UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2205

September Term, 2014

DYLAN JAMES FINNERTY

v.

STATE OF MARYLAND

Wright,
Graeff,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 26, 2016

Following a jury trial in the Circuit Court for Harford County, Dylan James Finnerty, appellant, was convicted of fourth-degree burglary. He was sentenced to a term of three years' incarceration, with all but 18 months suspended, and a period of three years of supervised probation upon release.

On appeal, Finnerty presents two questions for our review, which we quote:

1. Did the trial court err when it permitted the investigating detective to testify about statements William Ellison made to him at the scene?

2. Assuming *arguendo* that the trial court did not err when it permitted the detective to testify about statements William Ellison made to him, did the court nevertheless err or abuse its discretion when it refused defense counsel's request for a limiting instruction?

For the reasons that follow, we shall reverse the judgment of the circuit court.

BACKGROUND

Donna Ellison testified that on the morning of September 6, 2013, she woke up and discovered her son, William ("Will"), and his friend, Finnerty, sleeping in her family room. Will, age 26, had moved out of the family home about three months earlier. He was married and lived in Cecil County with his wife. Ms. Ellison and her husband had custody of Will's oldest child, Onica.

According to Ms. Ellison, Will's relationship with his wife was "very turbulent," and when they would argue, Will would "come home." She explained that she and Will's wife did not get along "at all," and that Will's wife had previously broken into her home and assaulted her. Nonetheless, Will was welcome in her home and would stay there approximately once a month. He did not have a key to the house, so before visiting,

he would either call to find out when someone would be home, obtain a key from his brother, or "just show up and knock on the front door." She agreed that her relationship with Will was "strained," and she added, "That's my son's doing, not mine."

Ms. Ellison and her husband had allowed several of Will's friends to stay at their home temporarily when they needed to. She explained, "we don't want to see anybody homeless."

Ms. Ellison knew Finnerty but had not seen him in two or three years. The last time she saw him was at her house, at which time "there was a suspicion of him going through [her] cell phone." As a result, her husband told Finnerty "that it was best that he stayed away" from their house. This incident occurred when Will lived at home, and, according to Ms. Ellison, Will was aware that Finnerty was no longer welcome in the home.

After discovering Will and Finnerty asleep in her family room, Ms. Ellison spoke to her husband, who told her that the two men had shown up at the home at two or three o'clock in the morning, and that he had let them in. Ms. Ellison then went to work. She admitted that Finnerty was not asked to leave. She did not recall that Finnerty was in the house when she returned home from work that day.

The next day, Ms. Ellison and her husband went to an Orioles baseball game accompanied by Onica, Will, and Will's best friend, Andrew, who was renting a room at the Ellisons' house. Ms. Ellison was the last one out of the house and locked the door behind her. When they returned home from the ball game, Finnerty was in the house. Ms. Ellison asked him why he was in her house, and Finnerty responded that he needed

to charge his phone because he had to call his sick grandmother. Finnerty claimed that Will had told him that he could go into the house. Ms. Ellison explained to Finnerty that it was her house, that Will did not live there, and Will could not have given Finnerty permission.

Ms. Ellison's husband told her to check her jewelry. When she reported that none of it was missing, her husband "pretty much told [Finnerty] to get out of the house and kind of followed him out[,] talking to him, trying to figure out why he felt it was okay to come into [their] house."

After Finnerty left, Ms. Ellison discovered that change and small bills totaling approximately $20.00 was missing from a glass jar on her dresser and from Onica's piggy bank. She called Finnerty and gave him a chance to "come clean." When Finnerty denied taking the money, Ms. Ellison called the police.

Detective Chris Maddox of the Harford County Sheriff's Office responded to the call. Ten minutes later, he interviewed Finnerty, who was on foot, not far from the Ellison's home. Finnerty told Det. Maddox that Will had given him permission to enter the home if the door was unlocked, and Finnerty stated that when he knocked on the door, it "came open, indicating it wasn't secured all the way." Det. Maddox testified, over objection, that he had asked Will if Finnerty had his permission to enter his parents' home when no one was there, to which Will responded that Finnerty "was not welcome in the house."

