Circuit Court for Caroline County
Case No. 05-K-14-010104

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 434

September Term, 2018

TORELL LITAY LITTLE

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: October 21, 2019

Torrell Litay Little was convicted in the Circuit Court for Caroline County of offenses relating to a home burglary. He argues on appeal that the circuit court erred in admitting a forensic lab report because the State failed to establish an adequate chain of custody for the DNA evidence that was the subject of the report. We agree that the State failed to establish a proper chain of custody and that the error was not harmless. We reverse Mr. Little's convictions and remand for further proceedings.

I. BACKGROUND

Mr. Little was convicted after a one-day bench trial of first-degree burglary, conspiracy to commit first-degree burglary, and other offenses. He did not file a timely notice of appeal. Instead, nearly two years after judgment was entered, he filed a Petition for Postconviction Relief in the circuit court. After a hearing, the postconviction court granted Mr. Little the right to file a belated direct appeal and denied the postconviction petition. Mr. Little filed a belated direct appeal on May 7, 2018.[1]

In the early morning of October 25, 2013, James Biscoe awoke after falling asleep in front of the television. He noticed that he couldn't open his bedroom door because one of the bi-fold doors of the bedroom closet jammed the door shut. Mr. Biscoe testified that he always left his closet door shut, and this discovery told him that "somebody had been in that room." When he got into his bedroom, Mr. Biscoe "noticed the drawers had been messed[] with" and his "silver coin collection [was] gone." Mr. Biscoe then called the

[1] Mr. Little also filed for leave to appeal the denial of his postconviction petition. That application is pending and awaits the resolution of this appeal.

police who later identified Mr. Little as a suspect.

At trial, the State introduced a Forensic Sciences Lab Report that contained conclusions from the analysis of DNA evidence taken at the scene of the incident. The DNA included swabs taken from Mr. Biscoe's house, a DNA sample of Mr. Biscoe himself, fingerprints on his damaged gun safe, and a DNA sample of Mr. Little himself. Defense counsel objected to the admission and, when asked for specific grounds for objection, stated those grounds, which the circuit court overruled:

> [THE STATE]: And Your Honor pursuant to 10-915 of the Courts and Judicial Proceedings Article, I would like to submit the Forensic Sciences Lab report [], and the conclusions therein.
>
> [DEFENSE COUNSEL]: For the record Your Honor, as discussed prior with counsel, I object to its admission.
>
> THE COURT: You object.
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Okay, what's the basis of your objection?
>
> [DEFENSE COUNSEL]: Ah, Your Honor we haven't heard any testimony of how this evidence was handled once it was swabbed from the lab technician. And with that Your Honor we believe it's inadmissible.
>
> THE COURT: All right Mr. um, [Prosecutor]
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: What's your response to that, I got to pull out the section, the code.
>
> [THE STATE]: Courts…Courts and Judicial Procedures [], 10-915 is the [], is…states that if submitted within a certain time perimeters ah, the report and the findings within the report can come in and if defense wants to make an objection or, makes a request for how the items were collected there's time constraints to do those in, ah, then the State would be on notice to bring the agent in to come and testify, or could produce the defense the methods that were used, the slides that were used,

> all the scientific data…that was collected, that's all provided for in the rule. There was no such movement from defense ah, prior to trial. Therefore the State, as pursuant to 10-915 I believe . . . submitting of the report and the findings should be admitted.
>
> [DEFENSE COUNSEL]: We note that argument and we would just ask the Court to just note our continuing objection.
>
> THE COURT: So, just taking a look at the Statute generally it's admissible. There's a couple predicts, the State has to notify the defense in writing, at least forty-five days before the trial. And was that done? Was there any…
>
> [THE STATE]: Ah, yes Your Honor.
>
> [DEFENSE COUNSEL]: It was done.
>
> THE COURT: Okay. Um, and then thirty days before the criminal proceeding and the defense would have the opportunity I guess to ask for, I guess all the…[] I call it the underlying evidence. And was that done?
>
> [DEFENSE COUNSEL]: We didn't object Your Honor.
>
> THE COURT: Okay. All right it would appear that the State has meet [sic] it's burden um, I think it's really an issue as to weight um, at this point I mean you make those arguments, but I think it's going to be admitted so…
>
> (State's 5, Forensic Science Lab Report, marked and admitted into evidence)
>
> [DEFENSE COUNSEL]: That's fine Your Honor.

