Circuit Court for Baltimore County
Case No. 03-K-18-004659

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1674

September Term, 2019

DAVID LEE SANDERS

v.

STATE OF MARYLAND

Kehoe,
Gould,
Wright, Alexander Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 11, 2021

*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.

A jury in the Circuit Court for Baltimore County convicted David Lee Sanders, appellant, of one count of first-degree assault and one count of second-degree assault in connection with the stabbing of two men. The court sentenced appellant to a term of 12 years in prison for first-degree assault and a consecutive four-year term for second-degree assault. Appellant presents one question for our review:

> Did the circuit court err in permitting multiple instances of inadmissible hearsay?

For the following reasons, we shall affirm.

FACTS

On September 23, 2018, shortly after midnight, a bartender at El's County Line Bar and Grill alerted the bar's bouncer, Angelo Koulatsos, that there was an altercation at an outdoor area of the bar. Koulatsos ran outside, followed by Daniel Cosner, the manager of the bar, and Luca Spinoso, an off-duty employee of the bar.

Koulatsos testified that he ran outside and saw two men on the ground. The man on top was punching the man on the bottom, whom Koulatsos later identified as the appellant. Koulatsos grabbed the man on top by the waist and took him out to the parking lot**.**

Koulatsos then returned to help Spinoso and Cosner, who "were still fighting" with appellant. Another individual approached and attempted to strike appellant, but Koulatsos intervened and physically removed that person from the bar.

When Koulatsos returned, Spinoso was gone and Cosner was trying to restrain appellant. Cosner suddenly stopped, put his hands to his back, and said, "I think he just stabbed me." Cosner was "leaking" blood. Koulatsos saw a knife in appellant's hand.

Koulatsos told Cosner that he was taking him to the hospital and left to get his car from the parking lot. When Koulatsos pulled his car up to where Cosner was standing, he saw appellant in the parking lot, surrounded by a group of bar patrons who were trying to prevent him from leaving. Appellant, who was wearing a red shirt, still had the knife in his hand and was holding it to "mak[e] sure that no one came near him."

Koulatsos then saw Spinoso in the parking lot, holding his stomach. Spinoso said that he had been stabbed and that he could not breathe. A bystander told Spinoso to lay on his back to stop the blood flow and began administering first aid while an ambulance was summoned. Koulatsos then took Cosner to the hospital. Koulatsos identified appellant in a photo array and at trial as the person with the knife.

Spinoso testified that, just before the incident, he was sitting near the front door of the bar with Koulatsos and Cosner. A bartender named Nancy "came in . . . all flustered and let [them] know that there was a fight[.]" By the time Spinoso got outside, Koulatsos, who was slightly ahead of him, was breaking up a fight. Spinoso stated that Koulatsos "grab[bed] someone off of the kid in the red shirt." As Koulatsos was removing that person from the premises, the male in the red shirt "[came] in flying with a fist going straight for" Koulatsos and the other individual.

Spinoso grabbed the person in the red shirt, who responded by punching Spinoso in the eye. The two men began to "scuffle." Spinoso held the individual in a "body lock[]" until he felt him relax. When Spinoso released his hold, the person in the red shirt hit Spinoso in the side of his body and said "bitch."

Spinoso felt a "real bad burn" and thought he had a broken rib. He ran inside and told Nancy, the bartender, that he had been "hit with something" and to call the police. He lifted his shirt and saw that he was bleeding profusely and then realized that the assailant had a knife. He ran back outside and saw the individual in the red shirt "trying to get away from everybody." Spinoso felt suddenly lightheaded and had difficulty breathing. He fell to the ground and a bystander began putting pressure on his wound. He was taken to the hospital by ambulance where he underwent emergency surgery.

Spinoso was interviewed by detectives a couple of hours after he woke up from surgery. He told detectives that his assailant was wearing a red shirt, that he had bad acne, and that he had "terrible English[,]" which Spinoso explained was a reference to the assailant's use of the term "bitch." He was shown a photo array, but he was not sure if his assailant was one of the individuals depicted in the array. Spinoso stated that he was "way too doped up on pain medication to even see straight." He remained hospitalized for five days.

Cosner's testimony regarding the incident was consistent with that of Koulatsos and Spinoso. Cosner stated that Koulatsos "got the one guy" who was on top of appellant and pulled him away. Spinoso grabbed appellant, who had gotten up from the ground, and "pulled him back" at which time Spinoso and appellant "got into a scuffle." An unidentified person began to assault appellant and Koulatsos restrained that person and removed them from the bar.

