Circuit Court for Baltimore County
Case No.: C-03-CR-22-001162

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 931

September Term, 2023

MAILLE STEVEN GOUSSE

v.

STATE OF MARYLAND

Nazarian,
Reed,
Shaw,

JJ.

Opinion by Shaw, J.

Filed: November 6, 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 to Rule 1-104(a)(2)(B).

Appellant, Maille Steven Gousse, was indicted in the Circuit Court for Baltimore County and charged with second-degree rape and related offenses. Appellant filed a motion to suppress and a motion to dismiss the indictment on the grounds that he did not consent to a cellphone recording made by his then fiancée and that the recording was made in violation of the Maryland Wiretapping and Electronic Surveillance Act ("Maryland Wiretap Act"). *See* Md. Code (1973, 2020 Repl. Vol., 2024 Supp.), § 10-401 et seq. of the Courts and Judicial Proceedings ("Cts. & Jud. Proc.") Article. Following the denial of the motions, Appellant entered a not guilty plea on an agreed statement of facts to one count of second-degree rape. He was convicted and sentenced to fifteen (15) years' imprisonment, suspend all but five years, to be followed by five years' supervised probation and with the condition that Appellant be subject to sex offender registration and supervision for life. On this timely appeal, Appellant asks us to address one question:

1. Did the trial court err in denying the motion to suppress and motion to dismiss the indictment?

For the following reasons, we shall affirm.

BACKGROUND

The issue in this case concerns the Maryland Wiretap Law and whether the rape victim, Ms. O., illegally recorded her fiancée, Appellant, on the evening of October 7th into the morning of October 8th, 2021, in their shared bedroom.[1] Ms. O. and Appellant

[1] Under Md. Rule 8-125, this Court shall not identify the victim of a crime or related individuals except by their initials if the victim was a minor child at the time of the crime, or if the alleged crime would require the defendant, if convicted, to register as a sex offender. Md. Rule 8-125 (a), (b)(1).

had been engaged since February 14, 2018, and lived in an apartment with their two children. At times during the relationship, Ms. O. recorded conversations between herself and Appellant. She testified at the motions hearing that the recordings were "a common occurrence throughout the relationship" and that they "also had home video cameras that were recording as well." She explained that she did this "any time there was not just regular conversation, any time there was like elevated conversation or dispute." She recorded Appellant when he came home and when they were in the bedroom.

With respect to these prior recordings, Ms. O. testified that Appellant consented to them, testifying, "there's been plenty of times where he's encouraged me to record him[.]" Asked whether she "would say to him, I'm recording you, is that okay," Ms. O. testified "No, I would not ask in that form." Generally, she either held the phone during the recordings or placed it nearby on a shelf. In addition, Appellant recorded Ms. O. at times. In fact, she testified that "throughout the relationship it was common practice for us to record each other."

At some point during the relationship, Ms. O. suspected Appellant was having an affair. She began sleeping separately, downstairs in the sunroom. However, on the evening in question, October 7th, 2021, after putting one of her children to bed in his bassinet, located upstairs in the bedroom, Ms. O. remained upstairs until the child fell asleep. When their other child, who was sleeping on the bed with them, finally fell asleep, Appellant momentarily left the bedroom to take that child to her own room.

At that point, and while Appellant was out of the bedroom, Ms. O. started recording on her cellphone. She placed her cell phone on the dresser located immediately adjacent

to the bed. Pertinent to our discussion, Ms. O. testified about Appellant's return to the bedroom:

> Q. Okay. And on that occasion, you certainly didn't tell Mr. Gousse you were recording him, did you?
>
> A. No, he noticed it when he came in the room.
>
> Q. Well, I don't know that you can say that. You say it was on your bedside dresser?
>
> A. Yes, he commented in the video that he noticed the phone on the bedside dresser.
>
> Q. What video are you talking about?
>
> A. The audio in question today.
>
> Q. You didn't have a video as well, did you?
>
> A. No, it's just the audio. He commented, when he came into the room, he commented on the phone on the dresser.
>
> Q. You are sure of that?
>
> A. Yes.
>
> Q. Uh-huh. Did he consent to this?
>
> A. I didn't ask.
>
> Q. How long did you record that particular episode?
>
> A. Up until the following morning before I went to PT.

