UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 603

September Term, 2016

RASSHAMMACH IJAHFARI ROBERTS

v.

STATE OF MARYLAND

Eyler, Deborah S.
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 13, 2017

In the Circuit Court for Allegany County, on an agreed statement of facts, the court found Rasshammach Ijahfari Roberts, the appellant, guilty of first-degree assault. He was sentenced to 20 years' imprisonment, with all but seven years suspended.

On appeal, the appellant asks whether the court erred by denying his motion to suppress evidence and his motion to dismiss the indictment.[1] We shall affirm the judgment.

FACTS AND PROCEEDINGS

On September 28, 2015, Kevin Wesley was stabbed repeatedly with a box cutter outside a 7-11 store in Cumberland. The police quickly developed the appellant as a suspect and arrested him at a nearby motel. They transported him to the police station and interviewed him.

Before trial, the appellant filed a motion to suppress from evidence statements he gave the police during the interview and a motion to dismiss the indictment. Two suppression hearings were held, and the motions were denied. Thereafter, the appellant was brought to trial before a jury. After the jury was selected and evidence was presented for one day, the State and the defense entered into an agreement by which the appellant would waive his right to a jury trial, plead not guilty on an agreed statement of facts, and

[1] The appellant phrased his question presented as:

> Did the lower court err in failing to suppress Mr. Roberts' statements, or dismiss the charges against him, and err in finding that: (1) the admission of Mr. Roberts' recorded statement to police, including a surreptitiously recorded portion of the statement, did not violate the Maryland Wiretapping Act; (2) Mr. Roberts did not invoke his right to counsel; and (3) Mr. Roberts' statement was voluntary when he continued to speak with police due only to misrepresentations made by the officers?

if he were found guilty by the court the State would recommend a sentence of 20 years' imprisonment, with all but seven years suspended.[2]

In the agreed statement of facts, the prosecutor laid out the State's evidence against the appellant, including video recordings of the stabbing, DNA evidence found in a van the appellant was associated with, and incriminating text messages the appellant sent after the stabbing. In addition, the prosecutor recited that the appellant had made two inculpatory statements in his interview with the police: 1) when asked what he believed he should be charged with, he answered "assault"; and 2) when asked whether he had intended to kill the victim, he answered no. The court found the appellant guilty of first-degree assault based in part on "the inculpatory statement with respect to [the appellant] having committed an assault only" and for "all the other reasons just stated by [the prosecutor]."

The issues on appeal concern the court's rulings on the motion to dismiss and motion to suppress. These motions largely were premised on the assertion that the statements the appellant gave to the police during an interview at the police station were obtained in violation of the Maryland Wiretapping and Electronic Surveillance statute, Md. Code (1974, 2013 Repl. Vol.), sections 10-401 through 10-414 of the Courts and Judicial Proceedings Article ("CJP") ("the Wiretap Act"), and therefore should not have been considered by the grand jury and were not admissible in evidence.

[2] The appellant had been indicted for attempted first-degree murder, attempted second-degree murder, first-degree assault, second-degree assault, reckless endangerment, stalking, openly wearing and carrying a dangerous weapon with the intent to injure, and disorderly conduct. As part of a plea agreement with the State, all charges except first-degree assault were *nol prossed*.

March 24, 2016 Suppression Hearing

The State called Detective Charles Goldstrom, an Assistant County Investigator for the Allegany County State's Attorney's Office. Detective Goldstrom testified that immediately after the appellant was arrested he was transported to the police station for questioning. He was placed in an interview room that was equipped with audio and video recording devices. The portion of the interview that took place in that room was conducted by Detective Roger Plummer, of the Cumberland City Police Department, and by Detective Goldstrom.

Before the interview started, Detective Goldstrom told the appellant that "everything was being . . . recorded by audio and video." Detective Plummer secured a written waiver of the appellant's *Miranda* rights. After he signed the waiver form, the appellant asked: "So if I don't want to speak, I can just cut it off at any time?" Detective Plummer responded in the affirmative, and the appellant then stated: "Anything I say can be used against me, though." Detective Plummer responded: "Absolutely, everything . . . . But like I said, this is being audio/video recorded[.]"

Detective Plummer informed the appellant of the charges against him, including attempted first degree murder. Very early in the interview, Detective Plummer asked the appellant, "Did you mean to kill him?" The appellant responded, "I didn't mean to kill nobody." Detective Goldstrom asked, "Was your intent to kill this man?" The appellant responded, "HmmMmm (indicating no)." Soon after that, the appellant said he wanted "to talk private" and did not "want to talk on camera." Detective Plummer responded: "We can't really do that, man, because obviously—listen, I'm not trying to screw you over, and

I don't and I understand what you're doing, but for our protection you know we can't do that." The appellant continued to answer questions.

