Circuit Court for Queen Anne's County
Case No. C-17-FM-17-000186

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2156

September Term, 2018

ANGELA C. STOLTZ

v.

CHARLES C. CLARK, IV

Arthur,
Leahy,
Beachley,

JJ.

Opinion by Arthur, J.

Filed: May 31, 2019

The parties to this appeal are the parents of two teenaged daughters. Beginning in 2008, the children lived primarily with their mother in Maryland during the school year and primarily with their father in Delaware during the summer. In 2017, however, both parents made competing requests for modification of custody. The Circuit Court for Queen Anne's County awarded sole legal custody and primary physical custody of the older daughter (then 15 years old) to the mother and awarded sole legal custody and primary physical custody of the younger daughter (then 14 years old) to the father.

The mother has appealed. She contends that the circuit court erred in two ways: by excluding evidence of text-message communications between the children and their parents; and by interviewing the children without recording the interviews and without disclosing the substance of the interviews to the parties.

Because the record fails to show reversible error, the judgment will be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Angela Stoltz ("Mother") and Charles Clark IV ("Father") are the parents of L., born in August of 2002, and E., born in February of 2004. Mother and Father are not married to one another.[1] They have lived separately for nearly the entire lives of their two daughters. Father lives in Millsboro, Delaware, where he manages a residential community. Mother, a university professor, lives in Stevensville, Maryland, with her husband and their two younger children, who were born in 2009 and 2010.

[1] Father has asserted that the parties were previously divorced. Mother has asserted that the parties were never married to one another. Regardless of the merits of that controversy, it is undisputed that they were not married to one another during the pertinent time frame.

Mother first petitioned for custody of the parties' older daughter, L., in 2003 in the Family Court of the State of Delaware. On an interim basis, the parties agreed that they would share joint legal custody, that Mother would have primary physical custody, and that Father would have regular visitation. After a reconciliation period and the birth of their second daughter, E., the parties separated permanently in 2005. Father petitioned for primary physical custody of both daughters, and Mother countered with her own petition. The Delaware court ordered that, until the resolution of their claims, the interim agreement would remain in effect and would apply to both daughters.

In 2007, the Delaware court issued an order establishing equal residency for both parents on a temporary basis. Under the temporary order, the children resided with one parent during one week and with the other parent during the next week, while staying overnight with the non-residential parent once in the middle of each week.

A year later, the Delaware court determined that the equal-residency arrangement was no longer in the best interests of the children. The court awarded Mother primary physical custody of the children during the school year, while granting Father visitation every other weekend. The court awarded Father primary physical custody of the children during the summer months, while granting Mother visitation every other weekend. The court also established an annual vacation and holiday schedule. By a separate order, the court established Father's child-support obligation.

In 2011, Mother and her husband decided to relocate their family to Maryland, approximately 100 miles away from her Delaware residence, to accommodate her husband's change of employment. Father moved for an order prohibiting Mother from

moving the two daughters outside of Delaware and for a modification of custody. The Delaware court declined Father's request for primary physical custody during the school year, but granted him three extra weekends of visitation during each school year.[2] The parties then agreed to the entry of a supplemental order that established mutually convenient locations for custody exchanges.

For several years, both parents abided by the terms of the 2008 and 2011 custody orders. In early 2017, however, Mother refused to transport the children to a custody exchange and unilaterally suspended Father's visitation. Father petitioned the Delaware court to find Mother in contempt for violating the governing custody orders. He also petitioned the Delaware court to award him primary physical custody of both children.

In response, Mother instituted new proceedings in the Circuit Court for Queen Anne's County. She asked the circuit court to register the 2011 Delaware custody order pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. At the same time, she moved to modify that order. She requested sole legal custody of both children, primary physical custody of the children throughout the year, a supervision requirement for Father's visitation, and a recalculation of child support. The primary basis for her request for custody modification was her allegation that Father was "encouraging" a relationship between L. and a boy who was a few years older than L.

At the hearing in Delaware on Father's contempt petition, Mother admitted that she withheld the children from visitation after she read text-messages on the children's

[2] The Delaware court also found Father in contempt for violating an order that required both parties to participate in co-parenting counseling.

phones and learned that Father had permitted a 16-year-old boy to stay overnight at Father's house while the two girls were staying in the same house. Father explained that, on one occasion after returning home late at night from a trip to Ocean City, he had permitted the boy to sleep on a living room couch on the first floor, while the two daughters slept in their bedrooms upstairs. The Delaware court found Mother in contempt for violating the existing custody orders, directed her to restore Father's visitation rights, and granted Father additional visitation days to make up for the period in which Mother had denied him access to the children.

Meanwhile, the Circuit Court for Queen Anne's County confirmed the registration of the Delaware court's 2011 custody order, but stayed the proceedings initiated by Mother in Maryland pending the outcome of the proceedings previously initiated by Father in Delaware. The Delaware court then declined to exercise further jurisdiction, concluding that the Maryland courts were the more convenient forum for the custody modification proceedings. As a result, the circuit court lifted the stay of the proceedings.

In the circuit court, Father filed a counter-motion for modification of custody. He requested primary physical custody of both children, supervised visitation for Mother, and a recalculation of child support. Among other things, Father alleged that Mother had restricted his communication with the children by confiscating their phones, that Mother failed to communicate effectively with him about the children, and that Mother made false comments to the children about his health.

In his counter-motion, Father also alleged that both children wanted to live primarily with him. He asked the court to appoint a best-interest attorney to represent the

children. Over Mother's objection, the court appointed a best-interest attorney.

