Circuit Court for Harford County
12K15000881

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2657

September Term, 2016

GARRETT HUTCHINS

v.

STATE OF MARYLAND

Wright,
Graeff,
Krauser, Peter B.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: January 11, 2018

A jury in the Circuit Court for Harford County convicted Garrett Hutchins, appellant, of reckless endangerment and assault in the second degree. Hutchins was sentenced to a term of ten years imprisonment, with all but six years suspended. In this appeal, Hutchins presents the following questions for our review, which we rephrase:[1]

> 1. Did the circuit court err in denying Hutchins's motion to dismiss and his motion for judgment of acquittal on the grounds that the State's case rested solely on the uncorroborated testimony of an accomplice?
>
> 2. Did the circuit court err in admitting a witness's prior inconsistent statement?
>
> 3. Did the circuit court err in admitting expert testimony regarding the location of a cellular phone on the day of the crime?

For reasons to follow, we answer all questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

In the evening hours of November 9, 2014, Nichole Richardson was at her home having a telephone conversation with her friend, Dionte McNeil, who was at his home on

[1] Hutchins phrased the questions as:

> 1. Whether the trial court erred by denying the appellant's motion to dismiss and motion for judgment of acquittal based upon a theory that Kristopher Walker was not an accomplice allowing for the appellant's conviction based upon his uncorroborated testimony.
>
> 2. Whether the trial court erred by allowing the State to enter into evidence a witness' prior out-of-court statement to detectives implicating appellant as substantive evidence of appellant's guilt.
>
> 3. Whether the court erred in allowing the admission of the cell phone tower testimony.

Tarragon Court in Harford County. During that conversation, McNeil informed Richardson that he was "going somewhere" and was waiting for "his ride." At some point, McNeil went outside of his home, at which time he observed "someone . . . approaching him." Richardson, who was still on the phone with McNeil, "repeated what he said," and "he confirmed like yeah." The conversation continued for "like a minute," at which time Richardson told McNeil to "hold on." When Richardson attempted to resume the conversation, she found that the "line was still open" but that McNeil "wasn't on the phone."

Approximately one hour later, Kendra Myers, who was in her vehicle with her husband near Tarragon Court, observed a man, later identified as McNeil, lying in the middle of the road. Myers' husband, who was driving, stopped and exited the vehicle, while Myers remained in the vehicle and called 911. Myers then observed another bystander exit her vehicle and approach McNeil. After the bystander helped McNeil to the curb, and sat with him for a short time, the two got up and walked down the sidewalk.

Shortly thereafter, Harford County Sherriff's Deputy Donald Crites responded to the scene and made contact with several witnesses, including Debra Hare, who reported that she had helped McNeil walk back to his nearby home. Deputy Crites then went to McNeil's residence, where he met Tara Shuron, McNeil's aunt, who stated that "everything was okay," and that McNeil "appeared to be intoxicated." Shuron later testified that, although she did not observe any physical injuries on McNeil upon his arrival home, she did notice that he was wearing only one shoe. Nevertheless, Deputy Crites left the residence without making contact with McNeil.

Not long after Deputy Crites left, Shuron went to check on McNeil, who had gone to bed. When she did, Shuron observed blood on the floor next to McNeil's bed. Shuron attempted to rouse McNeil, who "was just agitated" and "kept saying 'I'm just tired, I got a headache, I just want to go to sleep.'" Shuron ultimately called for an ambulance, and McNeil was transported to Johns Hopkins Bayview Medical Center.

Sheriff's Deputy Christopher Allen was later dispatched to Johns Hopkins Bayview to check on McNeil's well-being. In doing so, Deputy Allen observed that McNeil was "unresponsive" and was "breathing on a respirator." Deputy Allen also observed that McNeil had "swelling" on the left side of his face and "small red marks near his left ear lobe." It was later determined that McNeil had severe bleeding in his head requiring surgery. As of the date of trial, McNeil was in a vegetative state and "completely dependent for everything." Shuron later testified that McNeil would likely remain in that state "for the rest of his life." It does not appear from the record that McNeil ever regained consciousness after being transported to the hospital.

As a result of the seriousness of McNeil's injuries, Detective Donald Kramer of the Harford County Sheriff's Criminal Investigation Division was asked to "assist patrol . . . in the investigation of the assault of Mr. McNeil." As part of that investigation, Deputy Allen was instructed to "canvas the area" around where McNeil had been found lying in the street. In so doing, Deputy Allen recovered one of McNeil's shoes, which the officer found in a "wooded area" approximately ten feet from the street.