The appellant again said that he wanted to talk "off camera" and "privately." Both detectives responded that such a conversation was not an option: "We can't do that." After the appellant again said, "I have to talk to you all privately" and "Let's go to another room or something[,]" Detective Plummer told him that, even if they went into another room, he was "still going to write all that stuff down." The appellant said, "That's cool."

The appellant continued to answer questions, although more time was spent with the detectives asking questions and with the appellant trying to ascertain what evidence they had against him than with responses. Detective Goldstrom asked the appellant what he thought he should be charged with: "What charges should be files [sic] against you?" The appellant at first said he could not answer the question based on what the detectives had told him. When asked whether he should be charged with attempted murder, he said "I don't think so." When asked, "How about assault?" he answered, "To be honest . . . [a]ssault."

Soon thereafter, the appellant started complaining that he did not want to go to jail and said: "I got to go. Let's go out there, please. Let's go outside the door and I'll tell you something. I'll tell you something. I just want to give you something." Detective Goldstrom responded: "Alright. We'll listen to it. We'll take it to a room that doesn't have a camera." The three moved to the office of Detective Corey Beard, who was not there at the time, and were joined by Investigator John Dudiak. Unbeknownst to anyone else in the room, Detective Plummer continued recording an audio of the interview by means of a

"mini-recorder" that he had in his pocket. After the interview concluded, Detective Plummer told Detective Goldstrom that he had audio recorded the portion of the interview that took place in Detective Beard's office and had done so because he thought that "since it was [a]ttempted [m]urder charge[d] that he was able to record [the] interview."

Detective Goldstrom testified that at no time during any portion of the interview did the appellant say he wanted to end the interview or that he wanted to speak to a lawyer. Detective Goldstrom described the appellant as "polite and cooperative" throughout the entire interview. He further testified that the appellant was engaged and asking questions of the officers during the interview and that no one threatened him or made any promises to him at any time.

The transcript of the first part of the interview, which took place in the interview room, was moved into evidence. The State attempted to introduce into evidence a transcript of the second part of the interview, which took place in Detective Beard's office, but the defense objected and the objection was sustained. There is nothing before this Court on appeal that informs us of what the appellant said during the second part of the interview.[3]

The defense did not call any witnesses.

[3] In opening statement, the prosecutor told the jurors that the appellant had been interviewed by the police and that they would hear that he had said he should be charged with assault and that he did not intend to kill the victim. The prosecutor stated that the appellant did not admit to committing the crime, although his words placed him at the scene. There is no indication in the record of what he said to that effect.

At the close of evidence, the prosecutor argued that no part of the interview could be considered a "private conversation" and, as a result, the Wiretap Act was not implicated. Defense counsel countered that, at a minimum, the part of the interview that took place in Detective Beard's office was a private conversation and that the entire interview violated the Wiretap Act because, based on the "totality of the circumstances[,]" the appellant never consented to being recorded and, even if he did, his consent was revoked when he said he wanted to "'talk privately.'"

The next day the court issued a written order denying the motion to suppress evidence and the motion to dismiss. It explained:

> The contention raised by counsel for [the appellant], that the audio and video recording of the interview of [the appellant] violated the [Wiretap Act], is contrary to the exemption from the Act for law enforcement conducting custodial interrogations. Md. Code Ann., Crim. Proc. § 2-403. There is a clear exemption for law enforcement from the Act when conducting such custodial interrogations.
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> This Court finds that [the appellant] was a criminal suspect being interviewed by a law enforcement unit and the interview was a custodial interrogation. Md. Code Ann., Crim. Proc. § 2-401. Accordingly, the provisions of the Act do not apply to this interview and there has [sic] been no violations. Moreover, based upon the totality of the circumstances the statements of [the appellant] were voluntary and the State did not ignore a request for counsel by [the appellant].

March 29, 2016 Suppression Hearing

Defense counsel asked the court for an additional hearing on his suppression motion because, although the court had found that the appellant had not been deprived of his right to counsel and his statements had been voluntary, the defense had not had the opportunity

to put on evidence on those issues. The court agreed and a suppression hearing was held on March 29, 2016. The State called Detective David Broadwater of the Warrant Fugitive Unit in Allegany County, and the appellant testified on his own behalf. The following evidence was adduced.

