Circuit Court for Worcester County
Case No. 23-K-15-000047

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1351

September Term, 2016

SARAH ANN THUSS

v.

STATE OF MARYLAND

Graeff,
Friedman,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: September 13, 2017

On June 9, 2015, Sarah Ann Thuss, appellant, was convicted by a jury in the Circuit Court for Worcester County of first degree assault, conspiracy to commit first degree assault, and reckless endangerment. The court sentenced appellant to eight years for the first degree assault conviction, with all but four years suspended. The remaining convictions merged for sentencing purposes.

On September 3, 2015, appellant filed a Motion to Reduce or Modify Sentence, which the court denied on September 23, 2015. On April 15, 2016, appellant filed a Petition for Post-Conviction Relief seeking, among other things, the right to file a belated appeal. On October 21, 2016, following a hearing, the court granted appellant's motion to file a belated appeal.

On appeal, appellant raises a single question for our review, which we have rephrased, as follows:

> Did the circuit court err in admitting statements regarding appellant's involvement in the crime?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was a waitress for approximately two years at Our Place, a restaurant owned by Mustava Koksal. She stopped working there on September 6, 2014.

On the morning of December 12, 2014, Mustava Koksal parked his car near the back door of the restaurant. As he was about to open the door to the restaurant, he "felt something banging on [his] head." He turned and saw William "Billy" Borum, appellant's ex-husband, who began hitting Mr. Koksal with a piece of wood. After striking Mr. Koksal

five or six times, Mr. Borum ran away, and Mr. Koksal followed him. As Mr. Borum ran down 14th Street, Mr. Koksal, who was four or five yards behind Mr. Borum, saw appellant waiting in a running vehicle. Mr. Borum got into the vehicle, and appellant drove away. Mr. Koksal called the police and later identified Mr. Borum as his assailant from photographic arrays.

Detective Joseph Bailey, a member of the Pocomoke City Police Department, responded to Our Place as a result of Mr. Koksal's call. He observed injuries to the back of Mr. Koksal's head, as well as his wrists, calf, and fingers. Mr. Koksal told Detective Bailey that Mr. Borum had assaulted him and then fled to a red Mustang, where appellant was sitting in the driver's seat. Mr. Koksal had observed Mr. Borum and appellant the previous night in a red Mustang outside of his house.

Detective Bailey located Mr. Borum and appellant at Mr. Borum's sister's house and placed them under arrest. He interviewed appellant, who told him that, on the date of the incident, she had fallen asleep, and when she woke up, Mr. Borum was gone. She later received a phone call from Mr. Borum and went to pick him up. After she picked up Mr. Borum, the two went to McDonalds and then back to Mr. Borum's sister's house, where they went back to sleep.

Detective Bailey also spoke to Mr. Borum's sister, Trisha Walker. Ms. Walker pointed out a dowel rod that was behind her residence to Detective Bailey.

Ms. Walker testified that that she had known appellant, Mr. Borum's wife, for approximately seven years. Appellant had worked at Mr. Koksal's restaurant, but she told Ms. Walker that she was fired.

On the night prior to the incident, Ms. Walker saw appellant and Mr. Borum at approximately 9:00 p.m. Mr. Borum had a dowel rod and said he was going to cut it for a job he was doing building shelves.[1] Mr. Borum was "very fidgety" and "really hyper," which concerned Ms. Walker because Mr. Borum had just gotten out of a rehabilitation facility and was showing signs of "possibly being under the influence again." Appellant was "quiet" and not "very talkative." After he cut the dowel rod, Mr. Borum and appellant left. The following morning, Ms. Walker went to wake Mr. Borum at 7:00 a.m., but when she opened the door and called his name, she did not get a response, which was unusual.

Ms. Walker testified that she and appellant visited Mr. Borum at the jail following his arrest. Over objection, Ms. Walker testified that, during the visit, Mr. Borum told Ms. Walker "we did it." Appellant was not present when Mr. Borum made the statement. When she returned, however, Mr. Borum repeated his statement, and appellant "just dropped her head and said, please don't tell." When appellant and Ms. Walker left, appellant told Ms. Walker that she "had tried to talk him out of . . . doing that, and to just not to say anything."