Cosner, who apparently did not see Spinoso get stabbed, grabbed appellant under his armpits, pulled him back, and told him to "chill out." Appellant struggled for about 30

seconds, then relaxed, at which point Cosner let go of him. Cosner then felt a sharp "punch to [his] kidney." He looked down and saw that appellant had him in a "half hug." Appellant stepped away from Cosner and said "[d]on't grab me up like that, yo." Cosner saw that appellant had a knife in his hand. Cosner looked down and that his pant leg was "all bloody."

As Cosner waited in the parking lot for Koulatsos to get his car to drive him to the hospital, Spinoso came out of the bar, holding his side where he had been stabbed. Cosner saw appellant, who was still holding the knife, talking to his friend.

Cosner received treatment at the hospital for lacerations and a punctured lung. He identified appellant in a photo array as the person who stabbed him, indicating that he was "[a] hundred percent" certain about his identification. Cosner also identified appellant at trial as the person who stabbed him.

Jordan Magsamen was at the bar with friends on the date of the incident. After Spinoso ran into the bar and said that he had been stabbed, she went outside, where she saw a person in a red shirt, with a knife in his hand, talking to someone. She took photographs of the person in the red shirt and gave them to police. Magsamen stated that the person in the red shirt stood there for a while and then "took off" on foot. The photographs that Magsamen took of the person in the red shirt were introduced into evidence.

Additional facts will be introduced in the discussion as they become relevant to the issues on appeal.

DISCUSSION

Appellant contends that the circuit court erred in admitting hearsay statements contained in 911 calls and body camera footage. The State responds that, to the extent appellant's objections are preserved for appellate review, the court properly overruled all but one objection, and that any error in overruling the remaining objection was harmless.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Maryland Rule 5-802 provides that hearsay is not admissible at trial, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes[.]" *See also Vielot v. State*, 225 Md. App. 492, 500 (2015) (citation omitted) ("A trial court has 'no discretion to admit hearsay in the absence of a provision providing for its admissibility.'").

"[W]hen the issue involves whether evidence constitutes hearsay, that is a legal question that we review *de novo*." *Baker v. State*, 223 Md. App. 750, 760 (2015). "Whether hearsay evidence is admissible under an exception to the hearsay rule, on the other hand, may involve both legal and factual findings." *Id.* "In that situation, we review the court's legal conclusions *de novo*, but we scrutinize its factual conclusions only for clear error." *Id*.

911 calls

Before the State called its first witness to the stand, the prosecutor requested permission to play to the jury six recorded 911 calls from people who were at the bar on the night of the stabbings. The prosecutor stated that he intended to introduce the 911 calls into evidence and represented that they had been provided to defense counsel. Defense

counsel said, "I have no objection[,]" and the court ruled that the calls would be admitted. The prosecutor then began playing the 911 calls for the jury. All of the 911 calls were placed between 12:17 a.m. and 12:20 a.m. on September 23, 2018. The first call was from a female employee of the bar, who gave her name as Nancy, and reported that there was a stabbing at the bar.[1] She said that she did not know exactly what happened, but that "[t]here was an altercation out back, and I hollered for my bouncers to come, and [Spinoso] come flying back in here and told me to call 911 because he was stabbed[.]" She was unable to answer the 911 dispatcher's questions regarding the whereabouts of the suspect or whether Spinoso was conscious at that time because she had called 911 from a landline inside the bar and "everybody" was outside. The dispatcher asked Nancy to ask someone whether Spinoso was alert. Nancy complied and then relayed to the dispatcher that Spinoso was awake.

At one point, Nancy reported what she was apparently observing from her location inside the bar, stating: "Oh, they are all getting ready to whoop this guy's ass so bad, right now. I just seen about 15 people run towards the person and he's gonna get his ass whooped." She then reported that the suspect was "running towards Bradshaw [Road]," and gave a description of the suspect, apparently repeating what someone in the background is heard saying: "white kid, red shirt, five [feet] eight [inches]."

[1] Each person that called 911 provided, at least, their first name, except for the last caller, who did not identify himself.

In the second 911 call, a female caller reported that there was a fight and that someone had been stabbed. When asked for a description of the suspect, the caller stated, "I know he has a red shirt on. I don't know what his name is . . . He's white." The caller then said, "He's getting ready to take off. I'm trying to get out of the way . . . He's on his way to his car now, I think. A lot of customers are trying to keep him here." The caller asked someone "Where is he driving?" and then told the dispatcher that the suspect ran down Route 7 toward Harford County and made a left on Bradshaw Road. The caller then asked: "What's his name?" and told the dispatcher, "[t]he guy's name that's in the red shirt, his name is David Sanders . . . . Some people are just telling me."

