UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1220

September Term, 2015

CORNELIUS ALEXANDER BRIDDELL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 7, 2016

This appeal arises from appellant, Cornelius Alexander Briddell's criminal conviction in the Circuit Court for Wicomico County. Briddell was tried before a jury and convicted of nineteen counts of human trafficking, two counts of conspiracy to commit human trafficking, two counts of conspiracy to commit false imprisonment, and four counts of second-degree assault. Additionally, Briddell was convicted of one count each of conspiracy to commit first-degree rape, conspiracy to commit second-degree rape, reckless endangerment, kidnapping, second-degree sex offense, third-degree sex offense, and distribution of a controlled dangerous substance. After several of the convictions were merged, the court imposed a total sentence of 145 years. Briddell filed a timely appeal, presenting the following questions for our review:

> Did the lower court err by allowing the State to play part of a jail call between Mr. Briddell and his wife?[1]

[1] The State argues that because Briddell was advised in advance that his calls would be recorded and monitored, he conceded at trial that it was lawful for the State to record his conversations. Further, to the extent that Briddell now argues on appeal that he did not consent to the recording of the calls, the State contends that his claim is unpreserved and cannot be reviewed. Md. Rule 8-131.

The issue below was whether, having lawfully recorded the conversation, that recording could be divulged under Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article § 10-402(d). In the lower court, Briddell argued that the notification that the conversation was going to be recorded and monitored did not allow the recording to be "divulged" unless the notification also expressly advised the parties that the recording could be used at trial. When a specific argument is offered as the basis for an objection at trial, additional unrelated arguments are not subject to appellate review. Md. Rule 8-131; *see Stewart-Bey v. State*, 218 Md. App. 101, 127 (2014) (appellate review confined to specific argument made in lower court). Thus, with regard to the wiretap statute, only Briddell's argument that an additional warning was necessary has been preserved for our review.

(continued…)

A. Was the call inadmissible under the wiretap statute and the marital communications privilege?

B. Assuming, a*rguendo*, that the call was admissible, did the lower court err by refusing defense counsel's request to have the jury hear the entire call?

For the reasons discussed below, we affirm the circuit court's decision.

BACKGROUND

An extensive recitation of the facts in this case is not necessary in order to reach the issues central to his appeal as what is pertinent occurred during Briddell's pre-trial incarceration.[2]

While awaiting trial, Briddell was recorded making a nearly twenty-two minute jail call to his wife. Part of the phone conversation included talking about one of the victims, Ruth Y,[3] being unable to remember what had happened to her "after the church[.]" The location of a "church" had not been discovered during the criminal investigation, and therefore, would tend to prove that Briddell was aware of information that would only be known by one of the perpetrators.

Thus, to the extent that the issue raised below, and on appeal, is the further dissemination of the contents of the jail call, we exercise our discretion to review the merits.

[2] Briefly, Briddell was accused and convicted of participating in a human trafficking ring where vulnerable women were kidnapped off the street, raped and sexually assaulted, shot up with drugs, and prostituted until they either escaped or were rescued by law enforcement.

[3] For purposes of the privacy of this crime victim, we are not using her surname.

The State played this portion of the jail call for the jury. Prior to placing the jail call, an automated audio message informed both Briddell and his wife that, "this call will be recorded and subject to monitoring at any time." During his conversation with his wife, Briddell acknowledged that he heard the recording by stating, "I do got to explain it because it need to be explained. I don't care who's taping or what."

In a motions hearing prior to trial, defense counsel argued that Briddell was aware that his phone conversation would be monitored by the jail but not that it would be shared with the State or used against him at trial. Defense counsel asserted that such calls were inadmissible under the Maryland Wiretap Statute, codified at Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP") § 10-402(d),[4] and asserted that disclosure and use by the State without notice to Briddell required proper authority of the State. The circuit court denied defense counsel's motion to suppress the jail call.

During Agent Rose's testimony, the State attempted to introduce a portion of the call. Defense counsel objected, stating Briddell's jail call with his wife was a privileged

[4] CJP § 10-402(d) states:

> (d)(1) Except as provided in paragraph (2) of this subsection, a person or entity providing an electronic communication service to the public may not intentionally divulge the contents of any communication (other than one to the person or entity providing the service, or an agent of the person or entity) while in transmission on that service to any person or entity other than an addressee or intended recipient of the communication or an agent of the addressee or intended recipient.
>
> (d)(2) A person or entity providing electronic communication service to the public may divulge the contents of a communication:
>
> (i) As otherwise authorized by federal or State law . . . .

marital communication. The circuit court overruled the objection. When the State attempted to play the jail call, defense counsel objected, arguing that the jail call should be played in its entirety. The objection was overruled.

