UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1195

September Term, 2015

ROBERT ESTEP

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: April 26, 2017

A jury in the Circuit Court for Anne Arundel County convicted Robert Lewis Estep ("Appellant" or "Estep"), of first degree assault and related charges stemming from the shooting of Ronald Kearney. Estep, who was sentenced to a total of forty-five years,[1] raises the following issues for appellate review:

1. "Did the trial court err in admitting inadmissible hearsay?"

2. "Did the motions court err by denying Appellant's motion to suppress the victim's pre-trial identification?"

We affirm. We conclude that the first issue was not preserved. As to the second, the victim's pre-trial identification was not admitted into evidence, so there is no resulting prejudice.

[1] Estep was convicted and sentenced as follows:

First degree assault: twenty-five years, the first ten without the possibility of parole;

Use of a firearm to commit a crime of violence: twenty years, with all suspended except five years without the possibility of parole, to be served consecutively;

Possession of a firearm after a disqualifying conviction: fifteen years, the first five without the possibility of parole, to be served concurrently;

Fourth-degree burglary: three years, all suspended.

Second degree assault, reckless endangerment, and carrying a handgun: these convictions were merged for sentencing purposes.

FACTUAL BACKGROUND

The following facts were established during Estep's four-day trial, which began on March 24, 2015 and concluded on March 27, 2015. Because witnesses at trial included multiple members of the McNeill family, at times we shall use their first names.

On June 9, 2014, Ronald Kearney was shot in the leg. The shooting occurred at the apartment of Shaniqua McNeill, located at 702B Newtowne Drive in an Annapolis neighborhood known as Newtowne 20. At that time, Shaniqua was informally subletting one bedroom of her three-bedroom apartment to Mr. Kearney and his wife Marvena.

The shooting occurred in the aftermath of an altercation between Ronald Kearney and Robert Lewis Estep, who is known "in the neighborhood" as "Nooney." The State's prosecution theory was that after the two men quarreled, Estep left the apartment, retrieved a gun, and returned to shoot Mr. Kearney. Estep challenged the evidence that he was the shooter and suggested that the victim may have shot himself with his own gun.

Ronald Kearney testified that after he arrived home from work around 9 p.m. on June 9, he and Marvena were in their room when Estep entered without knocking. When Mr. Kearney asked Estep what he was doing walking into their room, Estep said he "was looking for a young lady, Shadiamond,"[2] who is Shaniqua's sister.

As the two men confronted each other in the hallway, Estep raised his voice and became "agitated." When Mr. Kearney "explained" that Estep "was wrong for . . . just

[2] Shadiamond's full name is Angie Shadiamond McNeill.

walk[ing] into somebody's house without having any permission," Estep responded that "this was his old girlfriend's room" and that Mr. Kearney "didn't know who he was and he was a 20 boy."[3] Mr. Kearney testified that, at that point he "told him that [he] didn't care who he was. He was still wrong." And he testified that Estep "said he would see. And he walked away."

While the two men were arguing, Marvena Kearney, who remained in the bedroom, heard Shadiamond's voice. Ms. Kearney testified that she and Shadiamond were "talking at the same time basically telling them both t[o] let it go."

Both Mr. and Ms. Kearney testified that, after Estep left, Ms. Kearney dressed and went to the back door of the ground floor apartment, where she found Shaniqua and Shadiamond outside. As the women were talking about the incident, Mr. Kearney joined them. When Shaniqua's two-year-old came outside, Marvena picked him up. Still inside the apartment were the McNeills' younger sister, and other children.

Mr. Kearney explained that while the group was outside talking, Shaniqua "yell[ed] out," "'There is Nooney right there.'" He then turned around to see Estep "running towards" him. As Estep came down the apartment stairs, he pulled a "black semi-automatic" handgun from his waistband. Mr. Kearney ran. Just as he opened the door of the apartment, Estep fired. Mr. Kearney suffered a single gunshot wound in his upper thigh.[4]

[3] Estep has a neck tattoo that says "20 Boys."

[4] The bullet could not be removed safely and remains in Ronald Kearney's leg.

Mr. Kearney remained inside the locked apartment until police arrived. Although he did not know Estep's name, he told police that the person who shot him was the same man who had walked into his room earlier. At trial, he identified Estep as that person.

