UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0584

September Term, 2015

JAMAR SHERMAN MACKALL

v.

STATE OF MARYLAND

Graeff,
Friedman,
Thieme, Raymond, G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: April 19, 2016

Jamar Sherman Mackall, appellant, was convicted on charges of first degree assault and second degree assault following a jury trial in the Circuit Court for St. Mary's County. The court merged Mackall's convictions and sentenced him to serve twenty years in prison for first degree assault. In his timely filed appeal, Mackall raises one issue for our consideration: **Did the trial court err in admitting evidence of the 911 call?** Discerning neither reversible error nor abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL HISTORY

On the night of June 9, 2014, Joseph Harrod was standing outside a friend's apartment building, drinking and talking with a group of people when he got into an altercation with Mackall. The altercation became physical and Mackall stabbed Harrod three times, twice in the side and once in his stomach, leaving Harrod bleeding, with his intestines hanging out. Mackall then ran away, taking the knife with him. Harrod's girlfriend, Lakeisha Savoy, called 911 and the police and an ambulance responded. Harrod was stabilized at the scene and then transported by ambulance to a helicopter which transported him to the trauma center at Prince George's Hospital, where he underwent surgery to remove his spleen and "repair [his] organs."

Harrod said that he and Mackall were second cousins and knew each other very well. Harrod stated that there was no doubt in his mind that Mackall was the person who stabbed him on the night of June 9, 2014.

On the day Mackall's trial was scheduled to begin, in the course of plea negotiations, the prosecutor played a recording of the 911 call made by Savoy after Harrod was stabbed.

Mackall elected not to accept the plea deal offered by the State and trial commenced with the selection of jurors. Later that day, the prosecutor sought to admit the recorded 911 call during its questioning of a police witness as part of its case in chief. Defense counsel objected, and requested that the evidence be excluded, asserting that the State had failed to properly disclose either the existence of the recording or the State's intent to use it during Mackall's trial. The prosecutor averred that the defense had been put on notice of the recording, which was listed as an item of physical evidence in one of the police reports that was produced by the State. The prosecutor further asserted that defense counsel was fully informed of the State's open-file policy, and could have requested to hear the recording at any time.

The trial court refused to exclude the evidence, finding no bad faith in the State's failure to provide more explicit notice of the recording. The court did, however, offer to suspend Mackall's trial for the remainder of the day so that defense counsel could review the recording and adjust the defense strategy accordingly. Defense counsel accepted the remedy, but could not "assure" the court that the delay would be sufficient. The following morning, defense counsel did not request any additional time to prepare, but argued that the 911 call was inadmissible hearsay and did not fall within the exception for excited utterances. After hearing the recording, the trial court disagreed, finding that Savoy's statements to the 911 operator were spontaneously made under the stress of the event and therefore, there was "no question" but that the recording of the 911 call fell within the excited utterance exception.

The recording was admitted and played for the jury. The transcript of the 911 call reads as follows:

RECORDING: June 9, 2014. 11 hours 39 minutes and one second p.m.

911 OPERATOR: (Indiscernible).

MS. SAVOY: (Indiscernible) can you send the police and the ambulance around (indiscernible) behind the Laundromat?

911 OPERATOR: Where's this at?

MS. SAVOY: Behind the laundromat --

911 OPERATOR: Okay, where (indiscernible).

MS. SAVOY: -- on Breakmills (phonetic) Road.

911 OPERATOR: Uh-huh. What's going on?

MS. SAVOY: My boyfriend just got stabbed.

911 OPERATOR: He got stabbed? (Indiscernible).

MS. SAVOY: Yes. His gut is leaking out of him. Can you please send somebody?

911 OPERATOR: Yes, (indiscernible).

MS. SAVOY: Please hurry up. Please.

911 OPERATOR: Ma'am their being dispatched by another dispatcher. Let me get some information from you.

MS. SAVOY: Okay. Can you hurry please?

911 OPERATOR: Yes, I understand. Can you tell me who stabbed your boyfriend?

MS. SAVOY: Uh, his name is, uh, Sherman. Come on get in the car, come on babe. We driving to the hospital. Get in the car before you lose blood.

911 OPERATOR: (Indiscernible).

MS. SAVOY: Get in the car, you're going to pass out. Yo, come on. Sit down.

911 OPERATOR: Ma'am, (indiscernible).

MS. SAVOY: The ambulance is on the way. (Indiscernible) and sit on down, you're going to pass out. He's going unconscious. (Indiscernible) get him in the house.