Father also moved to dismiss Mother's motion for modification of custody, arguing that it relied on allegations that the Delaware court had already rejected. Mother then amended her motion, omitting the allegations regarding Father's decision to permit the older boy to stay overnight at Father's house, but adding new allegations. Among the new allegations, Mother claimed that Father suffered from medical conditions that limited his ability to care for the children, that Father failed to communicate effectively with her about the children, and that Father had engaged the children in inappropriate conversations about his health and about the custody dispute. Father withdrew his motion to dismiss in light on Mother's assurances that she would not seek to relitigate the matters already addressed by the Delaware court.

Counsel for Father, counsel for Mother, and the best-interest attorney each submitted written statements for a pretrial conference under Md. Rule 2-504.2. The pretrial statement on behalf of the children included extensive information gathered from the best-interest attorney's conversations with the children. Most notably, the attorney asserted that both children "expressed a desire to spend more time with their father and prefer to live with him during the school year." The attorney stated that the children felt "frustrated with some of their mother's recent actions," including her restrictions on their phone use; that they did not "feel[] like they have any privacy" in their mother's house; that they "complain[ed] that their mother's house is always cold"; that they did not "always get along well with their step-father"; that they were "frustrated with being asked to watch their younger siblings on a frequent basis"; and that they felt "that their younger

siblings are favored in their mother's house." By contrast, the attorney stated that the children enjoyed staying at Father's home in Delaware and interacting with the residential community that Father manages as part of a family business. The attorney also noted that Father's family is part of the Nanticoke tribe and that the children enjoyed exploring their Native American heritage.

Soon after the filing of the pretrial statement, the preferences of the older daughter, L., underwent an abrupt reversal. In April of 2018, L. decided that she no longer wanted to see Father and refused to travel to Father's home for weekend visits. According to Father, L. never explained to him the reasons for her decision to stop visiting him. The best-interest attorney offered no insight into the deterioration of L.'s relationship with Father. Mother asserted that L. stopped visiting Father because he was not truthful about his reasons for missing a weekend visit in early 2018.[3]

Unlike L., however, the younger daughter, E., continued to visit Father without interruption.

The court scheduled the case for a one-day trial on May 2, 2018. One week before the scheduled trial date, Father moved for a continuance because he was hospitalized for emergency medical treatment. The best-interest attorney consented to the request for a continuance, but Mother objected. The court granted the motion and postponed the trial until May 31, 2018.

Two weeks later, the best-interest attorney gave notice that she was "leaving her

[3] The circuit court did not credit Mother's explanation.

firm" effective on the day after the trial. The notice stated that the attorney would "not be able to take or retain private cases at her new position" and that she would "not be available" for any proceedings after the scheduled trial date. The court approved her request to withdraw from the representation of the children.

Two days before trial, Father filed a motion in limine seeking to exclude evidence allegedly obtained by Mother in violation of the Maryland Wiretap Act.[4] Father claimed that Mother had "installed one or more applications" on the children's phones "to surreptitiously intercept . . . their text message communications" without their consent, including "private text message conversations" between the children and Father. Father cited the pretrial statement from the best-interest attorney, who had written that L. told her that Mother used "surveillance apps" on the children's phones "to monitor all of their social media and texting communications in real time." Father asked the court to exclude "all unlawfully intercepted communications and evidence derived therefrom[.]"

Mother denied the accusations that she had "intercept[ed]" any electronic communications. Mother explained that she used a feature of her family phone plan to track the phone numbers of the persons with whom the daughters were communicating and the frequency of those communications, but not to view the contents of those communications. She asserted that her children had, at times, shared certain text-messages with her, either at her request or of their own accord.

On the morning of trial, the court heard argument regarding Father's motion in

[4] Md. Code (1974, 2013 Repl. Vol.), §§ 10-401 through 10-414 of the Courts and Judicial Proceedings Article ("Wiretapping and Electronic Surveillance" subtitle).

limine, but did not take any evidence on the matter. The court granted the motion, reasoning that, even if the children shared the messages with Mother, "any intercept would be . . . illegal" under the wiretap statute. The court also opined that it would be "inappropriate" to use the children's text-messages with their parents in a custody case.

The main source of evidence at trial was testimony from Mother and Father. Overall, Mother said that she desired a change in custody because she thought that the children needed "some protections that they don't get," in her view, at Father's house. For his part, Father expressed his regret that he had not been allowed to spend more time with his daughters and his hope that one day they would take over his family's business and continue to own his land rather than sell it.

Mother's testimony revealed a contrast in how the two daughters were faring in Mother's household. L., then a 15-year-old high school student, was thriving academically, was involved in sports and music lessons, frequently helped with housecleaning, and had recently improved her relationship with Mother's husband. Mother described L. as "completely relaxed" and "engaged with family and friends" since L. had stopped visiting Father. By contrast, Mother and her husband were experiencing some challenges with E., who was then a 14-year-old middle-school student. In Mother's words: "All of a sudden she's unhappy."

Although E. had always been an "incredible student," Mother had recently received a report from one of E.'s teachers that she was failing a class for the first time. E. managed to restore her usual high grades after Mother persuaded E. to complete missing assignments for that class. Mother also said that E. had recently started "refusing

to get up for school" without parental prodding. Mother reported that, because E. refused to clean her room at Mother's home, the room was now "filled with trash and old food" and dirty laundry. Mother said that E. had experienced "dramatic weight gain" in the previous year, despite efforts by Mother and her husband to encourage exercise and healthy eating habits. In addition, E. had started "physically bullying" her younger half-siblings and had "become very combative" at home, through "yelling" and "cussing" at Mother and Mother's husband. Mother reported that "relationships with [E.] among all family members [had] become very difficult" because of E.'s "outbursts and aggression."[5] Mother attributed E.'s behavior to "stress" from the custody dispute.

