Circuit Court for Baltimore County
Case No. 03-K-16-005543

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2044

September Term, 2017

MICHAEL STRATTON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: January 9, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Michael Stratton was convicted by a jury in the Circuit Court for Baltimore County of robbery, second degree assault, and theft between $1,000 and $10,000. Appellant presents the following questions for our review, which we reorder and rephrase slightly:

> 1. Did the trial court err in admitting a GPS tracking map where the probative value of that evidence was substantially outweighed by the danger of unfair prejudice to appellant?
>
> 2. Did the trial court err in admitting a bank balance screen where that evidence lacked a proper foundation under Maryland's business records hearsay exception yet was a key piece of evidence that the State needed to prove certain of the crimes charged?
>
> 3. Did the motions court err when it denied appellant's motion to exclude references to shots fired by the police?
>
> 4. Did the trial court err in denying appellant's Motion for New Trial where appellant was prejudiced at trial by repeated references to shots fired by the police?
>
> 5. Did the trial court err in admitting a video surveillance video when the State failed to satisfy the chain of custody?
>
> 6. Did the cumulative errors of the motions and trial courts deprive appellant of his right to a fair trial?

Finding no error, we shall affirm.

I.

Appellant was convicted by a jury in the Circuit Court for Baltimore County of robbery, second degree assault, and theft between $1,000 and $10,000. The court merged the assault and theft convictions into the robbery conviction and sentenced appellant to a

term of incarceration of twenty-five years for the robbery conviction.

Before trial, appellant moved *in limine* to exclude the fact that a police officer fired shots at the vehicle in which the police apprehended him, arguing that the shooting was substantially more prejudicial than it was probative. With the parties' agreement, the court excluded all evidence that the police killed the driver of the vehicle, but nevertheless denied appellant's motion to exclude the fact that a police officer fired at the vehicle. The court found that the relevance and prejudice would depend upon the evidence offered at trial and that it would "go with the State on the admissibility generally of a gunshot."

We state the following facts as set forth at trial. On September 23, 2016, appellant approached Kendra Perry, a bank teller working at a Wells Fargo bank in Pikesville, Maryland. Appellant handed her a note that read, "this is a robbery." Ms. Perry gave appellant approximately $1,900 from her drawer, including two twenty-dollar bills with a GPS tracker hidden between them. Appellant left the bank, and the GPS tracker began transmitting its location to the bank's security contractor, 3SI Security Systems. Moving ahead of the tracker, police officers stopped traffic in front of appellant's vehicle. Officer Stallings walked past a tan Ford Taurus without seeing appellant on the floor in the vehicle's back seat. Returning to that vehicle based on updated location information from the GPS tracker, Officer Stallings saw money in the back seat and appellant on the floor. He ordered the two people in the vehicle to show their hands, but the driver accelerated across the street into the oncoming traffic lane. Officer Bortner fired at the vehicle when it accelerated toward him. The vehicle entered a nearby intersection and crashed into another vehicle that was stopped at a traffic light.

Police officers removed and arrested appellant, who was lying on the floor in the back of the stopped Ford Taurus. At the time of his arrest, appellant wore clothing and carried a cell phone that each matched the bank robber seen on the bank's security footage. He had in his possession $1,861 in cash, the GPS tracker, and a note in his pocket that read, "this is a robbery." At trial, the court admitted into evidence a list of the GPS tracker's coordinates after the robbery. The court also admitted a map produced by 3SI Security that displayed the GPS tracker's coordinates as a line on the map, with the start of the line labeled "robbery" and the end of the line labeled "apprehension." The court admitted the bank surveillance video of the robbery and a printout of a balance screen from the bank that showed $1,990 missing from a teller's drawer on September 23, 2016, with Ms. Perry's name in a time stamp at the bottom of the document.

As indicated, the jury convicted appellant, the court imposed sentence, and this appeal followed.

II.

