UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2567

September Term, 2014

FREDERICK IHEDINMA

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: February 3, 2016

On November 20, 2014, a jury sitting in the Circuit Court for Prince George's County convicted appellant, Frederick Ihedinma, of second-degree rape, third-degree sex offense, fourth-degree sex offense, and second-degree assault. Appellant was sentenced to twenty years imprisonment with all but five years suspended for second-degree rape. The other counts merged for sentencing purposes. Appellant appealed and presents the following question for our review:

> Did the trial court err in permitting Detective Raynes to testify about his efforts to contact Appellant by phone and Appellant's failure to return his calls?

We answer in the negative, and, accordingly, affirm the judgment of the circuit court.

BACKGROUND

In August 18, 2013, Vivian Nmaggu went to Temple Ihedinma's home in New Carrolton, to attend a birthday party. Appellant, Temple Ihedinma's brother, also attended the party. Nmaggu and appellant never met before this night, and only spoke briefly while at the party. At trial, Nmaggu testified that she had consumed some alcohol, and at Temple's urging, she retired to a spare bedroom of the home to take a nap before driving home. She fell asleep fully clothed and with the bedroom light on and door open.[1] At some point in the night, she awoke to someone banging on the locked bedroom door. The lights were off and she was naked from the waist down. After awaking, she discovered someone on top of her. After initially mistaking the assailant for Temple, and telling him to stop, the assailant identified himself as Frederick. Appellant was straddling her and his penis was

[1] Temple Ihedinma testified that he left Nmaggu alone in the bedroom with the lights on and the door closed.

inside her vagina as she attempted to push him off of her. After pushing him off of her, appellant ran out of the room. Nmaggu put her underwear and pants back on, left the house, and went home.

The next day Nmaggu called Temple and arranged to meet with him at a park later that same day. At the park, Nmaggu told Temple about the assault. Temple then called appellant and spoke to him on speaker phone so that Nmaggu could listen to the conversation. According to Nmaggu, during the conversation appellant told his brother "three different stories about what happened." Temple testified that he had become upset during this conversation with appellant and had hung up on him. Temple further related that appellant had "hinted at [a sexual] encounter between" the victim and himself.

Nmaggu first reported the assault to a sexual assault support group, and nine days after the incident to the Prince George's County Police Department. Nmaggu was shown a photo array by the police and identified appellant, whose photo was included in the array, as the person who had sex with her against her will, and she positively identified him at trial.

Detective Gregory Raynes of the Prince George's County Police Department began investigating the assault and obtained Temple's phone number from Nmaggu. Detective Raynes then obtained appellant's phone number from Temple and after "two or three days" was successful in reaching appellant to tell him that he'd "like to speak with him about this incident." At this point in the trial, the following exchange occurred at the bench:

> [DEFENSE COUNSEL]: It's occurring to me that I'm not sure where exactly he's going to go with all this. Should have been—

THE COURT: I didn't hear the last part.

[DEFENSE COUNSEL]: Where the officer is going to be going with all this conversation with my client, so which may be—maybe it's my fault, maybe should have been Mirandized before he starts asking questions over the telephone.

I mean, I'd move in limine that we don't know exactly that he's talking to Frederick, because he's never spoken to him before just because he has a phone number. I would keep those conversations out.

[THE STATE]: We would argue to the [c]ourt that he was not in custody, because he was given a telephone number, was talking to someone, he had been given his phone number by the defendant's brother.

He called. He asked to speak to Frederick Ihedinma. The person responded that he was Ihedinma. He questioned him. He said that he called and asked him to come into [*sic*] talk about what had happened. His response was unsolicited.

It was merely to schedule the interview. And he, the defendant, volunteered that he did not have any knowledge about this incident, that why would the police want to speak to him and he doesn't know anything.

This conversation was right after he had been given a phone number. In addition to that conversation, it's the State's contention—all of this has been provided in discovery also to the defense.

The other addition is that he, the detective, we would proffer, the detective, is also going to be indicating that he tried to call him several times at that same number and—he previously had spoken to him on. And he never responded to any of the phone calls. Did not come in and talk to him about the incident. And ultimately, the phone was turned off.

THE COURT: All right. The first part, the witness, are you saying— are you saying the witness did establish the fact— I know you say he got that phone number from the brother.

[THE STATE]: Yes. I'm just rearguing the foundation. He established that he was the owner of the phone.

THE COURT: If he's established the foundation, that is, he got the number from the bother [*sic*], he asked to speak to Frederick and the person that's on the phone said, this is he, then I'm satisfied with the identification. With regard to the Miranda issues, he was on the phone, he obviously wasn't in custody. And without that custodial element, I don't find that any defense motion to suppress should be granted.

