Circuit Court for Baltimore City
Case No. 823096004

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 548

September Term, 2023

JAMES KEEN

v.

STATE OF MARYLAND

Berger,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 5, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

Following a jury trial in the Circuit Court for Baltimore City, James Keen ("Keen"), appellant, was convicted of second-degree assault. Keen was sentenced to ten years of imprisonment, with all but six years suspended, followed by a three-year term of supervised probation. On appeal, Keen presents two questions for our review, which we rephrase slightly as follows:[1]

> I. Whether the circuit court erred in admitting into evidence Ms. Cooper's medical records.
>
> II. Whether the circuit court erred in admitting into evidence Ms. Cooper's testimony about Johns Hopkins Bayview Medical Center's photography policy.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEDURAL HISTORY

This cases arises out of an incident that occurred at Johns Hopkins Bayview Medical Center ("Johns Hopkins Bayview") on January 20, 2023. Keen and his fiancée entered

---

[1] Keen's original questions presented read as follows:

> 1. Under Maryland Rule 5-803, which governs exceptions to the rule against hearsay, did the circuit court err in determining that the victim's medical records were admissible when the medical records were not self-authenticating according to Maryland Rule 5-902(12)?
>
> 2. Did the circuit court err in ruling that Ms. Cooper's testimony regarding Johns Hopkins Bayview Medical Center's written Photographic Policy was admissible when her testimony was offered to prove the truth of the matter asserted, that photography and videography were prohibited, and therefore was inadmissible absent an exception to the rule against hearsay?

Johns Hopkins Bayview for the purpose of checking Keen into a detoxification program. Upon arrival to the detoxification unit, hospital staff recognized that Keen had not properly checked in or complied with hospital policy. Hospital staff notified Keen and his fiancée that they had entered the unit without following the required hospital protocols. Keen grew increasingly irritated and vocalized his frustrations to the unit supervisor. Hospital staff tried to deescalate the situation but were unsuccessful and ultimately called security.

Charnita Cooper ("Cooper”), a public safety officer at Johns Hopkins Bayview, arrived at the detoxification unit and observed Keen yelling. Keen was asked to leave, but he refused. At some point, Keen pulled out his phone and began to record the interaction. Cooper -- who was aware of the hospital’s policy prohibiting photography and videography in patient areas -- walked towards Keen. She put her hand over Keen’s phone and asked him several times to put his phone away. Keen did not comply and punched Cooper, causing her to fall to the ground. In Keen’s recording of the incident, he insisted that Cooper “put her hands on [him]” and that he acted in self-defense. Keen was removed from the hospital and later arrested pursuant to a warrant. He was charged with second-degree assault.

Keen’s two-day jury trial commenced on May 3, 2023 in the Circuit Court for Baltimore City. At trial, Keen argued that he acted in self-defense. During the State’s cross-examination of Cooper, the State moved to admit Cooper’s medical records into evidence. Defense counsel objected, arguing that the records were not properly authenticated. The court overruled the defense’s objection, concluding that the records

were sufficiently authenticated by extrinsic evidence. The State also questioned Cooper about Johns Hopkins Bayview's photography policy. The State began by asking Cooper if she was familiar with the policy. At this time, defense counsel objected, arguing that it was inadmissible hearsay. The court ultimately overruled Cooper's objection. After asking if Cooper was familiar with the policy, the State asked Cooper about the purpose of the policy. Defense counsel once again objected, and that objection was overruled. The State continued:

> THE STATE: And what is the purpose of the Hospital's policy?
>
> COOPER: It's to protect the patient's privacy. You don't know what they're taking a picture for, so we just have to make sure that everyone under the HIPPA law protection [sic].
>
> THE STATE: Does it make any mention of what happens if there is a violation of this policy?
>
> COOPER: My Department will be contacted [and] an officer will be dispatched in the area to ask them to first erase and then put the phone away.
>
> THE STATE: And was this policy in place on January 20th, 2023?
>
> COOPER: Yes ma'am. Yes ma'am.

The State also questioned another witness, Johns Hopkins Bayview Nurse Hallie Logan ("Logan"), about the cell phone use in the hospital. At the time of the incident, Logan worked in the hospital's detoxification unit and assisted with unit admissions. The State asked Logan:

> THE STATE: And are you familiar as an employee at Johns Hopkins, on the policy regarding cell phone use?
>
> LOGAN: With the hospital policy, I'm not a hundred percent certain. For the unit that I work on, patients are not allowed to have their cell phones while they're admitted to the unit, and cell phone reporting [sic] and photography is not permitted in patient areas.

