Circuit Court for Baltimore City
Case #: 000615070002R00

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2313

September Term, 2015

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IN RE: T.W.

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Eyler, Deborah S.,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: February 15, 2017

At an adjudicatory hearing before a magistrate in the Circuit Court for Baltimore City, Appellant, T.W., was found to be involved in first-degree assault, malicious destruction of property, and violation of a peace order. T.W. noted exceptions and requested a *de novo* hearing.

At that hearing, T.W.'s counsel sought to offer a video recording of testimony given at the adjudicatory hearing by T.W.'s friend, C.S., who had since moved out of Maryland.

The State objected on the basis that T.W. had not satisfied the requirements of Md. Rule 5-804 dealing with unavailable witnesses. The trial court sustained the State's objection and disallowed the video testimony. Ultimately, the court found T.W. involved in the charged offenses and adopted the disposition recommendations of the magistrate.

In her appeal, T.W. asks us to consider the following question:

> At the trial *de novo*, did the trial court err in excluding former testimony of an important defense witness on the grounds that she was not shown to be unavailable, or in the alternative, in refusing to grant a postponement to procure the witness's presence?

We shall affirm the judgment of the circuit court.

## BACKGROUND

Because this appeal presents a procedural question and not one of sufficiency of the evidence, we need not set out in detail the aspects of the March 9, 2015 altercation that resulted in the charges against T.W. *Washington v. State,* 190 Md. App. 168 (2010).

In summary, the record reveals that, on March 9, 2015, an altercation occurred at a bus stop near the Mondawmin Mall in Baltimore City, during which a young woman, O.C., was assaulted by a group of four other young women, receiving punches and kicks to her

head, face, and body. O.C.'s cell phone and glasses were broken during the altercation, and she was admitted to the hospital for injuries sustained during the assault. Among the group involved in the melee were T.W. and C.S.

O.C. and T.W. were friends when they attended Northwestern High School. Their friendship ended after a series of disagreements and confrontations, which resulted in O.C. obtaining a peace order against T.W. on February 24, 2015, and T.W. obtaining a peace order against O.C.'s mother at about the same time. O.C. eventually transferred to another school.

At the April 24, 2015 adjudicatory hearing, O.C. testified that T.W. was the aggressor and that C.S. and the other young women joined in the assault. One of the other young women involved in the altercation, C.S., testified on T.W.'s behalf after being advised of, and waiving, her Fifth Amendment rights. In contrast to O.C.'s testimony, C.S. testified that it was she who initiated the altercation by hitting O.C., and that T.W. was not involved. C.S. testified that T.W. remained across the street until she approached to try to break up the fight. C.S. testified that T.W. never struck O.C., and never instructed her to attack O.C.

The magistrate found that the facts sustained that T.W. was involved in all of the offenses charged, and entered a finding of delinquency.

T.W.'s counsel filed timely exceptions to the findings and requested a trial *de novo* in the circuit court. T.W.'s counsel issued a witness subpoena to C.S., but was unable to effect service because C.S. had moved to Philadelphia. C.S.'s mother was unable to provide counsel with a new address, nor was T.W. aware of C.S.'s new location. Thus,

counsel moved, over the State's objection, for permission to use the video recording of C.S.'s testimony given at the adjudicatory hearing.

Regarding efforts to obtain C.S.'s attendance, T.W.'s counsel offered the following:

> [T.W.'S COUNSEL]: In the original trial, there was a young lady named [C.S.]. She testified for the defense, she's testified favorably for the defense, she was under subpoena, she did appear, she was – happened to be represented by Mr. Smuck because I felt she was going to inculpate herself, so he advised her. And, ultimately, she did waive her right, her Fifth Amendment right, and did take the stand, and did testify.
>
> Since that time, she has become unavailable. I have tried subpoenaing her at her last known address with her mother. Her mother still lives there but her mother says that she no longer lives there, that she lives in Philadelphia, and that she does not have a forwarding address. I have tried calling her at the last known phone number, that phone number is no longer working, it's not accepting phone calls. Her mother did not have a forwarding number, did not have a forwarding email address, was unable to provide me any means of contacting her.
>
> I did also reach out to [T.W.] and her mother to see if they had any means, and prior 'til today, I was told that they were unable to get in touch with her. I've just learned today that [T.W.] was able to contact her via a texting app called Kik.
>
> THE COURT: Yes.
>
> [T.W.'S COUNSEL]: And she just contacted her last night. [T.W.] just still does not know her address or phone number or any way of contacting her. So I will be asking this Court to allow me to submit her prior sworn testimony, which was subject to cross-examination.
>
> * * *
>
> . . . Some effort to make contact, the Court has found that to be reasonable efforts. I did send the subpoena to the home, it was – I also – she responded to my earlier subpoena –

