UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1188

September Term, 2015

JOEL NAVARRO-RAMOS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: November 16, 2016

The appellant, Joel Navarro-Ramos, was convicted by a jury in the Circuit Court for Montgomery County on March 11, 2015, of (1) second-degree burglary, (2) conspiracy to commit second-degree burglary, (3) theft of less than $1,000, and (4) conspiracy to commit theft of less than $1,000. On June 10, 2015, he received an aggregate sentence of three years' incarceration, all but eighteen months suspended. He presents a single question for our review:

> "Did the trial court prevent Appellant from making a knowing and intelligent waiver of his right to testify in his own defense by providing inaccurate legal advice?"

We find no error, and affirm.

Factual Background

The appellant's convictions relate to a storehouse burglary which took place during the early morning hours of August 27, 2014. The target property consisted of numerous pieces of landscaping equipment (*e.g.*, leaf blowers, hedge trimmers, and weed whackers) owned by the victim, Freddy Portillo, who operated a lawn care business. Mr. Portillo kept his equipment in a locked storage shed on the grounds of an industrial lot known as "Wood Acres" in Kensington, Maryland. Wood Acres is fully enclosed by a ten-foot-tall wooden perimeter fence. The only intended means of ingress and egress is a single bi-parting vehicle gate secured by a "pretty heavy duty" padlock.

At approximately 2:00 a.m., Corporal Charles Haak of the Montgomery County Police Department was conducting surveillance near Wood Acres in an unmarked police car when he observed a Honda mini-van, with "three or four" occupants, enter the rear

parking lot of a shopping center at a high rate of speed. Corporal Haak identified the appellant as the driver. The van made a U-turn, exited the parking lot, and then turned down Farragut Avenue – a dead-end street which runs behind Wood Acres. When the van did not soon reappear, Corporal Haak drove down Farragut Avenue to investigate.

Corporal Haak found the mini-van backed into a parking spot at the base of the perimeter fence; its sliding door was open and it was unoccupied. He parked his unmarked car some distance away in a spot facing the van and waited. Eventually he observed the appellant at the rear of the van loading "something long" into the back. He then watched as "all of a sudden" pieces of landscaping equipment began "coming over top" of the perimeter fence, where they were received by the appellant. Moments later he observed two men who had emerged outside the fence on opposite sides of the lot and who approached the appellant from the left and right. The three convened at the back of the van and began loading the rest of the equipment. Corporal Haak described the trio's behavior at this point as "frantic," and stated that "everybody's head was on a swivel." Once the cargo was secured, the three men got into the van and drove off. The appellant was again identified as the driver.

Corporal Haak radioed to nearby officers what he had seen and began following the van discretely. He was soon joined by other officers, also in unmarked cars, and a brief vehicle chase ensued. In the course of the chase, the mini-van traversed a curbed median and hit a parked car, but continued driving. The van eventually came to a halt in the cul-de-sac of a residential neighborhood. Its occupants "bailed out" and scattered into the

surrounding woods. A police canine unit found the appellant hiding beneath a section of wooden lattice which was leaning against a residential storage shed. The appellant was taken into custody along with the other two men.[1]

The police recovered from the mini-van a total of eight pieces of landscaping equipment belonging to Freddie Portillo. Police were able to gain access to Wood Acres later that morning and discovered the door to Mr. Portillo's storage shed had been "kicked in" and was heavily damaged. A couple of pieces of landscaping equipment were leaning against the interior side of the perimeter fence. Wooden pallets had also been left leaning against the interior and exterior sides of the fence.

Mr. Portillo testified that he had not given anyone permission to break into the storage shed or to remove the equipment. He also testified that he was interviewed by police after the burglary and informed them that he believed his estranged nephew, Labien Portillo (also known as Chino), was behind it. Chino had previously been employed by Mr. Portillo, but was fired in 2011 for disrespect to customers and otherwise poor job performance. On cross-examination, Mr. Portillo testified that Chino had been in contact with him as recently as 2014 asking for work.