The circuit court found Mr. Little guilty of first-degree burglary, conspiracy to commit first-degree burglary, conspiracy to commit theft, and conspiracy to commit malicious destruction of property in connection with stealing the coin collection.[2] Mr. Little was sentenced to a total of ten years in prison and five years of supervised probation, and was

[2] Only one coin, a John Fitzgerald Kennedy fifty-cent piece, was recovered when police executed a search warrant on Mr. Little's home.

ordered to pay $8,000 in restitution.

Since then, Mr. Little has made numerous attempts for postconviction relief, but only one is before this Court. On December 19, 2017, Mr. Little filed a Third Supplemental Petition for Post Conviction Relief that contained two requests: *first*, for permission to file a belated direct appeal, and *second*, for a new trial. The postconviction court granted Mr. Little's first request, but denied the second. Mr. Little filed a timely belated direct appeal. We supply additional facts as necessary below.

II. DISCUSSION

On direct appeal, Mr. Little raises a single issue: whether the circuit court erred in admitting the Forensic Sciences Lab Report when defense counsel objected to its admissibility on the specific grounds that the State failed to establish the chain of custody of the DNA samples from the time they were taken until they arrived at the lab.[3] In response, the State advances several arguments. *First*, the State argues that Mr. Little failed to preserve his objection for appellate review because defense counsel gave specific grounds for objection not raised on appeal, and even if preserved, Mr. Little waived his objection by acquiescing to the admission of the lab report. *Second*, the State argues that even if the grounds for objection stand, the State properly established the chain of custody for the evidence at trial. *Third*, the State argues that even if it didn't properly establish the chain of custody, the error was harmless. We disagree with each of the State's arguments,

[3] Mr. Little stated his question presented in his brief as follows:

> Did the trial court abuse its discretion in admitting the State Police Crime Lab's DNA report into evidence?

and address them in turn.

A. Mr. Little's Counsel Preserved The Chain Of Custody Issue For Appellate Review And Did Not Waive It.

The State argues that Mr. Little is limited on appeal to the specific basis to which he objected, and we agree. Where we part ways with the State, though, is on the question of whether counsel's specific words—"we haven't heard any testimony of how this evidence was handled once it was swabbed from the lab technician"—preserved an objection for failure to establish the chain of custody for the evidence. The State accuses Mr. Little of "attempting to repackage a specific objection to the absence of testimony regarding the evidence handling policies in place at the police lab, into a broader objection targeting the overall adequacy of the 'chain of custody' for the underlying DNA evidence." We find that Mr. Little's objection, read reasonably and in context, fits into the package.

To preserve an argument for appeal, a party need only make a timely objection and is not required to state the grounds for an objection "unless requested to do so by the trial court." *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997); *see also* Md. Rule 5-103(a)(1). Any grounds not stated are waived. *Anderson*, 115 Md. App. at 568; *see also* Md. Rule 2-517. If counsel provides specific grounds for objection, "the litigant may raise on appeal only those grounds actually presented to the trial judge. All other grounds for the objection, including those appearing for the first time in a party's appellate brief, are deemed waived." *Anderson*, 115 Md. App. at 569; *see also* Md. Rule 2-517.

It's true that the defense did not use the words "chain of custody" in its objection. But we disagree with the State's claim that "[t]he focus of the objection was the absence

of testimony from the police lab technician regarding how the DNA swabs were handled." That construction—that Mr. Little's counsel was objecting because a lab technician, specifically, needed to testify—makes no sense, and the State admits in its brief that such an objection would be fruitless: "Indeed, the lab technician would not have any personal knowledge of where or how the DNA swabs were stored *before* they arrived at the forensic laboratory for testing." We think the proper interpretation of Mr. Little's objection is that there needed to be testimony on how the evidence was handled after the lab technician took the samples:

> [THE STATE]: Courts…Courts and Judicial Procedures [], 10-915 is the [], is…states that if submitted within a certain time perimeters [], the report and the findings within the report can come in and if defense wants to make an objection or, makes a request for how the items were collected there's time constraints to do those in, ah, then the State would be on notice to bring the agent in to come and testify, or could produce the defense the methods that were used, the slides that were used, all the scientific data…that was collected, that's all provided for in the rule. There was no such movement from defense ah, prior to trial. Therefore the State, as pursuant to 10-915 I believe . . . submitting of the report and the findings should be admitted.
>
> [DEFENSE COUNSEL]: We note that argument and we would just ask the Court to just note our continuing objection.

In other words, a present wrapped in newspaper is the same as one that is gift-wrapped—it's what's inside the box that matters.

