UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 280

September Term, 2016

WILLIAM TAYLOR

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 18, 2017

William Taylor, appellant, was convicted by a jury, in the Circuit Court for Baltimore City, of burglary in the fourth degree and assault in the second degree. Upon being sentenced to concurrent terms of three years' imprisonment on the burglary conviction and ten years' imprisonment on the assault conviction, Taylor noted this timely appeal, raising three issues for our review:

> I. Whether the circuit court erred in denying defense counsel's motion to redact medical records to exclude inadmissible hearsay;
>
> II. Whether the circuit court erred in admitting hearsay testimony; and
>
> III. Whether the circuit court abused its discretion in admitting lay opinion testimony.

For the reasons that follow, we shall affirm the judgments.

BACKGROUND

At Taylor's trial, three witnesses testified, all for the State: Barbara Crosby, the victim; Officer Robert O'Brien of the Baltimore City Police Department, the first police officer to respond to the crime scene; and Detective Eric Green of the Baltimore City Police Department, the lead detective in the case. The following background is derived primarily from that testimony. Viewed in a light most favorable to the State, as the prevailing party below, that testimony established the following facts:

Barbara Crosby lived in a first-floor apartment in Baltimore City. Because she is disabled, Ms. Crosby "had a friend," named "Tetra," living with her and "helping" her. Tetra had a boyfriend, who was known to Ms. Crosby only as "Colonel" or "Ray," but

who was later identified as Taylor. Taylor visited regularly, and Ms. Crosby regarded him as a "friend."

On March 17, 2015, Ms. Crosby went inside her apartment, locked the doors, turned out the lights, and retired to her couch, where she fell asleep. When she awoke to go to the bathroom, she heard "a sound in the bedroom." When she went to investigate, she encountered Taylor "com[ing] through the window," angrily saying that she "should have opened the door." Although it was dark, and Ms. Crosby could not see Taylor, she recognized his voice. According to Ms. Crosby, Taylor "started pounding on" her, injuring her and rendering her "unconscious."

The following morning, after regaining consciousness, Ms. Crosby looked for her cell phone, but could not find it. She went outside and called for help. When a neighbor responded, Ms. Crosby borrowed her cell phone and placed a 911 call.

Officer O'Brien responded to the call, arriving at Ms. Crosby's apartment at 8:00 a.m. on March 18, 2015. According to Officer O'Brien, Ms. Crosby "had a lot of swelling on her face" and "appeared" to have been "assaulted." The officer interviewed Ms. Crosby and, while at her premises, recovered a cell phone that did not belong to her, but "was later found to belong to the person she knew as a Colonel or Ray," that is, Taylor. At the officer's request, a detective and a medic came to the crime scene.

Detective Eric Green responded to Ms. Crosby's residence. He noted that Ms. Crosby had a "swollen" face, that her left eye was "partially shut," and that she appeared "very shaken and scared." Starting from Ms. Crosby's statement that she knew her assailant as "Ray" or "Colonel," Detective Green was able to determine that Taylor was

known by those names. The detective prepared a photographic array, which two other detectives showed to Ms. Crosby, using a double-blind technique in which neither the detectives nor the witness know which picture depicts the suspect. Ms. Crosby identified Taylor from that photographic array. She later confirmed the identification in court.

After Officer O'Brien and Detective Green had finished interviewing Ms. Crosby, a medic arrived at her apartment and transported her to a hospital, where she received treatment for her injuries. During her hospital stay, Ms. Crosby was diagnosed as having sustained a broken "orbital bone"[1] and two broken ribs as a result of the assault.

In May 2015, a grand jury returned a five-count indictment, charging Taylor with: (1) burglary in the first degree; (2) burglary in the third degree; (3) burglary in the fourth degree; (4) assault in the second degree; and (5) theft of property having a value of less than $1000. A jury convicted him of fourth-degree burglary and second-degree assault, but acquitted him of the remaining charges. After the circuit court sentenced Taylor to concurrent terms of three years' imprisonment for fourth-degree burglary and ten years' imprisonment for second-degree assault,[2] he noted this timely appeal.

