Circuit Court for Montgomery County
Criminal Case No. 127644

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2695

September Term, 2015

CARLOS ENRIQUE VELEZ

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 24, 2017

On November 10, 2015, a jury sitting in the Circuit Court for Montgomery County convicted appellant, Carlos Enrique Velez, of 15 counts of possession of child pornography. The court sentenced appellant to three years for each of the 15 counts, all suspended except for Count 1, and it imposed five years of probation. Upon release, appellant would be required to register as a sex offender for a period of 15 years.

On appeal, appellant presents the following two questions for our review:

1. Did the trial court err by admitting hearsay evidence?
2. Was the evidence insufficient to convict appellant?

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

FACTUAL AND PROCEDURAL BACKGROUND

On February 11, 2015, Dennis Valverde was working as a Loss Prevention Officer at the Giant food store located at 2900 University Boulevard in Wheaton. At approximately 7:30 p.m., Mr. Valverde observed a man, whom he later identified as appellant, enter the store. A short time later, appellant left the store with a shopping cart, which contained four jugs of Tide detergent. Mr. Valverde followed appellant to the parking lot and attempted to talk to him. At that point, appellant had a car key fob in his hand, and he no longer had the shopping cart, which had been left by the exit to the store. Mr. Valverde called out to appellant and identified himself as Giant security. Appellant ran, and Mr. Valverde followed him for a short distance, but he ultimately abandoned his pursuit. Mr. Valverde then noticed a blue Dodge Avenger parked in the parking lot with its passenger compartment lights on, but no one nearby. He looked into the car and saw jugs of Tide

detergent on the backseat of the car. The jugs were the same type found in the shopping cart abandoned by the appellant.

Police officers from the Montgomery County Police Department responded to the Giant, secured the Dodge, and had it towed to the police station. Detectives Matthew Vendemio and Jim Cherry obtained a search warrant for the Dodge, which permitted them to search the vehicle for possible stolen property and search any electronics found to ascertain to whom they belonged. They executed the search warrant and saw on the front seat a cell phone which they submitted to the Electronic Crime Unit of the Montgomery County Police Department for forensic analysis. Detective Vendemio also submitted a request to Sprint for business records associated with the phone.

Identification cards belonging to a person named Kelly Galvanedas also were found in the car. Ms. Galvanedas came to the police station and retrieved the car, which was registered to a member of Ms. Galvanedas' family.

Detective Michael Yu, a member of the Montgomery County Police Electronic Crimes Unit and an expert in electronic forensic analysis, examined the phone and noticed that there were a large number of photographs stored in it. When he began to look at the individual photos, he noticed that there were images that were "suspicious of child exploitation or child pornography." Pursuant to police department protocol, he stopped his initial investigation and contacted Detective Dane Onorio, a member of the Special Victims Investigations Division, Child Exploitation Unit. Detective Yu showed Detective Onorio the suspicious photographs, and Detective Onorio obtained a search warrant, which

allowed the police department to search the phone for "any evidence of child pornography."

Detective Yu found 15 sexually explicit photographs of children on the phone. His examination of the phone revealed that the photos had been sent and received on the phone as email attachments from the email address Velezcarlos79@yahoo.com. Detective Yu testified that the photos could not have been stored on the phone unless they had been opened on the phone. The phone also contained three photos of appellant, which Detective Yu determined had been taken by the phone's camera.[1] The call log for the phone revealed that the last outgoing call made on the phone was at 7:07 p.m. on February 11, 2015.

The Sprint phone records for the recovered cell phone revealed that, on February 11, 2015, the date of the seizure of the Dodge Avenger and its contents, the listed subscriber of the phone was Ivonne Ramirez. Effective February 24, 2015, the listed subscriber was changed to Carlos Velez.

[1] Detective Yu did not identify appellant in the photos, but he testified that the photos depicted the "same male subject." The photos were admitted into evidence at trial, but they do not appear in the record before us. Appellant, however, concedes that he is depicted in the photographs. In closing argument, the State characterized these photos as "selfies." A "selfie" is defined as a "photographic self-portrait." Oxford English Dictionary (3d ed. June 2014), *available at* https://perma.cc/C83Q-JGER.

DISCUSSION

I.

Hearsay Evidence

Appellant contends that the circuit court erred in admitting subscriber records from Sprint showing that he was the subscriber of the cell phone seized from the Dodge vehicle. He asserts that, although "the Sprint records might qualify as business records, the information concededly supplied by an unknown person that Carlos Velez was the subscriber, was hearsay because it was offered to prove the truth of the matter asserted therein: that Carlos Velez was the phone's subscriber."

The State contends that the circuit court properly admitted the cell phone records under the business records exception. It asserts that names of customers found in a business record are admissible. In any event, the State argues that, even if it was error to admit this evidence, the error was harmless.