Ms. O. confirmed that she never expressly told Appellant she was recording him. After Appellant gave Ms. O. a massage and engaged in nonconsensual sexual intercourse, Ms. O. left the residence and went to the police station. Ms. O. agreed that she spoke to

Detective R. Judy and told him she was concerned that she violated the wiretap law because she recorded the incident.[2]

Ms. O. signed a consent form that allowed Detective Judy to review the various recordings on her cellphone, including the one at issue recorded over the course of the evening from October 7th into the morning hours of October 8th, 2021. The recording at issue was never transcribed. It was neither introduced nor admitted at either the motions hearing, the not guilty plea hearing, or at sentencing.[3]

On cross-examination by the State, Ms. O. provided more detail about recording Appellant, generally, as follows:

> Q. Ms. [O.], how often would you say that you recorded you and Mr. Gousse recorded each other's conversations?
>
> A. I can't say how often because it was very sporadically, but it was throughout the course of the relationship.
>
> Q. And when you would record him, was he aware that you were recording him?
>
> A. On some instances, yes.
>
> Q. And was it the same, was it the same when he would record you?
>
> A. When he recorded me, I would find out later, but I would find the phone in my car or something like that, or I find the device somewhere, cameras plugged up underneath the bed.
>
> Q. And what was the reason you were recording, making these recordings?

[2] Detective Judy's full first name is not in the record.

[3] After Detective Judy examined the recordings on that phone, an iPhone 8, Ms. O. obtained a new cellphone because the screen on the old one no longer functioned properly. When she changed phones, she did not keep any of the recordings at issue.

A. The recording is because I felt like things were escalating with Mr. Gousse to some sort of aggression type of thing. First, he would block my way of walking. Then he would catch me in a room and block me in a corner of the room or then he would lock the door. Things were escalating and I just felt like I needed some kind of documentation just in case something happened.

Q. Is that why you recorded on the night of October seventh and then morning of October eighth?

A. Yes.

Q. You believed things were escalating between you and him?

A. Yes.

Q. And in the past, Ms. [O.], would Mr. Gousse be okay with you recording him?

A. In the past, yes.

Q. He would consent to it?

A. Yes.

Q. He wouldn't take the phone from you, delete things or anything of that nature, would he?

A. No, he would do it like in an encouraging manner, like, go ahead and record me or I know you are recording me, go ahead, pull out your phone and things like that.

On further cross-examination, Ms. O. was asked about a WhatsApp message she received from a phone number associated with Appellant, sometime in December 2021, after the incident at issue and before he was charged in this case. The message read as follows:

I know you were recording me I didn't know that's what you were doing we have rough sex before I don't know what was this about I had no attention of hurting you no attention so whoever is behind this god is good because I have no intention of hurting you for years never put my hands on you for years I have plenty of video of us having sex I'm sorry I cheated on you they

> should've never went that far charging me for rape that is big I have two kids with you they are babies they need their father I am sorry if you felt like I rape you God is going to punish me for life trust and believe I hate a fucking rapist because I've been molest when I was seven years old fuck this shit

Ms. O. testified she believed this message concerned the incident on October 7-8, 2021. On redirect by Defense Counsel, Ms. O. confirmed that Appellant accused her of stealing the cellphone associated with this number.

Defense Counsel next called Detective R. Judy, the primary officer assigned to this case. Detective Judy met with Ms. O. on the afternoon of October 8, 2021. Ms. O. reported that she had been recording Appellant "for a period of time" even before the incident at issue. Detective Judy agreed that Ms. O. never informed him that the recordings were made with Appellant's consent.

With respect to the incident at issue, Ms. O. informed the detective she recorded Appellant using her cellphone. She then gave consent for the detective to listen to the recording and some messages. Ms. O. expressed concern that she may have violated the law by recording Appellant. Detective Judy told her not to worry at that time.

Upon examining the cellphone, Detective Judy testified that there were a number of recordings that the police did not "collect[,]" but there were two recordings concerning Appellant "forcing himself" on Ms. O. Because Detective Judy was unable to download the contents of recordings on her cellphone, he returned the cellphone to Ms. O. Ms. O. then emailed two undated recordings related to the alleged sexual assault to the detective's work email. Detective Judy testified that he listened to a portion of these recordings. Asked by Defense Counsel whether there was "ever a word of that consent said[,]" on the

recordings, Detective Judy answered, "[n]ot that I recall." Detective Judy was also asked whether the content of the recordings provided by Ms. O. "capture[d] the rape that she had recorded[.]" The detective replied "Correct. Yes, it's believed to be." Appellant was not charged until March 3, 2022.