Background of the Issue

The appellate issue stems from discussions which took place at the outset of the third day of trial, after the State had rested its case. The appellant's defense theory was

[1]The appellant was tried along with a single co-defendant. At the time of trial, there was an outstanding bench warrant for the third occupant.

lack of intent; specifically, that Chino orchestrated the burglary and the appellant had been operating under the honest belief that he and his cohorts had permission to take the equipment. The looming question was whether or not the appellant would testify in his own defense, and if so, what the scope of his testimony would or could be.

Defense counsel indicated that a potential topic of the appellant's testimony would be a meeting which took place between the appellant, his co-defendant, and Corporal Haak at a shopping mall some days after the burglary. Although Corporal Haak and Mr. Portillo had both testified that such a meeting occurred, neither gave any testimony regarding the purpose of the meeting or the substance of what had been discussed. Co-defendant's counsel, who had been pursuing a defense theory of mistaken identity, was evidently concerned at the prospect of such testimony and requested that appellant's defense counsel "be limited to asking his client only questions about what happened [on the day of the offense], nothing about this separate, secret meeting that they had between him and [Corporal] Haak." Appellant's defense counsel protested this limitation, and the following ensued:

> "THE COURT: Your client can testify as to what happened at the incident. He can testify, if he wants to, that Chino set it up, and he had permission. And then the State gets to cross-examine him about the state [sic].
>
> "[DEFENSE COUNSEL]: *That's fine, Your Honor.* And I –
>
> "THE COURT: I mean do you want your client to get on and say I offered to return the property that I stole earlier in the evening?
>
> "[DEFENSE COUNSEL]: That's not what the –

"THE COURT: Is that what he [is] going to say?

"[DEFENSE COUNSEL]: -- substance of the conversation was, Your Honor, at all. That's not at all what the substance of the conversation was. Nobody –

"THE COURT: Okay. *The substance of the conversation* that says that Chino did it, or set it up *is not coming in. It's not coming in. It's hearsay*. "

(Emphasis added).

This ruling, excluding the contents of statements made at the meeting from the scope of appellant's potential testimony, did not elicit a proffer. Ultimately, with respect to Chino's alleged role in the burglary, the trial court ruled that the appellant would be permitted to testify as to why he (the appellant) was at Wood Acres that evening, what his intent had been, and that Chino had orchestrated it, but he would not be permitted to testify regarding the contents of any statements Chino may have made to him.

"THE COURT: Okay. *I've ruled. I've ruled.* It's done. No more argument. You're not going to get into the meaty, after the fact, after everybody was charged with the crime to get in that, yes, he told the police what he wants to tell the jury now. Absolutely, positively not. It's not happening, okay?

"He can testify as to what Chino – why he went there, or what his intent was, and it wasn't a break-in, and, you know, the door was already broken open, it must have been Chino. He can say all that stuff. *He can't say what Chino told him* –

"[DEFENSE COUNSEL]: *Fine, Your Honor.*

"THE COURT: – because Chino's not here to testify, and he's not subject to cross-examination, so he can't do that. He can say we met with Chino, and Chino took us over there.

"[DEFENSE COUNSEL]: Why doesn't it go to intent and motive as a hearsay exception?

"THE COURT: Okay. It's not happening, all right? I'm not going to have a law school class here for you now. You can subpoena Chino, and you can try to get him to come in here, and Chino can take the Fifth, but that's not happening. *You're not going to get hearsay testimony about what Chino said or Chino told him through your client*. All right?"

(Emphasis added).

After this ruling, defense counsel requested additional time to discuss with the appellant whether or not he still wished to testify. The court took a brief recess, and then inquired as to the appellant's decision:

"THE COURT: All right. Thank you. Be seated, please. Let's bring [Defense counsel]'s client out. All right. [Defense counsel], we took a recess, and left you with the Spanish interpreter and your client. Based upon the Court's ruling you indicated that you wanted another opportunity to speak to him. *Have you had sufficient opportunity to speak to him with respect to whether or not he wants to testify or not testify* in connection with this matter?

"[DEFENSE COUNSEL]: *Yes*, Your Honor.