Now, as to your last part, you said you tried to call him back and he never called back. I have some difficulty with that because he has a right not to talk to—

[DEFENSE COUNSEL]: And we don't know why he didn't call him back. There is no identification, because he didn't want to call him back. He was refusing. He can't call—

[THE STATE]: Then he can testify that he either, for whatever reason, he didn't call back and explain. He's just testifying to what he did. The jury and the State and defense—the jury can infer why he didn't call him back, but it's relevant to the fact that he had spoken to him on the phone. He identified—well, he called. This number was given. This number, he called the number. He identified himself as Frederick. He left voice messages. This person never called him back?

THE COURT: But he spoke to him.

[THE STATE]: I'm talking about the second part.

THE COURT: Right, but I'm saying he spoke to him and they had the conversation. Why is he—did he try to call back and Frederick didn't call back.

[THE STATE]: Because he was trying—he, this witness, told Frederick Friday to go talk and schedule a [*sic*] interview with you, and so not calling back, he didn't want that interview to ever happen.

[DEFENSE COUNSEL]: Well, kind of a conclusion.

[THE STATE]: He's not going to—the detective is not going to—he's not going to testify that the reason why he didn't call him back is whatever. He's just going to say, I tried to call and I left messages that I wanted to schedule a [*sic*] interview and he never called back, that's it. He's not going to say why. Because we don't know why he didn't call him back. But it's relevant that he didn't call him back; I think is

a fair argument for the State to argue why he didn't call him back. Just like it's fair for the defense to argue that he didn't have to call him back.

THE COURT: What do you say, [Defense Counsel], anything?

[DEFENSE COUNSEL]: I think she just has to be very tactful in how he explains that he was calling that number and never received a response versus, you know, my client actively chose not to call back and make it sound that way. I can argue that at closing.

[THE STATE]: If this [c]ourt grants a little bit of leading to lead him to make sure that he does not say that, then I can lead him a little bit to narrow his answer.

THE COURT: Okay.

[DEFENSE COUNSEL]: Did he hear back from him. No, right I call him and left messages. Did you ever hear back from him. No.

[THE STATE]: But I want to get that he called several times not just—

[DEFENSE COUNSEL]: I understand that.

[THE STATE]: Okay. I can ask him how many times did you call him, did he ever call you back. I also want to get that he left messages and to schedule the interview.

[DEFENSE COUNSEL]: Or he may have called back and never got the messages.

[THE STATE]: He can definitely testify that he never spoke to him after that.

[DEFENSE COUNSEL]: I agree he can say that, yes.

[THE STATE]: Okay.

THE COURT: So the defense motion to object to the telephone conversation is denied.

(Emphasis added).

Detective Raynes then testified that after successfully reaching appellant by phone, he attempted to call him back three times before speaking with him a second time. Detective Raynes then attempted to contact appellant again, and called him "numerous times" before discovering appellant's "phone was actually deactivated at some point and the phone number wasn't in service." This testimony was elicited without further objection.

Detective Raynes further testified that Nmaggu identified appellant as her attacker in a photo array, which was stipulated to by appellant's counsel. After the photo array, Detective Raynes testified that he and Nmaggu "had previously discussed that [they] would on the same day attempt to perform what's called a one-party consent phone call," but they were unsuccessful in their attempt, because appellant's phone was "deactivated."

In closing arguments, neither appellant, nor the State addressed, or alluded to, Detective Raynes' testimony regarding his phone calls to the appellant.

DISCUSSION

Appellant argues that "Detective Raynes's testimony about his efforts to reach [a]ppellant by phone and [a]ppellant's failure to return his calls was irrelevant and inadmissible under Rules 5-401 and 5-402" as appellant had a "right not to talk." He further contends that the jury "may have treated [a]ppellant's failure to return the detective's calls as substantive evidence of guilt." He also speculates that "[w]ithout Detective Raynes's testimony concerning his efforts to reach [a]ppellant by phone and [a]ppellant's failure to return his calls, the jury may very well have concluded that Nmaggu's testimony was not persuasive enough to establish guilt beyond a reasonable doubt," and argues that such an error "cannot be deemed harmless beyond a reasonable doubt."

In response, the State first argues that appellant "intentionally relinquished his right to claim error in the admission" of the detective's testimony as he "expressly consented" to it at trial. Further, the State argues:

> Even if this Court does not find the error intentionally waived, it is certainly not properly preserved. At no point did defense counsel argue that testimony regarding [appellant's] failure to return Detective Rayne's phone calls was inadmissible because it was irrelevant and unfairly prejudicial. [Appellant] challenged the testimony because, he argued, his identity as the recipient of the telephone call was not sufficiently established, and he should have received *Miranda* warnings before speaking with the detective on the phone.