911 OPERATOR: He's not (indiscernible).

MS. SAVOY: Come on, lay down, man. Lay back, babe. Lay back. Okay. What is Little Man real name? (pause). His real name is Jamar Mackall.

911 OPERATOR: Jamar Mackall.

MS. SAVOY: He's just -- (indiscernible).

911 OPERATOR: Where is he at now?

MS. SAVOY: He just took off running down there. The boy that stabbed him.

911 OPERATOR: (Indiscernible).

MS. SAVOY: Jamar Mackall.

911 OPERATOR: Okay. Where did he go running?

MS. SAVOY: He went running towards like -- he -- got dreds. Can you go get me a towel please? Black shirt, blue jeans.

911 OPERATOR: Black shirt and blue jeans?

MS. SAVOY: He had a (indiscernible).

911 OPERATOR: Where is the weapon at now?

MS. SAVOY: He got it with him.

UNIDENTIFIED VOICE: (Indiscernible).

MS. SAVOY: We gotta push it to stop the bleeding.

BACKGROUND MALE VOICE: Got to put pressure on that shit.

MS. SAVOY: Is the ambulance on the way?

911 OPERATOR: Yes, ma'am. They're being dispatched.

MS. SAVOY: Okay.

911 OPERATOR: How long -- did he leave on foot?

MS. SAVOY: Yes, he left on foot.

911 OPERATOR: And what direction did he go?

MS. SAVOY: He's probably going to Hopewell.

911 OPERATOR: Do you think he (Indiscernible).

MS. SAVOY: I got to put pressure on it -- huh?

911 OPERATOR: You said he probably went to Hopewell?

BACKGROUND MALE VOICE: I got to put pressure on it though.

911 OPERATOR: Okay. Maybe you can put towels on his wound.

MS. SAVOY: We got a towel on it.

911 OPERATOR: Do not remove it. If it bleeds through (indiscernible) towels on top of it.

MS. SAVOY: No, she said just put a towel on it. Say that again.

911 OPERATOR: If it bleeds through put (indiscernible) towels on his wound.

MS. SAVOY: No, it's not bleeding through.

911 OPERATOR: Do not take off that towel.

MS. SAVOY: Do not take off the towel. Put pressure on it. Babe, you okay?

911 OPERATOR: Where did he get stabbed at?

MS. SAVOY: In his side.

911 OPERATOR: What is your last name?

MS. SAVOY: Shavoy (phonetic).

911 OPERATOR: Your first name?

MS. SAVOY: He (indiscernible). I need another one. Latisha (phonetic).

BACKGROUND MALE VOICE: Hey, stay with me. Stay with me.

911 OPERATOR: Is there a (indiscernible) number (indiscernible).

MS. SAVOY: He (indiscernible).

911 OPERATOR: Is he unconscious?

BACKGROUND MALE VOICE: Yo. Do you hear me?

(End of call.)

Following a three-day trial on January 27, 28, and 30, 2015, the jury concluded that Mackall was guilty of first degree assault and second degree assault. On April 14, 2015, the court sentenced Mackall to serve a sentence of twenty years for first degree assault. Mackall's conviction for second degree assault was merged for the purposes of sentencing. Mackall filed timely notice of the instant appeal on April 20, 2015.

DISCUSSION

On appeal, Mackall contends that the trial court erred by denying the defense motion to exclude the recording of the 911 call. Mackall argues that the trial court abused its discretion when it refused to exclude the recording as a sanction for the State's failure to properly disclose the evidence prior to trial. Alternately, Mackall asserts that the trial court

erred in concluding that Savoy's statements on the recording fell within the "excited utterance" exception to the rule excluding hearsay evidence. We shall address each of Mackall's contentions in turn.

I. Discovery Violation

Maryland Rule 4-263(d) requires the State, without the necessity of a request, to provide the defense with, *inter alia*, "[a]ll relevant material or information regarding … pretrial identification of the defendant by a State's witness" and "[t]he opportunity to inspect, copy and photograph all … recordings … or other tangible things that the State's Attorney intends to use at a hearing or at trial. Md. Rule 4-263(d)(7)(B); Md. Rule 4-263(d)(9). This Court reviews *de novo* whether a discovery violation has occurred. *Cole v. State*, 378 Md. 42, 56 (2003). The trial court's relevant factual findings are accepted unless they are clearly erroneous. *Id*.

