Circuit Court for Baltimore County
Case No. 03-K-18-000845

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1790

September Term, 2019

DAVID EMMANUEL JOHNSON

v.

STATE OF MARYLAND

Fader, C.J.
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: February 22, 2021

Following a jury trial in the Circuit Court for Baltimore County, David Emmanuel Johnson, appellant, was convicted of home invasion, first degree murder, use of a firearm in a violent crime, and illegal possession of a firearm.[1] Appellant raises one question on appeal, which we have slightly rephrased: Did the circuit court commit reversible error by admitting hearsay? For the reasons that follow, we shall affirm.

BACKGROUND

Appellant was charged with the shooting death of Monday Makonnen on December 2, 2017. The State's theory of the case was that Makonnen's cousins paid appellant to kill Makonnen.

Four years prior to the murder, in August 2013, Makonnen was staying temporarily at the home of Lillie Griffin. Makonnen's paternal cousins, Dante Moore and Darin Moore, came to Griffin's house, looking for Makonnen. Makonnen told Griffin not to open the door. Griffin told Makonnen to hide, then answered the door and told Dante and Darin that she had seen Makonnen the previous day and that he told her that he was going to California. When they left, Makonnen told Griffin that they were looking for him because he had stolen $40,000 from them. Makonnen also said that he had stolen $10,000 from another paternal cousin, Katib Oliver.

[1] The court sentenced appellant to 25 years for home invasion; life, suspend all but 25 years for first degree murder, to be served consecutive to the home-invasion sentence; 15 years, concurrent, for use of a firearm in a crime of violence; and five years, concurrent, for illegal possession of a firearm.

A couple of months later, appellant went to prison in upstate New York for four years. He was released on November 28, 2017. The next day, Makonnen's uncle, Charles Oliver, who is also Katib Oliver's uncle and the cousin of Dante and Darin Moore, drove Makonnen from New York to Baltimore County, to the home of Makonnen's maternal aunt, Lisa Francis, and her husband, Ronald Francis.

Helean Lambert, a maternal cousin of Makonnen's, visited Makonnen at the Francis's home the day after he arrived there. Makonnen told Lambert that he knew his cousins were angry with him and that he needed "to make amends." Lambert assumed that Makonnen was talking about Katib, Dante, and Darin. Lambert recalled that Katib and Darin had attended family gatherings at the Francis home in the past.

In the early morning hours of December 2, 2017, Ronald Francis was awakened by a loud noise. He got out of bed and went into the hallway, where he observed shell casings on the floor. Makonnen was in his bedroom, "laying there bleeding."

Police were called to the home. Makonnen was found in his bed, dead of multiple gunshot wounds to the head. His death was ruled a homicide.

It was discovered that a sliding glass door that led from a den on the lower level of the home to the outside was ajar. The den had been disturbed, and credit cards were taken out of a wallet that Ronald Francis had left on a table before going to bed. The sliding glass door, which was off of its track and appeared to have a broken handle, was determined to be the point of entry and exit for the perpetrator. Latent fingerprints that did not belong to the residents of the home or to Makonnen were recovered from the door.

On December 12, 2017, appellant was arrested in Baltimore City on an unrelated warrant. It was discovered that his fingerprints matched the latent prints found on the sliding glass door of the Francis's home. He was brought to Baltimore County for questioning by Detective Heidi Westfall, the lead detective in the investigation into the murder of Makonnen. Detective Westfall told appellant that he was not being charged with anything, but that his name "came up in something" and she just needed to talk to him to see if he was the "right person," as his name was so common. Appellant agreed to be interviewed and waived his Miranda rights. An audiovisual recording of the interview was played for the jury.

During the interview, Detective Westfall gradually revealed to appellant that his fingerprint**s** were recovered at a house in the Randallstown/Owings Mills area, where "something bad" had happened in the past month, and the family that lived there had "lost someone." Appellant was shown a photograph of the Francis home. Appellant maintained that he had "nothing to do with that." He claimed that he was employed by a moving/hauling company, and he suggested that his fingerprints were at the house because he had worked there. He then said that he may have gone there to purchase marijuana. Detective Westfall told appellant that she knew that he had not worked at the house or purchased marijuana from the residents, and that, unless he had some other explanation, she would be "stuck with thinking" that he was the perpetrator. Appellant then said, "I don't want to talk about this . . . . I don't want to talk about this. . . . Can I get the phone call please? . . . . I'm confused right now."

Appellant called his cousin and said that he was "locked up" and "might be gone a long time." He said that he was "hurting right now" and needed to talk to his "baby mama," to tell her that he loved her. He then called the mother of his children, and told her, over and over again, that he was sorry. He said that everything he did was for her and the kids and he began to cry. He begged her not to leave him and promised that "when [he came] home," he would stop "hustling" and get a job. Appellant then spoke to "Doody" and said,

> I really need you step up, yo, and be the godfather, lil' bro . . . . they're questioning me[,] talking about some house . . . I don't know what the fuck is going on . . . I just feel like . . . my life [is] over. . . . I need you all to help my kids, yo. Be there for me, help my kids out, yo.