Marvena Kearney's account of the altercation and shooting was generally consistent with her husband's testimony but she could not identify the shooter. She explained that after Shaniqua started yelling, both sisters fled. As the gunman chased after Ronald and fired, Marvena stood still, holding Shaniqua's son, closing her eyes, and praying that they would not be shot.

Annapolis Police Detective John Murphy testified that on the night of the shooting, he questioned Shaniqua and Shadiamond at the police station. They explained that before the Kearneys rented that room, Shadiamond stayed in it whenever she was at the apartment.

Around 2:30 a.m., Detective Murphy came to the apartment, where he found Shaniqua and Shadiamond with their mother, Keisha McNeill; the women were "upset"—frightened by the shooting—and packing to leave and stay at their mother's house. He again asked about the identity of the shooter. Although Shadiamond was reluctant to provide information, Keisha urged her to "tell him who shot" Ronald Kearney and mentioned "Nooney." In response, Officer Murphy testified that

Shadiamond identified the gunman as Danshawn.[5] When Detective Murphy asked her why she had not done so earlier, she answered that "she was afraid to."

The State also presented testimony from Estep's former cellmate, Danshawn Stukes. He claimed that while the charges in this case were pending, Estep told him that he had stashed drugs in a room where his ex-girlfriend had been staying, then returned to find the drugs missing and "started spazzing out." Estep also told Stukes that he and "this dude had a few words," that he then "left," but "came back" later and "shot the dude."

We will discuss additional facts as necessary and relevant to our discussion below.

DISCUSSION

I.

Hearsay Challenge

Maryland Rule 5-802.1(c) establishes an exception to the hearsay rule for a "statement that is one of identification of a person made after perceiving the person" that was previously made by a witness who testifies at the trial and who is subject to cross-examination concerning the statement. Estep contends that the trial court erred in admitting Detective Murphy's testimony regarding a statement made by Keisha McNeill

[5] Appellant explains in his brief that the father of Shadiamond's child is Danshawn—coincidentally the same name as Appellant's cell mate—and that Shadiamond intended to identify the gunman as the father of her child. The State, however, claims that Detective Murphy must have made a misstatement during his testimony, or that there was a transcription error. On the basis that Danshawn is the same name as the witness who was incarcerated with Appellant, the State claims that "[m]ore than likely, the detective meant to say that Shadiamond identified Estep as the shooter." We do not accept the State's presumption, without more, that the transcript is incorrect.

that identified Estep as the shooter under Rule 5-802.1(c) because she was not present at the shooting. The State responds that "Estep's claim is not preserved for review as he initially lodged an objection on grounds different than what he now raises on appeal and then failed to object timely." On the merits, the State argues that the challenged identification of Estep as the shooter was not made by Keisha, but by her daughter Shadiamond. And finally, the State contends that any error in permitting Detective Murphy's testimony was harmless beyond a reasonable doubt because the victim identified Estep as the person who shot him, and Danshawn Stukes testified that Estep admitted that he shot the victim. We agree that Estep did not preserve this challenge for appellate review.

A.

The Record

On the second day of trial, Shadiamond and Shaniqua testified that they did not know who shot Ronald Kearney and claimed that they had not identified the gunman. Shadiamond testified first, followed immediately by Shaniqua. Both sisters specifically denied that they told Detective Murphy that Estep was the shooter. When Shadiamond maintained that she never told the detective that she knew who shot Mr. Kearney, the prosecutor requested a bench conference and proffered that Shadiamond's trial testimony contradicted an out-of-court identification she made to Detective Murphy hours after the shooting. The trial court sustained defense objections to the State's attempts to impeach her based on the existence of an allegedly inconsistent prior statement recorded in the detective's notes. Even after using Detective Murphy's notes to refresh her memory,

Shadiamond insisted that she did not identify the shooter. The prosecutor had a bit more success with Shaniqua, who did not admit identifying Estep as the gunman but after reviewing the detective's notes, acknowledged that she initially told the detective "that my sister baby father is going crazy and somebody needed to lock him up" and later "asked him did he catch Shadiamond's baby father."

Later that day, Keisha McNeill testified. Although she was not present at the shooting, she was at the apartment with her daughters when Detective Murphy came back to the premises to question them. Keisha initially could not recall talking with the detective, but after refreshing her recollection from his notes, she testified that the statements attributed to her in those notes were "false."