On redirect examination by Appellant's counsel, and related to Appellant's motion to dismiss the indictment, the detective testified that he did not testify before the grand jury. After the prosecutor confirmed the proffer that was done by a paralegal in the State's Attorney's Office, and after agreeing that that presentation included a report detailing the sexual assault forensic examination of Ms. O., the defense moved for admission of that report at the hearing. The exhibit was admitted and, pertinent to the issue raised, includes the following information: "Due to increase in suspect's advances, patient reports that she began audio recording any conversation she had with the suspect on her cell phone."[4]

After Ms. O. and Detective Judy testified, Defense Counsel and the court argued generally with respect to the Appellant's motion to dismiss the indictment. The following ensued:

> THE COURT: Why don't you give me your proffer as to where you are going with this?
>
> [DEFENSE COUNSEL]: Where I'm going is this was presented to the Grand Jury and the indictment should be dismissed if you believe that the –

[4] The remainder of the report includes a narrative note of the allegations. The only other mention of the cellphone recording was that, after the Appellant left the bedroom momentarily, "patient reports that she pulled out her phone to initiate audio recording." The narrative in the SAFE report appears to be a summary of the victim's interview with the SAFE nurse. As the State notes at the end of its appellate brief, there is no evidence that the recording of the alleged sexual assault itself was played in front of the grand jury.

> THE COURT: Well, the question becomes whether it is an impermissible recording.
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: If it is an impermissible recording, you are absolutely correct, it will be precluded from being introduced at any hearing. But in that, I mean, I'm still piecing this altogether because nobody told me what the facts were, I'm kind of piecing it together based on what you all have put forward. And I would tell you right now at this juncture that I haven't heard everything yet, but it would seem that it would be permissible based on her testimony, one, that your client acknowledged and he acknowledged the recording when he entered the room, and two, based on the printout of the conversation where he says: "I know you were recording," which would negate any inference that it would be, that this would be an impermissible recording.

The court continued with whether a continuance was necessary for Defense Counsel to bring in the paralegal or law clerk who presented the case to the grand jury stating:

> [THE COURT:] Now, clearly, you can, you know, offer something to rebut that, but given that, I really don't see what's the necessity of bringing in the paralegal or the law clerk at this point. They are not going to offer anything. I mean now neither of you have given me a transcript of what the recording is. I mean, I don't know whether he acknowledges he is on the recording, I know you are recording me, or anything like that. I don't know, I haven't seen it, I haven't heard it, I don't know what was played in front of Grand Jury other than what was just said here that because of your Exhibit Number Two [sic[5]], it says that it acknowledges that she made the recording and she said that she recorded it and your motion says that it was played before the Grand Jury, but I have heard no testimony that anybody played anything before the Grand Jury, I have just seen your motion.

Addressing primarily whether Detective Judy's testimony rebutted Ms. O.'s earlier testimony, Defense Counsel and the court then discussed whether Appellant noticed the phone when he returned to the bedroom on the night in question:

[5] There is no "Exhibit Number Two" in the record.

[DEFENSE COUNSEL]: You know, clearly, he says there was never any mention of any consent that was given by my client.

THE COURT: I didn't hear her say he gave consent; she said he acknowledged, when he came in the room, he acknowledged the phone. She didn't say exactly what the words were and, you are right, she did not say whether he said, I record. All I am saying is considering the fact that –

[DEFENSE COUNSEL]: Acknowledging.

THE COURT: The way –

[DEFENSE COUNSEL]: Acknowledging a phone is in the room does not acknowledge it being recorded. And what this detective did say, Your Honor, is that never did that lady at any time say to him during the two hour interview that Mr. Gousse had ever consented to any of the conversations that she had recorded.

THE COURT: Well, I am saying that doesn't negate her because she never said that he did. I never heard her say that.

[DEFENSE COUNSEL]: Of course, she did.

THE COURT: I didn't hear her say that.

[DEFENSE COUNSEL]: You didn't hear her say that Gousse consented to the conversations from time to time.

THE COURT: From time to time, but I don't care, [Defense Counsel], I don't care about any other conversations. The only thing that's before the Court is what happened on October seventh and eighth.

[DEFENSE COUNSEL]: I understand, Judge, but –

THE COURT: His acknowledgment is separate and distinct. You don't give a blanket consent to record me in perpetuity and I never heard her say that he consented on October seventh or eighth. I never heard her say that. Now, if she did, I missed it.

[DEFENSE COUNSEL]: She didn't.

THE COURT: So he didn't dispute anything she said in that regard.

[DEFENSE COUNSEL]: What she's saying is implicitly he consented because I saw my cellphone.

THE COURT: Yes.

[DEFENSE COUNSEL]: So I don't know how he knows that he's being recorded, even if he did see the cellphone.

The court agreed with this summation, but only to a certain extent:

THE COURT: I agree with you. And I was with you until I saw the printout from the WhatsApp or whatever where he says, I know you were recording.

[DEFENSE COUNSEL]: Well, the question there is, when did he know, not on October eighth, when did he know, because this happened long after, if you believe, number one, that he even prepared whatever that was, that app up or WhatsApp, she acknowledges that he claimed that she stole his phone.