Mother's husband, in his testimony, confirmed the differences in the behavior of the two daughters. Mother's husband reported that his relationship with L. was "going better than" it had "ever been." He said that E. was "a bit of a challenge[,]" that she had been spending a great deal of time in her room lately, and that he generally tried to "stay out of [her] way."

In his testimony, Father described his parenting style as "180 degrees different" from that of Mother. Father said that, instead of "always telling [them] what to do," his approach was "to get inside their head and talk with them." Father said that "there isn't anything" that he and his daughters "cannot talk about." He emphasized that he always tried to respect his daughter's privacy. According to Father, he had never experienced conflicts with E. like those described by Mother. He said that, if he ever did see her show

[5] Mother admitted that, in one incident, Mother lightly slapped E. across the face because E. was "cussing" at Mother and refusing to go to her room.

those types of behaviors, he would try to "sit her down and ask her why she's behaving this way" and to "work through with her other ways of dealing with whatever was bothering her."

Father also offered testimony from one of his tenants, a close friend who had been helping him with household tasks after his recent hospitalization. Father's friend described the relationship between Father and his two daughters as an "extremely close relationship" in which they "seem[ed] to be able to talk about anything." She also observed that E. appeared to enjoy spending time with friends in the neighborhood whenever E. visited Father's home.

During the trial, the best-interest attorney requested that the court conduct interviews of the two children. Neither parent objected to that request. Later, the court took a break from the testimony to interview the children in chambers. The interviews were neither recorded nor transcribed. When the trial resumed, the judge announced that he had had "a nice conversation" with the children, but did not disclose the content of the interviews to the parties.

At the conclusion of the trial, the court instructed the best-interest attorney to deliver her closing remarks orally, because it was the final day of her representation, and instructed counsel for the parties to submit their arguments in writing. Before concluding the proceedings, the judge mentioned that, during the interviews, he had asked the children for their input on how they wanted the court to decide the custody dispute. The judge remarked that he was "always disinclined to separate siblings, especially two young ladies of the ages of [L.] and [E.], but in talking with them and hearing the

testimony[,]" he was "convinced that in this case, it [was] going to be warranted, sadly."

One month after the trial, the court issued a memorandum opinion explaining its decision that the best interests of the two children would be served "by placing [L.] in the care and custody of her mother and [E.] in the care and custody of her father[.]"

The court found that the existing custody arrangement was no longer viable because the parents had shown that they were not capable of making shared decisions about the children's lives. The court found that both parents were fit caregivers, sincere in their desires for custody, and capable of providing suitable homes for their daughters.[6] The court commented that Mother has "control issues" in that she "tends to pry into her children's personal lives." The court credited Mother's testimony that she monitors the children's phone usage "in order to keep [them] safe," but nevertheless opined that Mother's "constant intrusion" was "possibly a basis for the girls' earlier indication that they wished to live with their father."

The court expressed its belief that "both parties" often told the children "exactly what is going on in the [custody] case" and its concern that "in doing so, the parties" were "attempting to manipulate the children." The court found that the most plausible explanation for L.'s sudden change in attitude towards Father was that L. had been "improperly influenced and coached in order to support sole physical and legal custody." By contrast, the court attributed E.'s recent "acting out" to "endogenous causes" (namely, her unhappiness in Mother's household), rather than "manipulation" by Father.

[6] The court noted Mother's "general, unsubstantiated claims" about Father's health, but did not find that Father's "health issues impact on his fitness as a parent."

In the court's 16-page opinion, it made several references to the respective preferences of the two children, including the preferences that they had expressed in the interviews. In the court's assessment, both children possessed "considered judgment and the ability to make rational decisions." The court described them as "intelligent, bright, articulate," "matur[e] for their biological ages" of 15 and 14, and "remarkably well adjusted" despite the family turmoil.

The court said that "[L.'s] relationship with her father deteriorated to the point where she abruptly refused to visit with her father and has since indicated that she now does not even want to see or speak with him." The court also said that, "it is abundantly clear that [L.] wants to live with her mother and [her mother's husband] and have almost nothing to do with her father."

On the other hand, the court said that E. remained "absolute and adamant that she wants to live with her father in Delaware." The court noted that E. "does not enjoy a healthy relationship with her mother and step-father"; that, according to Mother, "[E.] 'is incredibly unhappy'"; that E. "is deeply interested in her Native American heritage and family culture"; that E. "wants to be involved in the family business affairs"; that E. has "friends near her father's house in Millsboro, Delaware and appears to be looking forward to switching schools and school districts"; and that E. wished to maintain visitation at her Mother's household but was unconcerned with the prospect of being separated from other family members.

On July 5, 2018, the circuit court issued a judgment awarding sole legal custody and primary physical custody of L. to Mother and awarding sole legal custody and

primary physical custody of E. to Father. In a supplemental order, the court set the visitation schedule and imposed a number of conditions on parental behavior.

In a timely motion to alter or amend the judgment, Mother raised a litany of complaints about the court's decision. The court denied Mother's post-judgment motion on August 13, 2018, without any further written opinion. Mother then filed a timely notice of appeal.

