Circuit Court for Baltimore City
Case No.: 110139020

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

580

September Term, 2023

Tavon Jackson

v.

State of Maryland

Wells, C.J.
Friedman,
Wilner, Alan M.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Wilner, J.

Filed: April 24, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant Tavon Jackson and a co-defendant, Dijon McClurkin, who is appellant's cousin, were tried together before a jury in the Circuit Court for Baltimore City and convicted of a variety of crimes committed against R.M. and R.M.'s mother.[1] A direct appeal by appellant was of very limited success, and before us now, nine years later, is an appeal from the denial of relief under the Maryland Uniform Postconviction Procedure Act, (Md. Code, Crim. Proc. Art. §§ 7-101 to 7-301.)

Appellant was convicted of attempted first-degree murder, using a handgun in the commission of a crime of violence, reckless endangerment, conspiracy to commit first-degree murder, conspiracy to wear, carry, or transport a handgun on his person, and unlawful possession of a firearm, for which he was sentenced to imprisonment for life, all but 75 years suspended, to be followed by probation for three years.[2]

All of that stemmed from an unpaid $200 debt that had led to several assaultive confrontations between appellant and R.M., in some of which McClurkin, in support of appellant, participated.

The precursor to what is now before us arose on the evening of April 30, 2010, when, with the active complicity of appellant, McClurkin, who had no interest in the alleged debt that created the animosity between appellant and R.M., confronted R.M. on the street where R.M. lived, shot him several times, and threatened to shoot R.M.'s mother,

[1] We do not deem it necessary to further define the victims in this case and have chosen not to do so.

[2] A third defendant, Donte Anderson, also was charged, but his case was severed.

who was on the street watching what was occurring, but was dissuaded from doing so by appellant. R.M was grievously wounded but, after several surgeries and a lengthy hospital stay, he survived. Summoned to the scene by neighbors, police officers located appellant and McClurkin, both of whom had fled, and arrested them.

The State's theory with respect to appellant was that he was an aider and abettor to McClurkin. In sustaining the jury's verdict regarding appellant in appellant's direct appeal, this Court concluded that "the evidence that Jackson aided and abetted McClurkin as well as conspired with him was overwhelming" and recited the evidence supporting that conclusion. *McClurkin v. State*, 222 Md. App. 461, 487 (2015), *cert. denied*, 443 Md. 735 (2015).

All of this is essentially background. What confronts us here is what occurred after appellant and McClurkin were arrested and committed to the Baltimore City Detention Center pending further proceedings, as revealed at their trial and considered by this Court in the direct appeals from their convictions. In that latter regard, *see* 222 Md. App. at 470.

As explained by this Court in that appeal, while incarcerated at the detention center, appellant and McClurkin made several telephone calls to various women, informing them that appellant and McClurkin "needed someone to pressure the victim (R.M.) and to stop him from telling people that he [appellant] and McClurkin were involved in the shooting." *Id.* It appears that each of them made one such call on or about May 5, 2010, and that two days later, McClurkin made two additional calls in an effort to enlist the recipients of those

calls to "induce the victim to sign a 'paper' which stated that [McClurkin and appellant] had nothing to do with the shooting." *Id.*

All four calls were from a prison telephone and were recorded. They are repeated verbatim in appellant's brief. The language used in McClurkin's calls is vile, and we shall not repeat it. The characterization of those calls suffices to make the point that they were a clear attempt to persuade R.M. to exonerate appellant and McClurkin. The calls were admitted into evidence at trial and were an issue raised and considered in the direct appeal. Appellant challenged the admission of those calls on the ground that, because neither defendant testified, their admission violated the Sixth Amendment Confrontation Clause and that the error was not harmless.

This Court rejected the Confrontation Clause argument on the ground that the calls were not "testimonial" in nature. *McClurkin* at 478. The panel agreed with **McClurkin's** argument that **appellant's** call constituted inadmissible hearsay but found the error to be harmless beyond a reasonable doubt. *Id.* at 484.