On January 14, 2015, Mr. Borum committed suicide while he was in jail. The day prior to his death, Ms. Walker had a telephone conversation with him. Over objection, the taped conversation was played for the jury.

[1] The transcript says towel rod, but the rod earlier was referred to as a dowel rod.

DISCUSSION

Appellant contends that the circuit court erred in admitting two statements made by Mr. Borum prior to trial, in violation of her Sixth Amendment right of confrontation and the rule against hearsay. First, she asserts that the recorded telephone call Mr. Borum made from jail to Ms. Walker "directly implicated" her and was "testimonial" because it "could be viewed as having been made with the primary purpose that it be used as evidence against her." Second, she asserts that the statements in the recorded telephone call, as well as Mr. Borum's statement that "we did it," were inadmissible hearsay.

The State responds in several ways. Initially, it asserts that the record is not sufficient to review the claim regarding the phone call because it does not contain a transcript of the jailhouse recording played for the jury, and although there is a 20-minute digital recording of the call in the record, "it is unclear what parts of the call were played for the jury."[2]

In any event, the State contends that neither of the statements at issue, i.e., the statement "we did it" or the recorded telephone call, were testimonial, asserting that both were "casual conversation[s] between private acquaintances," and neither was "made under circumstances that would suggest that [Mr.] Borum 'intended to bear testimony'" against appellant with the remarks.

[2] The transcript indicates that the State stopped playing the recording "at five minutes, forty-two seconds," but there is no indication of the place where the recording was started.

Moreover, the State makes additional arguments in support of the admissibility of each individual item of evidence. With respect to the statement that "we did it," the State asserts that was an adoptive admission, which "is neither testimonial nor hearsay." And with respect to the recording of the telephone call, the State contends that, although it is not clear what portions of the recording were played for the jury, the self-incriminating statements suggesting that Mr. Borum was in jail for doing something that was appellant's idea were not inadmissible hearsay because they were statements made against his penal interest, an exception to the hearsay rule.

Finally, the State argues that any error in the admission of the recording of the phone call was harmless. It asserts that "[a]ny statement that [Mr.] Borum may have made which was inculpatory only of [appellant] was both repetitive of the admissible statements he also made, and was far more vague than the adoptive admission already made by [appellant] herself."

I.

Legal Principles

A.

Confrontation Clause

"The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides, in pertinent part, that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Langley v. State*, 421 Md. 560, 567 (2011) (quoting U.S. CONST. amend. VI.). "[T]he Confrontation Clause bars 'admission of testimonial statements of a

witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross examination.'" *Clark v. State*, 188 Md. App. 110, 120 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)).

This Court recently discussed the evolving jurisprudence on testimonial hearsay:

> The [*Crawford*] Court concluded that the right of confrontation attaches to hearsay statements that are "testimonial." [541 U.S. at 51]. Without selecting any "comprehensive definition of 'testimonial,'" the Court reasoned that the term "applies at a minimum . . . to police interrogations," which are among "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id*. at 68. The Court specifically noted that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England," who performed "an essentially investigative and prosecutorial function" in producing evidence from witnesses who were not always under oath. *Id*. at 52-53. Consequently, the Court held that the recorded statements from the interrogation of Crawford's wife were testimonial. *Id*. at 68.
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> In [*State v. Norton*, 443 Md. 517 (2015)], the Court of Appeals' most recent opinion analyzing testimonial hearsay, the Court identified a number of inquiries that can be derived from *Crawford* and its successors. First of all, "[t]o whom the statement is made is a key component" in determining whether a statement is testimonial. *Norton*, 443 Md. at 530; *accord Clark*, 135 S. Ct. at 2182; [*Michigan v. Bryant*, 562 U.S. 344, 369 (2011)]. Because the involvement of government officials performing an investigative function implicates the core concerns of the Confrontation Clause (*Crawford*, 541 U.S. at 52-53, 56 n.7; *Bryant*, 562 U.S. at 358), statements made to law enforcement officers "principally charged with uncovering and prosecuting criminal behavior" are significantly more likely to be considered testimonial than statements made to others. *See Clark*, 135 S. Ct. at 2182.
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> A concomitant inquiry looks to the purpose of the statement, specifically "whether, when viewed objectively, the challenged statement was made 'for the purpose of establishing or proving some fact' in a criminal prosecution or investigation." *Norton*, 443 Md. at 531 (quoting *Crawford*, 541 U.S. at 51). Typically, statements made in response to questions from law enforcement "are testimonial when the circumstances objectively indicate" that there is no ongoing emergency requiring police assistance "and that the primary purpose of the interrogation is to establish or to prove past