"THE COURT: And *I assume you've explained it to him that he doesn't have to testify*, and if he doesn't testify [then] I'll give the jury an instruction, which we already have pulled, and which *I assume you've already gone over with him that says that the jury can't use against him his failure to testify* in the case, and, in fact, they can't even consider it when they go out to deliberate.

"[DEFENSE COUNSEL]: *Yes*, Your Honor, *I relayed that information*.

"THE COURT: All right. And it's my understanding that he wishes to testify, or he did wish to testify. Does he still want to testify in this case?

"[DEFENSE COUNSEL]: Your Honor, *based on your ruling, my client chooses not to testify in this case*.

> "THE COURT: Okay. And you believe you've had enough time to go over the pros and cons of that with him?
>
> "[DEFENSE COUNSEL]: *Yes*, Your Honor."

(Emphasis added).

The court confirmed that the appellant had been advised of his right to testify and his right to remain silent and that the appellant's decision not to testify was in keeping with defense counsel's own advice.

> "THE COURT: All right. And you've represented to the Court that you've gone over with him his right to remain silent; the pros and the cons of testifying in this case; and subjecting himself to cross-examination with respect to the facts before the jury; and *I gather it's your advice that he not testify,* as well.
>
> "[DEFENSE COUNSEL]: *Absolutely*."

(Emphasis added).

Discussion

The appellant's single contention on appeal is that "the trial court prevented [him] from making a knowing and intelligent waiver of his right to testify by providing *inaccurate legal advice*." (Emphasis added). For support, the appellant relies primarily on the Court of Appeals' decision in *Morales v. State*, 325 Md. 330, 600 A.2d 851 (1992).

Morales was an unrepresented criminal defendant. The responsibility for advising him of his right to testify or remain silent, therefore, fell to the trial court. *Id.* at 336, 600 A.2d at 854. The court advised Morales of those rights, as required, and Morales indicated that he wished to testify. The problem arose when the court "went further" and, in a good-faith attempt to advise Morales of the *risks* of testifying, incorrectly implied that the State

would be able to impeach him with any of his prior convictions. Morales then changed his mind and decided not to testify. It was discovered at sentencing that only one of Morales's prior convictions could have been used for impeachment purposes. The Court of Appeals concluded that, because Morales relied upon the trial court's gratuitously offered and inaccurate cautionary advice regarding the risks of impeachment in deciding not to testify, he had not made a knowing and intelligent waiver of that right:

> "Morales intended to testify until the judge advised him to 'think about this' and that his convictions could be brought out to show whether he should be believed or not. *Since Morales apparently changed his decision to testify based on the trial court's incorrect implication* that all of his prior convictions could be used to impeach him, *the defendant's decision to waive his constitutional right to testify and to exercise his constitutional right to remain silent was not knowingly and intelligently made*."

Id. at 339, 600 A.2d at 855 (emphasis added).

The theory of error described above does not apply to the facts of this case. Unlike Morales, the appellant was represented by counsel. "Defendants represented by counsel are presumed to have been informed of their constitutional rights by their attorneys," *Morales*, 325 Md. 330, 336, 600 A.2d 851, 853 (1992), and "absent some 'clear' indication in the record to the contrary, appellate courts will presume that whatever course of action the defendant ultimately takes at trial was in fact a voluntary decision made after a complete, but not necessarily on-the-record, consultation with defense counsel." *Oken v. State*, 327 Md. 628, 639, 612 A.2d 258, 263 (1992). *See also Tilghman v. State*, 117 Md. App. 542, 555, 701 A.2d 847, 853 (1997) ("[t]he trial court is entitled to assume that counsel has properly advised the defendant about [the right to testify] and the correlative

right to remain silent and, if the defendant does not testify, that he has effectively waived his right to do so.").

