Circuit Court for Charles County
Case No. C-08-CR-22-000416

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1150

September Term, 2023

JOSE EUGENIO ESCOBAR-ARGUETA

v.

STATE OF MARYLAND

Zic,
Kehoe, S.
Getty, Joseph, M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: October 8, 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 Maryland Rule 1-104(a)(2)(B).

Appellant, Jose Eugenio Escobar-Argueta, was indicted for sexual solicitation of a minor, fourth-degree sex offense, second-degree assault, attempted third-degree sex offense, and attempted fourth-degree sex offense in the Circuit Court for Charles County on July 29, 2022. Mr. Escobar-Argueta's appeal is based upon events during the jury trial and an allegedly inconsistent verdict. First, during its opening statement, the State said, "I made a mistake" as if speaking from Mr. Escobar-Argueta's point of view. Second, a police officer's body camera audio recording of the officer interviewing the complaining witness, a nine-year old female, was admitted into evidence under the excited utterance exception to the rule against hearsay. Third, at the conclusion of the two-day jury trial, the jury found Mr. Escobar-Argueta guilty of all counts except the attempted third-degree sex offense. Mr. Escobar-Argueta appeals his conviction of sexual solicitation of a minor as inconsistent with the jury's acquittal of attempted third-degree sex offense.

QUESTIONS PRESENTED

Mr. Escobar-Argueta presents three questions for our review:

1. Did the circuit court commit legal error in admitting double-hearsay contained in a body camera audio recording?
2. Did the circuit court commit clear error in allowing the [State] to attribute a statement to [Mr. Escobar-Argueta] that was not in discovery?
3. Did the circuit court commit clear error in allowing an inconsistent verdict by the jury?

For the following reasons, we affirm the circuit court.

BACKGROUND

The charges against Mr. Escobar-Argueta arose from events at a party on January 30, 2022, at the victim's house in Waldorf, Maryland. At the time, the victim, T., was nine years old and resided in the house with her family. T.'s mother, S., testified that, at the party, Mr. Escobar-Argueta asked to use the bathroom on the third floor of the house. S. allowed Mr. Escobar-Argueta to use the second-floor bathroom or third-floor bathroom in the hallway. At this time, T. was asleep in the master bedroom on the third floor.

According to T., Mr. Escobar-Argueta came into the master bedroom, sat down on the bed, and then laid down next to T. and started touching her stomach. She reported that he attempted to touch her chest, thighs, breast, and bottom, and asked to kiss her. He also tried to get "on top" of T. T. told Mr. Escobar-Argueta to stop throughout the encounter. T. got out of bed and tried to leave the bedroom, but the door was locked. Mr. Escobar-Argueta begged for T.'s forgiveness.

S. reported that, around the same time, she went to check on T. and found the door locked, which surprised her because the door was typically not locked. S. retrieved a knife and used it to unlock the door. When S. opened the door, Mr. Escobar-Argueta exited the bedroom, and S. testified that he said, "I didn't do nothing." S. testified that T. then said that Mr. Escobar-Argueta had touched her.

S. called 911 around 4:00 or 5:00 a.m. and stated that the incident happened about "15 minutes" before the call. In her call, she reported that "one of our friends came upstairs and tried touching my nine-year-old daughter. And she's saying he touch[ed] her

and he['s] trying to deny it now." The 911 call's audio recording was admitted at trial as State's Exhibit 1 under the excited utterance exception to the hearsay rule.

Officer Matthew Neel responded to S.'s 911 call at approximately 5:00 a.m. on January 30. He spoke with T. around 5:30 a.m., at which time she detailed the assault. Officer Neel's conversation with T. was recorded on his body camera audio. Portions of the body camera audio recording, specifically the interview between T. and Officer Neel, were admitted at trial as State's Exhibit 4 under the excited utterance exception to the hearsay rule.

Mr. Escobar-Argueta was convicted on multiple counts, including sexual solicitation of a minor, fourth-degree sex offense, second-degree assault, and attempted fourth-degree sex offense. Mr. Escobar-Argueta was found not guilty of attempted third-degree sex offense. Mr. Escobar-Argueta's second-degree assault conviction was merged with the fourth-degree sex offense conviction. Mr. Escobar-Argueta filed a motion for a new trial, raising ten issues for the circuit court to consider. The motion for a new trial was denied and Mr. Escobar-Argueta was sentenced to ten years of incarceration, with all but eight years suspended, to be served concurrently. This appeal followed.

DISCUSSION

I. MR. ESCOBAR-ARGUETA'S CLAIM REGARDING THE ADMISSIBILITY OF THE POLICE OFFICER'S STATEMENTS IS NOT PRESERVED. MR. ESCOBAR-ARGUETA'S CLAIM REGARDING THE ADMISSIBILITY OF THE COMPLAINING WITNESS'S STATEMENT IS INSUFFICIENTLY BRIEFED.

At trial, the State sought to admit the recorded audio interview between T. and Officer Neel. During a bench conference prior to Officer Neel testifying, defense counsel

objected that the audio could not be admitted under either the present sense impression or the excited utterance exceptions to the hearsay rule. Defense counsel argued that T. had spoken to multiple people before she spoke with Officer Neel and T.'s statements were not spontaneous. Defense counsel also argued that "there's tons of other hearsay on this. The mother is talking, the daughter is talking . . . it's not a present sense impression, it's not an excited utterance." The court ruled that it would allow the audio to be played, as T.'s interview is an excited utterance under *Cooper v. State*, 434 Md. 209 (2013).[1]

When the State sought to admit the recorded audio interview during Officer Neel's testimony, defense counsel renewed her objections, which the court overruled. The audio played for the jury was limited to only T.'s interview with Officer Neel.