> events potentially relevant to later criminal prosecution." *Davis* [*v. Washington*, 547 U.S. 813, 822 (2006)]. This primary purpose determination "requires a combined inquiry that accounts for both the declarant and the interrogator" and looks to "the contents of both the questions and the answers." *Bryant*, 562 U.S. at 367-68. Not only "[t]he identity of an interrogator" but also "the content and tenor of [the] questions can illuminate the primary purpose of the interrogation." *Id.* at 369 (citations and quotation marks omitted).

Taylor v. State, 226 Md. App. 317, 335, 338-39 (2016) (parallel citations omitted). We review *de novo* the question whether the admission of evidence violated a defendant's constitutional rights. *Id.* at 332.

B.

Hearsay

"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). An out-of-court statement is admissible, however, "if it is not being offered for the truth of the matter asserted or if it falls within one of the recognized exceptions to the hearsay rule." *Conyers v. State*, 354 Md. 132, 158, *cert. denied*, 528 U.S. 910 (1999); *Fair v. State*, 198 Md. App. 1, 37 (2011).

II.

Analysis

A.

Jail Statement

Addressing first Mr. Borum's statement to Ms. Walker in jail that "we did it," we note that the statement was not a formal declaration, *see Davis*, 547 U.S. at 830 n.5

("formality is indeed essential to testimonial utterance"), and it was not initiated by a known government official. *Id.* at 825 (statements made "unwittingly" to a government informant are "clearly nontestimonial"). Rather, it was a remark that Mr. Borum made during a conversation with his sister. *See Crawford*, 541 U.S. at 51 (a witness "who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"). In *Cox v. State*, 421 Md. 630, 650-51 (2011), the Court of Appeals determined that statements made between two inmates were not testimonial, noting as follows:

> [T]he interaction was a casual conversation between private acquaintances. Further, much like in [*United States v. Smalls*, 605 F.3d 765 (2010)], it is unlikely that Mr. Johnson would have made the statements to Mr. West if he believed the statements would be used in a later trial. Rather, the statements were "much more akin to casual remarks to an acquaintance than formal declarations to an official." *Smalls*, 605 F.3d at 780 (referencing *Crawford*, 541 U.S. at 51). In our view, Mr. Johnson did not intend to bear testimony against Cox, nor did he seek to establish "facts for use in a criminal investigation or prosecution." *Id.* Like the casual conversation between cell mates in *Dutton* [*v. Evans*, 400 U.S. 74 (1970)], which the Supreme Court referred to as "clearly nontestimonial" in *Davis*, 547 U.S. at 825, Mr. Johnson's statements were "spontaneous, and it was against his penal interest to make [them]." *Dutton*, 400 U.S. at 89. Therefore, the casual statements between acquaintances were not made for the primary purpose of creating a substitute for trial testimony.

(parallel citations omitted).

Similarly, Mr. Borum's statement, "we did it," was "a casual conversation between private acquaintances," which was not made under circumstances suggesting that he "intended to bear testimony against" appellant. *See Id.* Accordingly, the statement was not testimonial.