Ordinarily, we review rulings on the admissibility of evidence using an abuse of discretion standard. *Gordon v. State*, 431 Md. 527, 533 (2013). With respect to whether evidence is hearsay, however, that is an issue of law that we review *de novo*. *Id.* Whether hearsay evidence is admissible under an exception to the hearsay rule, on the other hand, may involve both legal and factual findings. *Id.* at 536. In that situation, we review the court's legal conclusions *de novo*, but we scrutinize its factual conclusions only for clear error. *Id.* at 538.

Hearsay is "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). Hearsay is not admissible "[e]xcept as otherwise provided by [the Maryland] rules or permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. "If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Stoddard v. State*, 389 Md. 681, 689 (2005). Here, the subscriber information was used by the prosecutor for the truth of the matter asserted, i.e., that appellant was using the phone.[2]

Maryland Rule 5-803, however, provides an exception to the general prohibition against hearsay. The business records exception provides for the admission of "[r]ecords of regularly conducted business activity" if:

> (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation.

Md. Rule 5-803(b)(6).

"The rationale underlying the business records exception is that because the business relies on the accuracy of its records to conduct its daily operations, the court may accept those records as reliable and trustworthy." *Dep't of Pub. Safety and Corr. Servs. v. Cole*, 342 Md. 12, 30 (1996). Further, "the recorder, who has no motive to falsify or record inaccurately, is under a business duty to make an honest and truthful report that can be relied upon by the business." *Id.* at 31.

[2] The prosecutor told the jury in his opening statement that the Sprint business records associated appellant with "ownership of this particular phone."

Appellant argues that, although the record itself falls under the business records exception, the subscriber information contained in the record is "hearsay within hearsay," as it was "supplied by an unknown person." We agree.

In *United States v. Blechman*, 657 F.3d 1052, 1065-66 (10th Cir. 2011), the United States Court of Appeals for the Tenth Circuit explained the situation involved here, as follows:

> "Double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person." *United States v. Gwathney*, 465 F.3d 1133, 1141 (10th Cir. 2006) (internal quotation marks omitted). If the person who provides the information is an outsider to the business who is not under a business duty to provide accurate information, then the reliability rationale that underlies the business records exception ordinarily does not apply. *See* [*United States v.*] *Ary*, 518 F.3d [775,] 787 [(10th Cir. 2008)] ("The essential component of the business records exception is that each actor in the chain of information is under a business duty or compulsion to provide accurate information. If any person in the process is not acting in the regular course of business, then an essential link in the trustworthiness chain fails." (ellipsis, citation, and internal quotation marks omitted)); *see also United States v. Snyder*, 787 F.2d 1429, 1433-34 (10th Cir. 1986) ("The business records exception is based on a presumption of accuracy, accorded because the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because of the accuracy demanded in the conduct of the nation's business. The reason underlying the business records exception fails, however, if any of the participants is outside the pattern of regularity of activity." (citation and internal quotation marks omitted)). Accordingly, the general rule is that "[a]ny information provided by . . . an outsider to the business preparing the record[ ] must itself fall within a hearsay exception to be admissible." *Gwathney*, 465 F.3d at 1141; *see also* Fed. R. Evid. 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.").
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> This Court, however, has recognized one exception to the general rule: information provided by an outsider that is included in a business record may come in under the business records exception "[i]f the business entity has adequate verification or other assurance of accuracy of the information

> provided by the outside person." *United States v. McIntyre*, 997 F.2d 687, 700 (10th Cir. 1993); *see also United States v. Cestnik*, 36 F.3d 904, 908 (10th Cir. 1994). In the context of identity information provided by an outsider, we have identified "two ways to demonstrate this 'guarantee[ ] of trustworthiness': (1) proof that the business has a policy of verifying [the accuracy of information provided by someone outside the business]; or (2) proof that the business possesses 'a sufficient self-interest in the accuracy of the [record]' to justify an inference of trustworthiness." *Cestnik*, 36 F.3d at 908 (some alterations in original) (quoting *McIntyre*, 997 F.2d at 700).

Here, the State did not provide any evidence regarding who provided the subscriber information, much less the trustworthiness of that information. Under these circumstances, the circuit court erred in admitting the evidence of appellant's name as a subscriber on the Sprint record.