After closing arguments, out of the presence of the jury, Briddell requested that the entire jail call be played for the jury. The circuit court determined that the parts of the CD containing the rest of the jail call were not relevant evidence, and thus, should not be played for the jury. The jury requested to listen to a portion of the jail call once more during its deliberations.

STANDARD OF REVIEW

When the trial court's decision "involves an interpretation and application of Maryland statutory and case law, [this] Court must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Walter v. Gunter*, 367 Md. 386, 392 (2002) (citation omitted). If the statutory language is clear and unambiguous "we apply the language as written in a commonsense manner," but this Court will refuse to "add words or ignore those that are there." *Downes v. Downes*, 388 Md. 561, 571 (2005). Any ambiguity may be resolved by searching for the legislative intent by "looking at legislative history and applying the most relevant of the various cannons." *Id*. (citations omitted). "Unambiguous language will be given its usual, ordinary meaning unless doing so creates an absurd result." *Hurst v. State*, 400 Md. 397, 417 (2007) (citing *MVA v. Shepard*, 399 Md. 241, 254 (2007)). In addition, the doctrine of verbal completeness is evaluated under an abuse of discretion standard. *Rutherford v. State*, 160 Md. App. 311, 322-23 (2004).

It is "ordinarily within the sound discretion of the trial court to determine the admissibility of evidence." *Blair v. State*, 130 Md. App. 571, 592 (2000) (citations omitted). We also review for abuse of discretion the trial court's relevancy determination of evidence. *State v. Simms,* 420 Md. 705, 724 (2011). An abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Brass Metal Prods., Inc. v. E-J Enters., Inc.*, 189 Md. App. 310, 364 (2009) (internal citations and quotation marks omitted).

DISCUSSION

I. Jail Call Admissibility under Wiretap Statute

On appeal, Briddell does not seriously contest the legality of the jail to record his phone calls, but he does object to this evidence being admitted against him at trial pursuant to CJP § 10-402(c)(3).[5] Briddell argues that the Wiretap Statute did not authorize jail staff to disclose the recorded conversation to the Office of the State's Attorney.

[5] CJP § 10-402(c)(3) states:

> It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.

The short answer to the question presented is that there is nothing in CJP § 10-402(c)(3) that would require a specific notification to the communicating parties that the recording will be used at trial. Pursuant to CJP § 10-402(c)(2)(i)(2),[6] both Briddell and his wife consented to being recorded when they continued their phone conversation after having heard an automated message stating they would be recorded and monitored by the Wicomico Department of Corrections. We elaborate.

CJP § 10-402(c)(2)(i)(2) "requires consent from all parties before a conversation may be taped or otherwise intercepted in the absence of a court order authorizing law enforcement officials to conduct a wiretap." *Miles v. State*, 365 Md. 488, 508 (2001) (citations omitted). The Court of Appeals has recognized that "people using telephones in Maryland may ordinarily rely on the fact that their conversation will not be surreptitiously recorded or, at the very least, that, unless done in strict conformance with the State law, a recording of their conversation will not be admitted into evidence in any Maryland court." *Id*. at 509 (citation and emphasis omitted). Indeed, the Wiretap Statute expressly provides that "[a]n otherwise privileged wire, oral, or electronic communication intercepted in accordance with or in violation of the provisions of [the statute], does not lose its privileged character." CJP § 10-407(d).

Inmates, as wards of the state, maintain less privacy than normal citizens. *See McFarlin v. State*, 409 Md. 391, 404 (2009) ("As a consequence of their relationship with the State, inmates have lower expectations of privacy than non-incarcerated individuals.")

[6] CJP § 10-402(c)(2)(i)(2) "applies to an interception in which . . . one of the parties to the communication has given prior consent to the interception."