Appellant was not charged with Makonnen's murder at the conclusion of the interview, but he remained in jail on the unrelated warrant until December 20, 2017.

In the days following the interview with Detective Westfall, appellant made several phone calls from the detention center. Excerpts of the phone calls were played for the jury. Appellant told the person on the other end that he was "scared as shit" and that all the "games" had to go, including the "PlayStation 4" and the "[Xbox] 360." Appellant explained that "we did something with the games," they were "dirty" and "all fucked up," and that they had to get "two new PlayStation 4s." Appellant said that the "games" should be taken to a pawn shop or put "deep in the harbor water somewhere." In one of the phone calls, appellant used the word "biscuit" interchangeably with "PlayStation 4." According to Detective Westfall, "biscuit" is a reference to a gun.

The shell casings and bullet fragments found at the scene of the murder were examined, along with bullets removed from Makonnen during the autopsy. According to

James Birchfield, the State's expert in firearms identification and examination, all of the ammunition had been fired from the same .40 caliber handgun. By analyzing the markings on the ammunition, Mr. Birchfield was able to narrow down the gun used to fire the ammunition to one of three Glock handguns: a Glock model 22, a Glock model 23, or a Glock model 27.[2]

Police obtained a search warrant for data on appellant's mobile phone, an iPhone 5S. The search revealed a photograph of a Glock 23 that was taken with an iPhone 5S on December 10, 2017, eight days after the murder of Makonnen. Detective Westfall asked the forensic examiner to determine whether the photograph had been taken with appellant's phone or only saved to the phone from another source. Over a hearsay objection, Detective Westfall stated that she was advised that the photograph of the Glock 23 was taken with appellant's phone. It is the ruling on that objection that is the subject of this appeal, as we shall explain in more detail in the discussion.

The phone's internet search history revealed an undated Google search for: "Can Glock 23 shot [sic] 9 mm bullet[?]" The saved data included a screenshot of an image of a Glock 26 and a screenshot of what appears to be an internet video, with the title "FULL AUTO GLOCK CONVERSION."

Two images on appellant's phone showed a hand displaying a large bundle of U.S. paper currency secured with a rubber band. Those images had been made with an iPhone

[2] Mr. Birchfield stated that the gun that was used to murder Makonnen was used in another shooting on February 17, 2018, while appellant was in custody. The gun was never recovered.

5S on December 8, 2017. On December 10, 2017, a photograph of a handgun was sent from appellant's phone to one of his saved contacts, along with the text message, "Look wat the n***a got for us bro."[3]

The phone contained a photograph that had been saved from the Instagram account of Antoine Smith, who was also listed as a contact on appellant's phone. The photograph shows a group of people, including Smith and appellant, posing for the camera. Police searched Antoine Smith's Instagram account and found a photograph of Smith with Dante Moore and appellant's sister.

Appellant was arrested on February 2, 2018 and charged with the murder of Makonnen. In a recorded jail call the following day, appellant told a person he referred to as "Big Wayne" that he had been charged with first-degree murder and that his fingerprints were found on a door of a house. Appellant told Big Wayne that, according to the charges, the victim took $60,000 from his family, and his cousins had been looking for him since 2013. When Wayne asked appellant if he knew them "at all," appellant responded, "I don't want to talk on this phone . . . I don't want to incriminate myself on the phone."

At trial, the State urged the jury to convict appellant, stating that appellant "is connected with the gun, and he's connected with the people who want [Makonnen] dead." As noted, appellant was convicted of first-degree murder and related offenses. Additional facts will be included in the discussion, as they become relevant.

[3] There was no information associated with the photograph of the handgun that was sent with the text message, such as date, time, or make and model of the device that was used to create the image.

STANDARD OF REVIEW

"The admissibility of evidence ordinarily is left to the sound discretion of the trial court." *Walter v. State*, 239 Md. App. 168, 200 (2018) (quotation marks and citation omitted). "We will not disturb a trial court's evidentiary ruling unless 'the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.'" *Id.* (quotation marks and citations omitted).

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) ("A trial court has 'no discretion to admit hearsay in the absence of a provision providing for its admissibility.'") (citation omitted).

"[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*.

DISCUSSION

Evidence that there was a photograph of a gun on appellant's phone was first mentioned during the testimony of Dana McAlister, a computer forensic examiner who

conducted an analysis of the data extracted from the phone. Ms. McAlister stated that the image of the gun had been taken by an iPhone 5S on December 10, 2017. Importantly, Ms. McAlister did not state that the photograph had been taken specifically with the iPhone 5S belonging to appellant.