That, however, is not the end of the inquiry. Erroneously admitted hearsay statements are reviewed for harmless error. *Frobouck v. State*, 212 Md. App. 262, 283, *cert. denied*, 434 Md. 313 (2013). "To prevail in a harmless error analysis, the beneficiary of the alleged error must satisfy the appellate court '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.'" *Id.* at 284 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

Here, in light of all the evidence, we agree with the State that the admission of appellant's name on the subscriber information of the Sprint record was harmless. The State presented extensive evidence that appellant had been in possession of the phone and the photographs contained therein. Initially, there were three photos of appellant stored in the phone, which were taken using the cell phone's camera. And, the email address associated with the phone was Velezcarlos79@yahoo.com, the address through which the

illicit photographs were sent and received. Moreover, the last outgoing phone call from the phone was made a short time prior to appellant entering the Giant food store. And finally, the evidence connected appellant to the car in which the phone was found, in several ways. First, the blue Dodge Avenger was found in the Giant parking lot containing 20 jugs of Tide detergent, which were identical to those appellant took from the store. Second, appellant was seen with a car key fob in his hand as Mr. Valverde approached him the parking lot, and after appellant fled the scene, Mr. Valverde noticed that the interior lights of the Dodge were illuminated, even though no one else was near the car.

Given all this evidence linking appellant to the child pornography on the phone, the admission of evidence that the subscriber's name on the records was changed to appellant's name approximately two weeks after the Dodge Avenger and its contents, i.e., the cell phone at issue here, were seized was harmless error.[3] Appellant states no claim for relief in this regard.

II.

Sufficiency of Evidence

Appellant next argues that the evidence in this case was insufficient to prove that he "possessed the photographs discovered in the pink iPhone." He alleges that the State failed to prove that he "'knowingly possess[ed]' the prohibited material," or that he "exercised control over the pink iPhone."

[3] Indeed, appellant's counsel argued, prior to the start of trial, that this information is "not only not relevant, but is exculpatory."

The State disagrees. It argues that appellant's "arguments address the weight which was given to [the] evidence, not its sufficiency," and "[u]nder the circumstances, a reasonable finder of fact could determine that [appellant] possessed the phone and, accordingly, knowingly possessed the illicit images found on the phone."

In addressing the sufficiency of evidence, "we review the evidence in the light most favorable to the prosecution and determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Perry v. State*, 229 Md. App. 687, 696 (2016) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)), *cert. denied*, 453 Md. 25 (2017). This "review standard applies to all criminal cases, including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Neal v. State*, 191 Md. App. 297, 314, *cert. denied*, 415 Md. 42 (2010). "We defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *State v. Mayers*, 417 Md. 449, 466 (2010).

Appellant was charged possession of child pornography pursuant to Md. Code (2012 Repl. Vol.) § 11-208 of the Criminal Law Article, which provides as follows:

> (a) A person may not knowingly possess and intentionally retain a film, videotape, photograph, or other visual representation showing an actual child under the age of 16 years:
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> (1) engaged as a subject of sadomasochistic abuse;
>
> (2) engaged in sexual conduct; or
>
> (3) in a state of sexual excitement.

Appellant does not dispute that the photographs stored in the seized cell phone constituted child pornography. As indicated, he argues that the State failed to prove that he possessed the cell phone, and therefore, did not prove that he "knowingly possessed" the child pornography contained therein. He argues that "the State presented no evidence showing that appellant ever had possession of the vehicle, much less the pink phone found inside it." We disagree.

The State presented evidence that the blue Dodge Avenger found in the Giant parking lot contained 20 jugs of Tide detergent, which were identical to those appellant was suspected of shoplifting. Additionally, he was seen with a car key fob in his hand as Mr. Valverde approached him in the parking lot. After appellant fled on foot, Mr. Valverde noticed that the interior lights of the Dodge were illuminated, even though no one was near the car. A rational trier of fact could have concluded that the key fob in appellant's hand activated the interior lights of the Dodge. This conclusion is further supported by the fact that a cell phone containing photos of himself and associated with the Velezcarlos79@yahoo.com email address was found in the car.

The evidence also supported a finding connecting appellant to the cell phone. His "selfie" photos, which were taken using the cell phone's camera, and the email address with his name were found in the phone. The last outgoing call made on the cell phone was made a short time before appellant entered the store, which supports the conclusion that appellant had been in possession of the phone. Finally, the evidence presented that the illicit photographs had been sent and received through the Velezcarlos79@yahoo.com email address supported a finding that appellant was in possession of not only the phone,

but the illicit photographs themselves.[4] The evidence was more than sufficient to support appellant's convictions.

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

[4] Appellant argues that the State failed to prove that appellant possessed the illicit photographs due to "wide evidentiary gaps in the State's case." He points out that the car was registered to another individual, and that Ms. Galvanedas picked up the vehicle and some of the contents found inside, from the police station. He further highlights that, "when the phone was confiscated on February 11, the phone's subscriber was someone named Ivonne Ramirez," and that "no evidence was presented that had appellant been able to access the phone with its passcode," that appellant would have been able to access the images. Appellant's arguments go to the weight of the evidence, not its sufficiency, as it is not necessary that the "circumstantial evidence be such that no possible theory other than guilt can stand." *Morgan v. State*, 134 Md. App. 113, 124-25 (citations omitted), *cert. denied*, 361 Md. 232 (2000).