There was no sign of a forced entry into the home. Nothing that had been taken from the house was found stashed on the property, in Finnerty's book bag, or on Finnerty's person. No latent fingerprints were found on the glass jar or the piggy bank.

Will was called as a witness for the defense. Will related that after he got married and moved to Cecil County, he continued to stay at his parents' house when he and his wife were arguing, which he estimated was "two to three times a month, maybe more." He once had a key to the house, but his parents took it back, which he speculated was because they were "really angry" about whom he decided to marry. Will no longer spoke to his mother, whom he described as "a very vindictive person" and a "borderline stalker." When asked if his relationship with his mother was "estranged," he answered, "Yeah, if you want to call it a relationship. There's really nothing there anymore."

Will related that upon returning to his parents' home after the Orioles game, he got to the door first, and found that it was not locked. As he entered the house, Finnerty was making his way out. When he asked Finnerty what he was doing there, Finnerty responded that he had to charge his cell phone.

Will did not recall that Finnerty had ever been banned from his parents' house, and he stated that after the incident involving his mother's cell phone, Finnerty continued to come to the house. When asked if he had ever given permission for Finnerty to enter his parent's house, Will responded, "I can't tell you whether or not I definitely told him, 'Hey, you can go in the house,' but I definitely made it seem like he could." Will explained, "I am pretty sure with the relationship that me and him have had over the years, the relationship my friends have had with my parents, that it was implied."

The case was submitted to the jury on charges of first-degree burglary, fourth-degree burglary, and theft under $100.00. As stated above, Finnerty was convicted only of fourth-degree burglary.

Additional facts will be introduced in the discussion as needed.

DISCUSSION

When the prosecutor asked Det. Maddox about a statement Will had made to him in the course of the investigation, defense counsel objected on hearsay grounds. The circuit court overruled the objection and the prosecutor repeated the question:

> [PROSECUTOR]: In speaking with [Will], did you at any time ask him if he had given Mr. Finnerty permission to come in the home when they were not there?
>
> DETECTIVE MADDOX: I did.
>
> [PROSECUTOR]: . . . What was [Will's] response?
>
> DETECTIVE MADDOX: That he was not welcome in the house.

Finnerty contends that Det. Maddox's testimony that Will told him that Finnerty was "not welcome" in his parent's home was inadmissible, either because it was hearsay that did not fall within any recognized exception, or because it was irrelevant.

The State concedes that the circuit court erred in admitting this testimony. We must concur. Under Md. Rule 5-801, 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 5-802 generally prohibits the admission of hearsay statements, as the Court of Appeals has noted:

> Hearsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is

> "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility.

Bernadyn v. State, 390 Md. 1, 8 (2005) (emphasis in original).

Will's statement that Finnerty was not welcome in the house constituted hearsay as it was indeed offered by the State as proof of the truth of the matter asserted, *i.e.*, that Finnerty had no reason to believe that he was authorized to be in the Ellison's home when they were not there. This is clear from the prosecutor's closing argument, during which he focused the jury's attention on the hearsay statement made by Det. Maddox, and argued that Will changed his story for trial because of the "issues" between him and his mother:

> What didn't [Will] say? "Yes, I gave [ ] Finnerty permission to go in the house." He never said that once. **As a matter of fact, when he spoke with Deputy Maddox at the house, Deputy Maddox asked Will [ ], "Did you give [Finnerty] permission to come in?" According to Deputy Maddox, who has no interest in this case whatsoever, Will [ ] said, "No, I did not," or words to that effect.**
>
> **Why is Will changing his story today? Well, the tension in the room as far as when [Will] was talking about his mother was very real . . . . [T]here's a problem between [Will] and his mother. He is going to help out his buddy.**

(Emphasis added.) It does not appear that the unrecorded, unsworn statement falls within any exception to Md. Rule 5-802, and the State, in conceding that it was error to admit it, does not argue otherwise.[1]

[1] Exceptions to the hearsay rule are set forth in Md. Rules 5-802.1 and 5-803.