> THE COURT: So was she served with the subpoena?
>
> [T.W.'S COUNSEL]: She wasn't there. She wasn't served because she wasn't there, and I don't have another address to serve her. And her mother did say she moved out of state to Philadelphia. If I did have another address, I certainly would have made an effort to serve, I would have called her.
>
> THE COURT: So in the app yesterday, was the witness advised of the date and time of the hearing?
>
> [T.W.'S COUNSEL]: I'd have to ask [T.W.].
>
> [T.W.], if you could just stand up for me. [T.W.] when you spoke to [C.S.] yesterday on Kik, did you tell her that we had a court hearing today?
>
> [T.W.]: No. It wasn't a very long conversation.
>
> [T.W.'S COUNSEL]: It wasn't a very long conversation. And what I can do, Your Honor, in the alternative – I don't know how the Court would feel about this – is we can go forward with the State's case today, and I could attempt, via Kik, to get an address, or a phone number, make contact in some meaningful way. I don't know if this 17 year old has any transportation to Baltimore, but I could certainly make additional efforts and we can come back to it at some time later.

After hearing from the State, the court prompted T.W.'s counsel for more information about the unavailability of C.S. and of their efforts to locate her and obtain her attendance at the exceptions hearing:

> THE COURT. . . And then it seems as if the one [hearsay exception] that you're relying on is absent from the hearing, and you've been unable to procure their attendance by process or other reasonable means. Do we know when this witness left the jurisdiction?
>
> [T.W.'S COUNSEL]: I don't know exactly.
>
> . . ., do you know when [C.S.] moved, or when the last time you saw her here was?

> [T.W.]: [C.S.] moved –
>
> [T.W.'S COUNSEL]: It wasn't recently, Your Honor, because I've been – since the – since we filed the exception, I've been trying to locate this young lady.
>
> [T.W.]: She been gone for about two.
>
> [T.W.'S COUNSEL]: Months?
>
> [T.W.]: Months.
>
> [T.W.'S COUNSEL]: Yeah. And, Your Honor, I'd also like to point out that she's no longer even in Maryland, to the best of my knowledge.
>
> THE COURT: No, and I understand, but subpoenas reach other jurisdictions –

The court turned briefly to the subject of proof of the efforts made to locate C.S.:

> THE COURT: And then usually don't I have an affidavit or something of the attempts to contact – I mean, don't I also have that?
>
> [T.W.'S COUNSEL]: So I look a little bit, I don't know that there's a specific – again it's because it's discretionary –
>
> THE COURT: Yes.
>
> [T.W.'S COUNSEL]: – and there's no set tests –
>
> THE COURT: Right.
>
> [T.W.'S COUNSEL]: – I've read some case law where the State merely proffered unavailability and the Court questioned whether or not they sent the subpoena, did they have an address, how did they try to procure an address. And I admit, it's within the Court's discretion.

Prior to the court's ruling, T.W.'s counsel again offered to engage in further efforts "if there were some more steps the Court wanted me to take." Counsel reiterated to the

court that, "this was a critical witness for the Respondent. She was an eyewitness to events, she has critical testimony that will corroborate my client's testimony." Taking the proffer by T.W.'s counsel into consideration, the court granted the State's motion to exclude the video testimony:

> THE COURT: So this is one of those places where the Maryland rules and the case law lag far behind the reality of the ways in which we communicate in this world. Certainly, even five years ago, we were – well, ten years ago, we were only talking about personal service, you know, handing it to someone, or certified mail. That's all we were talking about.
>
> A few years later, then we started talking about possible electronic notice, email notice. We're now at the point where in certain federal cases, not all, a post on Facebook qualifies as notice. We have apps that allow us to be in touch with people no matter where they are, and unfortunately one of those apps was available to the Respondent.
>
> I can't find today, [T.W.'s counsel] – in part because of the app and in part because I don't know that I have something like an affidavit outlining the reasonable efforts to get this witness here – that I can find that the witness is unavailable within the meaning of the statute. She is certainly unavailable in the way in which we conduct our daily lives. Can't reach her today, can't reach her by phone, she's not around the corner, can't go pick her up.
>
> So certainly, the way we use it in our day to day language, that witness is unavailable. But I think in the legal definition of unavailable, as I read the rule, I can't find that she's unavailable today. So the State's motion *in limine* is granted.

