The Circuit Court for Prince George's County
CT150885X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2458

September Term, 2016

MARIO BERMUDEZ-CHAVEZ

v.

STATE OF MARYLAND

Wright,
Kehoe,
Reed,

JJ.

Opinion by Wright, J.

Filed: May 8, 2018

This appeal follows an entry of judgment in the Circuit Court for Prince George's County, convicting Mario Bermudez-Chavez of multiple counts, including kidnapping, second degree assault, false imprisonment, and three counts relating to the violation of a protective order. Bermudez-Chavez now brings this timely appeal, requesting a reversal of the circuit court's decision. In his appeal, he presents the following question for our review:

> Did the trial court err in admitting out-of-court statements made by a witness not present at trial?

Though the circuit court erred in admitting the disputed testimony, the error was harmless. As such, the judgment of the circuit court is affirmed.

BACKGROUND

The present case arises after a physical confrontation between Ms. Milvian Reyes Villatoro ("Ms. Reyes") and her ex-boyfriend, appellant, Mario Bermudez-Chavez, with whom she has three children.[1] On June 26, 2015, the precipitating event took place outside of Ms. Reyes's apartment complex in Mount Rainier, Maryland. That evening, Bermudez-Chavez approached Ms. Reyes as she was loading their children into her minivan. He proceeded to grab Ms. Reyes around her waist and force her into the passenger seat of the vehicle. Ms. Reyes's neighbors, Mrs. Grisel Alverio and her husband, Mr. Dionicio Pleitez, along with her brother, Mr. Nelson Alverio, were all in the parking lot at the time of the incident. At trial, Mrs. Alverio testified that Ms. Reyes was

[1] Of note, Ms. Reyes had an active protective order against Bermudez-Chavez at the time.

resistant to Bermudez-Chavez, and that she signaled for Mr. Pleitez to call the police. Bermudez-Chavez proceeded to enter the driver's side of the vehicle, at which point Mr. Pleitez stepped in front of the vehicle to prevent him from leaving. Bermudez-Chavez accelerated, forcing Mr. Pleitez out of the way, and left the scene. Both Mr. and Mrs. Alverio called the police.

Ms. Reyes testified that, after leaving the apartment complex, Bermudez-Chavez told her they would be going to Atlanta. During the trip, Ms. Reyes alleged that Bermudez-Chavez struck her in the face several times and bit her lip, resulting in visible injury. During the trip to Georgia, the group stopped twice — once at a rest stop and again at a gas station — before arriving at the home of Bermudez-Chavez's sister, Lasina Lastalay,[2] the following day. Ms. Reyes testified that she and Ms. Lastalay visited two police stations, which were closed, before returning to Ms. Lastalay's home and calling the police by phone. Later that day, Bermudez-Chavez was apprehended and detained by the police. On June 28, 2016, Ms. Reyes returned to Maryland, and she went to Providence Hospital where she received medical treatment for headaches and the bite to the upper lip.

Bermudez-Chavez testified that he appeared at Ms. Reyes's apartment upon her request, as she was experiencing car trouble and needed some assistance. He further contended that they subsequently began arguing and then discussed taking a trip to Atlanta so that the children could meet his parents. He denied striking Ms. Reyes in front

[2] Phonetic spelling according to trial transcript.

of the apartment complex, alleged that he only grabbed her around the waist, and asserted that the trip was entirely consensual. However, he did concede that he had struck Ms. Reyes with an open hand and that he bit her when she attempted to kiss him.

At trial, Bermudez-Chavez was charged with nine counts, including: kidnapping; second degree assault; four counts of false imprisonment (one for Ms. Reyes' and each of the couple's three children); and three counts for various violations of Ms. Reyes' protective order. He was ultimately convicted of kidnapping, second degree assault, one count of false imprisonment, and all three counts relating to the protective order. On appeal, he argues that the circuit court erred in admitting prejudicial hearsay evidence, and, therefore, this Court should reverse his convictions.

At the heart of this appeal is a recording of the 911 call placed by Mr. Alverio on the date of the incident. The recording was introduced during the direct examination of Mrs. Alverio, and included the following exchange:

[State]: Now, did there come a time that you called 911?

[Grisel Alverio]: Yes.

[State]: Did somebody else in your house call 911?

[Grisel Alverio]: My brother.

[State]: Now, was your brother out there watching what was going on?

[Grisel Alverio]: Yes.

[State]: Your Honor, may we briefly approach?

