UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0928

September Term, 2015

LUIS ADOLPHO GUARDADO

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Krauser, C.J.

Filed: June 3, 2016

*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.

Luis Adolpho Guardado, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of second-degree rape.[1] After this Court affirmed that judgment of conviction (s*ee Guardado v. State*, No. 2397 (Sept. Term, 2014)(filed October 14, 2015), *cert. denied*, 446 Md. 219 (2016)), Guardado filed, in the circuit court, a motion for a new trial. The circuit court denied that motion, prompting this appeal. For the reasons that follow, we affirm.

FACTS

The evidence presented at trial showed that appellant and Nancy Vasquez, the victim, met as children in El Salvador when her father and his mother began a relationship. During that time, she and appellant saw each other, every few weeks, when the victim visited her father. The victim subsequently moved to the United States in 2003. And, a few years later, appellant did so, as well.

In 2008, the victim and appellant became romantically involved and eventually began living together. Two years later, they stopped living together but continued to date periodically. At some point, the victim told appellant that she no longer wanted to see him, whereupon appellant threatened both to post on YouTube and to show her family, friends,

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[1] The court sentenced appellant to 20 years of incarceration, all but nine years suspended, and five years of probation upon his release from prison.

and pastor, explicit photographs and videos he had taken, on his cell phone, of her engaging in sexual relations with him.

On February 13, 2013, appellant informed the victim that, if she did not want to continue seeing him, she should tell him in person, at which time he would give her the photographs and videos. He then suggested that she meet him in the parking lot of a local restaurant near her home at 11:00 a.m. that night. She agreed to do so. When she arrived at the location selected by appellant, he instructed her to get into his car. She did but warned him that she "didn't want to have anything to do with him" and asked for the memory card on which he kept the photos and videos. He told her that his phone was at his home, and, if they went there, he would retrieve the memory card and give it to her. His home was in the basement of a house that contained other tenants.

When they arrived at appellant's place of residence, no one else was in the house. Upon entering his basement apartment, appellant retrieved his phone and plugged it in to charge it. When the victim then sat down on the bed to wait for the phone to charge, appellant "positioned himself in front" of her, pinned her down, removed her shorts, and forcibly engaged in vaginal intercourse, ignoring her pleas to stop. Afterward, she told him, "[Y]ou raped me[.]" He responded, "I don't know what happened to me[.]" Upset, the victim then tried to enter the bathroom, but appellant blocked her path to the bathroom and said, "Forgive me," whereupon she went into the kitchen, grabbed a knife to cut herself, and

collapsed to the floor. Appellant took the knife away from her and repeatedly said, "Forgive me[.]" Shortly thereafter, she asked him to drive her to the home of her sister, Loli.

While en route to Loli's home, the victim told appellant that she was going to report him to the police. He repeatedly told her not to do so. Then, fearing that the victim's sister would see she had been crying, appellant told her "to say a black guy had done it" and that "if [she] didn't do that, something would happen to [her] father." At trial, the victim explained that the area, where her father and his mother had lived, was surrounded by gang members and that, when she and appellant had lived together, appellant had paid someone to protect her father and his mother.

Appellant subsequently dropped the victim off in a parking lot near her sister's home. When the victim arrived at Loli's house, she was, according to Loli, crying and nervous. The victim then informed Loli that, while walking to her home, a masked black man had forced her into a car at gunpoint and raped her. Loli then called "911."

The victim later recounted to the police officers, who had responded to the "911" call, what she had told her sister about the rape, adding that the "black man" had driven her to a nearby recreation center where he had raped her and that she, upon escaping from his vehicle, had run to her sister's home. The victim was subsequently transported to a local hospital. There, the victim described to hospital staff the events as she had related them to Loli and the responding police officer, adding that the man had raped her in the backseat of

his vehicle that she was able to escape when the rapist was distracted by a siren. After the hospital examination was completed, the victim was taken to a police station, where she reiterated that she had been raped by a "black man."

The next day, the victim told her older sister Maria, who, she said, was like a mother to her, that appellant had raped her. At a meeting with a police detective three days later, the detective confronted her with a surveillance video from cameras located in the area where her sister, Loli, lived. The video footage did not match the victim's story about being picked up by a "black man," although it did show her crying and walking quickly to her sister's home. The detective told her that, if someone was threatening her, the police could help. She then told the detective that it was appellant who had raped her.