THE COURT: Okay.

[DEFENSE COUNSEL]: And if someone steals someone else's phone, they can do an awful lot with it.

THE COURT: Maybe, sure.

[DEFENSE COUNSEL]: They can go into your bank account, they can probably sell your children if they want.

THE COURT: Okay.

[DEFENSE COUNSEL]: There's any number of things that can be done. So just because that exists doesn't necessarily mean that it was prepared by my client. We have got a lady that's secretly recording the father of her children in the bedroom.

THE COURT: Um-hum.

[DEFENSE COUNSEL]: Pretty shocking.[6]

[6] At this point, Defense Counsel informed the court that it wanted to introduce a recording of Detective Judy's two-hour interview with Ms. O. Counsel indicated that he prepared an "index of comments" that concerned the bedroom recording and that, during the police interview, "[t]here are probably a half dozen instances where the matter of recording is talked about in the interview with Detective Judy." This "index" prepared by Defense Counsel is included in MDEC as Defendant's Exhibit 1A. The index appears to (continued)

At this point, Defense Counsel called Appellant to the stand. Appellant testified that he had listened to the recording Ms. O. made of the two of them on October 7-8, 2021, and that it lasted "a couple of hours or so." Appellant testified that he did not know he was being recorded at that time and that he did not even see the cellphone. Appellant maintained that Ms. O. did not ask for his consent to be recorded. He also testified that he expected that their conversations were private. However, on cross-examination, Appellant agreed he and Ms. O. had a practice of recording each other, "privately."

Turning to the WhatsApp message purportedly made from Appellant's cellphone, Appellant testified he was not familiar with that message, and he denied writing that message.[7] Suggesting that the message was forged by Ms. O., Appellant further testified that Ms. O. stole his cellphone at some point. Appellant did not know where this phone was located as it was never recovered.

On cross-examination by the State, Appellant acknowledged his cellphone was stolen before the incident in question. He also agreed he did not report the alleged theft to the police, but did call his cellphone carrier, T-Mobile. Appellant clarified that he noticed

be Defense Counsel's personal, annotated notes of portions of the interview when Ms. O. admitted she recorded Appellant during their entire relationship. The State responded that it had no problem with the admission of the police interview but insisted that the references in the interview to "recordings" included *all* the recordings Ms. O. made, not just the one at issue. In the end, like the cellphone recording of the rape in the bedroom, the recording of the police interview with Ms. O., recorded the day after, was not admitted in the motions hearing or the plea hearing and is not included in the record.

[7] Appellant later confirmed that the phone number for this allegedly stolen phone was a certain number, and that number matched the phone listed on the disputed WhatsApp message.

his cellphone was missing the same day as the underlying incident, he believed Ms. O. stole it, and he called T-Mobile a few hours later to report that theft. Asked why he called T-Mobile, Appellant testified "I couldn't find my phones on the table." Asked what he expected T-Mobile to do about this, Appellant replied: "Investigate, find out where they were, yeah, and make sure she wasn't doing any kind of illegal stuff on my phone, stuff like that, checking messages and doing anything like that I don't know."

Addressing the defense theory that Ms. O. stole Appellant's cellphone and created the WhatsApp message, the State continued and asked Appellant if he asked T-Mobile to turn off his phone after it was allegedly stolen. Appellant replied, "Not right away, no." He then explained that even with cellphone service turned off, "some of these phones you can use with wifi while it's still active and stuff like that." Appellant did ask T-Mobile to turn off service.

Turning to the content of the WhatsApp message, the State asked Appellant if Ms. O. knew about his "past history" and whether he was "allegedly molested when [he was] seven years old[.]" Appellant testified "No." The State then asked Appellant to explain the portion of the message that provided that he hated a "fucking rapist" because he was molested when he was seven years old. The State asked, "Is it your testimony here that [Ms. O.] would never have known that, correct[.]" Appellant replied, "If I could remember, it was a touchy subject and if I did tell her that, I forgot when, you know. And I never told anybody about that besides my mother."

After this, the court heard argument on the motion to suppress and the motion to dismiss. Defense Counsel argued that the issue was whether Appellant consented to being recorded:

> Your Honor, I think the statute is pretty clear. I don't need to go into that. And I think, at least I think in the Court's mind it's somewhat debatable whether or not this October the eighth conversation was consented to or not. Mr. Gousse says clearly he did not consent to it. [Ms. O.] doesn't say he consented, but says the phone was on a piece of furniture and I don't know whether that moves the ball across the finish line. I think it does not.
>
> I still think we are in that area where we have an unconsented to conversation and I think the testimony given by Detective Judy somewhat confirms that fact because nowhere during that audio which I have introduced, and I know the Court hasn't had the opportunity, but nowhere in that audio is it said by [Ms. O.] that there was any consent or that he was aware or that it was being recorded. There is absolutely nothing said along those lines to indicate that Mr. Gousse was aware that he was being recorded.
>
> I think it was a secret recording. I think it was done for a purpose. She had been recording him for God knows how long. By her own testimony, when he came in the house, he would record her. When they were in the bedroom, he would record. I really think this is an issue of privacy. I think that he certainly could have realistically and did think that what was occurring in the confines of his bedroom was very private.