[1] The "orbit" is "the bony socket of the eye," which "encloses and protects the eye and its appendages." https://www.merriam-webster.com/dictionary/orbit (last viewed May 9, 2017). "The most common mechanisms for" an orbital fracture are "a punch or elbow to the face, [being] hit by a ball or other spherical object, or blunt trauma." Andrew P. Weinstein, *Athletic Training Student Primer: A Foundation for Success* 161 (2d ed. 2009).

[2] Both of those sentences were also concurrent with a five-year sentence that the court had previously imposed for a count of witness intimidation, to which Taylor had pleaded guilty.

DISCUSSION

I.

Taylor contends that the circuit court erred in denying his motion in limine to redact Ms. Crosby's medical records to exclude what he describes as inadmissible hearsay concerning an "assault." He argues that, to the extent that the statements are attributable to Ms. Crosby, they were not "pathologically germane" to her treatment and therefore were not admissible under Md. Rule 5-803(b)(4), the hearsay exception for statements for purposes of medical diagnosis or treatment. He also argues that, to the extent that the statements are attributable to a treating physician, they were not based upon personal knowledge, did not rest upon an "adequate factual basis," and were not admissible under any hearsay exception. Finally, he argues that the admission of the physician's statements violated both the Confrontation Clause of the Sixth Amendment and Article 21 of the Maryland Declaration of Rights.

Taylor did not preserve most of his arguments, and the ones that he did preserve have no merit.

A. Preservation

In the argument concerning Taylor's motion in limine to remove references to an "assault" from the medical records, defense counsel focused on the physician's statements rather than Ms. Crosby's. In particular, defense counsel argued that the jury would give "undue weight" to the physician's statements, that the jury "could be confused" as to why the physician referred to an "assault," and that the prejudicial value of the physician's statements outweighed their probative value.

Toward the end of the argument, the circuit court judge introduced the issue of whether Ms. Crosby's own statements were "germane to the treatment." When defense counsel denied that it was germane to treatment for the physician to know that the patient claimed to have been the victim of an assault, the court asked, incredulously, "An orbital fracture and the doctor doesn't need to know how it occurred?" Counsel responded by refusing to concede the point, and the court proceeded to deny the "motion to redact the portions of the medical records that refer to or state assault."

At trial, when the State introduced Ms. Crosby's medical records, defense counsel told the court: "Your Honor, I would have no objection, subject to maintaining my previous objection." The court replied: "So noted and they will be admitted."

1. Treating Physician's Hearsay Statements

The State contends that Taylor did not preserve his argument that the admission of the treating physician's hearsay statements violated his right of confrontation, because Taylor did not raise that argument below. We agree. An examination of the transcript fails to reveal the slightest hint of a claim based upon either the Confrontation Clause of the Sixth Amendment or its analog in Article 21 of the Maryland Declaration of Rights. Consequently, we decline to consider that argument. *See Collins v. State*, 164 Md. App. 582, 602 (2005) (holding that objection on hearsay grounds did not preserve issue of

whether evidence was inadmissible on confrontation grounds); *Marquardt v. State*, 164 Md. App. 95, 125 n.14 (2005) (same).[3]

Nor did Taylor preserve an argument that the admission of the treating physician's statements violated the general prohibition against hearsay. Although Taylor did challenge those statements at trial, he based his challenge solely on Md. Rule 5-403, which authorizes a trial court 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[.]" On appeal, however, Taylor does not assert that argument. Consequently, we do not consider it. *See Stevenson v. State*, 222 Md. App. 118, 140-41 (2015) (holding that defendant failed to preserve contention that court should have excluded evidence on hearsay grounds where defendant objected on another ground at trial).

2. Victim's Hearsay Statements

"[W]hen specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999); *accord Colvin-El v. State*, 332 Md. 144, 169 (1993), *cert. denied*, 512 U.S. 1227 (1994). Hence, the State argues that Taylor waived any objection to the admission of Ms. Crosby's statements to

[3] Even if it were preserved, Taylor's argument almost certainly would have no merit, as the treating physician's comments were not "testimonial hearsay," a requirement for implicating the Confrontation Clause. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009) (observing that "medical reports created for treatment purposes" are generally not "testimonial").

her physicians, because he made a completely different objection in the circuit court – that the hearsay statements in the medical records were attributable to the treating physician and that their probative value was substantially outweighed by their potential for unfair prejudice.