The State asserts that the circuit court's error was nonetheless harmless because 1) the hearsay statement had no effect on the jury's verdict, because Will lacked legal authority to give Finnerty permission to enter his parents' home, and 2) the evidence would have been admissible as a prior inconsistent statement when Will took the stand later in the trial. We disagree.

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be 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.

Morris v. State, 418 Md. 194, 221-22 (2011) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976) (footnote omitted)). We are not persuaded beyond a reasonable doubt that Will's statement in no way influenced the verdict. The jury was instructed that in order to find Finnerty guilty of fourth-degree burglary, one of the elements that the State was required to prove was that he "did not honestly and reasonably believe that he had the right or invitation to enter the premises." Finnerty's defense was that Will had given him permission to go into the house. The only witness to testify for the defense was Will, who stated that he was not aware that Finnerty was banned from the house, that Finnerty continued to come to the house after the incident involving Ms. Ellison's cell phone, and that Finnerty had "implied permission" to enter the house. Admitting Will's statement to Det. Maddox in the State's case-in-chief may have had the effect of calling Will's testimony into question before he even testified. The State then emphasized the

statement in closing and argued that it established the critical fact – that Finnerty entered the house without reasonable belief that he had permission to do so. We are not satisfied beyond a reasonable doubt that the hearsay statement in no way contributed to the verdict.

We disagree with the State's assertion that the statement could not have affected the jury's verdict because Will had no authority to allow anyone to enter his parents' house. A reasonable belief that an intrusion is warranted is a complete defense to fourth-degree burglary. *Herd v. State*, 125 Md. App. 77, 93 (1999). The State argued in closing that Finnerty could not have reasonably believed that permission from Will to enter his parents' house was valid because Will did not live there and did not have a key to the house. But the jury was not required to agree with that argument, especially in light of the evidence that Will's daughter lived with his parents and that Will was welcome in the home and stayed there at least once a month.

We also disagree with the State's assertion that the admission of the evidence in the State's case was harmless because it would have been admissible later in the trial, when Will took the stand, as a prior inconsistent statement for impeachment purposes. The manner in which the evidence would have unfolded in the hypothetical case, in which the objection to the hearsay statement had been sustained, cannot be predicted with sufficient certainty to permit us to conclude that the statement would necessarily have been admissible later in the trial. For example, the defense may have felt it unnecessary to call Will as a witness. Assuming Will did testify, it is conceivable that the State, either intentionally or inadvertently, may not have questioned Will about his statement to Det.

Maddox.[2] If the State did raise the issue of the prior statement, it may have failed to lay the proper foundation for the statement to be admitted.[3] It is also conceivable that Det. Maddox may have not been available to testify in rebuttal if Will had been questioned about the statement and denied it. To conclude that the statement would have been admissible later in the trial, after Will testified for the defense, requires too many assumptions about how the evidence would have been presented.

Because we have concluded that the error in admitting Will's statement to Det. Maddox was not harmless and requires a reversal of the conviction, we need not address

[2] At trial, Will was never questioned by the prosecutor about his statement to Det. Maddox.

[3] Under Md. Rule 5-613(b), the following foundation must be laid before extrinsic evidence of a witness's prior inconsistent oral statement is admissible for impeachment:

> 1) the contents of the statement and the circumstances under which it was made, including the person to whom it was made, must have been disclosed to the witness during his trial testimony; 2) the witness must have been given the opportunity to explain or deny the statement; 3) the witness must have failed to admit having made the statement; and 4) the statement must concern a non-collateral matter. Before the requirements of Rule 5-613(b) come into play, however, the prior statement of the witness must be established as inconsistent with his trial testimony.

Hardison v. State, 118 Md. App. 225, 237-38 (1997) (citation omitted).

the merits of the argument that the circuit court erred by declining to give a limiting instruction.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED. COSTS TO BE PAID BY HARFORD COUNTY.