Defense Counsel continued:

> So the issue here is, in my opinion, did Mr. Gousse consent to a secretly recorded conversation. And if he consented, I don't know why this young lady had to wait until he left the room to turn the recorder on. That doesn't make any sense.
>
> The exhibit that the State entered Mr. Gousse says, it's not mine, my phone was taken. A lot of things can happen with phones, there is no date on there and I think the issue in that document is not whether there is a rape or not a rape; the issue is simply the recording and when did he know, in fact, this is his document, that the recording took place. His testimony clearly is, I didn't know. Her testimony is, well, you know, I think he knew. I don't think thinking [sic] he knew passes the sniff test.

I really believe there has to be proof that there was consent. I ask the Court to listen to the parts of the interview that I have introduced. I think you will see that there is no mention of consent and really consent is the real issue here. And you know what, Judge, even if what is said in that document, Exhibit Number One, is true, if someone says, I knew you were recording me, is that saying I consent to you recording me. I don't think it does. I think consent is something that affirmatively has to take place. And I see none of that in this case.

The State responded as follows:

[PROSECUTOR]: Your Honor, I think the State's Exhibit One demonstrates the Defendant had knowledge and I think consent doesn't need to be affirmative belief. We don't, it's not practice to sit here and say to someone, I allow you to record me.

THE COURT: Let's be clear. In response to what [Defense Counsel] said, the case law is clear, it does not have to be an affirmative consent and there are many cases that even talk about Ring cameras, when you know that you are being recorded, when it's very apparent that you are being recorded, audio phones, when you leave a message on an answering machine, you don't have to say, I agree. The mere fact that you participate, that you allow yourself is an assent. So that's a non-issue.

[PROSECUTOR]: Thank you, Your Honor. So moving past that, Your Honor, I believe that the Defendant had knowledge of this recording in this matter. So, therefore, if there is knowledge, the recording is admissible.

***

But Your Honor, I believe that, as you see it says, "I know you were recording me," I think the Defendant, I believe the Defendant had knowledge that day of that recording, he continued to go about conducting what happened on the recording and, Your Honor, I believe once that there is consent or any knowledge of the recording, it is admissible in this matter.

After a brief rebuttal from Defense Counsel, the judge denied the motions, stating:

I hear you. Okay. Well, I'm going to deny the motion. I do find that this was not a violation, on the surface, this is not a violation of the Maryland wiretap law. Consent can be explicit or implicit. In this particular case, I find that the credibility of [Ms. O.] outweighs that of the Defendant and that's really what it comes down to, because her credibility is corroborated by the documentary

> evidence of his acknowledgment that he knew he would was [sic] being recorded as well as the inconsistency of what he testified to.
>
> It just makes no sense at all to say that I called to report my phone stolen immediately. The only reason you would call to report your phone is stolen is because you want to stop anybody from using your phone, you want to have that phone turned off, which would totally negate any idea that this woman has taken his phone and manufactured a convenient explanation or affirmation of the recording. This is wrong. Her testimony is that she wasn't even aware of this until she received the text message months later from the Defendant and, as the State pointed out during cross examination, some very personal and private information that the Defendant said no one else knew about other than he, which gives me the indication that, yes, he in fact did send that text message and did acknowledge the fact that he knew he was being recorded and knowledge without withdrawal is assent for the purposes of this proceeding.
>
> So I'm going to deny the Motion to Dismiss. I'm going to deny the Motion to Suppress.

On June 12, 2023, Appellant entered a not guilty plea on an agreed statement of facts to one count of second-degree rape. Those facts included that, on October 8, 2021, Ms. O. informed Baltimore County Police that Appellant sexually assaulted her the prior evening, October 7, 2021. As part of that report, Ms. O. advised that at around 11:00 p.m. on October 7, 2021, Appellant gave Ms. O. a back massage. After she momentarily fell asleep, Ms. O. awoke to Appellant removing her shorts. He then inserted his penis into her vagina. Ms. O. informed the police that she told Appellant "no" on multiple occasions, and scratched and struck him with her hands, but Appellant disregarded her resistance. After advising the police of these details, Ms. O. was transported to the hospital for a sexual assault forensic examination.