(Citing *Hudson v. Palmer*, 468 U.S. 517, 524 (1984)). When balanced against security concerns, an inmate does not have an expectation of privacy in an outgoing letter because "any privacy expectations that [a defendant] might have had regarding his letter . . . were outweighed by [the prison's] legitimate security needs." *Id*. at 408-09. An institution's policy of "taping outgoing calls from inmates serves important penological interests." *United States v. Lentz*, 419 F. Supp. 2d 820, 835 (E.D. Va. 2005). Specifically, taping phone calls "deter[s] inmates from using the telephone in furtherance of criminal activity inside and outside the jail," and allows for detecting and prosecuting such activity if it does occur. *Id*. An inmate's Fourth Amendment protection against unreasonable search and seizure is not violated when a recording or message comes "into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution." *Stroud v. United States*, 251 U.S. 15, 21-22 (1919). In sum, the confinement of an inmate and the "legitimate goals and policies of the penal institution limits [a prisoner's] retained constitutional rights." *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (citations omitted).

Here, Briddell was aware that his jail call was being recorded and monitored by the Wicomico Department of Corrections, which was fundamentally a third party to the calls. The Wicomico Department of Corrections's jail call procedures were part of its established practices and security protocol. Prior to placing the call, an automated message informed Briddell: "This call will be recorded and subject to monitoring at any time." Briddell consented to the call by continuing to speak after the "this is being recorded" message was played.

Briddell, thereby, waived any objection to the subsequent use of the call against him.[7] It is illogical to imagine that a recording of a jail call could not be used against an inmate at trial, given the express and meaningful notice of such a recording beforehand, and when the inmate explicitly provides acknowledgement of such notice.

Finally, Briddell argues his status as an inmate left him no choice but to accept the conditions imposed by the Wicomico Department of Corrections. However, Briddell was not forced to communicate with his wife by phone nor continue with the phone conversation after being notified that it would be recorded and monitored. Briddell could have chosen not to call, or otherwise could have refused to disclose anything to his wife that he did not want recorded and potentially used at trial. Any objection to the calls as discussed above is undeniably waived. An inmate's "decision to proceed with the conversations, despite notification that the conversations were being recorded and were subject to monitoring, is no different from the inmate proceeding with these conversations notwithstanding the known presence of a third party within earshot of the conversation." *Lentz*, 419 F. Supp. 2d at 828 (footnote omitted).

Because Briddell consented to the call and the applicable portions of CJP § 10-402 do not prohibit the disclosure of the recording to the State, the circuit court did not err when it admitted the jail call at trial.

[7] A waiver may be created by acts, conduct, or declarations. *MacPhail v. Sagner*, 266 Md. 318, 331-32 (1972) (quoting *Crane Co. v. Onley*, 194 Md. 43, 49-50 (1949)).

II. Applicability of Marital Privilege

The marital privilege doctrine, as codified in CJP § 9-105, is "one of two privileges that protects confidential communications between husband and wife." *Wong-Wing v. State*, 156 Md. App. 597, 607 (2004) (citations omitted). It provides that "[o]ne spouse is not competent to disclose any *confidential* communication between the spouses occurring during their marriage." CJP § 9-105 (emphasis added).

There exist, however, several exceptions to martial privilege. "There is a rebuttable presumption that martial communications are confidential and privileged," but this presumption can be rebutted when it is shown that "the communication was not intended to be confidential." *State v. Enriquez*, 327 Md. 365, 372 (1992) (citation omitted). If this presumption has been thoroughly rebutted, the "burden of establishing the element of confidentiality" falls on the appellant. *Ashford v. State*, 147 Md. App. 1, 69 (2002). Because of the disfavor with which the courts look upon the use of testimonial privileges at trial, "we resolve an ambiguity against the privilege, rather than in its favor." *Id*. at 70. Furthermore, martial privilege exists only if such confidential communications are "expressly made so, or if the subject is such that the communicating spouse would probably desire that the matter be kept secret, either because its disclosure would be embarrassing or for some other reason." *Coleman v. State*, 281 Md. 538, 542 (1977) (citation omitted).