(Counsel approached the bench and the following ensued)

> [State]: I'm going to move at this point to introduce the 911 call. I don't know if he's going to object, so I just wanted to do that.
>
> [The Court]: This one by her?
>
> [The State]: **It's by her brother, but I'm going to argue that it's a present-sense impression.**
>
> [The Court]: **Is he here?**
>
> [The State]: **Hmm-mm.**
>
> [The Court]: But she can recognize his voice?
>
> [Defense]: **I would still object even if it's a present-sense impression. He's not here. There's no foundation to indicate that he is the actual person making the call**.
>
> [The Court]: That's why I asked if she can recognize his voice because it is her brother; otherwise, that's why I wanted to know about the recognition. So I'm going to overrule.
>
> [Defense]: Okay.
>
> * * *
>
> [The Court]: All right. And I note your objection.
>
> [Defense]: May I just make it a continuing objection for the duration?
>
> [The Court]: Well, it doesn't need to be continuing. You can object to the 911 call based on what we discussed at the bench. I'll note your objection. Thank you.

(Emphasis added). At this point the recording was played, with the following dialogue:[3]

> [Speaker]: There's a problem that happened with one of my neighbors. **She was living there with her children and her ex-husband just came and he started beating her up and he got her into his car against her will**, but then –

[3] When questioned by the State, Mrs. Alverio directly stated that the voice on the recording belonged to her brother.

[Operator]: Where do you live?

[Speaker]: I live in Mount Rainier.

[Operator]: Hold on.

* * *

[Operator]: Sir, I'm very sorry. We have a lot going on at the moment. Okay. So the person that you're talking about, are they still there in the area or where are they at?

[Speaker]: No. He just drove off and the problem is that I can – I don't know if the – plates from the car. I only know like her name and her phone number, but I don't – I don't – you know, I just know it was a Odyssey, but I don't know the license plate.

[Operator]: What's the address?

[Speaker]: Okay. I live in 4004 36th Street in Mount Rainier. I live in Apartment 104. She lives in Apartment 103.

* * *

[Operator]: You live in 104. She lives in 103.

[Speaker]: In 103 and apparently, I don't know, she's been living there for about two weeks, and according to her she was separated from him and then he just came today and he was – **my sister was the one that saw him beating her up.**[4] And he forced her into her car and he drove off with her and the kids inside the car.

* * *

[Operator]: Okay. What is – what is your – what is your name? I'm sorry.

[Speaker]: My name is Nelson.

[4] At trial, Mrs. Alverio testified that she saw Bermudez-Chavez grab Ms. Reyes around the waist and place her in the passenger seat of the vehicle. However, she did not mention any other physical contact.

[Operator]: Nelson. Okay.

[Speaker]: Alvario (phonetic). That's my last name.

[Operator]: Okay.

(Emphasis added). After the tape was played counsel again approached, with the following exchange:

> [Defense]: **He explicitly states in the tape that he didn't see, that his sister saw the victim being beaten up, not him.**
>
> [The State]: Does he say that?
>
> [Defense]: Yes.
>
> [The Court]: He didn't see it, but whether or not – **so he's made something that would be hearsay to the 911 operator.**
>
> [The State]: She testified that he was out there.
>
> [The Court]: Her brother?
>
> [The State]: Yes. She said her brother was out there.
>
> [The Court]: Let's be clear. Why don't we make sure before we play any more of the tape?

(Emphasis Added).

At this point, the parties returned to their tables and the questioning of Mrs. Alverio resumed, with her reaffirming her earlier testimony that her brother was outside to observe the incident in question.

On appeal, Bermudez-Chavez contends that the admission of the 911 recording amounted to prejudicial hearsay, and requires a reversal of his convictions.

DISCUSSION

I.

Before addressing the merits of the evidentiary hearsay issue, we must first consider whether it has been preserved for appellate review. The State contends that the 911 recording was appropriately admitted, drawing a distinction between those portions of the tape based on Mr. Alverio's personal knowledge of the incident and those premised on the observations of his sister, Mrs. Alverio. As such, the State argues that Bermudez-Chavez failed to distinguish between those aspects of the recording that were admissible as present-sense impressions and those that were not. The State concedes that those portions of the tape relaying Mrs. Alverio's ostensible observations ought to have been excluded, but nonetheless argues that in failing to object solely to those portions, to request redaction, or to request a curative instruction with respect to the inadmissible parts, Bermudez-Chavez failed to object in a manner that could preserve the issue on appeal.