Before the next call was played, defense counsel asked to approach the bench where the following colloquy took place:

> [DEFENSE COUNSEL]: We listened to two calls, and I essentially object. I let the first one play, but the person on the phone is communicating what other people are telling them. I think it's inappropriate. I don't remember on this next call whether there's any more of that, but I would object to any conveying - - this comes under the excited utterance exception, and they are conveying something that somebody else is saying to [them]. I think it could no longer be an excited utterance at that point.
>
> [PROSECUTOR]: It's also a present sense impression.
>
> THE COURT: I'm going to allow it at this point in time. What is the next call?
>
> [PROSECUTOR]: The next call is another person who is in the parking lot who describes the scene and what's happening.
>
> THE COURT: Okay, so you've heard it, I assume?
>
> [DEFENSE COUNSEL]: Yeah.

> [PROSECUTOR]: I would submit to you, Judge, it's all excited utterances and present-sense impressions of what they're observing and what's happening, and it's obviously by definition hearsay, but it's an exception to it.
>
> THE COURT: I understand. I'm going to allow it.

The four remaining 911 calls, with a combined duration of over 20 minutes, were then played for the jury, without further objection. After the jury heard the 911 calls, the prosecutor moved the CD of the calls into evidence. The court asked defense counsel if there was any objection to the admission of the CD and defense counsel responded, "Just previous."

As an initial matter, we agree with the State that appellant waived any objection to the admission of the first two 911 calls. "To preserve an argument for appeal, a party shall object to the admission of evidence at the time the 'evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.'" *Matthews v. State*, 249 Md. App. 509, 528 (2020) (quoting Md. Rule 4-323(a)). The contemporaneous objection rule is designed to ensure that the trial court has "an opportunity to consider the issue, and rule on it first, in the context of the trial." *DeLeon v. State*, 407 Md. 16, 26 (2008). *See also* Md. Rule 5-103(a)(1) (error may not be predicated upon a ruling that admits evidence unless the party is prejudiced by the ruling and a timely objection or motion to strike appears in the record.)

We note that, although the prosecutor did not move the CD containing the 911 calls into evidence until they were all played for the jury, the calls were in evidence at the time they were played for the jury. *See, e.g., Green v. State*, 231 Md. App. 53, 79-80 (2016),

rev'd on other grounds, 456 Md. 97 (2017) (affirming the trial court's ruling allowing the State to replay recorded jail calls during closing argument, even though the CDs of the calls were not offered into evidence, stating that, "[a]s the [trial] court noted, although the recordings themselves were not in evidence, 'the words [were] in'"). *See also Harris v. Divine*, 272 S.W.3d 478, 483 (Mo. Ct. App. 2008) ("Exhibits that are marked, identified, testified to regarding their contents, and used in evidence are in evidence as if they had been formally introduced.").

Here, defense counsel, who admitted that he had listened to the calls, initially stated that there was no objection publishing the 911 calls to the jury. The jury listened to the first call, which was almost 10 minutes in duration, and the second call, which lasted more than six minutes. Defense counsel did not attempt to retract the waiver of objection to the 911 calls at any point while the jury was listening to the first two calls, nor did he move to strike any of the statements in those calls from evidence. Accordingly, appellant's claim of error with respect to the admission of the first and second 911 calls is waived. *See Cantine v. State*, 160 Md. App. 391, 407 (2004) (citing *Hill v. State*, 355 Md. 206, 229 (1999)) ("When counsel fails to object, or request curative action, the alleged error ordinarily is waived.").

Moreover, we see no error in the court's ruling on defense counsel's objection to the remaining calls. Defense counsel did not assert that the 911 calls should be excluded in their entirety but objected only to the extent that there might be statements that were not based on the caller's personal knowledge. But defense counsel could not remember if there was "any more of that" and could not point to a single example of what the defense was

asking the court to exclude. We cannot find error in allowing the jury to resume listening to the 911 calls where defense counsel could not say whether there were any objectionable statements in the remaining calls and the court was provided with no further information. *See State Roads Commission v. Creswell*, 235 Md. 220, 229 (1964) (citations omitted) (When a piece of evidence is admissible in part, a trial court is "neither expected nor required to search the [evidence] and sift out the objectionable material.").[it might be more clear to say part or a portion instead] *See also Haile v. Dennis*, 184 Md. 144, 153 (1944) (allegedly inadmissible entries in account books that were otherwise admissible "should have been pointed out to the [c]ourt, at the time of the objection thereto, so that in admitting the books as evidence for the jury the inadmissible entries could have been deleted, or obscured from the jury's view")