Moreover, the statement was an adoptive admission. As this Court explained in *Cox v. State*, 194 Md. App. 629, 650-51 (2010), *aff'd*, 421 Md. 630 (2011), we explained:

> A tacit admission occurs when a person makes "another person's statement his or her own," 6A Lynn McLain, Maryland Evidence State and Federal § 801(4): 3, at 114 (2d ed.2001), when the person "remains silent in the face of an accusation that, if untrue, would naturally rouse the accused to speak in his or her defense." *Darvish v. Gohari*, 130 Md. App. 265, 278 (2000), *aff'd on other grounds*, 363 Md. 42 (2001). The Court of Appeals has explained that a party "'may make a "tacit admission," adopting, by his or her silence, another person's statement,'" if the following prerequisites are satisfied:
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> > (1) the party heard and understood the other person's statement; (2) at the time, the party had an opportunity to respond; (3) under the circumstances, a reasonable person in the party's position, who disagreed with the statement, would have voiced that disagreement. The party must have had first-hand knowledge of the matter addressed in the statement.
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> *Henry* [*v. State*, 324 Md. 204, 241-42 (1991), *cert. denied*, 503 U.S. 972 (1992),] (citation omitted). *Accord Grier v. State*, 351 Md. 241, 254 (1998); *Darvish*, 130 Md. App. at 278.

(parallel citations omitted).

We explained why admitting an adoptive admission into evidence is not a violation of the right to confront witnesses, as follows:

> When such a statement is admitted into evidence, the "witness" against the defendant, therefore, is the defendant. Thus, there is no violation of the right to confront "the witnesses against him." (quoting U.S. CONST. amend. VI.). "As the Court of Appeals has noted, a party "cannot be prejudiced by an inability to cross-examine him or herself." (quoting *Briggeman v. Albert*, 322 Md. 133, 135 (1991)).

Id. at 652-53.

Here, Mr. Borum's statement was adopted by appellant when it was made in her presence and, instead of disagreeing with the accusation that "we did it," she hung her head

and asked Ms. Walker not to tell anyone. Accordingly, Mr. Borum's statement was admissible as an adoptive admission by appellant, and therefore, it did not implicate the Confrontation Clause. Nor did it violate the hearsay rule. *See* Md. Rule 5-803(a)(2) ("A statement of which the party has manifested an adoption or belief in its truth, . . . is not excluded under the hearsay rule.").[3] The trial court, therefore, did not err in admitting the jail statement into evidence.

B.

Recorded Telephone Conversation

We address next the recorded telephone conversation. As the State points out, there is no transcript in the record of the recorded telephone call played for the jury. And appellant does not specify in her brief what statements in the telephone call were testimonial and/or improperly admitted. Under these circumstances, appellant has failed to provide an adequate record for appellate review. *See* Md. Rules 8-411 and 8-413 (appellant shall provide transcription of any testimony or proceeding relevant to the appeal); *Jacobs v. State*, 45 Md. App. 634, 641-42 ("No transcript of [the telephone call recording was] . . . included in this record. The burden in this regard is clearly upon the appellant. In view of this failure of the appellant to perfect the record, we have no way of

[3] To be sure, the first time Mr. Borum said this, appellant was not present. When he said it again moments later, however, appellant adopted the statement. Under these circumstances, any error in admitting the first statement was rendered harmless by appellant's adoptive admission of the second statement. *See, e.g., Barksdale v. Wilkowsky*, 419 Md. 649, 663 (2011) ("[A]n error in evidence is harmless if identical evidence is properly admitted).

knowing whether the telephone call in question contained [hearsay].”), *cert. denied*, 288 Md. 737 (1980). Accordingly, we decline to address this contention.[4]

JUDGMENTS OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] We do note that, if we had a sufficient record to determine what portion of the recording was played for the jury, we likely would find the claim meritless. In *McClurkin v. State*, 222 Md. App. 461, 478 (2015), this Court held that taped telephone calls from prison were not testimonial, stating that it would “def[y] logic” to conclude that, “merely because correctional institutions record outgoing telephone calls and routinely notify the participants that their conversations are being recorded, . . . all parties to a jailhouse phone call categorically intend to bear witness against the person their statements may ultimately incriminate.” *Id.* at 478 (citation omitted). Accordingly, any statement made in the recorded telephone call here likely was not testimonial.