As the trial *de novo* went forward, the only evidence presented by T.W. was her own testimony. The court found T.W. involved in the offenses charged, and this timely appeal followed.

**Standard of Review**

Witness unavailability determinations are reviewed for an abuse of discretion. *Cross v. State*, 144 Md. App. 77, 88 (2002). However, T.W. argues that the court's decision here was based on its interpretation of the law, and therefore should be reviewed for legal correctness, citing *Brooks v. State*, 439 Md. 698 (2014).

T.W. maintains that the court could not have made its determination based on an analysis of the facts, because it cited very few facts in its decision. The State counters that the court did perform a factual analysis because it focused on whether T.W.'s counsel had undertaken reasonable efforts to obtain C.S.'s attendance.

In reviewing decisions by trial courts to admit or exclude evidence, three different standards of review apply, depending on the nature of the ruling. "The standard of appellate review of an evidentiary ruling turns on whether the trial judge's ruling was based on a pure question of law, on a finding of fact, or on an evaluation of the admissibility of relevant evidence." *Brooks*, 439 Md. at 708. Many evidentiary rulings involve the exercise of discretion, which "will ordinarily not be disturbed on appeal." *State v. Walker*, 345 Md. 293, 324 (1997). For example, such discretionary decisions include whether to admit hearsay statements under an exception, whereas the determination of whether a statement is hearsay is a question of law, which is reviewed *de novo* for legal correctness.[1] *See Brooks*, 439 Md. at 708-09. Likewise, some rulings consist of subsidiary determinations

[1] The third most common standard of review, whether the factual finding was "clearly erroneous," is not relevant here. *See Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455-56 (2004).

which may themselves be purely factual or discretionary, whereas the conclusion reached on those subsidiary determinations may be a legal question subject to *de novo* review. *See Walker*, 345 Md. at 325.

Although the court below referenced a reading of the relevant rule, the decision to deem C.S. not unavailable, and therefore exclude the video testimony, was not a pure question of law. The unavailability determination required a factual analysis, and the subsequent decision to exclude the video testimony was a legal determination made on those facts. The unavailability determination, ultimately at issue in this appeal, is subject to an abuse of discretion standard.

There is an abuse of discretion "'where no reasonable person would take the view adopted by the [trial] court,'" or where the ruling is "'clearly against the logic and effect of facts and inferences before the court.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (quoting *North v. North*, 102 Md. App. 1, 13 (1994)). On this record, we find no abuse of discretion.

## DISCUSSION

### The Unavailability Determination

T.W. first argues that her trial counsel's efforts to locate C.S. were reasonable and demonstrated the diligence and good faith required by Maryland law. She further argues that the trial court erred in weighing the fact that her counsel's proffer had been oral and not in the form of an affidavit. She also asserts that she could not have given effective notice to C.S. during their brief conversation over the Kik app. Thus, she posits, the appropriate remedy should not have been exclusion of the video testimony, but a

continuance to allow her counsel to attempt to reach C.S. using the app. T.W. maintains that because C.S. waived her Fifth Amendment rights and testified willingly at the adjudicatory hearing, this is indicative of her willingness to testify again at the exceptions hearing.

The State responds that the court did not abuse its discretion in deciding that T.W.'s counsel's efforts to locate C.S. did not demonstrate diligence and good faith, primarily because counsel's proffer to the court contained little in the way of substance. The State argues further that T.W., as a close friend of C.S., was in a position to know that she moved away two months prior to trial, and that counsel therefore could have begun his search at an earlier time. The State concludes that the court did not abuse its discretion in denying the postponement, as T.W. presented no evidence that further attempts to contact C.S. would have been fruitful.[2]

Rule 5-804 allows a trial court to admit otherwise inadmissible hearsay evidence in the form of former testimony where the declarant is found to be unavailable. Md. Rule 5-804(b)(1). The rule provides for five circumstances under which unavailability may be found; T.W. relies on subsection (a)(5) "in which the declarant is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." Md. Rule 5-804(a)(5).

[2] The State also asserts that T.W. did not preserve her claim that the court erred in noting that counsel did not file an affidavit of attempts to locate C.S., as opposed to a mere oral proffer. We are satisfied that the issue, even if relevant, has been preserved.

