UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1222

September Term, 2015

JEROME HUDSON

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Kenney, James, A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 5, 2016

Following a jury trial in the Circuit Court for Prince George's County, Jerome Hudson, appellant, was convicted on charges of negligent homicide by motor vehicle while under the influence of alcohol per se, negligent homicide by motor vehicle while under the influence of alcohol, and various lesser included and related offenses. The circuit court sentenced Hudson to serve five years in prison for his negligent homicide conviction. Hudson's other convictions were merged for the purposes of sentencing.

In his appeal, Hudson raises a single question for our consideration:

> Did the trial court err in admitting evidence of Hudson's serum alcohol concentration and testimony by the State's toxicology expert based on that evidence?

Because we conclude that this issue was not properly preserved for appellate review, we affirm the judgments of the circuit court.

Background

On August 25, 2013, at approximately 10:30 p.m., Hudson, driving a green Cadillac Deville, left the parking lot of the Hangar Club in Camp Hill, Maryland, making a right-hand turn onto Old Branch Avenue. Hudson then attempted to make an immediate left-hand turn onto Allentown Way, at which time his car was struck by Terrence Boston, who was riding his motorcycle on Old Branch Avenue. Witnesses immediately called 911 to report the accident. A video recording of the collision taken by a surveillance camera from the adjacent community college was later obtained by the police.

Boston was transported by ambulance to Prince George's Medical Center, where he later died as a result of the injuries he suffered in the collision. Hudson was treated for his injuries at the Southern Maryland Hospital Center. In the course of his treatment, medical personnel collected a sample of Hudson's blood.

Scientific testing of the blood sample indicated that the serum alcohol concentration of Hudson's blood was 277.9 mg/dl, which corresponds to a blood alcohol level of 0.22.

Hudson was arrested and tried before jury in the circuit court on May 19 to 20, 2015. The jury found Hudson not guilty of causing the death of another by operating a motor vehicle in a criminally negligent manner but convicted him of negligent homicide by motor vehicle while under the influence of alcohol per se, negligent homicide by motor vehicle while under the influence of alcohol, negligent homicide by motor vehicle while impaired by alcohol, driving a motor vehicle while under the influence of alcohol per se, driving a motor vehicle while under the influence of alcohol, driving a motor vehicle while impaired by alcohol, negligently operating a motor vehicle, and failing to yield the right of way.

Analysis

At Hudson's trial, the State sought to introduce State's Exhibit 34, Hudson's medical records from Southern Maryland Hospital Center. Defense counsel moved to redact page 87 of the exhibit, which reported Hudson's serum alcohol concentration. The trial court denied counsel's motion to redact page 87 and admitted State's Exhibit 34 in

its entirety, granting the defense a continuing objection to the testimony of the State's toxicology expert, Dr. Barry Levine, regarding the serum alcohol test results.

During Hudson's trial, defense counsel raised multiple grounds in support of his argument that page 87 of State's Exhibit 34 should be redacted. On appeal, Hudson limits his argument to contending that the affidavit executed by the custodian of records of Southern Maryland Medical Center that accompanied his medical records did not "meet the requirements of Rule 5-902(b)(2)." Specifically, Hudson asserts that the certification from the records custodian was inadequate because it failed to state that the medical records were "true and correct copies" of the original documents. This omission, Hudson contends, was "fatal to self-authentication under Rule 5-902."[1]

[1] Hudson's medical records were admitted pursuant to Md. Rule 5-902(b)(2), which authorizes a court to admit business records without testimony of the custodian if prior notice is given to opposing parties of the proponent's intention to seek admission through the rule and the originals or copies are accompanied by a certification from the custodian of records. Rule 5-902(b)(2) states:

> For purposes of subsection (b)(1) of this Rule, the original or duplicate of the business record shall be certified in substantially the following form:
> **Certification of Custodian of Records or Other Qualified Individual**
> I,_____, do hereby certify that:
> (1) I am the Custodian of Records of or am otherwise qualified to administer the records for _____(identify the organization that maintains the records), and
> (2) The attached records
> (a) are true and correct copies of records that were made at or near the time of the occurrence of the matters set forth by, or from the information transmitted by, a person with knowledge of these matters; and
> (b) were kept in the course of regularly conducted activity; and
> (c) were made and kept by the regularly conducted business activity as a regular practice.

(continued…)

The problem with Hudson's argument is that defense counsel did not raise any objection regarding the content of the records' certification at Hudson's trial.

