Circuit Court for Wicomico County
Case No. C-22-CR-18-000341

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1101

September Term, 2023

DIONTE KEITH DUTTON

v.

STATE OF MARYLAND

Wells, C.J.,
Reed,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: December 11, 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).

On October 7, 2019, a jury sitting in the Circuit Court for Wicomico County convicted the appellant, Dionte Keith Dutton, of second-degree murder and seven related offenses. The court sentenced Dutton to an aggregate term of 83 years' imprisonment. On appeal, we held that the cumulative effect of improper comments made by the State during its closing argument were so unfairly prejudicial as to deprive Dutton of a fair trial. *Dutton v. State*, Case No. 2184, Sept. Term, 2019, slip op. at 23 (filed Sept. 21, 2021). Accordingly, we reversed Dutton's convictions and remanded the case for a new trial. *Id.*, slip op. at 25. The outcome of Dutton's second trial was identical to that of his first. A jury convicted him of the same eight offenses, and the court imposed the same 83-year sentence. Dutton noted another appeal and presents a single issue for our review, which we quote:

> Did the trial court violate Mr. Dutton's rights to confrontation, counsel, and due process by admitting Fonnette Gale's former testimony without his knowledge and consent?

We answer this question in the negative and will therefore affirm the judgment of the circuit court. As the underlying facts are irrelevant to the resolution of this appeal, we will forgo a recitation thereof and proceed directly to the procedural history on which our holding rests.

BACKGROUND

As the second day of Dutton's retrial drew to a close, the court invited the State to either "call another witness" or read into the record an excerpt from the transcript of the first trial. The State elected to do the latter and presented the court with a copy of the trial

transcript from which it intended to read. During a bench conference, the following exchange occurred:

> THE COURT: Okay. So how would you like me to explain what we're doing to the ladies and gentlemen of the jury?
>
> * * *
>
> [DEFENSE COUNSEL]: Before we do, Your Honor, Ms. Gale -- and I believe I made the Court aware the other day that she is in the hospital, last I know, with stage 4 breast cancer.[1] That's what -- I've been told stage 4. I have the report that had her doing some form of surgery today.
>
> In any event, I agree with the State that it's a good idea to probably read in . . . her testimony. [I]t's certainly not necessarily a show-stopper, but she testified in both Mr. Braboy's trial and in Mr. Dutton's trial.[2] And we hadn't had the chance to talk yet, and, frankly, I have not compared what those two looked like.
>
> So[,] I'm not really sure which one I would say, oh, that's the one we're doing. For example --
>
> THE COURT: I don't understand the "which one." When you say "which one," I don't understand what you're talking about.

Defense counsel explained that Gale had testified at both Dutton's and Braboy's trials, but he had not yet compared the transcripts of her testimony and did not know with "which one the State ha[d] chosen to proceed[.]" The following colloquy ensued:

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[1] Following jury selection on the first day of Dutton's second trial, defense counsel advised the court that Gale was hospitalized with stage four cancer and therefore unavailable to testify at trial. He added that Gale's family members dropped off paperwork, which indicated she was scheduled to have surgery on the second day of trial. Finally, defense counsel expressed his expectation that the State and he would "probably . . . agree to work with [Gale's] prior sworn testimony."

[2] Lee Braboy was charged with, tried for, and convicted of the same crimes as was Dutton.

THE COURT: Well, let's ask. Let's just ask that one question.

Which one are you proceeding with?

[PROSECUTOR]: The one from the trial against Mr. Dutton. I think that's most appropriate given it was Mr. Dutton's counsel [who] was present as well as the focus of the trial was about Mr. Dutton, not against his codefendant.

THE COURT: And also he had the opportunity to cross-examine --

[PROSECUTOR]: Exactly.

THE COURT: -- and be present at the testimony of that witness.

So is there any objection to the prior testimony of Mr. [sic] --

[DEFENSE COUNSEL]: There isn't to that. But I would ask the [c]ourt's leeway as far as potentially reading in either tomorrow morning or whenever the Braboy transcript if I find that --

[PROSECUTOR]: That's fine.

[DEFENSE COUNSEL]: -- if I find that that would be -- bring in additional points.

THE COURT: Okay. Well, I can't agree to it at this moment to be a quid pro quo. Like, I'm consenting to the reading of this transcript from this gentleman's prior trial.

Now, in consideration for the ability to read tomorrow, I can't agree to that.

[DEFENSE COUNSEL]: Sure.

THE COURT: I just want to handle this issue, this transcript.

So[,] do you have -- do you agree that they are -- it is appropriate for them to read this transcript from the prior Dutton proceeding?

[DEFENSE COUNSEL]: Yes, I do.