In any event, appellant's claim for relief would fail because the substance of the statements that appellant now claims were inadmissible came into evidence without objection at several other points during the trial. The statements that appellant specifically challenges on appeal are:

- In call number three, the caller stated that the stabber was trying to leave, that the suspect "tried to leave in his vehicle," that the caller did not have a description of the vehicle because they were in their car, and that the suspect "went towards Philadelphia Road."

- In calls four and five, the caller asserted that someone with a knife had stabbed someone.

- In call six, the unidentified caller conveyed that the person wearing a red shirt: had a knife; was white with blonde hair; was trying to leave; and ran toward Philadelphia Road.

The jury had already heard evidence in the first two calls, however, that there had been a stabbing, that the suspect was white and was wearing a red shirt, that he tried to leave in his car and that he ultimately fled on foot down Route 7.[2] Later in the trial, both Spinoso and Koulatsos said that the suspect was wearing a red shirt. Koulatsos and Magsamen testified that the suspect tried to leave the bar after the stabbings took place. The photographs Magsamen took of the person that she saw holding the knife, which were admitted without objection, depict an individual with light-colored hair wearing a red shirt.

As we have observed, "[w]hen evidence is received without objection, a defendant may not complain about the same evidence coming in on another occasion even over a then timely objection." *Williams v. State*, 131 Md. App. 1, 26 (2000). *See also Benton v. State*, 224 Md. App. 612, 627 (2015) (quoting *DeLeon v. State*, 407 Md. 16, 31 (2008)) (objection is waived "if, at another point during the trial, evidence on the same point is admitted without objection." Accordingly, even if a proper objection to the remaining 911 calls had been made at trial, appellant would not be entitled to relief on appeal

Body camera footage

Over objection, the court admitted footage from the body camera of one of the responding officers. Appellant claims that the court erred in admitting the following statements contained in the footage because they do not fall within any exception to the rule against hearsay: (1) a woman identified "the guy in the red shirt" as the suspect; (2) a

[2] We shall take judicial notice of the fact that Philadelphia Road is also known as Route 7.

man stated that the suspect "was at Bradshaw and made a left;" and (3) a voice from someone off-screen is heard stating, "David Sanders is his name."

We conclude that appellant waived any objection to the first two statements because evidence that the stabbing suspect was wearing a red shirt, and that he turned onto Bradshaw Road was admitted without objection at various points elsewhere in the trial. *See Williams* and *Benton*, *supra.*

The State concedes that the statement identifying the suspect by name was admitted in error but that the error was harmless beyond a reasonable doubt. We agree with the State that error, if any, was harmless.

Improperly admitted evidence is not automatic grounds for reversal. "If [the error] is merely harmless error, [then] the judgment will stand." *Davis v. State*, 207 Md. App. 298, 317 (2012) (quoting *Conyers v. State*, 354 Md. 132, 160 (1999)) (alterations in original). An error in admitting evidence is harmless if the reviewing court is "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." *Nicholson v. State*, 239 Md. App. 228, 244 (2018) (quoting *Dionas v. State*, 436 Md. 97, 108 (2013)) (additional citation omitted), *cert. denied*, 462 Md. 576 (2019).

"To say that an error did not contribute to the verdict is [ ] to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Dionas*, 436 Md. at 109 (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008)) (additional citation and quotation marks omitted). By contrast, an error in admitting evidence is not considered harmless where the evidence "provided potentially

scale-tipping corroboration" to other evidence before the jury or "added substantial, perhaps even critical, weight to the State's case." *Parker v. State*, 408 Md. 428, 447-48 (2009) (citation omitted).

Here, Cosner identified appellant in a photo array and at trial as the person who stabbed him. Koulatsos identified appellant in a photo array and at trial as the person with a knife who fought with Spinoso and Cosner. The jury saw photographs that Magsamen took of the person in the red shirt who had a knife. Appellant did not move to strike a prior statement identifying him by name as the suspect. Based on our review of the record, we are convinced that, even if the statement on the body camera footage identifying appellant as the suspect was improperly admitted, any error was harmless beyond a reasonable doubt and, therefore, reversal of the judgments is not warranted.

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

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1674s19cn.pdf