Moreover, the purpose behind requiring specific objections, "as we have made patently clear on a number of occasions, is 'to enable the trial court to correct any inadvertent error . . . [and] to limit the review on appeal to those errors which are brought

to the trial court's attention.'" *Hoffman v. Stamper*, 385 Md. 1, 40 (2005) (*quoting Fisher v. Balt. Transit Co.*, 184 Md. 399, 402 (1945)). This provides the trial judge "an opportunity to amend or supplement his charge . . . ." *Sergeant Co. v. Pickett*, 283 Md. 284, 288 (1978) (cleaned up). In this instance, defense counsel's objection brought the chain of custody issue to the court's attention, and in doing so, the court had an opportunity to review the objection and require testimony on the handling of evidence prior to the introduction of the lab report. Although the circuit court chose ultimately to overrule it, the specific objection was preserved for appellate review.

The State further argues that even if Mr. Little adequately preserved his objection, Mr. Little acquiesced in the admission of the DNA report when defense counsel stated, "That's fine Your Honor" in response to the circuit court overruling his objection. But acquiescence does not include "mere responses to remarks of the trial court." *von Lusch v. State*, 279 Md. 255, 263 (1977). In this instance, Mr. Little did not acquiesce in the admission of the lab report and did not waive his objection to the chain of custody evidence, which we address next.

B. The State Failed To Establish An Adequate Chain Of Custody For The DNA Evidence.

Ordinarily, admission of evidence "is left to the sound discretion of the trial court." *Bey v. State*, 228 Md. App. 521, 535 (2016). "On appellate review, we will not disturb a trial court's evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Id.* (cleaned up).

Although it doesn't say so directly in its brief, the State does not dispute its obligation to prove the chain of custody before evidence can come in. Under Maryland Rule 5-901, authentication is "a condition precedent to admissibility . . . ." The shortcuts for DNA evidence provided in Maryland Code (1974, 2013 Repl. Vol.)[4] § 10-915 of the Courts and Judicial Proceedings Article ("CJ") do not eliminate Rule 5-901's authentication requirement, as the circuit court believed. Instead, § 10-915 streamlines the reliability prong of the admissibility analysis and eliminates the need for a *Frye-Reed* hearing when DNA has been analyzed according to dependable standards. *See Phillips v. State* 451 Md. 180, 189–90 (2017). On the other hand, Rule 5-901 ensures that evidence, including DNA evidence, has not been tampered with before it comes in. *Wagner v. State*, 160 Md. App. 531, 552 (2005). These are separate questions, and compliance with CJ § 10-915 doesn't prove the chain of custody before the materials tested arrived at the lab.

The State agrees that "establishing an adequate chain of custody *does* require the proponent to negate every possibility of tampering or contamination" (emphasis added), and argues that it met that burden. Put a slightly different way, the State had to demonstrate a reasonable probability that no tampering occurred. *Easter v. State*, 223 Md. App. 65, 75 (2015). Although "[w]hat is necessary to negate the likelihood of tampering or of change of condition will vary from case to case," *id.*, proving chain of custody "in most instances is established by accounting for custody of the evidence by responsible parties who can

[4] This statute has been revised twice since 2013, but the revisions are irrelevant for our purposes here.

negate a possibility of 'tampering' and thus preclude a likelihood that the thing's condition has changed." *Best v. State*, 79 Md. App. 241, 250 (1989) (cleaned up).

The State recognizes that the issue was close in this case, and that "the chain of custody showing for the DNA swabs could have been more robust." And indeed, the only testimony offered at trial attesting to the chain of custody of the DNA swabs came from Trooper Vansant, who took Mr. Little's buccal swabs and logged them into temporary storage:

> [THE STATE]: In your years as a law enforcement officer, you ever take a DNA swab from an individual?
>
> [TROOPER VANSANT]: Yes.
>
> [THE STATE]: Did you do so in this case?
>
> [TROOPER VANSANT]: I did.
>
> [THE STATE]: Do you know when you did that?
>
> [TROOPER VANSANT]: Um, I'd have to reflect on the actual date it was collected.
>
> [THE STATE]: Permission to approach?
>
> THE COURT: Ah-huh
>
> [THE STATE]: Can you please read the chain of custody log to yourself, after you read the chain of custody log let me know when you're done and see if that refreshes your recollection…
>
> [TROOPER VANSANT]: Ah, February the 12th, 2014.
>
> [THE STATE]: Okay, and who's DNA did []…well who's…
>
> [TROOPER VANSANT]: Mr…Mr. Little's.
>
> [THE STATE]: The Defendant's?
>
> [TROOPER VANSANT]: Yes.
>
> [THE STATE]: What procedure did you use?
>
> [TROOPER VANSANT]: Um, oral swab, DNA swab, [] basically it's swab the inner portion of Mr. Little's mouth.
>
> [THE STATE]: Would that be a couple buckle…buckler [sic]

swab?