The record makes clear that the appellant was advised of his right to testify and his right to remain silent. He discussed those rights with defense counsel at length. After a recess – taken for that very purpose – defense counsel informed the trial court that "*based on your ruling*, my client does not wish to testify in this case." (Emphasis added). Defense counsel confirmed he had gone "over the pros and cons" of that decision with the appellant. The court inquired whether it was defense counsel's advice that the appellant not testify. Defense counsel replied, "Absolutely." The appellant does not contend that defense counsel's advice was in any way incomplete, inaccurate, or otherwise deficient. The appellant, in other words, makes no effort to rebut the presumption that he was properly advised of his rights by his attorney.

The appellant's contention is, in effect, that notwithstanding the perfectly adequate advice of his attorney he was nevertheless prevented from making a knowing and intelligent waiver of his right to testify due to "inaccurate legal advice" given by the trial court. The question then is to what is the appellant referring as being "inaccurate legal advice" of the trial court? The answer lies in the appellant's confusing "legal ruling" with "legal advice." As he articulates in his appellate brief,

> "the trial court *advised* Appellant, incorrectly, that he would not be able to explain his lack of intent to commit the crimes charged based on the contents of statements made to him by Chino because those statements were hearsay. Appellant relied on that *advice* when he decided not to testify. Therefore, as in *Morales*, his decision to waive his constitutional right to testify and to exercise his constitutional right to remain silent was not knowingly and intelligently made and reversal is required."

Appellant's Brief at 14 (emphasis added).

On analysis, appellant's contention does not present an issue of constitutional dimension. "Of course, the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process.'" *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 2711 (1987) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1046 (1973)). "Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify." *Rock*, 483 U.S. at 55 n.11, 107 S. Ct. at 2711 n.11. *See also Dallas v. State*, 413 Md. 569, 582-83, 993 A.2d 655, 663 (2010); *Passamichali v. State*, 81 Md. App. 731, 741-42, 569 A.2d 733, 738-39 (1990).

Here, the ruling of which appellant complains is, right or wrong, an application of the hearsay rule. The State has a legitimate interest in requiring that fact findings at a trial be based on reliable evidence. Appellant's issue presented a garden variety evidentiary ruling.

The error now claimed by appellant in the "advice" (*i.e.*, ruling) is that the statement by Chino to which appellant would testify was not being offered to prove the truth of the content of the statement but was offered as relevant to appellant's honest belief that removal of the property was authorized by its owner.[2] This evidentiary issue has not been preserved. Appellant made no proffer of what appellant would say under oath that Chino said to him.

[2]We assume, *arguendo*, that counsel's reference to intent was sufficient to advise the court that the statement was to be offered for a limited purpose.

In order to preserve an objection to the trial court's exclusion of evidence, "the party must show both prejudice and that 'the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered.' Md. Rule 5-103(a)(2)." *Peterson v. State*, 444 Md. 105, 125, 118 A.3d 925, 936 (2015).

Finally, had appellant decided to frame his appellate contention as a challenge to the trial court's evidentiary ruling, and had the appellant properly preserved that issue for review, and were that ruling erroneous, the error was harmless beyond a reasonable doubt. Although no proffer of the excluded statement's content was ever made at trial, the appellant suggests in his brief that,

> "defense counsel previously indicated that he may call his client to testify to explain that *he didn't know that they didn't have permission* and to testify to a statement that he made to Officer Haak during a meeting with him at the White Oak Shopping Center after the burglary where he claimed that Labien, otherwise known as 'Chino,' picked them up and told them that they were going to get lawn equipment but *never informed them that they did not have permission to take it.*"

Appellant's Brief at 7 (emphasis added). The trial court's ruling did not bar the appellant from testifying as to what Chino *did not* tell him, or from testifying as to his own intent.

Moreover, the evidence of the appellant's guilt was overwhelming and uncontroverted. He was observed receiving landscaping equipment over the top of a ten-foot perimeter fence in an industrial park under cover of darkness, frantically loading the equipment into the back of a nearby van, engaging police in a vehicle chase through a residential neighborhood, and ultimately fleeing into the woods and hiding next to a storage

shed under a pile of debris. *See Rubin v. State*, 325 Md. 552, 580, 602 A.2d 677, 690 (1992).

For these reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.