In this case, the sole mention of the 911 recording was a notation in a list of physical evidence that was included in one of the several police reports that were provided to defense counsel in discovery. Item "No. 28" in the list noted "copy of 911 recording was obtained." No further mention was made of the recording until the prosecutor disclosed it to defense counsel during last-minute plea negotiations on the day Mackall's trial was scheduled to begin. At that time, defense counsel heard the recording of Savoy's 911 call for the first time.

Despite the State's "open file" policy, we conclude that the State failed in its duty to adequately disclose this relevant evidence of an out-of-court identification to the defense in a timely manner. Md. Rule 4-263(d)(7)(B). This was an important piece of evidence

that the State relied heavily upon during its case. Defense counsel should have had an opportunity to review and consider the recording and prepare a defense prior to the day trial was scheduled to begin.

That said, however, the choice of sanction imposed for a violation of a discovery rule is committed to the sound discretion of the trial court.[1] Md. Rule 4-263(n). *Breakfield v. State*, 195 Md. App. 377, 389, 391 (2010). "[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas v. State*, 397 Md. 557, 571 (2007). Among the factors a court should consider when fashioning a sanction for a discovery violation are: "(1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id*. at 570-71 (internal footnote and citations omitted). Exclusion of evidence for a discovery violation is "one of the most drastic measures that can be imposed" and, therefore, "is not a favored sanction[.]" *Id*. at 572 (citations omitted).

Discerning no bad faith in the State's failure to provide more specific notice of the 911 recording, the trial court offered to suspend trial for the remainder of the day to allow

[1] Maryland Rule 4-263(n) provides, in pertinent part:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances.

defense counsel time to review the recording and adjust his trial strategy accordingly. Although Mackall now claims that the length of the continuance was "wholly insufficient" to cure the prejudice he suffered as a result of the State's failure to disclose the recording earlier, we note that when court reconvened the following morning, defense counsel did not request any additional time to prepare, and, in fact, appeared fully prepared to argue that the recording contained inadmissible hearsay evidence. We also note that this was not a case of claimed mistaken identity or that Lakeisha Savoy's identification of Mackall as Harrod's assailant was a surprise; the men are second cousins and knew each other well.

We are persuaded that the trial court did not abuse its discretion in crafting an appropriate sanction for the State's violation of the discovery rules. A reasonable continuance is generally sufficient to ameliorate any prejudice caused by late disclosure. As the trial court's remedy satisfied the goal of discovery – to permit Mackall to prepare his defense and to protect him from unfair surprise – Mackall was not entitled to the windfall of complete exclusion of the 911 recording.

II. Hearsay Evidence

Hearsay is defined 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." Md. Rule 5-801(c). Generally, hearsay evidence is not admissible. *See* Md. Rule 5-802. ("Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible."). One of the many exceptions to the hearsay rule, however, allows for the admission of statements that qualify as "excited utterances." Md. Rule 5-803(b)(2). An excited utterance is "[a] statement

relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." Md. Rule 5-803(b)(2).

A court's determinations regarding whether any particular evidence is hearsay and whether the evidence is, nonetheless, 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." *Gordon v. State*, 431 Md. 527, 538 (2013). "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*. (internal citations omitted).

In this case, after listening to the 911 recording and considering the parties' arguments, the court concluded that there was "no question that this falls within the hearsay exception as an excited utterance[.]" Though the trial court did not make explicit findings on the record establishing that Savoy's statements were made spontaneously while she was still affected by the stress of witnessing Harrod's stabbing, we find sufficient evidence in the record to support such factual findings.

There is no reason for us to doubt that the call was made within moments after Mackall stabbed Harrod, while he was laying on the sidewalk bleeding from a wound so severe that his viscera were exposed. Indeed, listening to the recorded call, we are witnesses to Savoy's attempts to staunch Harrod's bleeding with towels until emergency personnel arrived. The trial court expressly rejected defense counsel's suggestion that the fact that many of Savoy's statements were made in response to questions posed by the 911 operator rendered the statements insufficiently spontaneous to fulfill the requirements of the exception. We agree that there was no evidence of any formal interrogation or that

Savoy engaged in any thoughtful reflection to craft her responses to the operator's prompts. Moreover, though Savoy was not audibly crying or hysterical during the call, she was clearly upset and distracted by Harrod's worsening condition.

Under all the circumstances, we conclude that the recording of the 911 call was properly admitted under the excited utterance exception to the hearsay rule.

JUDGMENTS OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.