Later in the trial, Detective Westfall testified that she requested a forensic examination of the photograph to "determine if the phone itself took that picture or if it was saved by some other means or how that file was created to that phone." When the prosecutor asked Detective Westfall if she recalled "the result of that examination," defense counsel objected on the basis of hearsay, and the following exchange transpired at the bench:

> [PROSECUTOR]: . . . the answer's already in evidence . . . . Dana McAlister . . . already testified as to the photograph and - -
>
> [THE COURT]: So that's the photograph?
>
> [PROSECUTOR]: Yes.
>
> [THE COURT]: And - - but no one's testified yet as - - and it was found on his phone - -
>
> [PROSECUTOR]: Yes.
>
> [THE COURT]: that's the testimony so far. But the question next becomes whether [ ] that was imported into the phone or taken by the phone, which has some significance.
>
> [PROSECUTOR]: That's what . . . McAlister testified to, that she conducted [ ] an examination of the phone using Opanda software.
>
> [THE COURT]: Right.

> [PROSECUTOR]: And the only image that she was able to [ ] identify that had [ ] EXIF information, which details when the picture is taken and other particulars, was this photograph.
>
> [THE COURT]: Okay.
>
> [PROSECUTOR]: And that this photograph . . . was taken with . . . an iPhone 5S, and the [appellant] has an iPhone 5S.
>
> * * *
>
> [THE COURT]: And I remember the EXIF data[.] [Ms. McAlister] testified that she could tell the date, the time, the make, model, the author and the revisions from the data she received from the Opanda software.
>
> [PROSECUTOR]: Yes, sir, and that is was taken with an iPhone 5S.
>
> [THE COURT]: All right. I'm going to overrule the objection. It is already in evidence[.]

When direct examination resumed, Detective Westfall's testimony continued as follows:

> [PROSECUTOR]: . . . what was the purpose of sending this photograph up to [Ms. McAlister]?
>
> [DETECTIVE WESTFALL]: Because it was the same caliber and make of the weapon that was used in this case that was determined by a firearms report I received. It was of interest to me to see if this picture, again if this file, was created by the phone itself, meaning someone took a picture with this phone[,] or if this was saved like a screen shot or some other means.
>
> [PROSECUTOR]: And do you recall the result of the examination?
>
> [DETECTIVE WESTFALL]: Yes. I was advised that based on that report, that it was the phone that took the picture.

Appellant contends that Detective Westfall's testimony that appellant's phone had captured the photograph of the gun was inadmissible hearsay. He asserts that the court

erred in admitting the evidence because, contrary to the court's stated rationale for overruling the hearsay objection, there was no other evidence that the picture of the gun had been taken with his phone, but only that the photograph had been taken with an iPhone 5S.

The State does not contend that the testimony that the photograph was taken specifically by appellant's phone was not hearsay, or that it was admissible under an exception to the hearsay rule. Instead, the State maintains that appellant waived his objection because defense counsel (1) did not argue with the court's determination that the hearsay objection was waived because evidence of the results of the examination of the photograph had already been admitted, and (2) did not renew the hearsay objection after Detective Westfall was permitted to answer the question. Alternatively, the State contends that any error in admitting the evidence was harmless.

We do not agree with the State's argument that the objection was waived. Issues related to trial court rulings or orders are sufficiently preserved for appellate review if a party, "at the time the ruling or order is made[,]" either lodges an objection to the court's action or informs the court of his or her desired course of action. Md. Rule 4-323(c). Here, a timely objection was made, and the court was asked to rule on whether the prosecutor's question called for hearsay. As such, we conclude that the issue was sufficiently preserved for our review.

We agree with the State, however, that any error in admitting evidence that the photograph of the gun was taken with appellant's phone 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).

Based on our review of the record, we are convinced that, even if the evidence at issue was improperly admitted, there is no reasonable possibility that it contributed to the verdict. Appellant's fingerprints were present on the door that had been used to break into the Francis's home on the night Makonnen was murdered. Appellant was interviewed and gave implausible explanations for having been at the house. The day after learning that police had fingerprint evidence, appellant placed a phone call from the detention center to tell the person on the other end that the "games" were "dirty" and had to be pawned or

thrown into the water, which the prosecutor argued was a disguised direction to dispose of the gun that he had used in the murder. Photographs posted on social media established a connection between appellant and Makonnen's cousins, from whom Makonnen had stolen tens of thousands of dollars. Appellant implicitly corroborated that connection when he declined to discuss whether he knew the victim or his cousins, citing a fear of incriminating himself. Data on appellant's phone included images of two of the three possible murder weapons, evidence that he had researched ammunition and "conversion" instructions for Glock handguns, and an image of a large amount of cash that was photographed with an iPhone 5S six days after the murder. Appellant's demeanor and statements made in recorded phone calls demonstrated consciousness of guilt.

Compared with the above, evidence that the photograph of the Glock 23 found on appellant's phone was taken by appellant's phone was relatively unimportant. The disputed evidence provided no "scale-tipping corroboration," nor did it add substantial weight to the State's case. Accordingly, we conclude that 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.