Before this Court, appellant argues that the circuit court erred in four evidentiary rulings at trial and that these errors warrant reversal. Appellant argues first that the circuit court erred in admitting 3SI Security's GPS tracking map. Relying on Maryland Rule 5-403, appellant argues that the court should have excluded the map because it was substantially more prejudicial to him than it was probative. Appellant focuses his argument on the use of the word "apprehension." Appellant contends that the label of "apprehension" led the jury to conclude that appellant was the bank robber because he was "apprehended"

at the end of the line on the map. Because the list of GPS coordinates and various witness' testimony established essentially the same facts as the map, appellant contends, the map had minimal probative value, and the trial court should have excluded it on the basis of Rule 5-403.[1] Appellant argues that the error is not harmless because the State used it repeatedly at trial and in closing arguments.

Appellant's second argument refers to a printout of a bank balance screen admitted at trial as a Wells Fargo business record. Appellant argues that of the four requirements to admit a hearsay document as a record of regularly conducted business activity, the State did not elicit testimony sufficient for the second requirement, that the record "was made by a person with knowledge or from information transmitted by a person with knowledge." Appellant notes that Ms. Perry's only testimony to the statement's creation was that "It's our balancing screen" and argues that the testimony is insufficient under Maryland law. Appellant concludes that the admission of the balance screen is not harmless error because without it, the State lacked any evidence as to the amount of money taken from the bank, which the State needed to prove for the value element of the theft conviction.

Third, appellant argues that the motions court erred in denying his motion *in limine* to exclude the evidence that the police fired at the Ford Taurus. Citing again Rule 5-403, appellant contends that evidence of the gunfire had no probative value because it took place after he committed the crimes and while another man drove the vehicle. Appellant argues

[1] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

that the unfair prejudice caused by this evidence—namely that the jury would unfairly assume appellant to be a violent criminal who sought to escape from or harm the police after they saw him—substantially outweighed any probative value. Appellant claims that the error was not harmless error. He also argues that the circuit court erred in failing to grant his Motion for New Trial under Rule 4-331 because it was in the interest of justice to grant a new trial after police officers testified to the gunfire at trial.

Finally, appellant requests that we reverse his conviction because the admission of the bank's surveillance video violated Maryland Code, Courts and Judicial Proceedings, § 10-1003.[2] Section 10-1003 pertains to evidence of controlled dangerous substances and requires that the State, upon a defendant's written request, produce any requested person in the chain of custody for such substances. Appellant argues that this section of the Maryland Code required a representative from Wells Fargo to testify to the chain of custody for the surveillance video and contends that admission of the video was not harmless error.

In sum, appellant argues that the cumulative errors denied him the right to a fair trial, a right guaranteed by the Due Process Clause of the 5th Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights.

The State argues that the circuit court admitted the evidence properly. Regarding the 3SI GPS map, the State argues that the evidence was highly probative because it made it far more likely that appellant was the bank robber. Moreover, the State argues that there

[2] All subsequent statutory references herein shall be to Md. Code, Courts and Judicial Proceedings Article.

was no unfair prejudice. The security firm, 3SI, made the map based on its awareness of a robbery from the Wells Fargo bank and based the map on objective GPS coordinates and colloquial terms that captured the events it knew occurred—3SI knew that the bank was robbed, that a teller activated the GPS tracker, and that the police recovered the tracker.

As to the bank balance printout, the State argues that the business records exception to the hearsay rule was satisfied. Ms. Perry testified that the evidence was "our balancing screen," and her name appeared in the time stamp at the bottom of the document. In addition to Ms. Perry's testimony, the State emphasizes that the purpose of the rule is to efficiently admit trustworthy and reliable records of regular business activity and argues that the bank's balance screen was such a record. Because of the witness testimony and the record's facial reliability, the State argues that the circuit court did not abuse its discretion in admitting the document.

Third, the State maintains that the evidence of the officer's gunshots was not substantially more unfairly prejudicial than it was probative. As a threshold matter, the State argues that appellant failed to preserve this issue for our review. This motion was not, as appellant suggests, a motion to suppress. Instead, it was a motion *in limine* to exclude the evidence. The significant difference, the State argues, is that under Rule 4-252, motions to suppress are preserved for appellate review without an objection at trial. By contrast, the State argues, appellant did not preserve his motion for our review because he did not object to the evidence when offered at trial.

