

Circuit Court for Baltimore City
Case No. 116174007

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2633

September Term, 2016

JOSHUA ASHLEY

v.

STATE OF MARYLAND

Woodward, C.J.
Kehoe,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: November 27, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a jury trial in the Circuit Court for Baltimore City, Joshua Ashley was convicted of illegal possession of a regulated firearm and ammunition by a prohibited person. He was arrested after a foot chase by three members of the Baltimore City Police Department (“BPD”). Over the course of the chase, the dispatch recording captured several statements from various officers to the effect that Mr. Ashley had a gun. When Mr. Ashley was finally detained, no gun was found on his person, but officers recovered a loaded gun on a garage roof adjacent to where Mr. Ashley was seen throwing something. Mr. Ashley moved *in limine*, and moved again at trial, to exclude the statements on the dispatch recording as hearsay. The trial court denied the motions; it found that the officers’ statements were hearsay, but that they qualified as present sense impressions and thus were admissible. Mr. Ashley appeals and we affirm.

I. BACKGROUND

Mr. Ashley has prior felony convictions that prohibit him from owning or possessing a firearm or ammunition. On the night of June 7, 2016, an unmarked car containing three uniformed police officers pulled up outside of a convenience store, near where Mr. Ashley and several other men were standing. Detective John West drove the unmarked car, Officer Elvin Cruz was in the front passenger seat, and Sergeant Schmidt¹ sat in the back. Officer Cruz saw Mr. Ashley touch his waistband upon seeing the BPD, a sign, according to the officers’ training, of a concealed weapon. Detective West also spotted a bulge in Mr. Ashley’s waistband that resembled the outline of a weapon.

¹ The record does not reflect the Sergeant’s first name.

Officer Cruz approached Mr. Ashley to determine whether he had a weapon. As the Officer approached him, though, Mr. Ashley fled and a chase ensued. Mr. Ashley ran down the block and turned into a series of dark back alleys. Officer Cruz followed Mr. Ashley on foot while Detective West followed in the unmarked car. Detective West eventually left the vehicle to join Officer Cruz's foot pursuit after he spotted Mr. Ashley's "elbow come out from his waistband" with a black revolver in his hand, and Sergeant Schmidt took control of the car. As Officer Cruz and Detective West pursued Mr. Ashley through the alleys, Sergeant Schmidt radioed police dispatch to ask for assistance stating, "[h]e's got a gun. He's got a gun."

Officer Cruz also reported to dispatch that Mr. Ashley had a gun. As Officer Cruz began to pursue Mr. Ashley through the alleys, he noted that Mr. Ashley kept his hand on the right side of his waist band as he ran. At some point during the chase, Officer Cruz stated that he saw Mr. Ashley "trying to remove something from his front waistband" and saw a black revolver in Mr. Ashley's hand as he went around a corner. Later, Officer Cruz spotted Mr. Ashley's right hand "motioning of, like as if he was tossing something." Detective West was fifteen feet behind Mr. Ashley, and also saw the hand holding the black revolver "go up in the air."

Another officer parked nearby in a different car, Officer Vincenzo Julio, saw Officer Cruz and Detective West pursuing Mr. Ashley, and he cut off Mr. Ashley's escape route from the alleys. Officer Julio detained Mr. Ashley, and Officer Cruz and Detective West arrived shortly after to handcuff him. The officers did not find a gun on Mr. Ashley's person, but they searched the alleys where Mr. Ashley ran and discovered a loaded black

revolver on the roof of an adjacent garage, about five to ten feet from where Officer Cruz and Detective West had seen Mr. Ashley make a throwing motion. No fingerprints were recovered from the gun that linked it to Mr. Ashley, but Officer West and Detective Cruz both positively identified the black revolver recovered from the garage roof—State’s Exhibit #7—as the weapon they saw Mr. Ashley carrying.

Mr. Ashley was charged with illegal possession of the gun and ammunition. The State disclosed before trial that it intended to introduce the exchanges among the dispatcher and the officers recorded from the police radio dispatch system—known as the “KGA tape”—as part of its case against Mr. Ashley. The KGA tape was approximately twelve minutes long and included multiple statements to the effect that Mr. Ashley possessed a gun, including:

- “[n]umber 1 male running west on Erdman. He’s got a gun. He’s got a gun;”
- “[I]ike I said, number 1 male, white T-shirt, red shorts, short has a handgun;”
- “[h]e definitely had a gun in the dip;” and
- “[h]e threw a gun out of his waistband.”

The State did not attribute these statements to individual speakers, but did identify Officer Julio and Sergeant Schmidt as the primary speakers on the tape.

Mr. Ashley moved to exclude the KGA tape as hearsay. The trial court agreed that the statements were hearsay, but ruled them admissible under the present sense impression exception to the hearsay rule. Mr. Ashley noted a continuing objection to the KGA tape.

At trial, the State called Officer Cruz and Detective West, the two officers who pursued Mr. Ashley on foot, to testify; the State did not call Sergeant Schmidt. Mr. Ashley renewed his objection to the KGA tape when the State introduced it during Officer Cruz’s testimony. The trial court overruled the objection and noted Mr. Ashley’s continuing objection. Officer Cruz identified the voices on the KGA tape as his own and Sergeant Schmidt’s. Officer Cruz positively identified Sergeant Schmidt’s voice as saying, “[n]umber 1 male running west on Erdman. He’s got a gun. He’s got a gun,” but otherwise said that it was “hard to tell” which officer said what. During closing arguments, the State again referred to the KGA tape and argued that “[n]ow, if you don’t believe the officers, if you don’t believe the bodycam footage, if you don’t believe the audio recording, then I think it’s reasonable doubt and you should find the Defendant not guilty.” A jury found Mr. Ashley guilty of the charged crimes, and later the trial court sentenced him to eight years of incarceration. This timely appeal followed.