A party, relying on subsection (a)(5) must satisfy the court of the exercise of "good faith and due diligence" in attempting to obtain the witness's attendance. *State v. Breeden*, 333 Md. 212, 222 (1993). "The lengths to which [a party] must go to produce a witness . . . is a question of reasonableness." *Id.* at 221 (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)). In-court, on-the-record explanations by counsel are acceptable methods of proffer, as are more formal methods such as testimony and sworn affidavits. *See Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 643 (1997).

In *Breeden*, the State's expert witness had left his job at Perkins Hospital Center and moved to Puerto Rico, where he intended to become a Jesuit priest at a monastery there. 333 Md. at 217. For a re-trial scheduled on January 6, the State sent three letters to the expert's home in Puerto Rico, on November 6, November 26, and December 16, asking him to contact the State's Attorney's Office. *Id.* at 216-17. On December 27, he informed the State that he would not attend the second trial. *Id.* at 217. The State relayed this information to the court on December 30, and the court advised the State to undertake the procedures available to it under the Uniform Act to Secure Attendance of Out of State witnesses. *Id.* The paperwork was to arrive in Puerto Rico on January 2; by the start of trial on January 6, there was no response to the Uniform Act request. *Id.* In one other attempt to obtain the expert's attendance, an Assistant State's Attorney telephoned the monastery where the expert was living, as well as his parents' home, but received no response. *Id.*

The trial court found that the expert witness was unavailable for purposes of the rule, and permitted the State to place into evidence a transcript of the expert's testimony

from the first trial. *Id.* at 218. The court also permitted the State to read the transcript aloud, using the Deputy State's Attorney, defense counsel, and the Assistant State's Attorney, respectively, to read the direct examination, cross-examination, and answers. *Id.*

The Court of Appeals affirmed our reversal, holding that the State did not demonstrate due diligence as it failed to attempt service under the Uniform Act until just one week prior to trial, and only then when the court prompted the State as to the availability of the rule. *Id.* at 226. The Court held that, in these circumstances, where the State only sent letters and failed to make timely contact, attempting to use the Uniform Act would have been a reasonable demonstration of diligence. *Id.* at 226-27.

In *Cross*, the State was unable to locate four witnesses for a re-trial, each having moved from the addresses on file at the time of the first trial. 144 Md. App. at 83 After requesting a postponement, which was denied, the State moved to offer into evidence the transcripts or videotapes of their testimony from the first trial. *Id.*

In support of this motion, a detective testified to his search that encompassed checking arrest records, inquiring with friends and former neighbors of their whereabouts, checking Motor Vehicle Administration records, inquiring with people standing on the street near the home of a relative of one of the witnesses, driving through the neighborhoods where the witnesses were reported to have moved, and calling the school police at the school where a juvenile witness was enrolled. *Id.* at 84-86. His efforts were partially successful, as he was able to locate two of the four missing witnesses. *Id.* at 84-85. He encountered two of the witnesses the day before trial and served them with subpoenas,

which they agreed to honor. *Id.* However, they failed to appear for trial the following day. *Id.*

The trial court found that the State had made reasonable efforts to obtain the witnesses' attendance, and permitted the State to offer a videotape of the testimony of the two subpoenaed witnesses given at the first trial. *Id.* at 86-87. On appeal, we agreed that the State had undertaken diligent and good faith efforts to obtain the attendance of those two witnesses. *Id.* at 94. We further concluded that the two witnesses demonstrated a willingness to testify, noting, "they previously had appeared in court when required, they were under subpoena, and they had promised to return for trial." *Id.* Under these circumstances, we held that the trial court had not abused its discretion in concluding that the two witnesses were unavailable. *Id.*

In *Coleman v. State*, 49 Md. App. 210, 226 (1981), at a motions hearing, a detective testified of his efforts to locate a State's witness who had testified at a first trial. His efforts included inquiring at the witness's previous address, the Motor Vehicle Administration, the Post Office, utility companies, and the witness's last known place of employment. *Id.* The trial court allowed the witness's testimony from the first trial into evidence, and we agreed that the State's efforts demonstrated diligence and good faith "sufficient for the trial judge to properly conclude that [the witness] was 'unavailable.'" *Id.* at 227. We rejected Coleman's argument that the search was not diligent because the detective did not also check other sources, including the Internal Revenue Service or the Social Security Administration, or contact other police officers or paid informants, concluding that, while

those sources might have been helpful, not checking them did not lessen the diligence and good faith of the search. *Id.* at 226-27.