[TROOPER VANSANT]: Yes, correct.

[THE STATE]: State's 3, swab.

[THE STATE]: Let the record reflect I'm approaching the witness with State's 3. TFC do you recognize this?

[TROOPER VANSANT]: Yes.

[THE STATE]: What do you recognize it to be?

[TROOPER VANSANT]: The chain of custody for the oral DNA swabs collected from Mr. Little.

[THE STATE]: Okay. And were you the officer that packaged those?

[TROOPER VANSANT]: Yes.

[THE STATE]: And is your signature on there?

[TROOPER VANSANT]: It is.

[THE STATE]: Your Honor at this point I'd like to submit State's 3, chain of custody.

[THE COURT]: All right…

[DEFENSE COUNSEL]: No objection.

[THE COURT]: …with no objection…thank you, it'll be admitted.

(State's Exhibit 3, Chain of custody of DNA swabs, marked and admitted into evidence.)

[THE STATE]: What did you do with those swabs?

[TROOPER VANSANT]: Um, after they were collected they were placed in the temp storage evidence at the Maryland State Police Easton Barrack?

[THE STATE]: Do you know what happened to them after that?

[TROOPER VANSANT]: Um, at that point and time they were, a DNA submittal form was attached with those items, which is procedure, and then they would be forwarded to the lab.

[THE STATE]: Okay. And to the lab you mean the Forensic…

[TROOPER VANSANT]: The Forensic Scientist Division

> Laboratory.
>
> [THE STATE]: Okay, and that's in Pikesville?
>
> [TROOPER VANSANT]: Correct.
>
> [THE STATE]: You familiar with the procedure on how to collect ah, oral DNA swabs?
>
> [TROOPER VANSANT]: Yes.
>
> [THE STATE]: And you followed the procedures when you collected these?
>
> [TROOPER VANSANT]: Yes.
>
> [THE STATE]: Same with the packaging of them?
>
> [TROOPER VANSANT]: Correct.

The only other evidence introduced at trial were the chain of custody logs for Mr. Little's buccal swabs and the chain of custody logs for the swabs of Mr. Biscoe's residence.

This testimony left gaps and, therefore, unanswered questions about the condition of the DNA evidence at the time it was tested. Trooper Vansant's testimony revealed nothing about what happened to the swabs of Mr. Little's DNA between the time they were removed from temporary storage and when they were tested in the Forensic Scientist Division Laboratory in Pikesville; the State concedes "there is no date of receipt by the Pikesville laboratory." There was no testimony by Crime Scene Technician Woods, who took the swabs of Mr. Biscoe's house and Mr. Biscoe himself, nor other testimony or evidence on the condition of the swabs when they arrived in Pikesville. And the chain of custody logs by themselves don't establish that the swabs were in the same condition when removed from temporary storage. We agree with Mr. Little that the evidence and testimony offered at trial did not preclude the likelihood that the condition of the DNA swabs remained unchanged when they arrived at the lab in Pikesville, and that the circuit court

abused its discretion by admitting the lab report under CJ § 10-915 without first establishing an adequate chain of custody.

C. The Circuit Court's Error Was Not Harmless.

After concluding the circuit court erred in admitting the lab report, we consider whether this error was harmless. The Court of Appeals articulated the standard for evaluating harmless error in *Dorsey v. State*, and it remains unchanged today:

> [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.

276 Md. 638, 659 (1976). And in practical terms, it is difficult to find harmless error with regard to improperly admitted evidence on which the State relied heavily at trial. *See Washington v. State*, 406 Md. 642, 657 (2008) (concluding that it was not harmless error when the trial court erroneously admitted surveillance videotapes and the State heavily relied upon the videotapes to prove its case).

As the prosecutor explained in closing argument, DNA evidence played a central role in the State's case-in-chief:

> [THE STATE]: Now, um, the DNA evidence is what it is, it says with a scientific degree of certainty Mr. Little's the primary contributor of the DNA that was collected from the safe. We know the safe didn't leave the residence. The testimony was from Mr. Biscoe, the safe weighs some one thousand pounds. The safe was in his house when he fell asleep. The safe was in his house when he found out about the

> burglary. There's no doubt that the safe had to be in the house when Mr. Little's DNA got on the safe.

We also know that the circuit court relied on the lab report in finding Mr. Little guilty because, in listing its reasons, it cited the "[s]econd . . . [being] the DNA [] that was located on the safe." And because we cannot say beyond a reasonable doubt that the evidence didn't contribute to the guilty verdict, the error in admitting the DNA evidence on this record was not harmless.

JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. CAROLINE COUNTY TO PAY COSTS.