Spouses communicating in the presence of a third party may also eliminate the applicability of marital privilege. "If the [defendant] had spoken to his wife in the presence of a third person . . . his communication would not be deemed to have been

confidential." *Ashford*, 147 Md. App. at 69 (citations omitted). For instance, in *Mulligan v. State*, 6 Md. App. 600, 615 (1969), this Court found that the admission made by the appellant to his wife while they were in the presence of the police at a police station, "was not a confidential communication . . . as it was made in the hearing of a third person." *See also State v. Gladden*, 600 S.E.2d 93, 96 (N.C. Ct. App. 2005) (holding that marital privilege did not apply where defendant's step-daughter had "*actively participated* in the phone conversation" between him and his wife). "The burden is not on the State to establish the presence of third persons; it is on the appellant to establish their absence." *Ashford*, 147 Md. App. at 69.

Here, Briddell and his wife were informed that the jail call was not confidential as it was being recorded. Any claim that the presumption of confidentiality was maintained regarding Briddell's jail call is without merit because they were both aware that a third party was recording and potentially listening to the call. In support of his argument, Briddell cites *Newman v. State*, 384 Md. 285, 306-07 (2004), asserting that the privilege remains despite the presence of a third party, so long as the person communicating "reasonably understood the conference to be confidential." It would be unreasonable for Briddell to believe that his conversation would remain confidential considering Briddell's knowledge of the presence of a third party—the Wicomico Department of Corrections.

III. Playing the Remainder of Jail Call for Jury

Finally, Briddell argues that the circuit court erred in refusing to allow the playing of the entire jail call under the doctrine of completeness. Briddell asserts that the court erred when it failed to play his approximately twenty-two minute jail call. Briddell

contends that the jury was left with an incomplete and inaccurate representation about the purpose and content of the call, and that any inaccuracies would be cured by playing the entire call for the jury. We disagree.

In *Conyers v. State*, 345 Md. 525, 541 (1997), the Court of Appeals held that the doctrine of completeness allows a party to respond to the entry of a writing or conversation by a party opponent, "by admitting the remainder of that writing or conversation." (Citation omitted). The *Conyers* Court listed three requirements for the doctrine of completeness to apply: "[1] No utterance irrelevant to the issue is receivable; [2] No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable; [3] The remainder . . . merely aids in the construction of the utterance as a whole, and is not in itself testimony." *Id.* at 541-42 (quoting *Feigley v. Balt. Transit Co.*, 211 Md. 1, 10 (1956)).

Further, the remainder of the conversation sought to be introduced should be excluded if "the danger of prejudice outweighs the explanatory value." *Id.* at 542 (citing *Richardson v. State*, 324 Md. 611, 622-23 (1991)). Likewise, any evidence that is not relevant is also not admissible. Md. Rule 5-402. Even when relevant, evidence may be excluded if its probative value is substantially outweighed by: (1) the danger of unfair prejudice, (2) confusion of the issues, (3) misleading the jury, or (4) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Md. Rule 5-403.

At no point at trial or on appeal does Briddell state how the remainder of the jail call explained, helped clarify, or would put into context the section of the call played at

trial. On the third day of testimony, the circuit court noted that any desire by defense counsel to clarify the portion of the jail call played before the jury could be undertaken during Briddell's direct examination. This was never done or attempted.

Further, the doctrine of verbal completeness is inapplicable if the remainder of the recording requested to be played is "in itself testimony." *Conyers*, 345 Md. at 542. Briddell's desire to play the balance of the jail call was not to give context to the portion played by the State, but an attempt to include other statements regarding witnesses and potential trial testimony not relevant to the portion played by the State. All of those statements constituted self-serving hearsay, in place of direct testimony, inappropriate for the jury to hear under the doctrine of completeness.

Finally, any probative evidence was substantially outweighed by several factors. The danger of unfair prejudice was clear. By playing the balance of the jail call, the circuit court would have permitted Briddell to admit self-serving hearsay, causing prejudice, by denying the State's ability to cross-examine Briddell on his statements. Such an extensive, and at times meandering, jail call included a discussion of his wife's new tattoo, a discussion about the exclusion of witnesses, and a speakerphone conversation between Briddell, his wife, and his mother-in-law in which Briddell asked his mother-in-law to lie on the stand regarding her familiarity with Briddell.

All of these topics within a nearly twenty-two minute jail call would have done nothing, except create potential confusion of the issues, and be completely irrelevant. The remainder of the jail call did not explain or clarify for the jury the portions played by

the State at trial. Therefore, the circuit court did not abuse its discretion when it refused Briddell's request to play the remainder of the jail call for the jury.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.