The statement of facts presented to the court included the following:

> During this incident, prior to the incident the victim did start recording on her phone due to the escalation. During that audio recording you can hear the victim crying, also saying stop and please stop dozens of times. The Defendant stated at the end, What have I done?[8]

Baltimore County Police contacted Appellant and Appellant agreed to waive his *Miranda*[9] rights and speak with the police. Appellant admitted that Ms. O. told him twice that she did not want to engage in sex during the massage. Appellant became aroused and admitted he digitally penetrated Ms. O.'s vagina, to which she again told him she did not want to engage in sexual relations. Appellant informed the police that Ms. O. eventually consented to vaginal intercourse. During that intercourse, Appellant agreed that Ms. O. again stated "no[,]" and that she did not want to engage in sexual activity, but they continued to have sex. He denied that she scratched him. The vaginal intercourse continued until Appellant ejaculated inside Ms. O.'s vagina.

There were no additions, corrections or modifications to the statement of facts, and the court found Appellant guilty beyond a reasonable doubt of second-degree rape.[10]

[8] As the recording of the incident on the morning hours between October 7th and 8th was never entered into evidence, at either the motions hearing or the plea hearing, this part of the agreed statement of facts, amounting to at best a summary, is the only "evidence" in the entire circuit court and appellate record of the contents of that recording. Although it is difficult to review a challenge to an alleged nonconsensual recording under the Wiretap Act when the underlying recording does not appear anywhere in the record, arguably raising issues of preservation, waiver and harmless error, we shall review the merits of this issue. *See White v. State*, 250 Md. App. 604, 648 (citations omitted), *cert. denied*, 475 Md. 717 (2021) ("Under an agreed statement of facts, the State and the defense agree to the ultimate facts, and the court merely applies the law to the agreed upon facts.").

[9] *Miranda v. Arizona*, 384 U.S. 436 (1966).

(continued)

DISCUSSION

Appellant argues the court erred in denying his motion to suppress and the motion to dismiss the indictment because he did not consent to the recording at issue. The State asserts that Appellant raises a new unpreserved argument on appeal which focuses on the interpretation of the WhatsApp message itself. In reply, Appellant recognizes that the focus of argument in the motions court was whether the phone was stolen and whether Appellant even sent the message. However, defense counsel did raise the issue with respect to whether he consented to the recording. Moreover, the court expressly decided the issue when it found, "he in fact did send that text message and did acknowledge the fact that he knew he was being recorded[.]"

Maryland Rule 8-131 (a) provides, in pertinent part:

> Ordinarily, the 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The purpose of the preservation rule "is to 'prevent[] unfairness and requir[e] that all issues be raised in and decided by the trial court[.]'" *Peterson v. State*, 444 Md. 105, 126 (2015) (quoting *Grandison v. State*, 425 Md. 34, 69 (2012)). Maryland courts have

[10] Subsequently during sentencing, the State informed the court that it had a copy of the recording, and that it comprised two parts. The first part was primarily just "conversation between two people in bed" and silence and was one hour and twenty minutes long. The sexual activity portion of the recording was twenty-eight minutes long. The court initially stated that it wanted to hear the recording, but after further discussion, the court declined to hear the recording and it is not included in the record. The court then sentenced Appellant to fifteen years, suspend all but five, on the conviction for second degree rape.

recognized that "'an appellant/petitioner is entitled to present the appellate court with a more detailed version of the argument advanced' below." *State v. Greco*, 199 Md. App. 646, 658 (2011) (citing *Starr v. State*, 405 Md. 293, 304 (2008), *aff'd*, 427 Md. 477 (2012)) (concluding that an issue was not waived where the State generally made the argument at trial, and where the trial court clearly decided the issue on the grounds raised on appeal); *see also Lockett v. Blue Ocean Bristol, LLC*, 446 Md. 397, 417–18 (2016) ("When, as here, both parties discussed the issue and the court necessarily decided it in reaching its decision, the issue has been raised for the purposes of Rule 8-131(a)."). "Thus, as long as the party, whether in a civil or criminal case, clearly makes the judge aware of the course of action he or she desires the court to take and the reasons for such course of action, the party shall have adequately preserved that issue for appellate review." *In re Ryan S.*, 369 Md. 26, 35 (2002).