At trial, the victim testified that, after the rape, appellant called her several times a week and texted her nearly every day. She later showed appellant's text messages to a detective assigned to the case. In the messages, appellant said he wanted to see her and have "relation[s]" with her again. She responded by texting him back to stop bothering her and that he had "harm[ed]" her enough.

On August 1, 2013, the police set up a "sting" in which the victim, wearing a body wire, met appellant at a park. When appellant arrived at the park, he tried to hug the victim. When she told him not to touch her, he hugged her anyway. The police officer later testified

that, during the 45 minute meeting, appellant repeatedly tried to touch the victim or move toward her while she repeatedly tried to stay out of his grasp.

On January 29, 2014, almost six months after the "sting," appellant was interviewed, by the police, about the victim's rape allegation. During that interview, appellant told the officers that he had not raped the victim but that they had engaged in consensual sex. He further denied ever threatening to disseminate the sexually explicit photographs of her and suggested that the victim was upset with him, after they had consensual sex, because he had told her, after they had consensual sex, that he did not want to be in a relationship with her. His repeated apologies to her at the park were not, he explained, because he had raped her, but because he had insulted her on a prior occasion.

Motion for new trial

On December 12, 2014, almost a month after sentencing, defense counsel filed a motion for a new trial under Md. Rule 4-331(b). That rule provides that a court may set aside an unjust or improper verdict. In support of that motion, defense counsel related that, after appellant's conviction, he spoke with Davi de Jesus Ramirez, a tenant in the house where the rape had allegedly occurred. Attached to the motion was a written statement, signed by Ramirez, dated August 12, 2014, that read:

> I remember that on Wednesday, February 13, 2013 between 11:00 a.m. and 1:00 p.m. I was cooking my lunch when I saw Mr. Luis Guardado leaving

> with his girlfriend, who he affectionately called "my chickie." I remember that day, Wednesday, because the following day it was February 14th which we call "the day of love." And my boss told me that we were not going to work on that day and also the following day. Well, I don't like to be off so much: Well: But I never saw Mr. Luis Guardado arguing with the lady. The whole time I saw them happy, hugging each other, playing, kissing, and I never saw any fights or mistreatment to Ms. Nancy. She is a lady who is obsessed with him and that's why she is accusing him.

At a subsequent hearing, the court asked defense counsel how he came to speak to Ramirez, whereupon defense counsel explained:

> So, I spoke to him after the verdict in this case. I did not speak to him prior to the case going to trial. I spoke to him close in time to the time that he provided the statement, I think in August. August 12, 2014 is the date of the statement, and I spoke to him right around that time. That was the first time that I spoke to him. Mr. Ramirez – I, [appellant] had given me the name of Mr. Ramirez so I knew that name as someone who might be a valuable Defense witness, someone who [appellant] believed was in the home that day, but I didn't have contact information for Mr. Ramirez, and so the, the first time that I spoke with Mr. Ramirez was close in time to the time that I filed this motion.

Defense counsel added that a woman from New York was also in the house on the date of the alleged rape and could corroborate Ramirez's observations. Although he did not have the woman's contact information, counsel stated that he had received a call from her after filing the motion. When the court asked defense counsel to explain why the verdict was "unjust and improper," the standard for granting a new trial under Md. Rule 4-331(b), defense counsel responded, "Well, it's unjust in that there's a real risk that an innocent man

was convicted. There's a real risk that a jury would have come to a different conclusion had they heard from . . . [this] witness[.]"

The court denied the motion, concluding that Ramirez's affidavit was not credible based on the timing of its procurement, which occurred well after appellant's trial had concluded, even though defense counsel knew of Ramirez and that he was a potential defense witness before trial. The motions court, moreover, described as "ridiculous" Ramirez's statement that he remembered the interaction between appellant and the victim a year and a half after it occurred, and it found Ramirez's statement that he remembered that day, because his boss told him not to come to work for the next couple of days, to be "not credible." The court further found Ramirez's reference to the "whole time" – in describing appellant and the victim's interaction – to be ambiguous as it was unclear whether Ramirez was referring to the day of the assault or the period of time that appellant and the victim had dated. Finally, the court concluded that it "would be unjust and improper" to give appellant a new trial based on Ramirez's statement, which was "unclear, unreliable, and untrustworthy" and, "even if believed, that certainly does not result, in the opinion of the Court, even in a remote possibility of a different outcome of this case."