In this case, however, the circuit court injected the additional issue of whether the victim's hearsay statements were pathologically germane to her treatment. In rejecting defense counsel's assertion that the statements were not germane, the circuit court appears to have decided that Ms. Crosby's own statements were admissible under an exception to the hearsay rule. Consequently, we conclude that Taylor adequately preserved an objection to the admissibility of Ms. Crosby's hearsay statements in the medical records. *See* Md. Rule 8-131(a) ("[o]rdinarily, the appellate court will not decide any" issue other than subject matter or personal jurisdiction "unless it plainly appears by the record to have been raised in or decided by the trial court").

B. Merits of Preserved Claim

For purposes of determining whether Ms. Crosby's statements were "pathologically germane" to treatment, "the relevant state of mind is the patient's." *State v. Coates*, 405 Md. 131, 145 (2008). In our view, it is beyond any serious dispute that a patient with a broken orbital bone and two broken ribs would want her physician to know how her injuries had occurred. *See Griner v. State*, 168 Md. App. 714, 745-47 (2006) (holding that victim's statements to nurse that victim suffered injuries when defendant hit him were admissible at assault trial under hearsay exception for statements made for purposes of medical diagnosis or treatment); *see also Webster v. State*, 151 Md. App.

527, 536 (2003) (explaining that Rule 5-803(b)(4) "specifically contemplates the admission of statements describing how the patient incurred the injury for which he is seeking medical care"); *United States v. Bercier*, 506 F.3d 625, 632 (8th Cir. 2007) ("[s]tatements to a medical professional concerning the cause of an injury – 'I was assaulted' – are usually admissible under" the analogous federal rule); *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980) (victim's statements to medical doctors were admissible under the analogous federal rule, in part, because they "concern[ed] what happened rather than who assaulted her"). The circuit court, therefore, correctly rejected any argument that Ms. Crosby's statements about the assault, as reflected in her medical records, amounted to inadmissible hearsay.[4]

C. Harmless Error

Even if the circuit court erred in admitting Ms. Crosby's hearsay statements, which it did not, we would hold any such error to be harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). Taylor did not deny that Ms. Crosby had suffered injuries or that she had been assaulted; he simply contended that the police had done an inadequate investigation as to the identity of the assailant. Moreover, on at least

[4] We might have reached a different conclusion if the State had sought to introduce records that identified the assailant. *See State v. Coates*, 405 Md. at 146 ("[s]tatements to a medical practitioner as to the identity of the person who caused an injury are unlikely to be regarded by the declarant as related to diagnosis or treatment"); *United States v. Bercier*, 506 F.3d at 632 ("statements identifying the assailant are 'seldom, if ever,' sufficiently related to diagnosis or treatment to be admissible") (citation omitted); *United States v. Iron Shell*, 633 F.2d at 84.

six separate occasions, the State introduced testimony, without objection, that Ms. Crosby had been "assaulted" or "beat[en]."

In short, the references to an "assault" in the unredacted medical records were cumulative of other evidence that was before the jury, and those references involved what was, at most, an ancillary issue. *Potts v. State*, 231 Md. App. 398, 409-10 (2016) (holding that any error in admission of hearsay statement was harmless whether the statement was cumulative of other evidence); *Webster v. State*, 221 Md. App. 100, 119-20 (2015) (same). In these circumstances, we have no difficulty in declaring our belief, beyond a reasonable doubt, that the putative error "in no way influenced the verdict." *Dorsey v. State*, 276 Md. at 659.

II.

Taylor claims that the circuit court erred in admitting hearsay testimony "on two occasions over defense counsel's objection." The first of these claims is waived, and the second is without merit.

A. Officer O'Brien's Testimony

During Officer O'Brien's direct examination about his encounter with Ms. Crosby, he attempted to discuss what she had told him. Defense counsel interrupted with an objection, which the court sustained.

A moment later, the officer testified that after interviewing Ms. Crosby he "found a cell phone that was later found to belong to the person she knew as a Colonel or Ray." Taylor lodged a general objection, which the court overruled.