Alternatively, as to the merits, the State argues that the evidence was relevant for three reasons—it was narrative, "background" information, it explained why an

inexperienced police officer failed to follow evidence collection procedures, and it demonstrated consciousness of guilt.[3] Further, the State argues, the evidence of gunfire did not prejudice appellant because he was not the driver of the vehicle who precipitated the gunfire. If anything, the evidence prejudiced the jury against the police officer who fired his gun at an unarmed black man lying down in the back seat of a car over which he had no control.[4] Regarding the Motion for New Trial, the State argues that given the wealth of powerful evidence against appellant and his failure to object to this minor piece of evidence in the State's case, it was not in the interest of justice to grant a new trial because of the testimony of police gunfire.

Turning to the surveillance video, the State notes that video evidence is admissible upon a Rule 5-901 finding that the evidence is "what its proponent claims."[5] It argues that Ms. Perry satisfied Rule 5-901 when she testified that she saw the robbery and that the video fairly and accurately depicted the events. The State then argues that § 10-1003 is inapplicable to the admission of the video evidence, as that section pertains explicitly to the authentication of controlled dangerous substances, not video recordings.

Finally, the State argues that the errors appellant alleges did not deny him a fair trial

[3] The State argues that because appellant was hiding on the floor of the fleeing automobile, and the police needed to shoot at the car to stop it, the evidence supported an inference of consciousness of guilt on the part of appellant.

[4] The State's argument references the national reaction to the death of Freddie Gray in Baltimore City in 2015.

[5] Rule 5-901 provides as follows: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

because there were no errors, and "three times nothing is still nothing." Even if there were errors, the State contends that any error was harmless beyond a reasonable doubt. The police produced body camera footage of appellant's removal from the backseat of the Ford Taurus, where they found the GPS tracker, $1,861 in cash, a black Pittsburgh Pirates baseball cap, black sunglasses, a white and silver cell phone, and, significantly, a handwritten note in appellant's pants pocket which read "this is a robbery." Such evidence was consistent with the robbery as observed by Ms. Perry and the bank's surveillance cameras. All of that evidence, the State argues, made any error in admitting other evidence harmless beyond a reasonable doubt.

III.

We hold that the circuit court did not err in admitting the map of GPS coordinates created by 3SI Security Systems. Evidence is relevant when it makes a fact of consequence to the determination of an action more or less likely, and relevant evidence is presumptively admissible. Rule 5-401; 5-402. Under Rule 5-403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." All relevant evidence is in some way prejudicial, but *unfairly* prejudicial evidence "tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Smith v. State*, 218 Md. App. 689, 705 (2014). When an appellant claims that the admission of evidence violated Rule 5-403, we review the relevance of the evidence *de novo* and the circuit court's balancing of Rule 5-403 for abuse of discretion. *Id.* at 704.

The map of the tracker's GPS coordinates was relevant, as the map made it far more

likely that appellant perpetrated the robbery. Though appellant argues that the map was minimally probative because other evidence established the same facts, he does make the (unpreserved) legal argument that it was inadmissible as needlessly cumulative evidence under Rule 5-403. As for unfair prejudice, appellant bases his claim on the State's order of proof and claims that the presentation of the map toward the beginning of the State's case-in-chief made it more prejudicial. He focuses on the final coordinate's label "apprehension," arguing that it unfairly prejudiced him and induced the jury to conclude that whomever the police "apprehended" at the final coordinates of the GPS tracker perpetrated the robbery.

The trial court enjoyed the discretion to admit evidence in a manner "effective for the ascertainment of the truth." Rule 5-611(a). The court did not abuse its discretion or err in permitting the State to introduce a map early in its case in chief. As to the labels "robbery" and "apprehension," no one contested the fact that a robbery occurred or that appellant was arrested or apprehended. The high probative value of the map far outweighed any unfair prejudice, and the circuit court did not abuse its discretion in admitting the map.

Turning to the admission of the bank's balance screen, we hold that the circuit court did not err in admitting the balance screen under the "business records" exception to the hearsay rule. Hearsay is any oral or written assertion made outside hearing or trial testimony that is then offered into evidence to prove the truth of the matter asserted. Rule 5-801. A business record may be admitted if the proponent of the record can prove the following:

> "(A) it was made at or near the time of the act, event, or condition . . . (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."

Rule 5-803(b)(6). The purpose of the Rule is to facilitate the admission of records relied upon by businesses, which are presumed reliable enough for use at trial. *Jackson v. State*, 460 Md. 107, 124–25 (2018) (noting that "the business record exception is premised on the theory that 'because the records are reliable enough for the running of a business, in part because of the business duty imposed on the reporter and the recorder, that they are reliable enough to be admissible at trial,'" quoting *Hall v. Univ. of Md. Med. Sys. Corp*., 398 Md. 67, 89 (2007)). Bank records are considered by Maryland courts to be particularly reliable. *Id.* On appeal, we review the ultimate determination of admissibility *de novo* but do not disturb the trial court's factual findings unless clearly erroneous. *Gordon v. State*, 431 Md. 527, 538 (2013).

In *Jackson*, the defendant stole the victim's debit card and used it to make four ATM withdrawals. *Id.* at 111. On the same day as two of the transactions, the victim went to his bank and requested a statement of all withdrawals from his account that month. *Id.* 122–23. On appeal, the Court of Appeals held that the State satisfied the knowledge requirement of Rule 5-803(b)(6)(B) at trial. *Id.* at 128. The Court reasoned that although no bank employee testified to the propriety of the records, the victim testified that he had received the statements from bank personnel after asking for an accounting of his compromised account. *Id.* at 126. The Court also noted that the statement reflected "information of

which PNC bank, as a financial establishment, had knowledge," as the statement included detailed financial information from deposits, deductions, service charges, and other, related categories. *Id.* at 127. Finally, the Court concluded that because the statement included transactions from another bank's ATMs, the trial judge could have inferred that the victim's bank, PNC, acquired the accurate knowledge of the other bank, Bank of America. *Id.* at 128.

Maryland Rule 5-803(b)(6) is modeled upon Federal Rule of Evidence 803(6), the federal business record exception, which contains the same knowledge requirement. *Bernadyn v. State*, 390 Md. 1, 18 (2005); Fed. R. Evid. 803(6)(A). Federal courts hold that the employee who prepared a business record need not authenticate it—if the circumstances of the record's preparation indicate reliability and regularity, anyone familiar with the record-keeping system may do so. *See e.g.*, *United State v. Flom*, 558 F.2d 1179, 1182 (5th Cir. 1977); *Phoenix Assoc. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995). In *Flom*, a representative of the defendant's company provided foundational testimony for records prepared by another company and sent to his company. *Flom*, 558 F.2d at 1182. In *Phoenix Associates*, an executive at the plaintiff company testified that the records his company sought to admit "were completed regularly by [his company]'s accounting department on the receipt or issuance of every wire transfer." *Phoenix Assoc.*, 60 F.3d at 101. In both cases, the federal Courts of Appeals held that the witnesses provided sufficient foundation to establish that a person with knowledge or transmitted knowledge prepared the records, making it proper to admit them into evidence. *Id.* at 102; *Flom*, 558 F.2d at 1183.

Appellant cites *State v. Bryant*, 361 Md. 420 (2000), for his argument that the bank statement admitted here lacked sufficient foundation to satisfy Rule 5-803(6). In *Bryant*, the State offered and the trial court admitted a blood toxicology report to prove the defendant's blood alcohol level. *Id.* at 422. The court admitted the report as a self-authenticating document under Rule 5-901. *Id.* at 428. The report included the dates the hospital received the blood sample and performed the test as well as a technician's initials on spaces marked "IDENTIFIED BY" and "ANALYST." *Id.* at 429. The Chief Toxicologist for the Office of the Chief Medical Examiner for the State of Maryland testified that the hospital performed the test regularly and kept such records in the regular course of its business. *Id.* at 425, 429. The Court held that the State failed to satisfy the requirements of Rule 5-901. *Id.* at 428. Although the trial court admitted the record as a self-authenticating document, the Court also held that the State failed to satisfy the requirements of Rule 5-803(b)(6) because "Dr. Levine never testified that the report was made at or near the time of the tests or that it was made by a person with knowledge, as Rule 5-803(b)(6) requires." *Id.* at 430.

Here, the circuit court admitted the bank balance screen properly because, unlike the blood toxicology report admitted improperly in *Bryant*, the record was inherently reliable, and there were sufficient facts to reasonably infer the knowledge required by Rule 5-803(b)(6)(B). First, as in *Jackson*, the record at issue was a bank financial record and therefore inherently reliable, satisfying the purpose of Rule 5-803(b)(6). Further, the State provided testimony which suggested that the record's creator had knowledge of the matter recorded. At trial, Ms. Perry testified that the record was "our balancing screen" and that

"we [create such records] each day." The screen provides a detailed accounting of the starting and ending quantities of cash in "Cashline 04" at 2:47 p.m. on September 23, 2016—the afternoon of the robbery. Ms. Perry's first name appears at the bottom of the printout. As in *Jackson*, *Flom*, and *Phoenix Associates*, the State offered minimal but sufficient testimony as to each element of Rule 5-803(b)(6), and the circuit court did not err in admitting the bank's balance screen.

Appellant asks us to find that the court erred in admitting the testimony that a police officer fired his gun at the Ford Taurus. We hold that he did not preserve the issue for our review. A criminal defendant may raise an objection "capable of determination before trial without trial of the general issue" in a pretrial motion. Rule 4-252(d). If the court denies the motion *in limine*, the defendant's failure to object at trial forfeits or waives appellate review. *Reed v. State*, 353 Md. 628, 637 (1999); Rule 4-323(a). Appellant raised the issue of the police gunfire in a pretrial motion *in limine*, which the court denied, finding that it was "not prepared to exclude that evidence at this time" and would "go with the State on the admissibility generally of a gunshot." The motions court judge left open the opportunity for appellant to object at trial, but appellant failed to do so. Therefore, appellant waived his right to appeal this issue by failing to object to the evidence when offered at trial.

Similarly, the circuit court did not err in denying appellant's motion for a new trial. Under Rule 4-331(a), if the defendant files a proper motion within ten days of the circuit court's verdict, the court "in the interest of justice, may order a new trial." We review the denial of a motion for a new trial on an abuse of discretion standard. *Jackson v. State*, 164

Md. App. 679, 700 (2005). We hold that the circuit court did not abuse its discretion in denying appellant's motion. First, given the practically insurmountable evidence against appellant, it was not "in the interest of justice" to grant him a new trial. Second, it was not error to allow the two police officers to testify that another officer fired his gun during appellant's apprehension.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." All relevant evidence is in some way prejudicial, but unfairly prejudicial evidence "tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission." *Smith v. State*, 218 Md. App. 689, 705 (2014). Where an appellant claims that the admission of evidence violated Rule 5-403, we review the circuit court's balancing of Rule 5-403 for abuse of discretion. *Id.* at 704.

Evidence related to the officer shooting at the vehicle in which appellant was hiding on the floor in the rear of the car was relevant and probative. Flight from the scene of a crime is relevant. Hiding in the back seat on the floor is relevant. That appellant was crouching on the floor is evidence of consciousness of guilt. The fact that the police had to shoot at the vehicle to stop it was not unfairly prejudicial. It goes without saying that the circuit court did not abuse its discretion in refusing to grant a new trial because its admission of the testimony of police gunfire was a proper exercise of discretion.

Section 10-1003 does not apply to the bank surveillance video. Part I of Subtitle 10 in the Maryland Rules of Evidence (which includes § 10-1003) pertains to "Controlled Dangerous Substances." It applies when the State seeks to establish that "physical

evidence in a criminal or civil proceeding constitutes a particular controlled dangerous substance." *Wheeler v. State*, 459 Md. 555, 565 (2018). The statutory scheme "did not impose a new burden on the State," which remains free to offer evidence subject to Rule 5-901. *Id.*; *see* Rule 5-901 (requiring only evidence sufficient to support finding that matter in question is what proponent claims). Here, where the evidence was a bank surveillance video of a robbery and not a controlled dangerous substance, § 10-1003 does not apply. As the State offered the video with testimony sufficient to satisfy Rule 5-901, the evidence was admitted properly.

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