Also during the investigation, Detective Kramer learned that several individuals, including Hutchins, may have been involved in an assault on McNeil. Detective Kramer

ultimately interviewed one of those individuals, Kristofer Walker, at the Harford County Detention Center, where Walker was being held on unrelated charges. During that interview, Walker provided a statement, which was recorded.

In his statement, Walker indicated that Hutchins had contacted him in "mid-October" and stated that he had been the victim of a robbery, and that McNeil may have been involved. According to Walker, Hutchins asked him to contact McNeil, with whom Walker was friendly, and arrange a meeting so that Hutchins could confront McNeil and find out who had robbed him. Walker agreed and, at approximately 10:30 or 11:00 p.m. on the night of the assault, Walker, Hutchins, and Hutchins' cousin, Jordan Hicks, drove to an area near where the assault occurred. Posing as Walker and using Walker's cell phone, Hutchins then sent several text messages to McNeil indicating that he was "close." Upon spotting McNeil on the street, Hutchins exited his vehicle and accosted McNeil. After the two exchanged words, Hutchins struck McNeil in the face with his fist, causing McNeil to fall and hit the ground and causing McNeil's shoes to "fall off." Hutchins, Walker, and Hicks eventually fled the scene. In his statement, Walker indicated that he was not involved in the assault and that he did not know that Hutchins was going to hit McNeil.

Detective Kramer later subpoenaed and received the records for McNeil's cell phone, which showed, among other things, "a whole lot of phone calls" and "several text messages" between Walker and McNeil, including several contacts from the night of the assault. Also during his investigation, Detective Kramer entered Hutchins's name into a police database and obtained a cellular phone number associated with Hutchins and

registered to Hutchins's mother. Detective Kramer then subpoenaed and later received the phone records for that number, which included subscriber information, cellular tower information, and information regarding each call and text message sent or received by that number. Detective Kramer sent that information to the Maryland Coordination and Analysis Center for help in "mapping out the cell site locations and times."

Kelly Sparwasser, an analyst with the Maryland State Police, received and processed the information sent by Detective Kramer regarding Hutchins's cell phone. In so doing, Sparwasser ascertained that, around the time of the assault, Hutchins' phone had communicated with certain cellular towers located in close proximity to where McNeil had been assaulted. Hutchins was ultimately arrested and charged.

At trial, the State called Walker, who recanted his pretrial statement to police. The State then confronted Walker with a recording of that statement. Defense counsel objected, at which time the following colloquy ensued:

> [DEFENSE]: Your Honor, I'm objecting to it on the basis of hearsay. Your Honor, this witness just testified on the stand and actually he did not contradict anything that he said.
>
> THE COURT: How could it be hearsay? It is the statement of the witness.
>
> [DEFENSE]: But he is here today to testify about it. [The State] is at liberty to question him about anything that he told the detective at that time. Therefore, he actually just questioned him about it and he admitted to making those statements.
>
> THE COURT: I think from the standpoint of confronting the witness and an opportunity to present that – are you going to play it?

[STATE]: Yes, sir.

THE COURT: If he is going to play the statement, I think in terms of his examination of the witness he is allowed to confront him with an inconsistent statement.

[STATE]: At this point it is not being offered to confront or impeach the witness at this point. He has disavowed everything on that CD. It is not an inconsistent statement for substantive evidence at this point.

THE COURT: I think it comes in. It is certainly not hearsay. So, I think it comes in. I'll overrule your objection.

The State then played Walker's prior statement to the jury. Following that playing, Walker testified that the statement was "a lie." He stated that he, Hutchins, and Hicks had planned on meeting McNeil to purchase marijuana, but that the transaction never occurred because McNeil "never responded." Walker maintained that the three went to the area anyway but there were "too many people," some of whom were "running." According to Walker, the three then got back in their vehicle and left the area.

The State also called Kelly Sparwasser, who was admitted as an expert in "cell tower data plotting." Sparwasser testified that, on the night of the assault, Hutchins's phone had communicated with certain cellular towers located near where McNeil had been assaulted. On cross-examination, Sparwasser admitted that she could not say where a particular cell phone was located at a particular moment, nor could she determine how far away a cell phone was from a particular tower at the time of communication.

At the close of the State's case, and again at the close of all evidence, Hutchins made two motions: a motion to dismiss and a motion for judgment of acquittal. In

support of those motions, defense counsel argued that the only evidence probative of Hutchins's guilt was Walker's testimony, which was uncorroborated. The circuit court ultimately denied both motions and found that a reasonable fact-finder could conclude beyond a reasonable doubt that Walker was not an accomplice and, as a result, Walker's statement did not need to be corroborated.