On appeal, Taylor argues that the latter statement amounted to inadmissible hearsay – that it implicitly encompasses Ms. Crosby's hearsay assertion that the phone belonged to Taylor and that the officer may have phrased his answer as he did because of the successful hearsay objection that followed his earlier attempt to recount what Ms. Crosby had told him. Taylor adds that Officer O'Brien would have had no firsthand knowledge about who owned the phone; that the officers were unable to identify the phone's owner through a subscriber database; and that even if the database identified the owner, it would not have identified him as "Colonel" or "Ray," which were the names by which Ms. Crosby knew Taylor.

The State counters that this claim is waived because the same evidence was later admitted into evidence, without objection, during redirect examination:

> [THE STATE]: Now, . . . Officer O'Brien, defense counsel just said that your attention was drawn to this cell phone. Did you just see the cell phone on the floor and say I'm going to take this cell phone?
>
> [OFFICER O'BRIEN]: No.
>
> [THE STATE]: So why was your attention drawn to the cell phone that you recovered?
>
> [OFFICER O'BRIEN]: Ms. Crosby **advised me it belonged to the suspect.**
>
> [THE STATE]: And that is why you recovered the cell phone?
>
> [OFFICER O'BRIEN]: Yes.
>
> [THE STATE]: Did you recover anything else in that house?
>
> [OFFICER O'BRIEN]: No.

> [THE STATE]: **Did Ms. Crosby advise you that anything in the house belonged to someone other than her?**
>
> [OFFICER O'BRIEN]: **No.**
>
> [THE STATE]: So the only reason why you recovered the cell phone was because **Ms. Crosby advised that it did not belong to her, it belonged to who[m]?**
>
> [OFFICER O'BRIEN]: **The suspect.**
>
> [THE STATE]: No further questions, Your Honor.

(Emphasis added.)

Taylor did not object to this testimony, which was substantially the same as the testimony that he claims was erroneously admitted. For that reason, his claim of error is waived. *See DeLeon v. State*, 407 Md. 16, 31 (2008) ("[o]bjections are waived if, at another point during the trial, evidence on the same point is admitted without objection"); *Williams v. State*, 131 Md. App. 1, 24-25 (2000) (finding waiver, despite timely objection to the admissibility of evidence, where the same evidence was otherwise received into evidence without objection).

B. Detective Green's Testimony

During the direct examination of Detective Green, the detective attempted to explain how the police had concluded that Taylor was the person who was known as "Ray" and "Colonel." Taylor contends that the circuit court erroneously admitted inadmissible hearsay when it overruled an objection to the detective's statement that he "was provided information by a source of information from the community." We disagree.

Initially, the court sustained an objection to questioning along those lines:

> [THE STATE]: And Detective Green, was there was a suspect developed?
>
> [DETECTIVE GREEN]: At that time, all that I had was Ms. Crosby knew a possible first name of the suspect being Ray and she knew him, a nickname of Colonel.
>
> [THE STATE]: And were you able to determine who Ray or Colonel was?
>
> [DETECTIVE GREEN]: Yes. We were able to develop a suspect by the name of William Taylor who's seated to the right of counsel in the plaid shirt.
>
> [THE STATE]: And, Your Honor, just for the record, the Detective has identified the defendant.
>
> THE COURT: And the record shall so reflect.
>
> [THE STATE]: And so Detective Green, how were you able to determine that Ray or Colonel was the defendant, William Taylor?
>
> [DETECTIVE GREEN]: A **source of information notified our office.**
>
> [DEFENSE COUNSEL]: **Objection, Your Honor.** That's all **hearsay**.
>
> THE COURT: **Sustained.** Ladies and gentlemen of the jury, you will disregard the last response by the witness.

(Emphasis added.)

A little later, however, Detective Green testified as follows:

> [THE STATE]: Is there anything else that when you've investigated burglary cases where there's no suspect at that time, if that person is not known to the victim, is there anything else that you would do or have done?