As a starting point, objections made at trial can be either general or specific in nature. The Court of Appeals clearly delineated the form and extent of this distinction with its decision in *Boyd v. State*, 399 Md. 457 (2006), where it provided:

> Maryland Rule 4-323,[5] applicable to criminal cases, Rule 2-517(a), applicable to civil cases, and Rule 5-103(a)(1), applicable to cases

[5] The relevant portion of Md. Rule 4-323 reads:

> **(a) Objections to Evidence.** An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court,

> generally, reflect the long established Maryland practice that **a contemporaneous general objection to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence.** Under Rules 2-517, 4-323, 5-103(a)(1), and this Court's opinions, **the only exceptions to the principle** that a general objection is sufficient **are where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and "where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence,"** [von Lusch v. State, 279 Md. 255, 263 (1977)]. *See, e.g., Grier v. State*, 351 Md. 241, 250, (1998) ("If neither the court nor a rule requires otherwise, a general objection is sufficient to preserve all grounds of objection which may exist"); *Ali v. State*, 314 Md. 295, 305-306, (1988) ("The effect of a general objection in this State is far-reaching [. . . .] We have said that when the trial court does not request a statement of the grounds for an objection, a general objection is sufficient to preserve all grounds which may exist").

Id. at 475-476 (emphasis added) (original footnotes omitted). Thus, where an objection is general in nature, all grounds on which the objection could be based are preserved for appellate review, and more specific grounds are required only when mandated by rule, when requested by the court or otherwise when they are offered voluntarily by counsel. However — and notably here — where specific reasons are voluntarily offered, a party is limited on appeal to those raised explicitly in the trial court. *DeLeon v. State*, 407 Md. 16, 25 (2008).

> at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

In support of its position, the State cites to our decision in *Belton v. State*, 152 Md. App. 623 (2003). In *Belton*, we considered a case involving a shooting victim that positively identified his shooter, only to later renege on his statement. *Id.* at 626. In the case, Howard Thomas was shot and robbed while trying to buy marijuana. *Id*. The next day, Thomas was interviewed by police in the hospital, where he named a previous acquaintance, Tylance Belton, as the shooter. *Id*. at 627. When presented with a photo array of six suspects, Thomas again identified Belton as the shooter and provided a detailed recorded statement recalling the events on that evening. *Id*. However, at trial Thomas recanted and named another person as the shooter. *Id*. 628-29. Despite the shift in Thomas's testimony, the recorded statement identifying Belton was played for the jury over Belton's *general* objection, and Belton did not request a redaction or limitation of the portion of the tape to be played to the jury. Ultimately, Belton was convicted on multiple counts.

On appeal before this court, Belton argued that the trial court exceeded its authority by playing the tape in its entirety, which contained various pieces of extraneous information, and argued that only the portion of the tape relevant to his identification should have been admitted. We declined to accept this argument, stating in relevant part:

> [A]fter the circuit court overruled appellant's general objection to admission of the tape, appellant did not request a redaction or limitation of the portion of the tape to be played to the jury. Appellant contended at oral argument that it was the State's obligation to limit or redact portions of the tape that exceeded Thomas's identification. This contention is without merit, for it is the obligation of the party seeking redaction to raise the issue to the judge. *See* JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK 20 (3D. 1999) (stating: "If your objection gets overruled, request that the trial judge exclude specific portions which could easily be

> redacted. If the admission of minute details would create unfair prejudice, those detail should be excluded."). The trial court did not err in admitting Thomas's audiotaped statement.

Id. at 634. Relying on our holding in *Belton*, the State concludes that in the instant case Bermudez-Chavez, having failed to request redaction of the inadmissible portions, has failed to preserve the issue on appeal. The State misinterprets what was said in *Belton*, because our opinion in this appeal only applied to whose burden it was to request a redaction, and we decline to interpret our analysis to also mean that it is the defendant's burden to ask for a redaction to preserve the issue for our review. Specifically, *Belton* dealt with the *admissibility* of certain hearsay evidence, but we did not discuss any preservation issues with Belton's appeal.

In resolving the issue, then, we look to the two objections offered by the defense before the circuit court, both of which cited specific grounds. The first, raised before the tape was played, addressed the availability of Mr. Alverio in court, with the defense contesting that "[h]e's not here" and that "[t]here's no foundation to indicate that [Mr. Alverio] is the actual person making the call." Though raised in the court, Bermudez-Chavez did not raise or argue this issue in his brief, and consequently, it will not be considered here.