II. DISCUSSION

Mr. Ashley raises a single issue on appeal: did the trial court commit reversible error by allowing the KGA tape into evidence?² He argues *first* that by admitting hearsay statements with unidentified declarants into testimony, the court failed to hold the State to its burden of proving the statements qualified as present sense impressions. *Second*, Mr.

² In his brief, Mr. Ashley phrased the Question Presented as follows:

Did the trial court commit reversible error when it allowed into evidence, over objection, a tape recording containing inadmissible hearsay on the central issue in the case: whether Mr. Ashley in fact possessed a firearm?

Ashley argues that he was unfairly prejudiced by the tape and, as a result, his conviction should be reversed. The State responds *first* that the trial court properly admitted the KGA tape under the present sense impression exception, but *second*, that even if the tape was hearsay, the error was harmless. We don't reach the second question because we agree that the KGA tape was properly admitted under the present sense impression exception to the hearsay rule.

Trial judges have “broad discretion in the conduct of trials in such areas as the reception of evidence,” *McCray v. State*, 305 Md. 126, 133 (1985), and as such, appellate courts “extend the trial court great deference in determining the admissibility of evidence” and will reverse only upon a determination that the trial court abused its discretion. *Hopkins v. State*, 352 Md. 146, 158 (1998) (cleaned up). We treat hearsay differently, though. *Gordon v. State*, 431 Md. 527, 536 (2013). A trial court “has no discretion to admit hearsay in the absence of a provision providing for its admissibility,” *Bernadyn v. State*, 390 Md. 1, 8 (2005), and we review *de novo* whether proffered statements are hearsay in the first place. *Gordon*, 431 Md. at 536. After we determine whether a statement is hearsay, we determine whether it “falls within an exception to the hearsay rule.” *Id.* at 535. As we do that, “we review the [trial] court’s legal conclusions *de novo*, but we scrutinize [the underlying] factual conclusions only for clear error.” *Baker v. State*, 223 Md. App. 750, 760 (2015).

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Md. Rule 5-801(c). Hearsay *must* be excluded at trial unless the statement falls within an exception

provided by rule, statute, or constitutional provision. Md. Rule 5-802. The trial court determined that the KGA tape was hearsay under Md. Rule 5-801(c), but admitted it under the “present sense impression” exception to the hearsay rule. A present sense impression is a “statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.” Md. Rule 4-803(b)(1). Present sense impressions are presumed reliable because they are spontaneous, so “the time interval between observation and utterance must be very short.” *Booth v. State*, 306 Md. 313, 324 (1986).

Present sense impressions require “contemporaneousness, or near contemporaneousness, [to] reduce[] the chance of premeditated prevarication or loss of memory.” *Booth*, 306 Md. at 323. As such, present sense impressions “cast in opinion form” may be construed by the court as “a shorthand method of [the] statement,” “[s]o long as the language does not indicate a conscious deduction.” *Id.* at 325–26 (cleaned up). The declarant need not have been a participant in the perceived event, *id.* at 324–25, nor must a present sense impression be corroborated by an “independent and equally percipient observer,” *id.* at 327, so long as the “in-court witness serving as a testimonial conduit for an out-of-court sense impression declaration” conveys by his own personal knowledge “everything which was apparently open to the declarant’s faculties.” *Id.* at 328 (cleaned up). Finally, “[i]dentification of the declarant, while often helpful in establishing that he or she was a percipient witness, is not a condition of admissibility. When the statement itself, or other circumstantial evidence demonstrates the percipiency of a declarant, whether identified or unidentified, this condition of competency is met.” *Id.* at 325. In that instance,

however, the hearsay statement must have sufficient “indicia of reliability” to make it admissible. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

There is no dispute that the statements on the KGA tape made by officers who didn’t appear in court are hearsay. The statements contained on the tape were made outside the courtroom, some by people not there to testify, and the State sought to introduce them for the truth, *i.e.*, for the purpose of proving that Mr. Ashley in fact possessed a loaded gun. Nor does Mr. Ashley challenge the underlying fact that the KGA tape contains statements by BPD officers that were recorded in real time as they pursued him. On its face, then, the KGA tape has the minimum “indicia of reliability” to be admissible.

The question is whether the statements on the KGA tape fall within a recognized hearsay exception. Mr. Ashley disputes that the statements on the tape qualify as present sense impressions because, he says, the speakers have not been clearly identified and because the State could not establish that the speakers had the opportunity to observe personally whether Mr. Ashley possessed a gun. The trial court found that the statements on the KGA tape were made contemporaneously with the BPD’s pursuit of Mr. Ashley and therefore were admissible under the present sense impression.

We agree. The statements on the KGA tape were made and recorded as the declarants observed and described Mr. Ashley, Mr. Ashley’s actions, and their locations throughout the pursuit, information that was “apparent[] [] to the declarant’s faculties.” *Booth*, 306 Md. at 328. The contents of their statements were re-affirmed by the trial testimony of Detective West and Officer Cruz, the two BPD officers involved in the chase

of Mr. Ashley. Officer Cruz was able to identify Sergeant Schmidt’s voice on the KGA tape and to provide his own testimony about what happened as he pursued Mr. Ashley. Even though the State did not establish the identity of each declarant on the KGA tape definitively, all the other “circumstantial evidence demonstrate[d] the percipiency of [the] declarant[s]....” *Id.* at 325. As such, the circuit court did not err in allowing the State to play the KGA tape at trial, and thus no error to assess for harmlessness.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED. APPELLANT TO PAY
COSTS.**