> [DETECTIVE GREEN]: Basically try to find sources of information that would give us some type of lead on who the suspects were.
>
> [THE STATE]: But you didn't have to do any of that in this case?
>
> [DETECTIVE GREEN]: Well, **I was provided information by a source of information from the community.**
>
> [DEFENSE COUNSEL]: **Objection. Move to strike.**
>
> THE COURT: **Overruled.** Move on.

(Emphasis added.)

Taylor argues that, in overruling the objection and denying the motion to strike, the circuit court permitted the detective to testify that someone in the community told him that Mr. Taylor was a "suspect." His argument misconstrues the import of the detective's testimony. According to the detective, the source did not say that Taylor was a "suspect" or that Taylor had committed the assault; the source simply said that Taylor was the person known as "Colonel" or "Ray."

The court could have admitted the detective's testimony for the nonhearsay purpose of rebutting Taylor's defense that the State had failed to pursue other suspects. In that regard, this case resembles *Frobouck v. State*, 212 Md. App. 262, 283, cert. denied, 434 Md. 313 (2013), in which this Court affirmed the admission of a detective's statement that he went to the defendant's premises to investigate "a suspected marijuana grow," because the statement was admissible for the nonhearsay purpose of "briefly" explaining what had brought him "to the scene in the first place." In a similar vein,

Detective Green's statement was admissible for the nonhearsay purpose of "briefly" explaining how he came to focus the investigation on Taylor.

III.

Taylor complains that the circuit court abused its discretion in permitting a State's witness, Officer O'Brien, to give lay opinion testimony. This claim concerns the following testimony:

> [OFFICER O'BRIEN]: I remember also asking for a Medic because [the victim] at the time, I remember she had a lot of swelling on the face. **It appeared as though she had been assaulted.**
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

(Emphasis added.)

Maryland Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

"The decision to admit lay opinion testimony is vested within the sound discretion of the trial judge." *Warren v. State*, 164 Md. App. 153, 166 (2005).

Taylor complains that Officer O'Brien had no firsthand knowledge of an assault because he was not present when Ms. Crosby suffered her injuries. *See Goren v. U.S. Fire Ins. Co.*, 113 Md. App. 674, 685 (1997) (quoting *Waddell v. State*, 85 Md. App. 54, 66 (1990)) (stating that a lay witness may opine "'on matters as to which he or she has

first-hand knowledge'"). The officer, however, did not testify that Ms. Crosby had been assaulted, but that "[i]t *appeared* as though she had been assaulted." The officer had the requisite firsthand knowledge to express that opinion, because after responding to a complaint of an assault, he was met by the victim, who, he said, had "a lot of swelling on the face." The officer was not disqualified from expressing that opinion merely because he did not personally observe an assault. His testimony was rationally based on his perceptions, as required by Md. Rule 5-701.

Taylor contends that because the jurors saw photographs of Ms. Crosby's injuries, the officer's opinion, that "[i]t appeared as though she had been assaulted," was not "helpful to . . . the determination of a fact in issue." *Id.* In advancing that contention, Taylor confuses the question of whether an opinion is indispensable with the question of whether it is helpful. The officer's statement was not unhelpful merely because it might not have been indispensable. Hence the trial judge did not abuse her discretion in allowing the officer to express his lay opinion about Ms. Crosby's appearance.

In any event, even if the court had erred, which it did not, we would not reverse the judgment, because Taylor waived his objection and because any error would have been harmless beyond a reasonable doubt.

As previously stated, on at least six separate occasions, the State introduced testimony, without objection, that Ms. Crosby had been "assaulted" or "beat[en]." By failing to object to the repeated references to a beating or assault, Taylor waived his objection to Officer O'Brien's lay opinion that Ms. Crosby "appeared" to have been assaulted. *DeLeon v. State*, 407 Md. at 31.

Finally, Taylor defended the case by contending that State had insufficient proof of his involvement in an assault, not on the ground that no assault had occurred. Under these circumstances, we have no hesitation in declaring, beyond a reasonable doubt, that Officer O'Brien's comment, which concerned a matter of tangential importance, had no influence upon the jury's verdict: any error in its admission into evidence was harmless. *Gutierrez v. State*, 423 Md. 476, 500 (2011); *Bellamy v. State*, 403 Md. 308, 332 (2008).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS ASSESSED TO APPELLANT.