With his second objection, Bermudez-Chavez addressed the hearsay issue directly, noting that "[Mr. Alverio] explicitly states in the tape that he didn't see, that his sister saw the victim being beaten up, not him," a fact which the circuit court acknowledged might be hearsay. The State contends Bermudez-Chavez's right to appeal is preserved only if he objected to the testimony, but he must also request a remedy to the court such

as a redaction or a curative instruction. The State's argument is not supported by *Belton*, nor is it an appropriate extrapolation from Md. Rule 4-323. Based on the record from trial, Bermudez-Chavez specifically objected to the hearsay testimony in the 911 tape and that objection was overruled, leaving for consideration on appeal only those grounds presented to the trial judge. *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997). Accordingly, we hold that the issue was properly preserved for appellate review.

II.

Now we turn to whether the circuit court erred in admitting the parts of the 911 recording under the present-sense impression exception to the rule against hearsay.

The appropriate standard of review for hearsay rulings received extensive consideration by the Court of Appeals with its decision in *Gordon v. State*, 431 Md. 527 (2013). There, the Court noted the longstanding difficulty across jurisdictions in articulating the appropriate standard of review for hearsay rulings, as well as the recent developments in Maryland's jurisprudence on the subject. *Id.* at 532-33. It further noted that the determinations involved in a hearsay analysis may involve findings that are both factual and legal. *Id.* at 536. As a general matter, "determinations of hearsay admissibility are subject to review on the law." *Id.* In keeping with the Court's adopted two-dimensional approach,

> the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed *de novo*, but the trial court's factual findings will not be disturbed absent clear error.

Id. at 538 (citations omitted). It is through this lens that we now review the ruling of the circuit court and the contentions of the parties.

Hearsay is statutorily defined in Md. Rule 5-801(c) as "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." With the exception of several statutorily created and court recognized exceptions, hearsay is not admissible. Md. Rule 5-802. Indeed, as the Court of Appeals made clear, "[h]earsay, under [Maryland] rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule . . . . Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Bernadyn v. State*, 390 Md. 1, 8 (2007). Among those categories of hearsay statements made admissible by the Maryland Rules are present sense impressions. These include statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Md. Rule 5-803(b)(1).

When it comes to the question of admissibility, the State again relies on *Belton*, reiterating the distinction between admissible present sense impressions and hearsay statements, which ought to be excluded. Specifically, the State highlights the distinction between Nelson's statement that "[his] sister was the one who witnessed [Bermudez-Chavez] beating [Ms. Reyes] up," and his subsequent statement that "[Bermudez-Chavez] forced [Ms. Reyes] into her car and . . . drove off with her and the kids . . . ." The former, the State concedes, should have been excluded; the latter, it maintains, had sufficient factual support for the circuit court to deem it admissible. Consistent with its

earlier contentions, the State argues that it was incumbent upon Bermudez-Chavez to request exclusion of only those portions relaying information not based on Nelson's personal knowledge.

The State's reliance on *Belton* for support on this issue is misplaced and does not give appropriate credence to a significant factual distinction between that case and the case at bar. Specifically, in *Belton* the admitted testimony, though concededly hearsay by both parties, was nonetheless admissible under two exceptions provided for under the Maryland Rules. *Belton*, 152 Md. App. at 631-34. We held that, to the extent Belton wanted to exclude extraneous information contained in the recording that was not within the scope of the cited exception, it was his responsibility to raise the issue with the circuit court and to request redaction of the additional material. Here, we are again confronted with a circumstance in which some portion of recorded testimony falls within an applicable exception, while another part of it does not. We acknowledge that the portion of Mr. Alverio's testimony that did not relay his sister's observations was appropriately admitted as a present sense impression. However, it is the nature of the material falling outside of the exception that confounds the State's argument — while in *Belton* that material was merely extraneous information, here it is concededly inadmissible hearsay which the State says ought to have been excluded. Consequently, to accept the State's argument would be to adopt the proposition that hearsay evidence excluded under the Maryland Rules may nonetheless be admitted where a party has failed to request redaction, even if the issue was raised before the court and the specific hearsay statement objected to. *Belton* cannot be read so broadly and such a holding would run contrary to

our Rules; as such, we decline to adopt that approach here. Rather, we conclude that the circuit court did err in admitting the statement. However, that determination does not conclude our inquiry.

III.