> And *would you like me to voir dire my client so that he's understood on the record as to what's occurring and why?*
>
> THE COURT: Okay. *Well, no. No, I don't think that's necessary.*
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: I mean, you've laid the foundation, correct?
>
> [PROSECUTOR]: Yes.
>
> THE COURT: Is there any other record that you'd like to make?
>
> [PROSECUTOR]: Yes, Your Honor.
>
> THE COURT: Any other foundational predic[ate]?
>
> [PROSECUTOR]: [Defense counsel] provided documentation of Ms. Gale's surgery. I'd ask that it be marked for identification purposes just so the record is clear. This is only admissible because she was unavailable. She is unavailable because of these records.
>
> I just think for making the record purposes, I'd ask that this be marked for identification.
>
> THE COURT: Okay.
>
> Any objection?
>
> [DEFENSE COUNSEL]: That makes good sense.
>
> No objection.

(Emphasis added).

Gale's medical records were marked for identification, and the court admitted the transcript of her prior testimony into evidence without objection. The court then instructed the jury as follows:

> So[,] Fonnette Gale was a witness that was going to be called by the State. The State intended to call Fonnette Gale. Fonnette Gale is unavailable. She's an unavailable witness. She's not able to be here today for no reason of her own making, and the jury should not consider the reason why she's absent and should not even discuss the reason why she is absent. The parties have agreed that she is absent [for] no reason of her own making.
>
> She had testified at a prior proceeding, and so what we will do is one of the prosecutors will take the witness stand. The other prosecutor will read the question and then you'll hear the answer from the other prosecutor. So, again, you're listening to -- the prosecutor who is sitting in the witness chair will be reading the statements of a witness named Fonnette Gale.
>
> During the cross-examination part of this proceeding, [Defense counsel] will read the cross-examination questions and, again, the prosecutor who is sitting in for Fonnette Gale will read Fonnette Gale's responses.

After addressing the jury, the court turned to counsel and asked whether its instructions were sufficient from each of their perspectives. The prosecutor and defense counsel both answered in the affirmative.

Gale's prior trial testimony was read into the record. Thereafter, the court expressly found that the transcript from which the prosecutors and defense counsel had read "was from a prior proceeding" at which Dutton "had an opportunity" and "a similar motive to develop the testimony by direct, cross, and redirect examination." When the court subsequently asked whether they concurred with its findings, the prosecutor and defense counsel answered in the affirmative.

DISCUSSION

Dutton contends that the trial court "violated [his] constitutional right to confrontation" by permitting the State to read into the record Gale's testimony from his first trial. Specifically, he argues that the court reversibly erred by admitting Gale's prior

testimony without first obtaining a knowing and intelligent waiver of his right to confront and cross-examine her. The State responds that "because Gale was an unavailable witness who had testified at Mr. Dutton's previous trial on the same charges, and was subject to cross-examination at that time, there was no violation of Mr. Dutton's right to confrontation."

"[I]n a criminal trial, the court has no discretion to admit 'testimonial evidence' that would violate the defendant's Sixth Amendment rights under the Confrontation Clause." *Davies v. State*, 198 Md. App. 400, 411 (2011). Accordingly, "'[w]e . . . apply the *de novo* standard of review to the issue of whether the Confrontation Clause was violated[.]'" *Id.* (quoting *Snowden v. State*, 156 Md. App. 139, 143 n.4 (2004), *aff'd*, 385 Md. 64 (2005)); *accord Langley v. State*, 421 Md. 560, 567 (2011); *see also Taylor v. State*, 226 Md. App. 317, 332 (2016) ("We review the ultimate question of whether the admission of evidence violated a defendant's constitutional rights without deference to the trial court's ruling.").

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, *see Langley*, 421 Md. at 567, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] U.S. CONST. amend. VI. "The 'main

[3] Article 21 of the Maryland Declaration of Rights similarly states: "[I]n all criminal prosecutions, every man [and woman] hath a right . . . to be confronted with the witnesses against him [or her] . . . [and] to examine the witnesses for and against him on oath[.]" Md. Decl. of Rts. art. 21. Maryland courts construe the State and federal confrontation clauses "*in pari materia,* or as generally providing the same protection to defendants." *Derr v. State*, 434 Md. 88, 103 (2013).

and essential purpose' of the Confrontation Clause is to ensure that the defendant has an opportunity for effective cross-examination of adverse witnesses, 'which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.'" *Taylor*, 226 Md. App. at 332 (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974)).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court "redefined many of the core principles for evaluating whether a criminal defendant has the right to require the prosecution to produce the declarants of extrajudicial statements so that the defendant can confront and cross-examine them." *Taylor*, 226 Md. App. at 333. Among these was the Court's determination that the Confrontation Clause applies exclusively to the testimonial hearsay of a non-testifying declarant.[4] *See also Smith v. Arizona*, 602 U.S. 779, 784 (2024) ("The [Confrontation] Clause's prohibition 'applies only to testimonial hearsay[.]'" (quoting *Davis v. Washington*, 547 U.S. 813, 823 (2006))); *Derr*, 434 Md. at 106 ("[T]he Confrontation Clause only applies when an out-of-court statement constitutes testimonial hearsay."). The Court thus imposed "two limitations on the reach of the right to confront witnesses." *Derr*, 434 Md. at 106. Under *Crawford*, the Confrontation Clause only applies to statements that are both (1) hearsay (*i.e.*, "out-of-court statements offered and received to establish the truth of the matter asserted") and (2) testimonial. *Id.* at 106-

[4] The Court reasoned: "Where *nontestimonial* hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v.*] *Roberts*[, 448 U.S. 56 (1989)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68 (emphasis added).