Logan also testified that Keen was not complying with these rules on January 20, 2023. Defense counsel did not object to this line of questioning.

The jury found Keen guilty of second-degree assault. He was sentenced to ten years of imprisonment, with all but six years suspended, followed by a three-year term of supervised probation. This timely appeal followed.

DISCUSSION

I. Standard of Review

Under Maryland Rule 5-802, hearsay is generally not admissible at trial "[e]xept as otherwise provided by [the Maryland Rules] or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. "'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). "[H]earsay is generally inadmissible at trial because of its inherent untrustworthiness." *Parker v. State*, 365 Md. 299, 312 (2001).

The admission or exclusion of evidence "is generally committed to the sound discretion of the trial court." *CR–RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 406 (2012) (citing *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619–20 (2011)). "We apply a different standard, however, when it comes to hearsay evidence." *Vielot v.*

State, 225 Md. App. 492, 500 (2015). 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). Accordingly, we review *de novo* whether the circuit court properly admitted hearsay pursuant to an exception to the rule against hearsay. *Id.* Any factual findings made by the trial court when evaluating whether a hearsay exception applies are reviewed for clear error. *Gordon v. State*, 431 Md. 527, 538 (2013).

II. Cooper's medical records were authenticated throughout extrinsic evidence.

On appeal, Keen argues that Cooper's medical records were not properly authenticated and, therefore, did not qualify as an exception to the rule against hearsay. Accordingly, Keen contends that the circuit court erred in admitting Cooper's medical records into evidence and asks this Court to reverse his conviction and remand for a new trial.

Maryland Rule 5-803 provides that records of regularly conducted business activities are not excluded by the hearsay rule even if the declarant is available as a witness. Md. Rule 5-803(b)(6). The Rule describes records of regularly conducted business activities as follows:

> A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation.

Id. "It is well settled that hospital records are admissible under the business record exception to the hearsay rule." *Newcomb v. Owens*, 54 Md. App. 597, 604 (1983).

Business records, however, "are not admissible until they have been properly authenticated[.]" *Bryant v. State*, 129 Md. App. 690, 696–97 (2000), *aff'd*, 361 Md. 420 (2000). Indeed, Maryland Rule 5-803 provides that "[a] record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness." Md. Rule 5-803(b)(6). This rule reflects the principle that "[a] threshold requirement of admissibility of evidence is whether the authenticity of the evidentiary matter may be established." *Jackson v. State*, 460 Md. 107, 115 (2018).

Records of regularly conducted business activities may be self-authenticated under certain circumstances. Maryland Rule 5-902(12) provides:

> The original or a copy of a record of a regularly conducted activity that meets the requirements of Rule 5-803(b)(6)(A)-(D) and has been certified in a Certification of Custodian of Records or Other Qualified Individual Form substantially in compliance with such a form approved by the State Court Administrator and posted on the Judiciary website, provided that, before the trial or hearing in which the record will be offered into evidence, the proponent (A) gives an adverse party reasonable written notice of the intent to offer the record and (B) makes the record and certification available for inspection so that the adverse party has a fair opportunity to challenge them on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

Md. Rule 5-902(12).

Keen argues that the requirements of self-authentication set forth in Maryland Rule 5-902 were not met and that Cooper's medical records, therefore, were not properly self-authenticated. He contends that neither the medical records nor its cover page include a certification by a Custodian of Records or other qualified individual as required by the rules. "Our inquiry, however, does not end with the inapplicability of Rule 5-902." *State v. Bryant*, 361 Md. 420, 429 (2000). The Supreme Court has recognized "two ways that the necessary evidentiary foundation for admitting business records may be established[.]" *Id.* at 426. Indeed, the records may be self-authenticated pursuant to Maryland Rule 5-902 or they may be authenticated "by extrinsic evidence (usually live witness testimony) regarding the four requirements of Rule 5-803(b)(6)[.]" *Id.*

The Supreme Court discussed the function of extrinsic evidence in authenticating business records in *Jackson v. State*:

> Although any authenticity determination is context specific, a trial judge need only determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be. Extrinsic evidence used to establish the necessary evidentiary foundation for authenticating a business record is generally in-court testimony; however, business records can sometimes be authenticated by circumstantial evidence of the manner of creation and nature of the document involved.