The circuit court then instructed the jury on the relevant law, including the law of "accomplice testimony:"

> You have heard testimony that Kristofer Walker made a statement before trial. Testimony concerning that statement was permitted only to help you decided whether to believe the testimony that the witness gave during this trial.
>
> It is for you to decide whether to believe the trial testimony of Kristofer Walker in whole or in part, and you may not use the earlier statement for any purpose other than to assist you in making that decision.
>
> You have heard testimony from Kristofer Walker, which may cause you to conclude that he was an accomplice. An accomplice is one who knowingly and voluntarily cooperated with, aided, advised, or encouraged another person in the commission of a crime. The Defendant cannot be convicted solely on the uncorroborated testimony of an accomplice.
>
> You must first decide whether Kristofer Walker was an accomplice. If you conclude that Kristofer Walker was an accomplice, you must decide whether the testimony of Kirstofer Walker was corroborated before you may consider it. Only slight corroboration is required. This means that there must be some evidence, which you believe, in addition to the testimony of Kristofer Walker, that shows either that the Defendant committed the crime charged or that the Defendant was with others who committed the crime at or about the time and place the crime was committed.
>
> If you find that the testimony of Kristofer Walker has been corroborated, you may consider it, but you should do so with caution and give it the weight you believe it deserves. If you do not find that the testimony of

> Kristofer Walker has been corroborated, you must disregard it and may not consider it as evidence against the Defendant.

Hutchins was ultimately convicted of reckless endangerment and assault in the second degree. This timely appeal followed.

DISCUSSION

I.

Hutchins first argues that the circuit court erred in denying his motion to dismiss and his motion for judgment of acquittal based on the argument that Walker was an accomplice whose testimony needed corroboration. Hutchins maintains that Walker admitted that the two had planned on meeting McNeil on the night of the assault for the purpose of purchasing marijuana, which "conclusively established" that Walker was an accomplice or co-conspirator "in the commission of criminal offenses." Hutchins also maintains that Walker "meets the definition of an accomplice because it is conceivable that he also could have been convicted, either as a principal or accessory before the fact, for the injuries of Diontae McNeil, if he was implicated by uncorroborated testimony of someone present on the evening in question." Hutchins argues that, because the State's identification of him as the perpetrator rested solely on Walker's testimony, which was uncorroborated, the court should have granted his motions.

The State counters that corroboration of Walker's testimony was not necessary if the jury concluded that Walker was not an accomplice. The State avers, however, that even if the jury reached such a conclusion, Walker's testimony was properly corroborated

by evidence adduced at trial, including the fact that, at the time of assault, Hutchins's cell phone had communicated with certain cell towers near the scene of the crime.

"In order to sustain a conviction . . . based upon the testimony of an accomplice, that testimony must be corroborated by some independent evidence." *In re Anthony W.*, 388 Md. 251, 263-64 (2005). "It is well established in Maryland law that to be an accomplice a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime." *Silva v. State*, 422 Md. 17, 28 (2011) (citations and quotations omitted). That said, "presence at the scene of the crime without more is insufficient to establish participation in the perpetration of the crime." *State v. Foster*, 263 Md. 388, 394 (1971). "Instead, the person must actually participate by assisting, supporting, or supplementing the efforts of another, or, if not actively participating, then the person must be present and advise or encourage the commission of a crime to be considered an accomplice." *Silva*, 422 Md. at 28 (citations and quotations omitted). Moreover, the question of complicity does not hinge upon whether a witness was involved in *any* criminal activity; rather, the question is "whether the witness could be indicted and/or punished *for the crime charged against the defendant*[.]" *Foster*, 263 Md. at 393 (emphasis added).

"Under Maryland's complicity law, 'the spectrum of proof' contains 'three distinct bands[.]'" *Silva*, 422 Md. at 28 (citations omitted). The first two bands include either "accomplices as a matter of fact, as determined by a jury (or a judge, acting in his or her fact-finder role, at a bench trial), or accomplices as a matter of law *vel non*, as determined

by a judge." *Silva*, 422 Md. at 28. Those two bands exist "at either extreme of the spectrum [and] are the domain of the judge in his capacity to make rulings of law." *Trovato v. State*, 36 Md. App. 183, 188 (1977). Within that domain, the judge does not weigh evidence but rather decides whether the facts "1) do not establish the necessary elements of the thing needing to be proved . . . or 2) are so clear and decisive that reasonable minds could not differ in resolving the question[.]" *Id.*