The next day, Detective Murphy testified about interviewing all three of the McNeills. Through the detective, the prosecutor again sought to establish that one or both of the sisters had identified Estep as the shooter, arguing that such an out-of-court statement should be admitted under the hearsay exception for statements of identification. *See* Maryland Rule 5-802.1(c). Pertinent to this appeal is the following colloquy during the State's direct examination of the detective, portions of which were inaudible to the court transcriber, as indicated by "____":

> [PROSECUTOR]: Okay. And after you spoke with them [i.e., Shaniqua and Shadiamond McNeill] then did you have an opportunity to speak with them after that initial time, second time? [Sic]
>
> [DET. MURPHY]: Yes.
>
> [DEFENSE COUNSEL]: May we approach? I have an objection.
>
> [COURT]: Your [sic] may approach.

(Whereupon, a Bench Conference commenced.)

[DEFENSE COUNSEL]: It is abundant that clearly ___ doing and ___ all along. This is -- and I want to get ___ it because it is prejudicial and I don't think we -- what he is going to use is ___ the interview ___ is also relevant.

[COURT]: I have to ___ it is relevant ___ I think the burden is on ___ investigation is completely relevant ___ so I am going to allow what ___ this investigation, I am not going to ___ again, I am not going to allow ___ statements --

[PROSECUTOR]: But is the statement, Your Honor, as opposed to the last one, this one was disclosed, it is in discovery and this one counts -- in ___ in 5-802.1[c] Statement of Identification Exception perfectly.

[COURT]: I understand ___

[DEFENSE COUNSEL]: We were over this yesterday when Keisha McNeill was on the stand and we did not ___ get that because the State's Attorney said he was not using that ___ photo.

[PROSECUTOR]: I am not talking about the photo, the photo was signed first off by Keisha McNeill.

[COURT]: Shhh.

[PROSECUTOR]: **I am talking about Shaniqua [sic] McNeill said that, you know, he is the shooter. Shaniqua McNeill said she made those statements to Detective Murphy yesterday. I have now been offered [sic] that as a statement of identification pursuant to 5-802.1.**

[COURT]: Yes.

[PROSECUTOR]: She said ___ not only that, it comes in for impeachment purposes as well, but I understand the Court's ruling on impeachment.

[COURT]: ___

[PROSECUTOR]: But for 5-802.1 it fits that exception perfectly, Your Honor.

[DEFENSE COUNSEL]: ___ recorded.

[COURT]: ——

[PROSECUTOR]: It doesn't have to be recorded pursuant to the rule for that subsection it is not a requirement.

[COURT]: There is nothing ___

[DEFENSE COUNSEL]: Thank you.

(Whereupon, the Bench Conference was concluded.)

(Short Pause.)

[PROSECUTOR]: Did you have an opportunity to speak with Shaniqua McNeill, a -- excuse me, the Court's indulgence. Did you have an opportunity to speak with Shaniqua, Keisha, and Shadiamond McNeill -- or Shaniqua and Shadiamond McNeill a second time?

[DET. MURPHY]: Yes.

[PROSECUTOR]: And when was that?

[DET. MURPHY]: Around 2:30 in the morning . . . .

[PROSECUTOR]: And what did you ask them?

[DET. MURPHY]: I was trying to find out who the person was that came into the apartment to shoot the victim, who shot the victim.

[PROSECUTOR]: And what were their responses?

[DEFENSE COUNSEL]: Objection.

[COURT]: I am going to sustain it as overbroad.

[DEFENSE COUNSEL]: Thank you.

[PROSECUTOR]: What was -- what was Keisha's response?

[DET. MURPHY]: She made ___ Nooney and said to Shadiamond to tell him, Nooney -- tell him who did the shooting and she brought the man up (sic).

[PROSECUTOR]: Okay. What was Shaniqua's [sic] response?