Jackson, *supra*, 460 Md. at 122 (internal citations and quotation marks omitted). *See also* Md. Rule 5-901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.").

Maryland Rule 5-901 sets forth a non-exhaustive list of methods for authenticating evidence. Md. Rule 5-901(b). For example, evidence may be authenticated by "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be." Md. Rule 5-901(b)(4). Evidence may also be authenticated through the "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." Md. Rule 5-901(b)(1). *See also Sublet v. State*, 442 Md. 632, 658 (2015) ("The most straightforward approach to authenticating a writing is to ask an individual with personal knowledge about the document whether the matter was what is purported to be."). Nevertheless, "it is not necessary that the testifying witness have 'first-hand knowledge of the matter,' be the one to have prepared the report, or have 'observed the preparation of the report.'" *Jackson*, *supra*, 460 Md. at 125 (quoting *Bartlett v. Portfolio Recovery Assoc., LLC*, 438 Md. 255, 284–85 (2014)).

Our decision in *Newcomb v. Owens* is instructive in this case. *Newcomb, supra*, 54 Md. App. at 604–05. In *Newcomb,* we similarly considered whether hospital records admitted at trial were properly authenticated. *Id.* We concluded:

> In this case the appellees proffered to the court that the records were furnished to the court in response to a *subpoena duces tecum* directed to the custodian of medical records of the hospital and delivered to the clerk of court by a representative of the custodian of records office. Appellees also proffered to the trial judge the testimony of the clerk of court that this was the usual procedure for handling subpoenas for medical records. When Newcomb was called as a witness, in response to questioning he admitted that the record was a true record of the information concerning the injury to his nose and his

> statements to the attending physician. In the light of these facts we find no error in the admission of the hospital records.

Id. at 605. Similar to the medical records at issue in *Newcomb*, Cooper's medical records were produced in response to a subpoena. Cooper also testified at trial as to the veracity of the records, identifying them as her own medical records and acknowledging that the records reflect the diagnosis she received from the physician who examined her.

Notably, there are plenty of other indicia of reliability in addition to Cooper's testimony. The cover letter of the medical records was printed on Johns Hopkins letterhead, which includes the Johns Hopkins seal. The cover letter also identifies Cooper's medical record identification number and date of birth, the contact information for Johns Hopkins Bayview, and the contact information for a staff member of Johns Hopkins's Health Information Management Department. The records include information about Cooper's visit to the hospital on the day of the incident with Keen, including which physician examined her and the ultimate diagnosis and treatment.

Cooper's testimony, the appearance and contents of the medical records, and the fact that the records were produced in response to a subpoena all provide sufficient proof from which a reasonable juror could conclude that the contested evidence was what the State claimed it to be. In our view, this ample evidence is sufficient to meet the four requirements laid out in Maryland Rule 5-803(b)(6) and to authenticate Cooper's medical records as records of regularly conducted business activities. Therefore, although Cooper's medical records were not self-authenticated by a certification of a Custodian of Records, they were properly authenticated by extrinsic evidence. Accordingly, the circuit court did

not err in admitting Cooper's medical records as properly authenticated records of regularly conducted business activities as an exception to the rule against hearsay.

III. Keen is not entitled to a new trial based on the trial court's admission of Cooper's testimony about Johns Hopkins Bayview's photography policy.

Keen also contends that the trial court erred in admitting Cooper's testimony about the purpose and contents of Johns Hopkins Bayview's photography policy. During its direct examination of Cooper, the State asked Cooper if she was familiar with Johns Hopkins Bayview's photography policy and asked her to identify the purpose of the policy. Defense counsel objected to both questions, and both objections were overruled. The State subsequently called Johns Hopkins Bayview Nurse Hallie Logan to testify. On direct examination, the State asked Logan if she was familiar with the hospital's "policy regarding cell phone use." Logan responded that she was "not one hundred percent certain" about the hospital's policy, but that she knew the rules for cell phone use in the detoxification unit. Defense counsel did not object to the State's question or Logan's answer.

On appeal, the State argues that Keen failed to preserve his argument that the trial court erred in admitting Cooper's testimony on the photography policy because defense counsel failed to object to Logan's testimony on the hospital's "policy regarding cell phone use." We disagree. The Supreme Court of Maryland "has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses."

Yates v. State, 429 Md. 112, 120 (2012) (quoting *Grandison v. State*, 341 Md. 175, 218–19 (1995)) (emphasis in original). "Objections are waived if, *at another point during the trial*, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008) (citing *Peisner v. State*, 236 Md. 137, 145–46 (1964)) (emphasis added). *See also Jones v. State*, 310 Md. 569, 588–89 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received.").

We conclude that Cooper's testimony about the hospital's photography policy and Logan's testimony about the hospital's "policy regarding cell phone use" do not constitute evidence on the same point. In our view, the subject matter of the evidence contested on appeal is Cooper's testimony about the purpose and contents of the hospital's photography policy. Notably, Logan never testified about the purpose or contents of the policy. The State merely asked Logan if she was familiar with the "policy regarding cell phone use" and whether she observed Keen complying with the policy on January 20, 2023. In response, Logan did not elaborate on the purpose or contents of the hospital's photography policy. In fact, Logan indicated she was "not one hundred percent certain" about the hospital's policy and merely testified about the rules applicable to the detoxification unit.

Because Logan did not testify about the purpose or contents of the photography policy, Keen did not waive his argument by failing to object to Logan's testimony about her familiarity with the hospital's "policy regarding cell phone use." Accordingly, we now consider the merits of Keen's argument and determine whether the trial court erred in

admitting Cooper's testimony about the purpose and contents of the hospital's photography policy.

Preliminarily, we conclude that Cooper's testimony about the purpose of the hospital's photography policy is not inadmissible hearsay. Cooper testified that the purpose of the photography policy is "to protect the patient's privacy." This statement merely reflects Cooper's perception of the purpose of the hospital policy and indicates her familiarity with the policy. This testimony is not an out-of-court statement offered for the truth of the matter asserted. Accordingly, the trial court did not err in overruling defense counsel's objection to Cooper's testimony about the purpose of the hospital's photography policy.

After Cooper testified about the purpose of the policy, the State asked Cooper the following:

> THE STATE: Does it make any mention of what happens if there is a violation of this policy?
>
> COOPER: My Department will be contacted [and] an officer will be dispatched in the area to ask them to first erase and then put the phone away.

Defense counsel did not object to the State's question or Cooper's response. Accordingly, this argument is not preserved for our consideration on appeal.

Under Maryland Rule 8-131(a), "[o]rdinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" The purpose of this rule "is to ensure fairness for all parties in a case and to promote the orderly administration of law." *Bryant v. State*, 436 Md. 653, 659–60 (2014)

(quoting *Robinson v. State*, 410 Md. 91, 103 (2009)). Therefore, failing to make a timely objection at trial "bars the appellant from obtaining review of the claimed error, as a matter of right." *Id.* Because defense counsel failed to object to this line of questioning at trial, Keen failed to preserve for appeal whether the trial court erred in admitting Cooper's testimony about the contents of the photography policy -- specifically, Cooper's testimony about the provisions of the policy concerning policy violations.

Assuming *arguendo* that Keen's argument is somehow preserved, we reject Keen's argument that the alleged error constitutes reversible error. Two crucial elements of self-defense require that the "accused . . . had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm" and that he "must have in fact believed himself in this danger." *State v. Faulkner*, 301 Md. 482, 485–86 (1984). The burden is on the defendant to establish these elements. *Holt v. State,* 236 Md. App. 604, 620–21 (2018). Accordingly, to mount an effective defense at trial, Keen was required to establish that he believed himself to be in imminent bodily harm at the time of the incident. Cooper's testimony about the hospital's photography policy provide insight as to why Cooper acted as she did -- namely, why she approached Keen, put her hand over his phone, and asked him to put his phone away. Her testimony, however, does not explain Keen's actions or undermine his self-defense argument.

Neither the contents of the hospital's photography policy nor Cooper's knowledge of that policy impact whether Keen could adequately establish that he believed himself to be in imminent harm on the day of the incident. In fact, Cooper's awareness of the policy

is not at all relevant to Keen's defense. Keen was required to prove *his* state of mind -- not Cooper's intent. Indeed, the outcome would be different if the State had somehow established that Keen knew about the policy. If Keen knew about the hospital's photography policy, he would have had reason to know why Cooper approached him. In that case, admission of testimony about the hospital policy would have impacted Keen's defense, because it would have discredited any argument that he had a reasonable fear of imminent bodily harm. The State, however, never even attempted to argue that Keen was aware of the policy. Cooper's testimony about the photography policy merely explained her actions. It did not explain Keen's actions or otherwise rebut his argument that he acted in self-defense.

For these reasons, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.