In the middle of those two bands, there exists a broad intermediate zone, "wherein reasonable minds might differ as to the facts and wherein different readings of those facts would dictate very different legal results." *Id.* This third band "is the unfettered domain of the fact finder with the prerogative to resolve genuine factual disputes in either direction." *Id.* Thus, "for a judge to take the question of complicity from the jury and make a finding as a matter of law, 'the proof must be so clear and decisive that reasonable minds could not differ in coming to the same conclusion.'" *Silva*, 422 Md. at 29 (citations omitted). "When, however, evidence relating to whether a witness is an accomplice is capable of being determined either way and justifies different inferences in respect thereto, the question is for the determination of the trier of fact and in a jury case should be submitted to the jury with proper instructions." *Id.* (citations and quotations omitted). In other words, "[t]o say that [an individual] might be an accomplice on [certain] facts is not . . . to say that he *must* be an accomplice on [those] facts." *Trovato*, 36 Md. App. at 187 (emphasis added).

Here, we hold that the circuit court did not err in denying Hutchins's motion to dismiss and his motion for judgment of acquittal. First, although the facts may have

established that Walker was an accomplice or co-conspirator in attempting to purchase marijuana, that "crime" was not the offense for which Hutchins was charged. Thus, for the purposes of determining whether Walker's testimony against Hutchins in this case required corroboration, the fact that Walker may have been an accomplice in some other, uncharged crime is irrelevant. *Burroughs v. State*, 88 Md. App. 229, 238 (1991) ("The test for determining whether a person is an accomplice of a defendant charged with a felony is whether he could be indicted and punished *for the crime charged against the defendant*.") (Emphasis added).

Regarding the offenses for which Hutchins was charged – first-degree assault, second-degree assault, and reckless endangerment – sufficient evidence was adduced from which a reasonable fact-finder could have concluded that Walker was not an accomplice in any of those crimes. Walker told the police that he arranged the meeting with McNeil because Hutchins informed him that he simply wanted information from McNeil regarding a prior robbery in which Hutchins had been a victim. Moreover, Walker made clear that, other than being present at the time of the crime, he had no knowledge of or role in the attack on McNeil. Thus, while a reasonable inference can be drawn that Walker played some role in the crimes charged, the evidence does not *require* such an inference. Rather, that is but one of many competing inferences that may be drawn from the evidence. And, as previously noted, when several reasonable inferences can be drawn from the evidence, resolution of those inferences falls squarely within the purview of the fact-finder and should not be disturbed by the trial court. Accordingly, the

circuit court did not err in denying Hutchins's motions and submitting the case to the jury with proper instructions.

II.

Hutchins next argues that the circuit court erred in admitting the recording of Walker's statement to the police in which he implicated Hutchins in the crime. Hutchins maintains that, although a prior inconsistent statement by a witness may be introduced into evidence, "the purpose of this rule is to prevent untrustworthy out-of-court statements from being offered as substantive evidence of guilt." Hutchins avers that his recorded statement to police was untrustworthy, and thus should not have been admitted, because it represented only a portion of the entire interview and because Walker alleged that his statements were partially induced by the police.

We disagree and hold that the circuit court did not err in admitting Walker's statement. Md. Rule 5-802.1(a) provides that an out-of-court statement made by a witness that is inconsistent with the witness's testimony is not hearsay, and thus is not necessarily inadmissible, "if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." Here, Walker's statement was both inconsistent with his testimony and recorded in substantially verbatim fashion by electronic means. Thus, the statement met the admissibility requirements of Md. Rule 5-802.1(a). Hutchins has failed to cite any authority, and we have found none that would dictate that the statement was later

disavowed by Hutchins as being induced by the police does not, without more, render the statement inadmissible. Moreover, there is nothing in Md. Rule 5-802.1(a) to indicate that partial recordings are inherently unreliable or should be treated differently than other recordings. In light of those facts, the circuit court did not err in admitting Walker's statement.

III.

Hutchins's final argument is that the circuit court erred in permitting Kelly Sparwasser to testify regarding "the specific location of a specific cell phone," as such testimony was "not specifically or sufficiently in the area of science that she was called upon to testify." We disagree. Sparwasser did not testify about the location of any particular cell phone; in fact, she expressly stated that such a determination was not possible. Rather, Sparwasser testified about the location of cell phone *towers* and the fact that Hutchins's cell phone had communicated with those towers on the night of the assault. That testimony fell squarely within the subject matter, *i.e.*, cell tower data plotting, for which Sparwasser was admitted as an expert. Accordingly, the circuit court did not err in admitting said testimony.

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