*Breeden*, *Cross*, and *Coleman* demonstrate that there is no hard and fast rule as to how, or how soon pre-trial, a party must commence a search for a potentially unavailable witness, or what steps constitute a diligent, good faith search. A comparison of the searches in *Cross* and *Coleman* demonstrates that a party need not exhaust every possible option, but should thoroughly pursue the available means of locating a witness reasonably available to the party. Further, the cases make clear that efforts to locate and serve a potentially unavailable witness ought to be clearly and precisely explained to the court in its role of determining diligence and good faith.

At this juncture, we recall relevant dates in this proceeding: the alleged offenses occurred on March 9, 2015; the adjudicatory hearing was held on April 24, 2015; a restitution hearing was held on August 18, 2015; notice of the *de novo* exceptions hearing was issued on August 21, and the hearing, after one postponement, was held on October 28, 2015.

T.W.'s counsel represented that he had been attempting to locate and serve C.S. since he filed the exceptions in August. It is, however, unclear from his proffer at what point he learned that C.S. was no longer living at her mother's address and had moved to Philadelphia. Attempting to locate a witness in a nearby jurisdiction within three weeks of trial is not unreasonable, but we agree with the trial court that the limited actions described in counsel's proffer, after he learned of C.S.'s move, fall short of a diligent search. Counsel informed the trial court that he: (1) sent a subpoena to her last known address; (2) called

C.S.'s mother, who informed him that she did not have C.S.'s new address in Philadelphia; (3) called C.S.'s phone number, which appeared to have been disconnected; and (4) asked T.W. and her mother if they knew of C.S.'s whereabouts.

T.W. argues that, to affirm the trial court ruling on the unavailability of C.S., would impose an unreasonably higher burden on counsel than is found in the rulings of this Court and the Court of Appeals. We disagree.

While counsel may well have made other efforts, his proffer to the court did not demonstrate any other actions taken to locate C.S., including whether he had made a thorough search using the means available. There was no suggestion that he employed the efforts of an investigator. He might have informed the court that, while on the phone with C.S.'s mother, he had asked her to attempt to provide recent contact information, or that he had similarly asked T.W. to inquire of her friends about information of C.S.'s new address, phone number, or school. Nor, did counsel proffer that he had asked T.W. to again contact C.S. via the Kik app after she informed him of their conversation the previous night. Indeed, counsel may well have made some, or even all of, such efforts, but those were not presented to the court. Even taking T.W.'s contact with C.S. via the Kik app into consideration further underscores the court's finding of a lack of a diligent search for C.S.

Given the facts before the court, we find no abuse of discretion in the court's ruling. That said, we hasten to add there is no suggestion, and we find none, that counsel's efforts were not taken in good faith. Our jurisprudence, however, requires both good faith and diligence.

Finally, we address briefly T.W.'s suggestion that the court erred in holding counsel to the requirement of an affidavit rather than a mere oral proffer. As we have noted, we reject the State's assertion that T.W. has failed to preserve that question for our review. We have noted, *supra*, that in-court, on-the-record explanations by counsel are acceptable methods of proffer, as are more formal methods, including testimony and/or sworn affidavits. *Commercial Union Ins. Co.*, 116 Md. App. at 643. Moreover, we interpret the trial court's comment that ". . . usually don't I have an affidavit . . .", not as a requirement, but as a request for additional supporting information. In that regard, we, likewise, find no error.

**Denial of Continuance**

Alternatively, T.W. posits that the court's denial of counsel's request for a postponement to allow more time to locate C.S. was an abuse of discretion.

We consider three factors in the exercise of discretion in deciding whether to postpone a trial in order to obtain the attendance of a witness:

> first, that [a party] had a reasonable expectation of securing the witness within a reasonable time; second, that the evidence was competent and material and that the case could not be fairly tried without the witness; and, third, that [the party] made diligent efforts to obtain the witness.

*Fontaine v. State*, 134 Md. App. 275, 298 (2000) (citing *Whack v. State*, 94 Md. App. 107, 117 (1992)).

T.W.'s counsel emphasized the importance of C.S. as a witness, and T.W. did present information regarding C.S.'s willingness to testify, arguing that she had willingly testified at the adjudicatory hearing after waiving her Fifth Amendment right and

inculpating herself in the charges at issue. However, counsel also stated, "I don't know if this 17 year old has any transportation to Baltimore" from Philadelphia, and gave no indication of their expectations of procuring her attendance.

Whether, on the information available to the court, we might have ruled differently is not the test. We do not find the court's ruling to be clearly against the logic and effect of facts and inferences before it; hence, we find no abuse of discretion in the court's denial of the requested continuance.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED;**
**COSTS ASSESSED TO APPELLANT.**