> [DET. MURPHY]: She was kind of ignoring back and forth, like not really saying a whole lot, and then she just started telling Shadiamond to tell him, Shadiamond, tell him who shot him.
>
> [PROSECUTOR]: What was Shadiamond's response?
>
> [DET. MURPHY]: Shadiamond was sitting -- she was actually sitting at the table where it was -- it's like a bar table, and she sat in there and she kind of teared up. She wouldn't really say a whole lot. And she brought up the name again, the new name Danshawn. [Sic[6]] And I asked her, why didn't you tell me that in the first place?
>
> [DEFENSE COUNSEL]: Objection.
>
> [COURT]: Overruled.
>
> [PROSECUTOR]: You can continue.
>
> [DET. MURPHY]: I asked her, why didn't you tell me that in the first place when we were at the station, and she made the comment that she was afraid to.

(Emphasis added.)

B.

Hearsay Challenge

Estep contends that "the trial court erred by admitting, through Detective Murphy, Keisha McNeill's statement implicating [him] in the shooting." Estep asserts that her out-of-court statement did not qualify for admission under the hearsay exception for statements of identification because it could not have been made "after perceiving the person," given that she was not present at the shooting. The State responds that this challenge is not preserved because (1) the transcription gaps preclude effective review,

[6] The State maintains that the reference to "Danshawn," who had testified earlier, "was either a misstatement by Detective Murphy or a transcription error."

and (2) "Estep failed to object to the testimony of Detective Murphy about which he now complains, and, when he did object, he based his objection on grounds different than those he now raises on appeal."

In regard to the State's first contention, we are not persuaded that the "Swiss-cheese" portions of the transcript preclude appellate review. The State points out, "[i]t is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed[.]" *Mora v. State*, 355 Md. 639, 650 (1999). But in this case, the gaps in the trial transcript were caused by inaudible dialogue and therefore cannot be attributed to Estep or his counsel. Nor do such gaps impede our review of Estep's hearsay challenge. While the transcript is somewhat unclear, we can discern that the State intended to introduce Detective Murphy's testimony regarding Keisha's statement under Maryland Rule 5-208.1(c), and that clearly the court eventually permitted the testimony to proceed.

The State's contention that the defense's objection was based on grounds different from those raised on appeal is also not convincing because it is clear from the transcript that defense counsel initially lodged a general objection to the statements coming in, which the court stated it would sustain for overbreadth. This objection does not lose its character as a general objection because the court decided to sustain it on narrower grounds.

Nonetheless, we agree with the State that Estep's hearsay issue was not preserved for the following reason. Most of the inaudible exchanges occurred during a bench conference that took place during Detective Murphy's direct examination. Thereafter,

the prosecutor asked Detective Murphy to recount the "responses" of Keisha, Shaniqua, and Shadiamond McNeill as he questioned them about "who came into the apartment" and "who shot" Ronald Kearney. Defense counsel lodged a general objection to that compound question. *See generally Gross v. State*, 229 Md. App. 24, 32 (2016) (a general objection preserves all grounds for excluding evidence, including hearsay). The trial court sustained that objection, ruling that the question, in asking for the responses of all three McNeills, was "overbroad." The prosecutor then narrowed the inquiry, asking, "what was Keisha's response?" Defense counsel did not object, either before or after the detective recounted what Keisha said. There are no gaps in this portion of the transcript. Indeed, there was no objection until after Detective Murphy subsequently answered the prosecutor's question; "What was Shadiamond's response?"

Under Maryland Rule 5-103(a)(1), "[e]rror 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 of record[.]" Similarly, under Maryland Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objections become apparent. Otherwise, the objection is waived." This contemporaneous objection requirement prevents error that requires re-trial and precludes "sandbagging" of the trial judge to obtain "a second 'bite of the apple' after appellate review[,]" *Sydnor v. State*, 133 Md. App. 173, 183 (2000), *aff'd on other grounds*, 365 Md. 205 (2001), by "requiring counsel to bring the position of their client to the attention of the lower court at the trial so that

the trial court can pass upon, and possibly correct any errors." *Robinson v. State*, 410 Md. 91, 103 (2009) (citation and quotation marks omitted).

Because defense counsel did not object when the State elicited Keisha McNeill's out-of-court statement, Estep waived his right to challenge the admission of that testimony. As the Court of Appeals has explained, "'[i]f opposing counsel's question . . . calls for an inadmissible answer, counsel must object immediately. Counsel cannot wait to see whether the answer is favorable before deciding whether to object.'" *Bruce v. State*, 328 Md. 594, 627 (1992) (quoting 5 L. McLain, *Maryland Evidence* § 103.3, at 17).