07. Although the Court left "for another day . . . a comprehensive definition of 'testimonial[,]'" it stated that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial[.]" *Crawford*, 541 U.S. at 68 (footnote omitted). The Court then held that the Confrontation Clause prohibits the admission of such statements by a non-testifying witness "unless he [or she] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. *See also Smith*, 602 U.S. at 784. Conversely stated, "'[t]estimonial statements of witnesses absent from trial' are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" *Rainey v. State*, 246 Md. App. 160, 181 n.12 (2020) (quoting *Crawford*, 541 U.S. at 59), *cert. denied*, 468 Md. 556 (2020).

In this case, the court found that Gale was unavailable to testify at Dutton's second trial and that she was subject to cross-examination at his first. Dutton did not challenge those factual findings at trial, nor does he do so on appeal—and for good reason. The uncontested evidence amply supported the court's findings. The excerpt from the transcript of Dutton's first trial that was read into evidence revealed that Dutton not only had a prior opportunity to cross-examine Gale but that he had done so. Gale's medical records, in turn, reflected that she had recently been diagnosed with cancer and was scheduled to undergo surgery on the second day of trial, thereby establishing her unavailability to testify. Thus, "*Crawford*'s requirements of unavailability and a prior opportunity to cross-examine" were both met, and the admission of Gale's prior trial testimony did not, therefore, violate

Dutton's rights under the Confrontation Clause regardless of whether he "waived" them. *State v. Snowden*, 385 Md. 64 (2005).

Citing *Clark v. State*, 306 Md. 483 (1986), Dutton argues in the alternative that the court violated his Sixth Amendment right to effective assistance of counsel by "prohibit[ing]" his attorney from communicating with him "about [his] constitutional right to confrontation." The State counters that because "Dutton was not foregoing [sic] his confrontation rights through the use of Gale's prior testimony, there was no need for counsel to consult with him about his understanding." Again, we agree with the State.

Dutton's reliance on *Clark* is misplaced. Steven Clark, the appellant in that case, was convicted of heroin possession following a joint trial by jury. *Clark*, 306 Md. at 486. Prior to trial, Clark and his co-defendant, Jonathan Hempfill, moved for severance, which the trial court denied. *Id.* at 484. During jury selection, the court prohibited the co-defendants' counsel from conferring with one another regarding the independent exercise of their peremptory challenges. *Id.* at 485. On appeal, the Supreme Court of Maryland held that the trial court's actions violated Clark's right to effective representation of counsel, reasoning, in part:

> [E]ffective representation means representation in which *the attorney is unhindered in the lawful pursuit for knowledge which might benefit the client*. The trial judge's ruling here in effect tied counsel's hands and foreclosed him from pursuing a valuable source of information in a consolidated trial—the co-defendant's attorney. The State disagrees, arguing that the defendant has no right to the effective assistance of his co-defendant's counsel. The point is, however, that *the trial judge's action adversely impacted upon the effectiveness of the defendant's attorney by placing an impediment on his assistance*.

Id. at 489 (emphasis added).

Even if we were to set aside their obvious procedural distinctions, *Clark* is readily distinguishable from, and therefore inapposite to, the present case. By declining defense counsel's offer to *voir dire* Dutton, the circuit court in this case neither hindered his pursuit of potentially advantageous information nor otherwise impeded his ability to effectively assist his client. As discussed above, Gale's former testimony was admissible regardless of whether Dutton waived his purported right to confront and cross-examine her, rendering defense counsel's proposed *voir dire* of him utterly inconsequential. The court did not, therefore, meaningfully "interfere . . . with the ability of counsel to make independent decisions about how to conduct the defense[.]" *Clark v. State*, 485 Md. 674, 693-94 (2023) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). Accordingly, we conclude that the trial court did not violate Dutton's right to effective assistance of counsel.[5]

THE JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.

[5] In the "Questions Presented" section of his appellate brief, Dutton also insinuates that the admission of Gale's prior trial testimony violated his constitutional right to due process. He does not, however, present any independent argument in that regard. Instead, Dutton seems to suggest that the court's alleged violations of his rights to confrontation and counsel *ipso facto* deprived him of due process. As we do not perceive any violation of the former two rights, Dutton's derivative due process challenge fails.