As a result of mediation, the parties agreed to a partial resolution of issues regarding the supplemental order on access and parental behavior. This Court ordered a limited remand to permit the circuit court to consider their joint application for a consent order modifying certain provisions of the supplemental order. The circuit court entered the consent order at their request. This appeal then proceeded on Mother's challenge to the underlying custody determination. Mother and Father submitted appellate briefs, but no brief was filed on behalf of the children.

Meanwhile, the circuit court resolved the issue of child support in a separate order. Mother appealed from that order, and Father cross-appealed. Their appeals from the child-support order are part of a separate case and are not before the Court at this time.

DISCUSSION

In this appeal, Mother raises two challenges to the custody determination. First, she contends that the trial court committed reversible error by granting Father's motion in limine to exclude evidence of text-message communications between the children and their parents. Second, she contends that the trial court committed reversible error by conducting interviews of the children without recording the interviews or disclosing the

content of the interviews to the parties.[7]

Mother asks this Court to reverse the judgment and remand the case for new evidentiary proceedings, including a consideration of developments that have occurred since the trial. As the appellant, Mother bears the burden "to show prejudice as well as error." *Gillespie v. Gillespie*, 206 Md. App. 146, 169 (2012) (citation and quotation marks omitted). To meet this burden, the party complaining of error by a trial court "must show more than that prejudice was *possible*; she must show that it was probable." *Id.* (citation and quotation marks omitted) (emphasis in original). In this case, even if the record is sufficient to show error by the trial court, Mother is "unable to carry her burden of demonstrating prejudice" from the errors. *Id.*

I. Exclusion of Evidence of Text-Messages

Mother contends that the court erred when it granted Father's preliminary motion

[7] In her appellate brief, Mother posed the following two questions:

> I. Whether the Court, in its desire to 'insulate the children from what goes on in the courtroom,' committed clear error by issuing a final, pretrial ruling that excluded an entire category of parent-child communications – specifically, all text/electronic communications from Appellee to the children – from being used as evidence in a custody trial, due preliminarily to the Chancellor's personal belief that allowing the use of such communications would be "inappropriate"?
>
> II. Whether, in a custody case, where the Court conducted interviews of each minor child off-the-record without (1) notifying the parties and counsel that the interviews would not be recorded, (2) obtaining an affirmative waiver from each party to conduct the interviews off the record, and (3) making any report whatsoever to the parties following the interviews regarding their content, the Court committed reversible error when it relied heavily upon the information garnered from the interviews as a basis to modify and split custody of the children/siblings?

to exclude evidence of parent-child text-messages, based on Father's allegation that Mother "intercepted" those text-messages in violation of the Maryland Wiretap Act.

In his motion in limine filed two days before the trial, Father asserted: "Upon information and belief, [Mother] has installed one or more applications on the minor children's cell phones to surreptitiously intercept and eavesdrop on their text message communications, and possibly other electronic and telephone communications as well[,]" including "private text message conversations between the minor children and [Father]." He further asserted: "Upon information and belief, neither minor child . . . had provided prior consent to these surreptitious interceptions of their electronic communications." Father electronically signed a statement purporting to "affirm under penalties of perjury" that the facts stated in his motion were "true and accurate."

Father's assertions were based, in part, on Mother's disclosures during discovery of text-messages obtained from the children's phones. Although it appears that Mother produced a large number of text-messages, only one text-message exchange made it into the record, as part of Mother's response to the motion in limine. An exhibit to the response, which is neither dated nor authenticated, appears to show part of a text conversation between L. and Father regarding her refusal to visit him.

The primary basis for Father's allegations was the pretrial statement filed by the best-interest attorney on behalf of the children. According to the attorney, L. said that, after Mother had learned that Father had permitted a boy to stay over one night at Father's house, Mother "placed an app on each of the girl's phones that allows her to monitor all of their social media and texting communications in real time." The attorney

described the technology as a "surveillance app[]." The attorney also asked the court to require that "[r]eal time monitoring of [L.'s] and [E.'s] communications cease" and that "the app be removed from their phones."

In arguments on the morning of trial, counsel for Father asserted that the court would "hear testimony" about "an app . . . placed on the children's phones in part through the Verizon plan[.]" Father's attorney said that he was "not fully familiar with the app itself" and did not "fully understand it[.]" Nonetheless, he alleged that Mother used this "app" to "intercept" text-message communications between Father and his daughters. Father's attorney argued that, under Maryland's Wiretap Act, the intercepted "communications and any information gathered from those communications" could not be admitted into evidence.

In her written response filed on the day before trial and in arguments on the morning of trial, Mother disputed the factual premise of Father's motion. Mother admitted that she used "an app" through her family phone plan to track the phone numbers of persons with whom the daughters were communicating and the frequency of those communications, but not to view the content of those communications. According to Mother's counsel, the app merely shows, "for example, that on a particular day her daughter might have texted someone 10 times[.]" She asserted that "[n]othing was intercepted . . . in real[ ]time." Mother also asserted that the children had, at times, voluntarily shown her certain text-messages, including messages from Father.

Counsel for Mother told the court that she was in possession of copies of the text-messages that she intended to introduce during trial, and that all of those messages had

been disclosed during discovery. Nevertheless, her counsel did not present the documents to the court, nor did she make a proffer of the substance of the messages.

The best-interest attorney took no position on the motion, but merely said that the children "in the past ha[d] expressed a concern about the general phone monitoring that ha[d] been going on."