DISCUSSION

Appellant contends, in denying his motion for a new trial under Rule 4-331(b): 1) the court's factual findings as to the reliability and trustworthiness of Ramirez's affidavit were clearly erroneous; 2) the court improperly discounted the significance of the affidavit; and 3) the court should have continued the hearing to allow appellant to subpoena Ramirez. The State responds that the court did not abuse its discretion in denying the new trial motion because there are no defects on "the face of the record," which are the limited grounds upon which a new trial motion may be made under Rule 4-331(b).

Rule 4-331, governing motions for a new trial, is structured so that relief "is available on three progressively narrower sets of grounds but over the course of three progressively longer time periods." *Isley v. State*, 129 Md. App. 611, 623 (2000)(citation and quotation marks omitted), *overruled on other grounds*, *Merritt v. State*, 367 Md. 17, 24 (2001). The Rule provides, in pertinent part:

> (a) **Within ten days of verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
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> (b) **Revisory power.** (1) Generally. The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
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> * * *
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> (B) in the circuit courts, on motion filed within 90 days after its imposition of sentence.

> Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.
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> * * *
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> (c) **Newly discovered evidence.** The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:
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> (1) on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief[.]

(Emphasis added.)

Appellant's new trial motion does not fall within any of the foregoing three subsections of the Rule. Appellant did not file his new trial motion within ten days of his verdict, and therefore, his motion was not brought under subsection (a) of the Rule. Moreover, appellant concedes that his motion was not brought under subsection (c) of the Rule, which applies to situations where newly discovered evidence is alleged. That leaves only subsection (b), which is also inapplicable. That subsection authorizes a court "to set aside an unjust or improper verdict" on a motion filed within 90 days of sentencing. Moreover, it is generally limited to errors that occur "on the face of the record (the pleadings, the form of the verdict) and not with the evidence or the trial proceedings[.]" *Ramirez v. State*, 178 Md. App. 257, 280 (2008)(quotation marks and citation omitted), *cert. denied*, 410 Md. 561 (2009). *See also Isley*, 129 Md. App. at 624-629 (discussing in detail

the limited concerns under which a person may bring a new trial motion under Rule 4-331(b)).

Appellant's motion for a new trial was based on Ramirez's post-trial affidavit. The affidavit is clearly extrinsic evidence, and therefore, is not a basis for granting a new trial under Rule 4-331(b). But, even if it were, the motion court properly exercised its discretion in denying appellant's new trial motion.

We review a court's order denying a motion for a new trial for abuse of discretion. *Cooley v. State*, 385 Md. 165, 175 (2005). An abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court." *Fontaine v. State*, 134 Md. App. 275, 288 (quotation marks and citations omitted)(brackets in original), *cert. denied*, 362 Md. 188 (2000). "Thus, where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Id*.

Contrary to appellant's contention, the motions court's finding that Ramirez's affidavit was unreliable and untrustworthy was supported by the record: the affidavit was procured 16 months after appellant was indicted even though his counsel knew, during trial, that he was a potential and possibly important defense witness. Moreover, the court did not abuse its discretion in concluding that the facts, as set in the affidavit, did not, even if true, create a substantial possibility that the result of his trial would have been different. That is because the evidence of appellant's guilt of the crime charged was, to say the least,

substantial. It included, among other things, text messages and the transcribed audio recordings of appellant expressing his desire to continue "relation[s]" even in the face of the victim's clear physical resistance and emphatic statements to appellant to stop. Furthermore, the text messages and transcribed audio recordings contradicted appellant's self-serving statement to the police that the victim was upset with him because he did not want to continue seeing her.

In addition, Ramirez's affidavit was ambiguous because the observations he made in that document, as defense counsel conceded, did not appear confined to what he observed on the day of the rape. Finally, as to appellant's claim that the motions court should have continued the hearing so he could subpoena Ramirez, we note that he had 16 months to procure Ramirez's attendance but did not do so. Accordingly, we find no abuse of discretion by the motions court in Ramirez's request for a continuance. *See Abeokuto v. State*, 391 Md. 289, 329 (2006) ("The decision whether to grant a request for continuance is committed to the sound discretion of the court.")(citation omitted).

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANT.