Circuit Court for Montgomery County
Case No. 135035C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2149

September Term, 2019

ERIC ANTONIO ALARCON-OZORIA

v.

STATE OF MARYLAND

Berger,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 29, 2020

Appellant Eric Antonio Alarcon-Ozoria was convicted by a jury in the Circuit Court for Montgomery County of illegal possession of a firearm. Appellant presents the following questions for our review:

> "1. Did the State's disclosure of jail calls on the morning of trial violate Maryland Rule 4-263, and did the trial court err in denying appellant's request for relief for the discovery violation in the form of a one-day continuance?
>
> 2. Is there reasonable doubt that the discovery violation at issue in [the first question] influenced the outcome at trial, such that Mr. Alarcon's conviction must be vacated?
>
> 3. Did the trial court err in prohibiting appellant from admitting into evidence a police report offered against the State as a public record under Maryland Rule 5-803(b)(8)?
>
> 4. Is there reasonable doubt that the evidentiary ruling at issue [in the preceding question] influenced the outcome at trial, such that Mr. Alarcon's conviction must be vacated?"

Finding no error, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Montgomery County on charges of assault in the first degree, use of a firearm in a crime of violence, and illegal possession of a firearm after a felony conviction. The circuit court granted judgment of acquittal as to first-degree assault and use of a firearm in a crime of violence. The jury convicted appellant of illegal possession of a firearm. The court sentenced appellant to a term of incarceration of fifteen years**,** with all but twelve years suspended (*i.e.*, three years suspended).

The case arose from a shooting in downtown Silver Spring in the wee hours of June 9, 2018. No one was injured. The shots were fired in the vicinity of the outdoor bar and side patio of Abyssinia, an Ethiopian restaurant and nightclub, as well as a nearby alleyway. Before the gunfire, pedestrians crowded the alleyway. The outdoor tables at Abyssinia were full. The alley was covered by the restaurant's outdoor surveillance camera, but the restaurant's outdoor tents obscured the view of the area in which the gunfire occurred.

Amir Abdella, the manager of Abyssinia, was working outdoors at the side patio when he heard one gunshot. He turned around, saw one man running away and a second man walking behind the fleeing man, pointing a firearm at him. Mr. Abdella saw a third man walking behind the shooter. Mr. Abdella then watched the shooter fire a second shot at the running man. He testified that he was only about five to six feet away from the shooter at the time of the second shot. He also heard a third shot, but he did not see it.

Mr. Abdella testified that he had seen the shooter and the third man earlier in the night at the restaurant, where they were seated with two young women. He called security at the time because he thought that the women appeared uncomfortable. Security personnel told the two seated men that they would need to order something if they wanted to remain at the restaurant, and the two men left.

In the days following the shooting, Mr. Abdella provided security footage depicting the two men earlier in the night at Abyssinia and he identified the shooter in the surveillance video. He testified, however, that it had been so long since the shooting that he was not sure if he would recognize the shooter again if he saw him. He was able nonetheless to

describe the shooter with some specificity. The description was partially consistent with the one he provided during his 911 call, but his memory of some details of the shooter's clothing and of the shooter's height diverged from his statements in that call. In the 911 call, he said that the shooter was about 5'1" or 5'2", but at trial he said that the shooter was approximately his own height, 5'8".

At least one other witness, Christopher Parkes, saw men running in the alley. Mr. Parkes worked as a security guard for Kaldi's, a coffee shop and nightclub near Abyssinia. He heard one shot, then moved to the middle of the street and heard three more shots.

Officer Douglas Miller responded to a call for shots fired. He found one bullet casing in the alley. Officer Sean Pierce, with the aid of his police dog, found a second shell casing in the alley. (Later police work determined that the two shells came from the same gun.) Officer Mark Ray interviewed witnesses, including of two men who looked like they had been in an altercation but reported that they had simply been running away from the sound of gunfire. Officer Ray drafted an initial police report. In June of 2019, Detective Horwitz completed a supplemental police report that was much longer than Officer Ray's initial report.

Follow-up police work led by Detective Charles Horwitz revealed that two other neighborhood establishments had relevant surveillance video. These video clips included depictions of two suspects, including one taller man and one shorter man, the latter of whom was holding a gun. On July 30, 2018, Detective Horwitz issued a press release asking for public help in identifying either of the two suspects. Police received an

anonymous tip identifying the taller man as Ruben Gilbert. Police looked at the Motor Vehicle Administration photograph of Mr. Gilbert, determined that he was the same person as the one in the surveillance footage, and obtained a search warrant for his phone. That cell phone revealed text messages between Mr. Gilbert and appellant about one hour after the shooting:

> Mr. Alarcon [appellant]: Is dere a camera At dat lil side bar
>
> Mr. Alarcon: And Erin just asked me bout you
>
> Mr. Gilbert: Tell her hit me
>
> Mr. Gilbert: N idek we Gucci doe babe

The mention of the side-patio bar together with the unintentionally ironic slang — no doubt soon to require an update to the Oxford English Dictionary — led police to appellant.[1] In December of 2018, police officers executed arrest warrants for appellant and Mr. Gilbert. The police executed a search warrant at appellant's apartment and they seized clothes consistent with those worn by the shooter in the surveillance video.

After a grant of immunity, Mr. Gilbert testified at trial that he and appellant were friends, and that they were at Abyssinia together on the night of the shooting. He testified that two of the surveillance videos showed him and appellant outside of Abyssinia, and that one of the videos showed him and appellant running. He stated, however, that he did not see appellant with a gun on that night, nor did he see appellant fire any shot that night.

[1] *We Gucci* means, essentially, "we're good." Mr. Gilbert apparently thought they were in the clear.

The State played a recording of a jail call between Mr. Gilbert and appellant. The call occurred on April 2, 2019. The call was made using another inmate's pin number, not appellant's number. Mr. Gilbert admitted that he and appellant were talking on the call. In that call, Mr. Gilbert and appellant discussed the case, including whether there was video of the incident. They speculated about the identity of the person who made the anonymous tip.

Before trial, on May 15, defense counsel wrote to the prosecutor requesting additional discovery pursuant to the Maryland Rules and *State v. Williams*, 392 Md. 193 (2006). Defense counsel sought any "recordings…or other materials concerning any . . . statements made by" Mr. Gilbert or by appellant, and asked the State to identify any responsive materials that it believed to exist but that the State did not possess, so that defense counsel could "issue subpoenas to the appropriate authorities."

In the months before trial, defense counsel sought assurance from the State that discovery was complete. On June 10, the State assured defense counsel that the State abided by "open file discovery." On June 27, the State again assured defense counsel that it would open its evidentiary file so that the defense could see everything held by the State, and that the State possessed no "written statements by any witnesses otherwise not provided."

On July 26, ten days before trial, the State disclosed additional evidence that it intended to introduce, particularly "new data" collected from the cell phone of Mr. Gilbert. The new evidence consisted of an activity log purporting to count Mr. Gilbert's steps

during different time-frames on the night of the shooting. Appellant moved *in limine* to exclude the new evidence as untimely and non-compliant with the diligence requirement of Maryland Rule 4-263(c). The circuit court granted appellant's motion and excluded the new evidence.

On Friday, August 2, 2019, three days before trial, defense counsel e-mailed the State to propose and finalize certain stipulations. The State did not reply until Sunday night, saying, "I didn't get to the office this weekend we can discuss tomorrow at 9."

On the first morning of trial, August 5, defense counsel arrived at the courthouse and learned that the State was providing additional, last-minute discovery. In chambers, the State disclosed that the prior Wednesday, July 31, it had requested jailhouse recordings of calls made or received by appellant since his arrest on December 19, 2019, seeking recordings that would cover through August 1, 2019. From that request, the State received approximately 200 jail calls on Friday morning, August 2. The State indicated that it began reviewing the calls on Saturday, August 3, and identified at least one call of interest by August 4. The State proffered one tape as evidence that it would offer at trial: the recording made April 2, 2019, of the call between Mr. Gilbert and appellant.

Appellant objected to the State's disclosure and requested a one-day continuance to review the tape. The circuit court did not rule as to whether the State had violated its discovery obligations, but denied appellant's request for a continuance. The trial judge stated: "First of all, I'm not inclined to continue the case. I am — and I think you will have an opportunity to review certainly the one call in question with respect to — that

we've been focused on." The State told the court that the State's opening statement would not mention the recorded call, and that the State would not call Mr. Gilbert on the first day of trial so that defense counsel would have an opportunity to review the recording.

Upon conclusion of the trial, appellant was convicted and sentenced as above. This timely appeal followed.

II.

Before this Court, appellant first argues that the State's disclosure of 200 jail calls on the morning of trial, and the lack of remedy, warrants reversal. The State's last-minute disclosure violated its discovery obligations, appellant argues, and the trial court erred by granting no remedy for the violation. Appellant argues that the State violated its discovery obligations because of three procedural flaws. First, the recordings of the jail calls were not provided within thirty days of the appearance of counsel, thereby violating Rule 4-263(h)(1). Second, the State did not "exercise due diligence to identify" the jail calls until months after they were made, but rather waited to request them until only a few days before trial, after the State had assured defense counsel that discovery was complete, thereby violating Rule 4-263(c)(1). Third, the State did not "promptly" provide the tapes once they were received three days before trial, nor even notify defense counsel that tapes had been requested, and instead proceeded to review the tapes, ignore e-mails from defense counsel, and produce the recordings on a CD only minutes before trial. Appellant argues that this conduct violated Rule 4-263(j).

Appellant argues that the trial court erred because the law requires appropriate relief for a discovery violation. Appropriate relief may include excluding evidence, granting a reasonable continuance, or entering "any other order appropriate under the circumstances." Rule 4-263(n). According to appellant, the court is required to consider a number of factors in determining a remedy, including: (1) "the reasons why the disclosure was not made"; (2) "the timing of the ultimate disclosure"; (3) "whether the disclosure violation was technical or substantial"; (4) "the existence and amount of any prejudice to the opposing party"; (5) "the feasibility of curing any prejudice with a continuance"; and (6) "any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 570–71. Appellant argues that every one of these factors would weigh in favor of relief, and that appropriate relief would have included at least the one-day continuance that defense counsel requested for review of the new materials.

Appellant's second allegation of error is the failure of the trial court to admit the police report into evidence. The police report was relevant to appellant's defense because it tended to show a shoddy investigation, appellant argues. Appellant sought to admit the report right after his defense counsel questioned one of the responding officers whether he "recall[ed] telling another officer to make the report vague." The officer responded, "I think. I don't know. I don't have the report. I don't know how it eventually cleared." Appellant then offered the report; the State objected; and the circuit court sustained the objection because it was not admissible as a business record and there was "no rule that allows the police reports to be admitted as substantive evidence."

Before this Court, appellant argues that the circuit court erred in excluding the police report because "public records and reports" are admissible under an exception to the hearsay rule. Appellant points to a "law enforcement" carve-out to the hearsay exception, which prohibits introduction of a "record of matters observed by a law enforcement person[,]" Rule 508(b)(8)(C), and appellant emphasizes that the carve-out applies only "*when offered against an accused* in a criminal action."

The State, appellee, responds on the discovery issue by arguing that appellant failed to preserve the issue for our review because the trial court did not rule whether the State violated its discovery obligations. Even if preserved, the State argues that there was no discovery violation. Finally, the State argues that, to the extent there was a violation, the circuit court took the appropriate curative action by delaying by one day the testimony of the witness, Mr. Gilbert.

The State maintains first that there was no discovery violation. To appellant's contention that the State did not disclose the calls within thirty days of the appearance of counsel, appellee agrees that this is accurate, but emphasizes that the State had not yet obtained the recordings by that earlier deadline for disclosure. Instead, appellee points out, the State disclosed the calls later, after the prosecutor obtained the recordings, and within seventy-two hours of that receipt.

In response to appellant's contention that the State did not exercise due diligence in identifying the jail calls, appellee argues that the State did exercise due diligence. The mere fact that the jail calls were available would not require that the State request them

immediately. The State observes that defense counsel conceded to the trial judge that the defense, just as the State, could have requested the jail call recordings from the prison facility. The State emphasizes that the April 2, 2019, call was not delivered to the State based on the initial request for appellant's jail calls, because appellant made the call using another inmate's pin number. To find this call, the prosecutor had to make a new request that the jail run Mr. Gilbert's phone number backwards to see if he received any other calls from the jail. Appellee argues that ordinary due diligence does not require the State's Attorney to uncover a defendant's calls that were not made from the defendant's phone number. Moreover, appellee argues that it was clear that appellant attempted to conceal the call by using another inmate's phone number to make the call. Appellant cannot claim unfair surprise from the late discovery of a phone call to which he was a party and that he attempted to hide from the State.

In response to appellant's contention that the State did not promptly provide the tapes of the jail calls, appellee argues that the jail calls were turned over promptly to the defense after they were identified and reviewed by the prosecutor. The prosecutor received the calls on Friday, reviewed them over the weekend, and then provided them to the defense on Monday morning, before the trial commenced. Appellee emphasizes that the prosecutor did not learn of the April 2 call between Mr. Gilbert and appellant, the call at issue, until the morning of trial. The prosecutor told the trial judge that an employee of the jail delivered the April 2 call to her at 6:00 a.m. on the day trial was to begin, because she

received the initial batch of calls in response to one request and later made a separate request that the prison run Mr. Gilbert's number backwards for a new search.

As to the police report, the State argues that the argument is not preserved for our review. On the merits, the trial court excluded it from evidence properly, as it contained inadmissible hearsay and was, in essence, hearsay within hearsay. The State argues that the argument was not preserved because defense counsel did not make the same argument to the circuit court that he now raises on appeal. At trial, the State objected on hearsay grounds. Defense counsel argued that it was "fair material as to how the investigation was conducted." Appellee emphasizes that appellant now argues that the police report was admissible as a hearsay exception under Rule 5-803(b)(8), the public-records exception. Appellee points out that appellant's counsel did not mention Rule 5-803(b)(8) to the circuit court, nor did appellant argue to the circuit court that the report was admissible as an exception to the rule against hearsay. Appellee thus claims that the argument is not preserved.

The State argues that the police report was excluded properly from evidence because, even as it probably did fall within the public-records exception of Rule 5-803(b)(8), it was nonetheless inadmissible because it contained hearsay within hearsay, thus violating Rule 5-805. The police report contained several hearsay statements that would otherwise be inadmissible, including statements from Abdella, Parkes, and three other civilians. Appellee argues that, as defense counsel did not suggest redacting the report or any other remedy, the trial court did not err in excluding the report.

III.

This Court reviews *de novo* whether a discovery violation occurred. *Thomas v. State*, 168 Md. App. 682, 693 (2006), *aff'd* 397 Md. 557 (2007). On an evidentiary ruling, whether evidence is hearsay is an issue of law reviewed *de novo*. *Dulyx v. State*, 425 Md. 273, 285 (2012). Nevertheless, ordinarily the appellate court will not decide any issue unless it plainly appears by the record to have been raised in or decided by the trial court. *Brice v. State*, 225 Md. App. 666, 678 (2015).

Appellant, in his question presented, assumes that there was a discovery violation and that the purported violation influenced the outcome of the case, thereby requiring reversal of the judgments of convictions. First and foremost, the trial judge did not find a discovery violation. In fact, he did not rule whether there was a violation of the discovery rules.

The preservation issue as to the alleged discovery violation is close. The State argues non-preservation because the trial judge did not rule as to whether there was any discovery violation, and appellant, as he is required to do, did not insist upon a ruling. Relying in part on *Williams v. State*, 364 Md. 160, 176 (2001), and the court's statement that when the judge makes "no specific finding as a matter of law that the State violated the discovery rule," the appellate court "exercise[s] independent *de novo* review to determine whether a discovery violation occurred," appellant argues this Court should address the issue.

Because the issue is so close, we shall review the discovery argument on the merits.

The trial court was well aware that appellant was claiming a discovery violation. Whether the court's action was a "remedy" or not is a question to be decided, but clearly, the court took *some* action related to the discovery issue.

A. Recordings of the Jailhouse Phone Calls

Rule 4-263 governs discovery in criminal cases before the circuit court. Among other requirements, the State's Attorney and the defense shall exercise due diligence to identify all of the information that must be disclosed under the Rule. Rule 4-263(c)(1). Each party is under a continuing obligation to produce discoverable material and information to the other side; a party who has responded to a request or an order and who obtains further material information shall supplement the response *promptly*. Rule 4-263(j). The State's Attorney shall make disclosure within thirty days after the earlier of the appearance of counsel or the first appearance of the defendant. Rule 4-263(h)(1). Upon finding a discovery violation, the circuit court may fashion appropriate relief. Rule 4-263(n).

In the case at bar, the recordings of the 200 jail calls were not provided within thirty days of the appearance of counsel, which could under certain circumstances contravene Rule 4-263(h)(1). Here, however, the State did not have the materials within thirty days of the appearance of counsel. And the State was not obliged to seek these jail records at that time. On this record, the State was not under a duty to disclose materials that it did not have. We reject appellant's argument that the State was *required* to inquire of the

Detention Center personnel whether there were any phone logs related to appellant.

We agree with the State that the State's Attorney's Office exercised reasonable due diligence. It is significant that appellant attempted to conceal the call by using another inmate's phone number to make the call, and we agree that appellant cannot claim unfair surprise from the late discovery of a phone call to which he was not only a party but indeed an active concealer.

The State was sufficiently prompt in providing materials to appellant. The prosecutor disclosed the information after she had an opportunity to review the materials, and the most important call was the one that appellant attempted to conceal. We find that there was not a discovery violation in the case at bar. In any event, the trial judge did provide a remedy to appellant. The State declined to mention the call in its opening statement and did not call the witness until the defense had an opportunity to review the call.

The court fashioned a remedy and did not abuse its discretion in declining to continue the case for at least a day.

B. Exclusion of the Police Report

Appellant's argument as to the admissibility of the police report is not preserved for our review. The argument he raises before us is different from the argument he presented to the trial court, when counsel told the judge that the police report was "fair material as to how the investigation was conducted." He now argues a different ground for admissibility.

Absent a general objection below, appellate review is limited to the ground set forth at the trial below. Ordinarily, an appellant cannot change horses in the appellate stream. *See Colvin-el v. State*, 332 Md. 144, 169 (1993) (holding "[a]ppellate review of an evidentiary ruling, when a specific objection was made, is limited to the ground assigned."). Appellant did not preserve his argument about admissibility of the police report under the public-records exception to the rule against hearsay.

Rule 8-131 governs the scope of appellate review: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" In the case at bar, the issue of the police report's admissibility came before the trial court; the argument about the exception to the hearsay rule did not. We are not obliged to review the issue.

Assuming *arguendo* that appellant sufficiently preserved the issue of admissibility under the public-records exception, appellant nevertheless would lose on the merits of that argument. The police report contains hearsay within hearsay. Where hearsay within hearsay exists, the statements are admissible only if both layers of hearsay fall within an exception to the rule against hearsay. Md. Rule 5-805; *Paydar v. State*, 243 Md. App. 441, 454 (2019). In the instant case, the public-records exception would not be enough to make admissible the police report's statements from Abdella, Parke, and others.

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