The court made the following ruling:

> The Court is going to grant [Father's] motion. There is no exception to the wiretap or the intercept statute. Even if the messages were shared by [L.] and [E.] with their mom, that doesn't change the fact that any intercept would be inappropriate and illegal. But more importantly, these children should not be used in this litigation in any way at all. They should be insulated from what goes on in his courtroom and to use their text messages between their father and themselves in a case involving their custody is inappropriate in the mind of this Court.
>
> These young ladies really don't need to know that their text messages with their father or from their father will be admitted in evidence in this courtroom. I'm therefore going to grant the motion and I'm not going to permit the admission of text messages between these two young ladies and either parent in this courtroom.

The only trial testimony about Mother's monitoring of her daughters' phones came from cross-examination of Mother. Consistent with her pretrial assertions, Mother testified that her family phone plan allowed her to monitor the children's phone use, but not to read the content of their communications. Mother said that she read text-messages from her daughters' phones only when they turned over the phones at Mother's request or when they showed her messages of their own accord.

On appeal, Mother argues that the trial court erred in granting Father's motion in the absence of evidence showing that Mother had, in fact, "intercept[ed]" any electronic

communications within the meaning of the Maryland Wiretap Act.

The Act generally makes it unlawful for any person to "[w]illfully intercept . . . any wire, oral, or electronic communication[.]" Md. Code (1974, 2013 Repl. Vol., 2015 Supp.), § 10-402(a)(1) of the Courts and Judicial Proceedings Article ("CJP"). The Act prohibits the willful disclosure or use of the contents of a communication if a person knows or should know that the information was obtained through an "interception" prohibited by the Act. CJP § 10-402(a)(2)-(3).[8] Subject to certain exceptions, "whenever any wire, oral, or electronic 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 in or before any court . . . of this State. . . if the disclosure of that information would be in violation" of the Act. CJP § 10-405(a).

As used in the Act, the term "'[i]ntercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." CJP § 10-401(10). As Mother points out, this Court has construed this term "'intercept' as requiring 'acquisition contemporaneous with transmission' of the messages." *Martin v. State*, 218 Md. App. 1, 19 (2014) (quoting

[8] Under the Act, it remains lawful "[f]or a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect . . . a user of that service[] from fraudulent, unlawful, or abusive use of the service." CJP § 10-402(c)(8)(ii). In addition, under CJP § 10-402(c)(3), it is lawful "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."

Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 878 (9th Cir. 2002)), *cert. denied*, 440 Md. 463 (2014), *cert. denied*, 135 S. Ct. 2068 (2015). "That is to say, an 'intercept' does not occur when, conversely, the electronic communication was in storage at the time of acquisition." *Martin v. State*, 218 Md. App. at 19. Thus, under the Act, a person does not "unlawfully 'intercept' text messages" from a cell phone if those messages were "already stored in that phone, having already been sent and received before [the person] gained access to them." *Id*.

Moreover, this Court has held that text-messages found on a cell phone are not subject to exclusion under the Act, because the Act "prohibits only interceptions that occur 'through the use of any electronic, mechanical, or other device.'" *Martin v. State*, 218 Md. App. at 19 (citation omitted). The Court reasoned that "a cell phone is not a 'device'" under the Act, because the Act "specifically excludes 'telephone' from the statutory definition of 'electronic, mechanical, or other device[.]'" *Martin v. State*, 218 Md. App. at 19 (citation omitted).[9]

Mother argues that "there is no basis in the record to conclude that an 'intercept' occurred" within the meaning of the Act. Although Mother admitted that she had installed an application on the children's phones, Mother explained that the application "does not record or otherwise acquire the content of any communications." Mother

[9] Under that exclusion, the term "'[e]lectronic, mechanical, or other device[,]' as used in the Act, does not include a "telephone . . . furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business[.]" CJP § 10-401(8)(i).

admitted that she did obtain text-messages from the children's phones, but she asserted that those text-messages were either messages "that the children shared with her" by choice or messages "that [she] reviewed after asking the girls to see their phones."

Father acknowledges that "the extent to which the court relied" on the Wiretap Act in granting the motion "is not obvious[,]" but he insists that the court had "ample information and evidence" upon which to find that Mother "intercepted" text-messages. Father suggests that his written motion itself included the necessary evidence because he filed his motion "under affidavit." Yet even by the more lenient standards that a court may use to decide preliminary questions on admissibility of evidence (*see* Md. Rule 5-104(a)), it is difficult to see how a court might find by a preponderance of the evidence (*see, e.g.*, *Crane v. Dunn*, 382 Md. 83, 92 (2004)) that Mother had intercepted any communications.

Father's allegation that Mother "intercepted" private text-message conversations was little more than a legal conclusion, devoid of the specific facts that are needed to evaluate whether Mother's conduct met the statutory definition. More importantly, Father made that allegation based on "information and belief," not on his personal knowledge of the matter. Father tells us that the statements from the motion were based on representations made in the best-interest attorney's pretrial statement. As Mother points out, however, pretrial statements "are not evidence." Even if they were, Father offered the statement for a hearsay purpose: to establish the truth of what the attorney heard the child say that Mother did. Mother herself appeared to be the only witness with knowledge of the matter. Even if the court disbelieved Mother's denials, a fact-finder's

"disbelief is not evidence in and of itself." *Grimm v. State*, 447 Md. 482, 506 (2016).

In addition to his arguments about the Wiretap Act, Father attempts to rely on the trial court's comment that it considered the use of text-messages between a parent and child to be "inappropriate" in a custody case. He notes that a trial court must exclude irrelevant evidence (Md. Rule 5-402) and that a trial court has discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Yet Father fails to explain how the court could have made any determinations of relevance and probative value in a categorical fashion.[10] Depending on the circumstances, some text-messages between a parent and child might be highly relevant and probative in a custody dispute, while others might have little to no evidentiary value.

Mother argues that, "[d]espite the [c]ourt's presumably good intentions, its ruling was contradictory to its charged duty to marshal the applicable facts and evidence[.]" She emphasizes: "This is not a situation in which the [c]ourt erroneously excluded *a specific piece of evidence of testimony* from being utilized at trial, whereby an assessment could be made regarding whether said exclusion was harmless or, on remand, how consideration of that piece of evidence would impact the [c]ourt's judgment." (Emphasis in original.) She asserts that admitting text-messages into evidence "could have" affected the court's determination in any number of ways.

[10] If the court actually did grant the motion on those grounds, the court did so on its own initiative without giving Mother the opportunity to address those grounds.

Mother's argument exposes its own flaw: the substance of the excluded evidence remains unknown. "Error may not be predicated upon a ruling that . . . excludes evidence unless the party is prejudiced by the ruling, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." Md. Rule 5-103(a)(2). Accordingly, if a party moves in limine to exclude evidence "the appropriate response by the opposing party is a proffer of the evidence that it seeks to introduce." *Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 60, *aff'd on other grounds*, 346 Md. 679 (1996). "Generally, to be sure to preserve the right to complain on appeal about the granting of an opponent's pretrial motion that bars admission of certain evidence, counsel must make an offer of proof . . . at trial." 5 Lynn McLain, *Maryland Evidence: State and Federal* § 103:19(a)(i), at 110.

There are some "special circumstances when an offer of proof is not required after the court has made a pretrial ruling excluding evidence." Committee Note to Rule 5-103(a). In *Prout v. State*, 311 Md. 348, 353-57 (1988), the Court of Appeals held that a criminal defendant preserved his challenge to a preliminary ruling precluding the defendant from introducing evidence of a witness's prior convictions, even though the defendant made no subsequent proffer of the evidence at trial. At the time of the ruling, the defendant informed the court of the crimes of which the witness had been convicted and the date of each prior conviction. *Id.* at 351. The Court explained that, when a trial judge resolves a motion in limine "by clearly determining that the questionable evidence will *not* be admitted, and by instructing counsel not to proffer the evidence again during

trial," an objection by the proponent "is preserved for review without any further action[.]" *Id.* at 356 (emphasis in original). Because the trial court in the case "specifically instructed defense counsel not to ask the witness any questions about the[] prior convictions[,]" the Court concluded that the trial court had made "a final ruling" on the issue of admissibility of the convictions, which was subject to appellate review. *Id.* at 357-58.

By its terms, *Prout* deals with the timing of a proffer, not the adequacy of a proffer. The *Prout* doctrine may, under some circumstances, obviate the need to make a second, duplicative proffer during trial; it does not, however, relieve a party of its obligation to make an adequate proffer in the first instance, at the time of an exclusionary ruling. In applying *Prout*, courts have still looked to ensure that the proponent of the evidence made an adequate proffer of the excluded evidence at the time that the court made its ruling. *See Simmons v. State*, 313 Md. 33, 38 (1988) (holding that, where defense counsel "advised the court on the record as to the substance of the proposed testimony and its relevance" and where neither the State nor the court requested "that defense counsel further particularize the proffer[,]" defense counsel had no need "to make a more specific proffer" at trial to preserve the issue for appellate review); *Davis v. Petito*, 197 Md. App. 487, 506-07 (2011) (reasoning that a mother made "an adequate proffer" of excluded expert witness testimony by describing the anticipated testimony through expert witness designations), *rev'd on other grounds*, 425 Md. 191 (2012); *Pepper v. Johns Hopkins Hosp.*, 111 Md. App. at 60 & n.5 (holding that the appellants preserved an issue of exclusion of evidence by responding to a motion in limine with an

"extensive" and "legally adequate proffer").

In this case, the trial record does not include the copies of the text-messages that Mother hoped to introduce, nor does it include any summary of the substance of those messages. Without an adequate proffer, this Court is unable to evaluate the potential prejudice to Mother from the exclusion of text-messages. At most, this record shows a mere possibility, but not a probability, that the ruling prevented Mother from offering evidence that might have advanced her claim for custody.

The only text-message exchange in the record, an exhibit attached to Mother's response in opposition to the motion in limine, fails to "demonstrate that [any] prejudice was 'likely' or 'substantial.'" *Gillespie v. Gillespie*, 206 Md. App. 146, 169 (2012) (quoting *Barksdale v. Wilkowsky*, 419 Md. 649, 662 (2011)). The record includes a document showing what appears to be part of a conversation between Father and L. regarding her decision not to visit him. On its face, the excerpt shows that Father told L. that he respected her decision. In light of the court's decision to *grant* Mother sole legal custody and primary physical custody of L., as Mother requested, it is difficult to imagine how Mother may have suffered prejudice from the exclusion of this piece of evidence.

In her motion to alter or amend the judgment, Mother asked the court to reconsider its in limine ruling and to reopen the case to permit her to offer "text record evidence[.]" Mother did not, however, include any documents to show what the evidence might be. She offered her own vague descriptions of Father's text-messages to L., which Mother characterized as "inappropriate" and "harmful." Mother did not even hint at the substance of any text-messages from Father to E., aside from one assertion that the

court's decision prevented her "from substantiating" her claims that Father "began engaging in inappropriate conversations with [L.] and [E.]" immediately after Mother requested a modification of child support.

Given that the court had already modified custody of L. in Mother's favor and that Mother offered no specific information about Father's text-messages to E., it was entirely appropriate for the court to decline Mother's request to vacate the judgment for the purpose of receiving additional evidence about text-messages from Father to the children. Under the circumstances, "we are not persuaded that the trial court's denial of the motion to alter or amend was 'far removed from any center mark imagined.'" *Cent. Truck Ctr., Inc. v. Cent. GMC, Inc.*, 194 Md. App. 375, 398-99 (2010) (citing *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418-19 (2007)) (further citations omitted).

II. Unrecorded Child Interviews

In a second challenge to the judgment, Mother contends that the court erred by conducting interviews of the two children without recording the interviews and without disclosing the content of the interviews to the parties.

During trial, the best-interest attorney asked the court to interview the two children outside the presence of the parties. Neither parent objected to that request. The trial judge commented that it was "not normally [his] practice to have a conversation with the children[,]" but said that he thought that it "m[ight] be helpful" in this particular case. The judge said that he ordinarily tries not to "put the children in a position of having to choose sides." The best-interest attorney responded: "They're already pretty much there." Mother's counsel agreed with that observation.

The logistics of the interview were complicated, because the trial judge was a retired, visiting judge, who had little room in his chambers in the small, eighteenth-century courthouse in Queen Anne's County. In a discussion about the logistics, the court said that it would conduct the interview in the jury room, and the parties agreed that counsel for the parents would not be present.

During those discussions, the best-interest attorney made the following cryptic comment: "Because I would like to preserve as much as possible, anything they say doesn't get out." The court responded: "I agree." A moment later, the court added that it wanted the children to feel comfortable and did not want them in a position that they would later regret. The attorneys for both parents were present during that conversation, and neither objected.

When the children arrived later in the afternoon, the judge took a break in the testimony to speak with them, one at a time, in chambers with the best-interest attorney present. Less than an hour later, the judge returned and announced: "As you know, I have talked to both young ladies in chambers and I had a nice conversation with both [L.] and [E.]" The trial then resumed. No one asked the judge to read a transcript of the interview or to disclose what he had asked and what the children had said.

On the day after trial, Mother submitted a written request for a transcript of the entire trial proceedings as promptly as possible. To meet a court-imposed deadline on the submission of written closing arguments, however, Mother's counsel submitted her closing argument before those transcripts were available.

Because Mother's counsel had withdrawn her appearance shortly after trial,

Mother represented herself in connection with the post-trial motions. Mother's motion to alter or amend the judgment included a claim that the "video recorded interviews of the children" did not support the best-interest attorney's pretrial claims that the children wanted to live with Father during the school year. Opposing the motion, Father's counsel asserted that, to the best of his knowledge, video recordings of the interviews did not exist.

Separately, Mother wrote to the court, asserting that she had obtained the transcripts of the trial proceedings, but that "[t]hose transcripts did not contain the children's testimony, which weighed heavily" in the court's decision. (Emphasis in original.) Mother requested either a "transcript of the children's testimony" or an opportunity "to review the video testimony they provided" at trial. The court denied the request, stating that interviews were "not recorded" because the trial judge had spoken to the children in a room without recording equipment.

On appeal, Mother contends that the trial court erred by conducting these unrecorded interviews of the children. She asserts that, since *Marshall v. Stefanides*, 17 Md. App. 364 (1973), this Court has repeatedly held that child interviews in custody cases must be recorded by a court reporter unless the parties affirmatively waive that requirement.

In *Marshall v. Stefanides*, 17 Md. App. at 367, a chancellor overruled a mother's objection to interviewing two children, ages eight and six, in chambers and excluded the parties and their counsel from the interview. Afterwards, the chancellor did not reveal the substance of the children's statements. *Id.* The chancellor awarded custody to the

father and explained that its determination relied to a great extent on information gathered during the interview. *Id.* at 367, 370 n.4. Because the interviews took place after the father's testimony and because the chancellor appeared not to have excluded the children from the courtroom, this Court assumed that the children heard the father's testimony. *Id.* at 369. Accordingly, our predecessors agreed with the mother's argument that, because the children were "possibly schooled" by the father's testimony and because the mother had a "total lack of knowledge" of what the children told the chancellor, "the interview was fundamentally unjust." *Id.* at 369. "[U]nder the circumstances of th[e] case," the interview "constitute[d] reversible error[.]" *Id.* at 370-71.

More generally, this Court determined that a trial court may, in its discretion, interview a child in a custody case even without the consent of the parties or the presence of counsel. *Marshall v. Stefanides*, 17 Md. App. at 369. "[U]nless waived by the parties," however, "the interview must be recorded by a court reporter." *Id.* "Immediately following the interview," moreover, its contents must "be made known to counsel and the parties." *Id.* One purpose of this requirement is to ensure that "some means of appellate review of the interview is available." *Id.* at 369-70.[11]

According to our predecessors, this procedure is designed to "minimize[], as much as possible, the psychological impact on the child, and at the same time allow[] interested

[11] In 1973 our predecessors asserted that a court reporter must read the shorthand record of the interview to the parties and their counsel. It is, however, unclear how that requirement is to be met today, when many courts have dispensed with court reporters in favor of recording equipment. It may take days or weeks to transcribe the recording that must be read to the parties and their counsel.

parties to produce all the evidence that is necessary to enable the court to arrive at a fair and just determination in accordance with the best interest of the child." *Id.* at 370. Subsequent opinions have endorsed the practice of "providing to the excluded party a recorded copy of a child's interview that occurs out of the presence of a party." *In re Maria P.*, 393 Md. 661, 678 (2006).