At trial, after the prosecutor announced his intention to enter the medical records relating to Hudson's treatment at Southern Maryland Hospital Center into evidence, defense counsel moved that the court redact page 87 of the record because it contained Hudson's blood alcohol level at the time he was admitted. Defense counsel based his objection on Courts and Judicial Proceedings Article § 10-306, which sets out a procedure by which the results of a breath or blood alcohol test may be introduced without the testimony of the technician performing the test. Because Hudson's blood sample was drawn by hospital personnel for purposes of medical treatment, § 10-306 is inapplicable. *See State v. Bryant*, 361 Md. 420 (2000).[2] During the colloquy between the

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I declare under penalty of perjury that the foregoing is true and correct.

_____
Signature and title

_____
Date

[2] Writing for the Court, Judge Raker stated:

> [W]e note that Maryland Code (1973, 1998 Repl.Vol., 2000 Supp.) § 10-306 of the Courts and Judicial Proceedings Article is not applicable to this case. Sections 10-302-10-309 pertain to compulsory chemical tests administered by law enforcement personnel for the purpose of determining a suspect's blood alcohol concentration. These sections do not apply in a case, such as this, where the blood sample is taken by hospital personnel for the apparent purpose of medical treatment. *See State v. Moon*, 291 Md. 463, 436 A.2d 420 (1981).

361 Md. at 423 n. 1.

court and counsel, it became clear to the court that neither defense counsel nor the prosecutor was familiar with *Bryant*. The trial court called a brief recess, saying to both lawyers, "*State v. Bryant* needs to be read, Okay?"

When proceedings resumed, defense counsel reiterated that he was relying on § 10-306. The following colloquy occurred:

> The Court: But what are you arguing here? I'm still not clear.
>
> Defense Counsel: Well, now that I read *Bryant*, Your Honor, I'm still arguing 10-306.
>
> The Court: Straight 10-306?
>
> Defense Counsel: But also, according to *Bryant*, the authentication was not proper in this case[.]
>
> . . . .
>
> [R]egarding specifically the serum alcohol, there's no indication as to who collected it, what equipment was used to test the serum, who was the person who actually tested it. There's actually no indication of that, Your Honor. And, as such, it is unreliable. It doesn't comply certainly with 10-306.
>
> The Court: But that's not the statute that the State's relying on. Same thing in *Bryant*. They weren't relying on that either. They were relying on [Rule] 5-902.
>
> Defense Counsel: Correct.
>
> The Court; So I'm asking you are you relying on 10-306 or are you relying on 5-902?
>
> Defense Counsel: Both.
>
> . . . .
>
> In *Bryant*, the court talks about the fact that, in that case, the toxicology report is ambiguous at best with regard to its timeliness. The personal knowledge of the person who made the report. The report indicated that the — (A) [sic] respondent samples were received and the tests were completed.
>
> In this case, we have an indication that the specimen was collected, but we have no indication of the technician involved. Of whether that one line was

> created even by the technician or by somebody who had personal knowledge.
>
> . . . .
>
> What the State needs to provide [is] some reliable information. . . .
>
> So in terms of this, whether it's admissible. . . .There's no indication of who created the test. Of who actually –- who submitted for testing the material. How it was tested. How it was obtained. There's no indication of the person who did it. And there's no indication that the specific report or indication is made by a person of knowledge — with personal knowledge.

After some additional discussion, during which defense counsel did not present any additional reasons as to why the medical record should not be admitted, the court denied the motion. The court granted appellant's request for a continuing objection to the testimony of the State's expert medical witness as to the effects the blood alcohol indicated in the hospital record, 0.22, would have on "all individuals," including delayed reaction time and impaired decision-making ability, judgment, and perception "of events or changes to events."

At no time did appellant's trial counsel assert that the failure of the records custodian to state that the records were "true and correct copies" rendered the certification inadequate. "It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Wong-Wing v. State*, 156 Md. App. 597, 606 (2004) (citing, among several other authorities, *Klauenberg v. State*, 355 Md. 528, 541 (1999)). We conclude that Hudson's appellate contention is not preserved for review. Moreover, permitting Hudson to raise it for the first time on appeal would be unfair to the trial court and the State. *Chaney v. State*, 397 Md. 460, 468 (2007) ("[C]onsiderations of

both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling. . . be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) *the other parties and the trial judge are given an opportunity to consider and respond to the challenge*.") (Emphasis added.).

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