In conclusion, the State contends that even if we were to find that it was preserved, our review of the trial court's decision to admit the testimony is deferential to the trial court, and, in any event, the evidence in question was more probative than prejudicial.

We agree with the State, and hold that the appellant expressly consented to the detective's testimony regarding his contact with appellant, and further, because he failed to object when the testimony was given, he is prevented from asserting error in the court's admission of the testimony.

The "contemporaneous objection rule" of Md. Rule 4-323(a) provides, in pertinent part: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Specifically with regard to motions *in limine*, it is well established that when a ruling on the motion "results in the admission of evidence, the contemporaneous objection rule . . . shall continue to apply. Contemporaneous objections to the admission of evidence normally must be made when the evidence is offered at trial."

Reed v. State, 353 Md. 628, 643 (1999). *See also Klauenberg v. State*, 355 Md. 528, 539 (1999); *Morton v. State*, 200 Md. App. 529, 540-41 (2011).

Here, appellant's attorney initially objected to Detective Rayne's testimony regarding his difficulty in his follow-up contact with appellant. At a bench conference held after the objection, however, he relented and agreed that Detective Rayne could testify that after his initial contact with appellant, he called appellant several times and left messages, but "he never spoke to him after that." Appellant clearly consented to the testimony to which he now claims was in error. Even if we were to assume, for the sake of argument, that it was not expressly consented to, it certainly was not properly preserved according to Rule 4-323(a), because no objection was ever lodged when the actual testimony was entered into evidence.

Notably, appellant neither addresses the non-preservation argument, nor asks us to overlook it. "In that the appellant, strangely, does not even ask us to overlook non-preservation, this contention may qualify as an instance of non-preservation squared." *Garner v. State*, 183 Md. App. 122, 151-52 (2008). However, there are certain occasions where we may take it upon ourselves to engage in plain error review, the basis for which is found in the pertinent part of Md. Rule 8-131(a):

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Unfortunately for appellant, even if we were inclined to engage in plain error review (which we are not), his deliberate waiver forgoes any possibility of us doing so:

> [T]he Court of Appeals has discussed the interplay between waiver and plain error review, and it has made clear that issues that a party has affirmatively waived are not subject to plain error review. *State v. Rich*, 415 Md. 567, 578–80, 3 A.3d 1210 (2010). The Court explained the difference between forfeiture, which is "the failure to make a timely assertion of a right," and waiver, which is the "intentional relinquishment or abandonment of a known right." Id. at 580, 3 A.3d 1210 (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). It held that "'[f]orfeited rights are reviewable for plain error, while waived rights are not.'" *Id*. (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir.1997)) (emphasis omitted).

Carroll v. State, 202 Md. App. 487, 509 (2011).

Clearly, when defense counsel affirmatively noted his agreement to the direction of the testimony to the State and the trial court, he was intentionally relinquishing any right to review of such a claim, and as such, is not entitled to plain error review. Accordingly, we hold that appellant's acquiescence to Detective Rayne's testimony was a waiver that now precludes our review of the admission of that testimony.

In any event, appellant's claim would still fail if it were considered on the merits. While appellant raised different grounds at trial (namely, appellant not being *Mirandized* before speaking to the detective on the phone) than those he raises now—yet another non-preservation issue (*see, e.g.*, *Wilkerson v. State*, 420 Md. 573, 597 (2011))—"[t]he trial court's relevancy determination, as well as its decision to admit relevant evidence over an objection that the evidence is unfairly prejudicial, will not be reversed absent an abuse of discretion." *Collins v. State*, 164 Md. App. 582, 609 (2005). "A trial court abuses its discretion only 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.'" *Easter v. State*, 223 Md. App. 65, 74-75 (2015) (quoting *King v. State*, 407 Md. 682, 697 (2009)).

Here, while the evidence in question was undoubtedly prejudicial, it cannot be said that it constituted *unfair* prejudice within the meaning of Rule 5-403.[2] At minimum, the evidence demonstrates that Detective Raynes attempted to investigate the victim's allegations and why, despite speaking with appellant on the phone several weeks earlier, Detective Raynes was unable to conduct the one-party consent call with the victim after she identified appellant in a photo array. The trial court clearly weighed the potential prejudice against the probative value (*e.g.*, when the court noted "I have some difficulty with that because he has a right not to talk to" the detective), and accordingly, we perceive no abuse of discretion.

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

[2] *See Burris v. State*, 435 Md. 370, 392 (2013) ("In balancing probative value against prejudice 'we keep in mind that the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5–403.' Rather, evidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'") (quoting *Odum v. State,* 412 Md. 593, 615 (2010)).