This Court has further held that "the record must affirmatively show the waiver" of the court reporter's presence. *Nutwell v. Prince George's County Dep't of Soc. Servs.*, 21 Md. App. 100, 110 (1974). Under various circumstances, this Court has concluded that a party waived the right to complain on appeal of the failure to record a child interview or to disclose its contents. *See Lemley v. Lemley*, 102 Md. App. 266, 288 n.4 (1994) (observing that "the parties waived their right to have the interview recorded"); *Shapiro v. Shapiro*, 54 Md. App. 477, 480 (1983) (holding that parent waived objection to court reporter's failure to read interview to his counsel but not to him, because he did not raise that objection in the trial court); *Denningham v. Denningham*, 49 Md. App. 328, 331 n.3 (1981) (observing that, although "[t]he court interviewed the children in chambers, alone apparently without even a court stenographer," "the correctness of that procedure" was not before the Court, "[b]ecause the private interview and the exclusion of even a court reporter was without objection and because appellant ma[de] no complaint about it in this appeal"). This Court has also said that, "even though the parties can affirmatively waive the presence of a reporter" for a child interview, "the better practice is to have a reporter present in order that a complete record will be available on appeal." *Id*. at 331; *accord* Cynthia Callahan & Thomas C. Reis, *Fader's Maryland*

Family Law § 5-7[b], at 5-44 (6th ed. 2016) (suggesting that "regardless of parental permission, the court should only rarely conduct a child interview off the record").

Father argues that Mother waived the requirement that the court create some record of the interview with the children. His argument has some force: Mother did not object when the court agreed with the best-interest attorney's cryptic comment that she did not want anything the children said to "get out." Furthermore, after the interviews ended, Mother did not ask the court to read a transcript, or play a recording, or provide copies of a recording, or inform the parties about what had occurred. Both of those omissions suggest that Mother may have known or agreed that the court would make no record of the interviews. In our judgment, however, Mother ambiguous omissions do not amount to the "affirmative waiver" (*Nutwell v. Prince George's County Dep't of Soc. Servs.*, 21 Md. App. at 109-10) that the cases require.

But even though our previous opinions have reiterated the importance of the recording and disclosure requirement for child interviews, no case has ever held that an erroneous failure to record and disclose to the parties the contents of a child interview automatically requires the reversal of a custody determination. Mother attempts to liken the present case to *Marshall v. Stefanides*, because the trial court here did not record the interviews, did not make the substance of the interviews known to the parties, and relied on the interviews in making its custody decision. Yet in *Marshall v. Stefanides*, 17 Md. App. at 369, this Court also determined that the interview was fundamentally unfair because the circumstances left the mother "in the untenable position of being called upon to answer, explain, or defend the alleged preferences of her [children] when she did not

know what preferences or 'desires' they had expressed."

In this case, by contrast, Mother cannot plausibly argue that she suffered any unfair surprise when the trial court wrote in its memorandum opinion that E. during the interview stated her preference to live primarily with Father. In a pretrial statement filed three months before trial, the best-interest attorney revealed that E. "want[ed] to go live with [her] father" and "to spend more time at [her] father's home." In her trial testimony, Mother confirmed that she had seen that pretrial statement at the time it was filed. In discussing the circumstances of the interview, Mother's counsel agreed with the observation that the two children had "cho[sen] sides" already. In closing argument, the best-interest attorney told the court that, "[a]fter hearing the girls again today," it remained clear that E. "want[ed] to go with her father." In its closing comments, the court also confirmed that the children had expressed their respective preferences during the interviews and that the court "in talking with them" became "convinced" that it should separate the two daughters. Subsequently, Mother's counsel submitted a written closing argument, in which she acknowledged that E. "ha[d] expressed the sentiment of wanting to live with her father," but argued that the court should discount E.'s stated preference as a product of "stress" or attribute it to a lack of "considered judgment" in the matter. Although the court's opinion noted a few new details that E. had mentioned during the interview, its opinion demonstrated overall that E. had remained "consistent in her expressed wishes and reasons to live with her father."

Mother points to no indication of prejudice here, but she hypothesizes that there are many ways in which an interview transcript might have helped her challenge the

court's custody decision. She argues that, without a transcript, she is unable to verify what the children actually said and lacks the ability to challenge the court's conclusion that they possessed considered judgment. In effect, Mother argues that the error here is significant enough that this Court should infer prejudice from the mere possibility of prejudice. The Court of Appeals has sometimes employed a presumption of prejudice for "particularly acute errors," such as errors that are likely to have affected the entire course of a trial. *Sumpter v. Sumpter*, 436 Md. 74, 88-89 (2013). The Court has emphasized, however, that any evaluation of prejudice "always requires a fact-intensive, case-by-case inquiry." *Id.* at 89 n.17.

The record does not show that this case is one of the exceptional situations in which an appellate court should presume prejudice. By all indications, the statement from the interviews that the court deemed most significant was that E. confirmed her previously expressed desire to live with Father. The lack of an interview transcript did not prevent Mother from addressing E.'s preferences, which were known before trial; rather, the lack of a transcript merely deprived Mother of another potential opportunity to do so. Under the circumstances, the record fails to establish that the trial court's errors were likely to have affected the outcome of the case. Consequently, reversal is not warranted. *See Denningham v. Denningham*, 49 Md. App. at 338.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.