Detective Broadwater testified that, on September 28, 2015, he executed an arrest warrant for the appellant at a local motel. He placed the appellant in handcuffs and put him in the front passenger seat of his vehicle. Detective Plummer was present and sat in the back seat of the vehicle, behind the appellant.

During the drive to the police station, the appellant said he "wanted to talk to his girlfriend on his cellphone." Detective Plummer agreed he could do that. The appellant said "he had to put his code into the phone to unlock it[.]" When he began "reaching" behind his back for his phone, Detective Broadwater felt "nervous" and told him to "remain still[.]" Upon arriving at the police station, Detective Broadwater escorted the appellant to the interview room. According to Detective Broadwater, at no time at the motel, during the transport, or while the appellant was being escorted to the interview room did he or Detective Plummer ask the appellant any questions related to "the incident"; nor did the appellant ever say that he wanted to speak with an attorney.

The appellant testified that he and Detective Plummer had a conversation during the ride to the police station about his cell phone, but "it wasn't about no girlfriend." His version of events was that Detective Plummer already had the phone, passed it to him to enter the code to unlock it, but he refused to do so, saying the police needed to get a warrant. The appellant further testified that, during the ride but before the conversation about the

phone, he told Detective Plummer that he was "going to need a lawyer[,]" to which Detective Plummer responded: "[D]on't worry about that."

At the close of evidence, defense counsel argued that the appellant's statement to the police during the interview should be suppressed because the appellant had invoked his right to counsel during the ride to the station. The appellant did not present any evidence about the voluntariness of his statements to police and made no argument about that issue.

Following the hearing, the court issued a written order denying the appellant's motion to suppress. The court stated:

> The Court finds that the State has established by a preponderance of the evidence that there [has] been no violation of the dictates of *Miranda v. State of Arizona.* The credible evidence elicited at the hearing from Detective Broadwater was there was no questions and at no time did [the appellant] indicate a desire for counsel. Although [the appellant] has testified that he made such a statement, the testimony lacks credibility as [the appellant] has an obvious bias and motive to assert that the statement was made. In contrast, the Court finds Detective Broadwater's testimony to be credible and accepts it on this issue.

DISCUSSION

Before addressing the appellant's contentions, we shall set forth the relevant provisions of the Wiretap Act and the exemption from that act contained in the Criminal Procedure Article.

Under the Wiretap Act, as pertinent here, it is "unlawful" for a person to "[w]illfully intercept . . . any . . . oral . . . communication[.]" CJP § 10-402(a)(1). An "oral communication" is "any conversation or words spoken to or by any person in private conversation." CJP § 10-401(13)(i). "'Intercept'" means the aural or other acquisition of the contents of any . . . oral communication through the use of any electronic, mechanical,

or other device." CJP § 10-401(10). It is "lawful," however, "for a person to intercept a[n] . . . oral . . . 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 . . . ." CJP § 10-402(c)(3).[4] Thus, "[i]n enacting [CJP section 10-402(c)(3)], the General Assembly sought to protect those who do not know their conversation is being electronically intercepted[.]" *State v. Maddox*, 69 Md. App. 296, 301 (1986).

With exceptions not applicable here, "whenever any . . . oral . . . communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding before any court, [or] grand jury . . . if the disclosure of that information would be in violation of [the Wiretap Act]." CJP § 10-405. Because it is not unlawful to intercept a communication when the parties have consented to that being done, an interception is admissible against a party who has consented. *Adams v. State*, 43 Md. App. 528, 536 (1979); *see also State v. Maddox*, *supra*, at 301 ("[W]hen one party to a conversation expressly or implicitly consents to the recording of that conversation, the recording is admissible in evidence against the consenting party[.]").

Title 2 of the Criminal Procedure Article ("CP") governs "Law Enforcement Procedures; Arrest Process." It includes Subtitle 4, which pertains to "Custodial Interrogation." That subtitle provides at Md. Code (2001, 2008 Repl. Vol.), section 2-403

[4] An exception exists when 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." CJP § 10-402(c)(3).

that "[a]n audio or audiovisual recording made by a law enforcement unit of a custodial interrogation of a criminal suspect is exempt from [the Wiretap Act]." The public policy underlying the exemption is set forth in CP section 2-402, as follows:

> (1) [A] law enforcement unit that regularly utilizes one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audiovisual recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible; and
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> (2) [A] law enforcement unit that does not regularly utilize one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audio recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible.

Before the court below, the appellant maintained that the recordings of his statements to the police were obtained in violation of the Wiretap Act, and therefore were not admissible before the grand jury or at trial. On that basis, he sought to dismiss the indictment or, in the alternative, suppress the statements from evidence. He also sought to suppress his statements on the ground that they were obtained after he had invoked his right to counsel, in violation of *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), and on the additional ground that they were not voluntary. As explained, the court ruled that the Wiretap Act did not apply; that the statements were not obtained in violation of the appellant's right to counsel; and that the statements were given voluntarily.

The appellant contends the court erred in denying his motion to dismiss and to suppress evidence on a number of grounds. His first several arguments pertain only to the

portion of the interview that took place in Detective Beard's office and was recorded surreptitiously by Detective Plummer. For ease of discussion, we shall refer to that portion of the interview as "the second interview." The appellant argues that the recording of the second interview was not exempt from the Wiretap Act under CP section 2-403 because the officers were not a "law enforcement unit." He argues that the Wiretap Act was violated during the second interview because words he was speaking in a private conversation were intercepted by Detective Plummer's recording device, without his consent.

With respect to the interview conducted in the interview room, which we shall refer to as the "first interview," the appellant argues that the court should not have ruled that the recording was exempt under CP section 2-403 because the State did not make that argument. He also argues that the statements he made in the first interview were recorded in violation of the Wiretap Act because he did not consent to their being recorded.

Finally, with respect to the motion to suppress, the appellant argues that the court erred by finding that he did not invoke his right to counsel prior to being interviewed by the police and that his statements to the police were voluntary.

The State responds that the CJP section 2-403 exemption applied because the first and second interviews were recorded by "a law enforcement unit as defined by statute[.]" Moreover, the Wiretap Act did not apply in any event because the recordings were not of a "private conversation" and, even if they were, the appellant consented to being recorded.

We begin with the second interview. None of the appellant's arguments are availing for the simple reason that he did not present any evidence, or make any proffer, of any

inculpatory statement made during the second interview. The two inculpatory statements included in the agreed statement of facts were made during the first interview. These were the only statements referenced by the appellant at the suppression hearings. (Likewise, they were the only statements mentioned by the prosecutor in opening statement.) The appellant presented no evidence as to what inculpatory statements, if any, were submitted to the grand jury.

It is of no consequence whether the police violated the Wiretap Act during the second interview because there is nothing in the record to show that the appellant made inculpatory statements during that interview that should not have been introduced into evidence before the grand jury or should have been suppressed from evidence at trial. If, with respect to the second interview, the court erred in its Wiretap Act ruling (and we are not suggesting that it did), the error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638 (1976).

When the appellant made his two inculpatory statements, during the first interview, he was seated in an interview room equipped with video and audio recording devices. In arguing, with respect to the second interview, that the court erred in ruling that the exemption in CP section 2-403 applied, the appellant asserted that Officer Plummer was not a "law enforcement unit" and that allowing an individual police officer to surreptitiously record an interview did not advance the policies underlying the exemption, which are set forth in CP section 2-402(1). We have not addressed those arguments, for the reasons explained above. The appellant takes a completely different tack in arguing that

the exemption did not apply to the statements he made in the first interview. In his brief, he states:

> [A]dmittedly, the [first interview] occurred in a room equipped with recording equipment, consonant with the public policy that animates CP § 2-403. Nevertheless, the lower court erred in deciding this case under CP § 2-403 because the State bore the burden to demonstrate the admissibility of the statement[s], and the State never presented this argument to the lower court (and Mr. Roberts, commensurately, was never provided an opportunity to argue against it in the lower court). *See Epps v. State*, 193 Md. App. 687, 704-05, 1 A. 3d 488 (2010) (holding it is improper for a motions court to decide a Fourth Amendment issue on any basis which was not suggested by the State or the court prior to the ruling).

In other words, the appellant concedes that the first interview was recorded by a "law enforcement unit" and that recording the first interview was consistent with the purposes of CP section 2-403.[5] His only argument with respect to the CP section 2-403 exemption is that the court should not have ruled that it applied because the State did not make that argument below.

We disagree. It was the appellant who advocated, in his motions to dismiss and to suppress, that his inculpatory statements to the police were recorded in violation of the Wiretap Act and therefore were not admissible before the grand jury or at trial. A violation of the Wiretap Act only could be shown if the act applied to the recording at issue *and* the recording was unlawful under the act. It was the appellant's burden to show both.

[5] There is no definition of "law enforcement unit" in Title 2 of the Criminal Procedure Article, in which CP section 2-403 appears. The only definition of that term is in Title 10, Subtitle 1, "Expungement of Police and Court Records." It is defined as "a State, county, or municipal police department or unit, the office of a sheriff, the office of a State's Attorney, the Office of the State Prosecutor, or the Office of the Attorney General of the State." CP § 10-101(f). This is the definition the State points to in its brief.

As a matter of law, the Wiretap Act does not apply to the audio visual recording in an interview room of the custodial interrogation of a criminal suspect, because such a recording is exempt from the act under CP section 2-403. The appellant's failure to show otherwise, by not addressing the CP section 2-403 exemption at all, did not bind the court to ignore that exemption and proceed as if the Wiretap Act applied. And although it would have been preferable for the prosecutor to address the exemption, it was not the State's burden to show that the Wiretap Act did not apply; it was the appellant's burden to show that it did. Fortunately, the court figured out on its own that the exemption statute existed.

The case the appellant cites in support—*Epps v. State*, 193 Md. App. 687 (2010)—is inapposite. There, the defendant moved to suppress evidence under the Fourth Amendment. He showed that the police obtained the evidence in a warrantless search of his person. The State took the position that the defendant consented to the search. The court denied the motion to suppress on the ground that the evidence was obtained by a valid frisk under *Terry v. Ohio*, 392 U.S. 1 (1968), an argument that neither party had made. On appeal, we reversed. We pointed out that once the defendant showed that the search in question was warrantless, the burden shifted to the State to show that the search was reasonable. Because the State only argued that the search was reasonable because the defendant consented to it, and did not advance an argument based on *Terry*, we held that the motion court erred in relying upon *Terry* to rule that the search was reasonable under the Fourth Amendment. We noted that it was not fair to the defendant for the court to rule based on an argument that the State did not advance and therefore the defendant did not have an opportunity to respond to.

Here, unlike in *Epps*, the State did not bear any burden of proof on the issue whether the recording of the first interview was obtained in violation of the Wiretap Act. As explained, it was the appellant's burden to prove that the act was violated, which included proof that it applied at all, and therefore to prove that the recording was not exempt from the Wiretap Act. For the same reason, there is no merit in the appellant's complaint that, like in *Epps*, the process was unfair because he had no opportunity to argue about CP section 2-403 during the suppression hearing. As explained, the appellant should have been aware of that statute and addressed it when advancing his Wiretap Act argument. In addition, the court issued its ruling that the recording was exempt from the Wiretap Act on March 25, 2016, four days before the second suppression hearing. Defense counsel could have been asked to be heard on the exemption issue at that hearing, but did not do so. In fact, defense counsel could have done so at any time before the trial commenced on May 11, 2016.

The circuit court correctly ruled that the police did not violate the Wiretap Act by recording the first interview, because the recording was exempt from the Wiretap Act under CP section 2-403. Therefore, CJP section 10-405 did not apply, and the recording of the first interview was not rendered inadmissible on that basis.

The appellant proceeds to argue that the first interview was recorded without his consent, because he did not state affirmatively that he was consenting to it and because during that interview he said several times that he wanted to be interviewed in private. Consent only is an issue if the Wiretap Act applies, because recording the interview of a person who has consented to being recorded is not unlawful under the Wiretap Act. As we

have explained, the Wiretap Act does not apply. In the absence of the act applying, the appellant's rights under *Miranda* were all that mattered. He had the right to end the interview at any time. He did not do so, however. Rather, with full knowledge that the first interview was being recorded and that his statements could be used against him in court, he continued talking to the police.

The appellant next contends that the court erred in finding that appellant did not invoke his right to counsel when being transported by Detective Broadwater to the police station following appellant's arrest. At the second suppression hearing, Detective Broadwater testified that the appellant never said he wanted a lawyer or to talk to a lawyer. The court credited this testimony and found incredible the appellant's testimony to the contrary. The court's credibility determinations are afforded deference unless they are clearly erroneous, *Kusi v. State*, 438 Md. 362, 383 (2014), and there was no clear error here. The court did not err in rejecting the appellant's argument that he invoked counsel before making his statements to the police and therefore the statements were not admissible.

Finally, the appellant's contention that the court erred in ruling that his statements to the police were not voluntary fails for the same reason his arguments about the second interview all fail. His voluntariness argument is based solely on the second interview. (He maintains that his statements in that interview were not voluntary because he was deceived into making them by being told, falsely, that he would not be recorded.) Again, there are no inculpatory statements identified by the appellant that were made during the second

interview. Any error, and we are not saying there was any error, was harmless beyond a reasonable doubt.

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