety v. Cole*, 342 Md. 12, 20 (1996)).

> Photographs may be admissible under one of two distinct rules. Typically,

> photographs are admissible to illustrate testimony of a witness when that witness testifies from first-hand knowledge that the photograph fairly and accurately represents the scene or object it purports to depict as it existed at the relevant time. There is a second, alternative method of authenticating photographs that does not require first-hand knowledge. The "silent witness" theory of admissibility authenticates "a photograph as a 'mute' or 'silent' independent photographic witness because the photograph speaks with its own probative effect."

Id. at 652 (quoting *Washington v. State*, 179 Md. App. 32, (2008), *rev. on other grounds by Washington v. State*, 406 Md. 642 (2008)).

Accordingly, "the silent witness method of authentication allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Id.*

> Authentication of a photograph does not require testimony of the person who took the photograph. Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when "a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system."

Id. at 653.

In the instant case, McCreedy testified that he was "the director of surveillance and risk" as well as "the senior leader of the surveillance department." In addition, he stated that he was "the custodian of all video." McCreedy further testified about the equipment, *i.e.*, a "Bosch based system," which is run "by a 24/7 team of surveillance people that work on the equipment and watch the cameras." He also stated that the casino is subject to the State Lottery and Gaming Control Agency standards and described the process by which video is retrieved by the surveillance team when they are alerted to an incident. McCreedy

also described the synchronization and time-stamping processes of the surveillance cameras. He also testified about "the digital watermark" program that the casino uses to ensure that a retrieved video is tamper-free when it is compiled and created post-incident and that the authentication process the Casino uses verified that the watermark for the footage at issue was accurate and intact. According to McCreedy, "[t]he system went through, counted all of the frames, all of the cameras, assessed the digital watermark and found no tampering."

In citing the Court of Appeals in *Washington*, *supra,* Appellant argues that the State has not sufficiently provided the foundation for authentication of the footage. We disagree. As the Court of Appeals held in *Washington*, even "[w]ithout suggesting that manipulation or distortion occurred in this case, [the Court] reiterate[d] that it is the proponent's burden to establish that the videotape [] represent what they purport to portray." 406 Md. at 655.

The Court reasoned that

> [t]he videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures.

Id.

The Court continued that

> Mr. Kim, the owner of the bar, testified that he did not know how to transfer the data from the surveillance system to portable discs. He hired a technician to transfer the footage from the eight cameras onto one disc in a single viewable format. Mr. Kim did not testify as to the subsequent editing process and testified only that the surveillance cameras operated "almost hands-free" and recorded constantly.

Id.

Unlike the factual background in *Washington*, the State's witness was the director of the surveillance department, not the owner of an establishment with limited technical knowledge. McCreedy expressly testified about "the process used, the manner of operation of the cameras, the reliability or authenticity of the images, [and] the chain of custody of the pictures." *Washington, supra*. Furthermore, the individual who compiled the footage was not an "unknown technician," but an employee of the casino's surveillance department, who McCreedy supervised. Therefore, we hold that the State's witness sufficiently testified to meet the "silent witness" method of authentication and that the trial court properly admitted the surveillance footage into evidence.

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