Here, Appellant raised the issue presented and the court decided that issue. Accordingly, we hold it is preserved. To the extent that the grounds could have been presented differently, we shall exercise our discretion to consider the issue properly presented. *Unger v. State*, 427 Md. 383, 407–08 (2012) ("It is a settled principle of Maryland procedure that, for purposes of preservation in various contexts, where the issue raised by a litigant is sufficiently interrelated with another issue not raised, the court will treat them as if both issues were raised by the litigant.") (collecting cases); *see also State v. Hart*, 449 Md. 246, 268 (2016) ("To the extent that the issue regarding the propriety of the colloquy may have been unpreserved for appellate review, we hold that the Court of Special Appeals properly exercised its discretion to consider it. The colloquy was

sufficiently interrelated with the issue concerning the declaration of the mistrial in Hart's absence.").[11]

In reviewing the merits of a trial court's denial of a motion to suppress evidence, "'we view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party.'" *Seal v. State*, 447 Md. 64, 70 (2016) (quoting *Davis v. State*, 426 Md. 211, 219, (2012)). "Although we extend great deference to the hearing judge's findings of fact, we review, independently, the application of the law to those facts to determine if the evidence at issue was obtained in violation of the law and, accordingly, should be suppressed." *Laney v. State*, 379 Md. 522, 533–34 (citations omitted), *cert. denied*, 543 U.S. 966 (2004). Our review of the fact-finding by the motions court is whether that finding is clearly erroneous. *Seal*, 447 Md. at 70 (citing *Bailey v. State*, 412 Md. 349, 362 (2010) ("We accord deference to the fact-finding of the trial court unless the findings are clearly erroneous.").

The Maryland Wiretap Act makes it unlawful to willfully intercept, knowingly disclose, or knowingly use any wire, oral, or electronic communication. Md. Code (1973,

[11] We note that both parties on appeal address whether Appellant had a subjective expectation of privacy in the recording. That issue was not raised in or decided by the motions court, and we decline to consider it further. *See generally Epps v. State*, 193 Md. App. 687, 706 (2010) (observing that the State is held to the same preservation rules as other litigants). The State also notes in responding to Appellant's assertion that "evidence pertaining to the recording was presented to the grand jury," albeit not the recording itself, that the "lack of the audio recording in the record makes it difficult to discern whether a 'communication' even occurred as contemplated by the Maryland Wiretap Act." Absent a more detailed argument, we also decline to consider this issue. *See* Md. Rule 8-504(a)(6) (providing that an appellate brief must include "[a]rgument in support of the party's position on each issue").

2020 Repl. Vol., 2024 Supp.), § 10-402 (a) of the Courts and Judicial Proceedings ("Cts. & Jud. Proc.") Article. An "oral communication" is "any conversation or words spoken to or by any person in private conversation." Cts. & Jud. Proc. § 10-401(13)(i). "'Intercept'" means the aural or other acquisition of the contents of any . . . oral communication through the use of any electronic, mechanical or other device." Cts. & Jud. Proc. § 10-401(10). With exceptions not applicable here, "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 before any court, [or] grand jury . . . if the disclosure of that information would be in violation of [the Wiretap Act]." Cts. & Jud. Proc. § 10-405; *accord Seal*, 447 Md. at 71. It is "lawful . . . for a person to intercept a[n] . . . oral . . . communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception." Cts. & Jud. Proc. § 10-402(c)(3); *accord Boston v. State*, 235 Md. App. 134, 144–45 (2017), *cert. denied*, 457 Md. 664 (2018).[12] An interception is admissible against a party who has consented. *Adams v. State*, 43 Md. App. 528, 536 (1979), *aff'd*, 289 Md. 221 (1981); *see also State v. Maddox*, 69 Md. App. 296, 301 (1986) ("[W]hen one party to a conversation expressly or implicitly consents to the recording of that conversation, the recording is admissible in evidence against the consenting party[.]").

[12] An exception exists when the communication "is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State." Cts & Jud. Proc. § 10-402(c)(3).

Pertinent to our discussion, "wiretaps are a form of a search." *Whack v. State*, 94 Md. App. 107, 122 n.8 (1992) (citation omitted), *cert. denied*, 330 Md. 155 (1993). On appeal, we consider whether, under the totality of the circumstances, consent under the wiretap statute was given freely and voluntarily. *Id*. at 122. In doing so, a trial court's determination of consent so given is "a question of fact[,]" and will not be disturbed unless it is clearly erroneous. *Id.* (observing that the principles applicable to consent searches apply to issues of consent under the wiretap statute). Consent may be both express and implied and implied consent to a recording of a conversation is sufficient. *See State v. Maddox*, 69 Md. App. at 301 (recognizing, under the facts of that case, that consent may be either express or implied); *see also Turner v. State*, 133 Md. App. 192, 207 (2000) (observing in a Fourth Amendment case that "consent to search not only may be express, by words, but also may be implied, by conduct or gesture"); *accord E.N. v. T.R.*, 474 Md. 346, 387 (2021).

In finding that Ms. O. was more credible than Appellant, the circuit court stated that its finding was "corroborated by the documentary evidence of his acknowledgment that he knew he would was [sic] being recorded as well as the inconsistency of what he testified to." The documentary evidence is the WhatsApp message wherein Appellant stated: "I know you were recording me[.]" Appellant maintains that the court "misread and misconstrued" this message. According to Appellant's argument, the message "constitutes evidence that while Gousse subsequently learned that Ms. O. had recorded their conversation on October 7-8, he did not know he was being recorded at the time of the recording." In other words, Appellant's admission in the message that "I know you were

recording me," is tantamount to an admission that he "*knew now*," when he wrote the message, and not that he "*knew then*" when the incident occurred.

Citing *Turner v. State*, 133 Md. App. 192, 207–08 (2000), Appellant argues this ambiguity must be resolved in his favor. In *Turner*, police followed Turner to an apartment complex after attempting to apprehend the driver of a vehicle stopped pursuant to a routine traffic stop. *Id.* at 196–97. The driver fled on foot after a short pursuit. Determining that the vehicle was registered to Turner, the police went to Turner's apartment complex and knocked on his apartment door. *Id*. at 197. Turner stepped out of his apartment and closed the door behind him. *Id*. The police then asked him for identification and Turner indicated there was a telephone bill inside the apartment. *Id*. at 198. Turner opened the door to his apartment and entered and the police followed close behind. *Id*. The officers did not ask for permission or tell Turner they were entering his apartment, and Turner did not tell them they could or could not enter the apartment. *Id*. A gun and suspected crack cocaine were seen in plain view and other contraband was later found pursuant to a search warrant based on the foregoing facts. *Id*. at 199. The motions court denied Turner's motion to suppress, finding that Turner consented to the police entry. *Id*. This Court reversed. *Id*. at 215. We stated:

> To be sure, the Maryland and Fourth Circuit cases plainly establish that consent to search not only may be express, by words, but also may be implied, by conduct or gesture. Yet, in all of these cases, the police made it known, either expressly or impliedly, that they wished to enter the defendant's house, or to conduct a search, and within that context, the conduct from which consent was inferred gained meaning as an unambiguous gesture of invitation or cooperation or as an affirmative act to make the premises accessible for entry.

Id. at 207 (internal citation omitted). We explained:

> [I]n the absence of a request by the police to enter, appellant's act of opening the door to his apartment and walking through it cannot give rise to a reasonable inference that he was giving the police permission to follow him. The police had asked appellant to produce an item that would help establish his identity, and in order to obtain it, he had to enter his apartment. It was for that reason that he opened the door to the apartment and walked inside. There was no evidence that in doing so he took any positive step or made any gesture that could be understood as an invitation to enter; the evidence showed only that he took the actions that were necessary to gain entry to the apartment himself.

Id. at 214; *see also United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990) (quoting *Johnson v. United States*, 333 U.S. 10, 17 (1948) ("Even if there was not implicit coercion in fact here, the government may not show consent to enter from the defendant's failure to object to the entry. To do so would be to justify entry by consent and consent by entry. 'This will not do.'"). *Turner* is, however, distinguishable. First, this was not a case of unlawful police entry into a home. This was a case where Appellant either did or did not consent to a recording on a cellphone, when there was evidence that the two of them had recorded each other on several prior occasions and other evidence that he acknowledged the presence of the phone upon entering the shared bedroom. That acknowledgment corroborated the court's interpretation of the meaning of the WhatsApp message. Further, other evidence supported the court's determination that Appellant sent the message and acknowledged that he knew he was being recorded at the time. This included: (1) contrary to Appellant's suggestion that Ms. O. stole his phone and wrote the message herself, Ms. O. testified that she did not take his phone; (2) that the message contained detailed information that included Appellant was sexually assaulted when he was seven years old

but that Ms. O. was unaware of that fact; and, (3) Appellant was inconsistent in remembering when this phone was allegedly stolen and when he reported it to his cell phone carrier.

Based on our review of the evidence, we hold that the court's factual finding that Appellant consented to the recording was not clearly erroneous. We evaluate factual determinations under a clearly erroneous standard, and thereby give due regard to the suppression court judge's findings as it is not this Court's role to evaluate credibility and weigh evidence. *Grimm v. State*, 232 Md. App. 382, 404–05 (2017), *aff'd*, 458 Md. 602 (2018). As such, there was no violation of the Maryland Wiretap Act when the alleged contents of that recording were used in any of the hearings or during the grand jury proceedings. The court properly denied the motion to suppress and the motion to dismiss.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APELLANT.