The sole issue presented in **this** appeal is whether the admission of **McClurkin's** calls constituted inadmissible hearsay and, if so, whether the allowance of that evidence against **appellant** was harmless. *See* Appellant's Brief at 2. This Court did not address that issue in the direct appeal on the ground that it had not been raised. *See McClurkin, supra*, 222 Md. App. at 479, n. 4.[3]

[3] Footnote 4 in *McClurkin* states "Jackson, unlike McClurkin, does not raise a hearsay challenge to the admission into evidence of McClurkin's jailhouse telephone calls. Jackson's only claim of

That is not entirely accurate. It is true that the major objection by appellant was on Confrontation grounds but, in his initial brief filed in the direct appeal, he added that "[t]hese calls [by McClurkin] were clearly hearsay and, because Mr. Jackson could not cross-examine Mr. McClurkin about them, he was denied his right of confrontation." Brief at 19. He expanded that argument in his reply brief, arguing that "[t]he state misconstrues the statements of McClurkin ***as they relate to Mr. Jackson***. Certainly, the taped statements made by McClurkin evidence his consciousness of guilt for having shot the victim here. But the statements by McClurkin implicating Mr. Jackson are hearsay . . . The truth of the matter asserted here by McClurkin is that **Mr. Jackson** needs the victim to lie about the events." *Jackson v. State*, 2014 WL 2115510, at 7–8.

As we have indicated, the only issue before us in this appeal is whether, as to appellant, the admission of McClurkin's telephone calls was an error under Maryland's hearsay law and, if so, whether the error was legally harmless. We could examine that issue in one of two ways: (1) accepting the Court's initial view that the State law hearsay issue was not properly raised in the first appeal, which would invoke an ineffective assistance of counsel analysis, or (2) conclude that the issue **was** sufficiently raised and should have been resolved. Given the record in this case, we shall follow the second approach.

error regarding those telephone calls was based upon Sixth Amendment grounds and is addressed in Part 1, *supra*."

This Court dealt with this issue in the first appeal in the context of whether **appellant's** phone calls were admissible against **McClurkin**. Relying on *Stoddard v. State*, 389 Md. 681 (2005) and *Lyle v. Koehler*, 720 F.2d 426 (6th Cir. 1983), the Court found that appellant's call was not for the purpose of asserting his innocence but solely to intimidate R.M. into changing his story, which constituted a "consciousness of guilt" and constituted hearsay when used for that purpose. *See McClurkin, supra*, 222 Md. App. at 482-83.

The Court then turned to whether Jackson's statement, though hearsay, was admissible under the "party-opponent" exception to the hearsay rule (*see* Md. Rule 5-803(a)(1)). The Court, relying on *State v. Payne and Bond*, 440 Md. 680, 710 (2014), concluded that that exception did not apply because "in a joint criminal trial, neither defendant is a party-opponent of the other and that therefore, hearsay statements by a co-defendant in wiretapped recordings were not admissible against other defendant." *McClurkin, supra*, 222 Md. App. at 483-84.[4] That conclusion, with respect to the admissibility of Jackson's recorded conversation was quickly neutered, however, by the Court's holding that the error in admitting Jackson's statement against McClurkin was harmless beyond a reasonable doubt because McClurkin's calls were worse.

[4] The actual statement in *Payne & Bond* is that the statement is inadmissible "to establish an express conspiracy of concealment." 440 Md. at 711.

Appellant seizes on that conclusion in arguing for a different end result in his case. In his brief, he attempts to minimize his conduct, both with respect to the conspiracy to kill R.M. and to have the recipient of his phone call put pressure on R.M. to fraudulently exonerate him and McClurkin.

We see this as a difference without a distinction. Appellant made one call as opposed to McClurkin's three and his language may have been more gentlemanly, but neither the purpose nor the illegality of it was any different. He was seeking to have the woman he called put pressure on R.M. to exonerate **both him and McClurkin**, which was precisely what McClurkin was doing. All of this arose from an ongoing dispute over an unpaid $200 debt. If the admission of **his** unlawful call was harmless as to **McClurkin**, the admission of **McClurkin's** calls were equally harmless as to **him**.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.