Having thus resolved that the admissibility of the recorded statement was preserved for our review, we turn finally to the issues of prejudice. Bermudez-Chavez contends that admission of the evidence was highly prejudicial. He avers that the statement unfairly bolstered Ms. Reyes's testimony, and consequently cannot be deemed harmless. The State, in response, argues that admission of the evidence indeed was harmless and that reversal is not warranted. They counter Bermudez-Chavez's contention that Mr. Alverio's statement supported Ms. Reyes's version of events, arguing that the statement was in fact inconsistent with the testimony of both Mrs. Alverio and Ms. Reyes at trial. Further, the State contends that, to the extent Mr. Alverio's statement *was* consistent with Mrs. Alverio's testimony; it was merely cumulative, rendering its admission benign.

In order to establish harmless error, an appellate court must find that the erroneous admission of testimony was harmless beyond a reasonable doubt. The applicable standard was articulated in *Dorsey v. State*, 276 Md. 638, 659 (1976), where the Court of Appeals provided:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied 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.

Before analyzing the issue further, we note that the statement at issue would only be directly relevant to one of the offenses for which Bermudez-Chavez was convicted — second degree assault. Generally,

> [a]ssault is defined in Md. Code [2002, 2012 Repl. Vol.] § 3-201(b) of the Criminal Law Article as "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Section 3-203 of the Criminal Law Article prohibits the offense of second degree assault . . . . As indicated by the statutory language, the offense of second degree assault retains its common law meaning . . . . [T]he State must prove that: (1) the defendant caused offensive physical contact with, or harm to, the victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified.

Nicolas v. State, 426 Md. 385, 403-404 (2012) (citations omitted). With this understanding of the legal standard, the scope of our review, and law governing the offense, we now consider the arguments of the parties.

Ultimately, we find Bermudez-Chavez's argument that the statement at issue influenced the verdict is not persuasive. His assertion that admission of Mr. Alverio's statement provided support for Ms. Reyes's testimony is without merit for the very reasons proffered by the State. Mr. Alverio's assertion that his sister witnessed Bermudez-Chavez beating Ms. Reyes runs contrary to the account offered by Ms. Reyes and by his sister. At trial, neither asserted that Bermudez-Chavez physically beat Ms. Reyes when the incident in question took place. Indeed, the State never made that assertion as part of its theory of the case. Mr. Alverio's statement thus ran *contrary* to

the State's argument and created an internal inconsistency in the State's case. Thus, we find the contention that Mr. Nelson Alverio's (her brother) statement bolstered Ms. Reyes's testimony and version of events is unavailing.

More importantly, there was sufficient evidence to establish a second degree assault conviction entirely independent of Nelson Alverio's statement, as Bermudez-Chavez himself admitted to striking Ms. Reyes with an open hand and biting her lip.[6] He admitted that it was those acts, which caused visible injuries to Ms. Reyes's face. Additionally, there was the testimony of Ms. Reyes and Mrs. Alverio, who both gave a version of events that included Bermudez-Chavez grabbing Ms. Reyes and forcing her into the vehicle. Between Bermudez-Chavez's own admissions and other testimony, there was an adequate evidentiary basis for a jury to find intentional, unconsented, and offensive physical contact on the part of Bermudez-Chavez.

Finally as a matter of housekeeping, we note the State's argument that Mr. Nelson Alverio's testimony was merely cumulative is incorrect. The proposition to which they cite, that courts "will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury without objection through the prior testimony of other witnesses," *Yates v. State*, 429 Md. 112, 120 (2012), is inappropriate, specifically because its application would ignore the distinction that the State itself draws between the inadmissible hearsay and the admissible portions of Mr. Nelson Alverio's testimony. The

[6] Any argument that the testimony at issue tended to put Bermudez-Chavez in a bad light is eclipsed by his own inculpatory statements.

point at issue is that the essential contents of Mr. Nelson Alverio's testimony were *not* established through other testimony. Mr. Nelson Alverio's testimony included two assertions: that Bermudez-Chavez physically beat Ms. Reyes, and that he forced her into the vehicle. To consider only those portions of his testimony corroborating the State's theory as "essential" would be a selective and capricious application of the rule.

However, even with that caveat, we conclude that the admission of Mr. Nelson Alverio's testimony was harmless beyond a reasonable doubt. There was substantial evidence in the record to support the jury's finding, even independent of Mr. Nelson Alverio's statement, and no prejudice suffered by Bermudez-Chavez.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.