Estep argues that counsel was not required to object when the prosecutor's question called for hearsay from Keisha, because "the court made its ruling on the [hearsay] objection only moments before admitting the testimony," during the bench conference set forth above, when the court "implicit[ly]" decided to allow the detective to testify about his conversations with the McNeills. In support, he points to three cases excusing failures to object to evidence that was previously ruled admissible after a motion *in limine*. *See Clemons v. State*, 392 Md. 339, 363-63 (2006); *Watson v. State*, 311 Md. 370, 372 n.1 (1988); *Washington v. State*, 191 Md. App. 48, 90 (2010).

In contrast to the cases cited by Estep, here the trial court did not rule in limine that Keisha's statement to Detective Murphy was admissible. During the bench

conference cited by Estep, the State argued only that "Shaniqua's"[7] statement to the detective was admissible under the hearsay exception for statements of identification. The prosecutor did not argue that statements made by Keisha were also admissible under that exception. Because the court's ruling did not address Keisha's statements to the detective, it did not constitute "a final ruling on a motion *in limine* to admit [such] evidence" and did not relieve defense counsel from the obligation to object when such evidence was elicited by the prosecutor. *See Watson*, 311 Md. at 372. As such, Estep's argument on this point is not preserved because he did not offer a timely objection to the question.

II.

Pre-trial Identification by Victim

In his alternative assignment of error, Estep contends that the lower court erred in denying his motion to suppress Ronald Kearney's pretrial identification of Estep from a photo array. In Estep's view, that identification resulted from impermissibly suggestive procedures during which (1) Mr. Kearney was shown a second array after he identified another person as the shooter,[8] and (2) the photograph of Estep during that second array "stood out from the other photographs" in a manner that unfairly pointed to him as the

[7] Even if the prosecutor intended to refer to Shadiamond rather than Shaniqua, he clearly did not make any reference to Keisha.

[8] Estep raises what he contends is a question of first impression, as to whether showing a witness a second photo array, after he misidentified a photograph in a first array, is impermissibly suggestive because it inherently "communicates that the prior identification was wrong." In the absence of prejudice, we shall not address that issue.

suspected shooter. *See generally Smiley v. State*, 442 Md. 168, 180 (2015) ("Suggestiveness can arise during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify.").

Pointing out that the prosecutor "opted not to introduce the victim's pre-trial identification of Estep during the trial," the State argues "there is no basis for an appeal." In its brief, the State proffers that "[a]fter a careful review of the record," it is "unable to find a point in the trial where the pre-trial identification of Estep by the victim was introduced into evidence." In turn, because "Estep did not suffer prejudice by the motions court's denial of his motion to suppress the photo array," the State maintains that "there is no basis for appeal." *See* Maryland Rule 5-103(a) ("error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling"); *Klauenberg v. State*, 355 Md. 528, 545 (1999) (appellant who received the remedy he requested has no grounds for appellate relief); *Dorsey v. State*, 276 Md. 638, 659 (1976) (error is harmless when "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").

After reviewing the trial record, we agree with the State that the jury was not informed that Ronald Kearney made a pretrial identification of Estep. The electronic record contains two exhibits with evidence pertaining to the photo array, both of which were admitted during the January 9, 2015 suppression hearing. Although all "trial

exhibits were returned to counsel," the transcript confirms that none of the exhibits marked for identification or admitted at trial pertain to a photo array.

Moreover, the State did not argue or elicit any evidence that Mr. Kearney identified Estep from a photo array. Even though Mr. Kearney identified Estep as the individual who came into his room and later returned to shoot him, neither he nor Detective Murphy testified about the photo arrays. In closing, the State argued only that on the witness stand, Ronald Kearney had identified Estep as his assailant. Acknowledging that the State did not present any evidence that the victim made a pretrial identification, defense counsel argued that "what the State doesn't have as a starting point is a positive identification by Ronald Kearney of Mr. Estep prior to seeing him sitting at that table" in the courtroom.

Because the State did not use the pretrial identification challenged by Estep, and the jury did not know that it existed, Estep was not harmed by the denial of his motion to suppress it. In the absence of prejudice, appellate relief is not warranted.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.