On appeal, Mr. Escobar-Argueta argues that the "the trial court failed to rule that each of the out of court statements fell within an exception to the hearsay [rule.]" He contends that "the trial court never made any evidentiary hearsay exception ruling as to the out of court statement made by the police officer in question during the jury trial." Mr. Escobar-Argueta also argues in his appellate brief that "the trial court . . . only ruled on the out of court statement made by the complaining witness, which was not an excited utterance as the alleged incident occurred several hours before the police officer's interview with the complaining witness." Mr. Escobar-Argueta relies upon *Paydar v. State*, 243 Md. App. 441, 456 (2019) to argue that "body camera footage (in this case,

[1] In *Cooper*, the Supreme Court of Maryland concluded that a sexual assault victim's statements to a detective approximately one hour after the incident occurred qualified as excited utterances. 434 Md. at 244-45.

audio only) must satisfy the hearsay-within-hearsay rule to be admissible when offered, as it was in this case, against the accused and to bolster the credibility of the complaining witness, *inter alios* [*sic*]." Mr. Escobar-Argueta concludes his argument with:

> Here, the trial court[] [erred] by allowing into evidence the double hearsay contained in the body camera audio, without making a ruling on the police officer's out of court statement. The trial court's error allowing double hearsay, i.e., body camera audio, influenced the jury in a profound way because this was a case rested mainly on the credibility of the witnesses. Therefore, this error by the trial court was not harmless error as this double hearsay was used against [Mr. Escobar-Argueta] to bolster the complaining witness's credibility.

The State argues that "Mr. Escobar-Argueta has not preserved any challenge to Officer Neel's statements on the recording." We agree that this issue is not preserved.

The State also contends that the "totality of the circumstances justified [the] admission [of T.'s statements] under the excited utterance hearsay exception." The State asserts that the "mere passage of time" did not render T.'s statements inadmissible and that T. was still under the stress of the event.

A. Mr. Escobar-Argueta Has Not Preserved His Challenge To The Admissibility Of Officer Neel's Statements On The Recording.

This Court generally does not address an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). To preserve a claim,

> [a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless

> the court, at the request of a party or on its own initiative, so directs.

Md. Rule 4-323(a). In *Hall v. State*, this Court explained:

> While a party need not state the specific grounds for objection unless directed to do so by the court, the [Supreme Court of Maryland] has nonetheless held that "where a party voluntarily states his grounds for objection even though not asked, he must state all grounds and waives any not so stated."

225 Md. App. 72, 84 (2015) (quoting *von Lusch v. State*, 279 Md. 255, 261 (1997)). In Mr. Escobar-Argueta's case, defense counsel did not object to Officer Neel's statements being admitted; defense counsel limited the hearsay objections to T.'s and S.'s statements. Therefore, Mr. Escobar-Argueta's argument regarding Officer Neel's statements is not preserved, and we will not address it.

B. Mr. Escobar-Argueta Inadequately Briefed His Challenge To The Admissibility Of T.'s Statements On The Recording.

"[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal." *Klauenberg v. State*, 355 Md. 528, 552 (1999). *See* Md. Rule 8-504(a)(6) (requiring that briefs contain "[a]rgument in support of the party's position on each issue"); *Bert v. Comptroller of the Treasury*, 215 Md. App. 244, 269 n.15 (2013) ("Appellant's 'argument' could also be rejected out of hand because it is inadequately briefed").

Except for a portion of a sentence in Mr. Escobar-Argueta's brief where he states that T.'s statement to Officer Neel "was not an excited utterance as the alleged incident occurred several hours before the police officer's interview with the complaining witness[,]" Mr. Escobar-Argueta does not provide any argument as to why T.'s statement

is not an excited utterance.[2] *See Silver v. Greater Baltimore Med. Ctr., Inc.*, 248 Md. App. 666, 668 n.5 (2020) ("A single sentence is insufficient to satisfy [Maryland Rule 8-504(a)(6)]'s requirement").

Additionally, the only supporting citation Mr. Escobar-Argueta provides is to *Paydar*, 243 Md. App. at 456, for the general hearsay rules surrounding introduction of recordings from body-worn cameras into evidence. "[W]e question whether [an] argument [is] properly presented to us considering that, other than a brief citation to the doctrine, appellant has not adequately briefed the issue." *Webster v. State*, 221 Md. App. 100, 133 (2015) (citing *Bert*, 215 Md. App. at 269 n.15). We conclude that Mr. Escobar-Argueta's argument as to the admissibility of T.'s statements is not adequately briefed and therefore, do not address it.

II. THE STATE'S OPENING STATEMENT DID NOT VIOLATE DISCOVERY RULES.

During the State's opening statement, the State said:

> The defendant continued denying and all he could say was he was in there and why he was in that bed touching and kissing that little girl was I was going to the bathroom. *I made a mistake.*
>
> Ladies and gentlemen, this was not a mistake. He couldn't wait a minute to go to the bathroom downstairs.

[2] Mr. Escobar-Argueta's characterization of the time lapse from when the alleged assault occurred to when T. made her statement to Officer Neel as "several hours" is not supported by the record. S. testified that she called 911 around 4:00 or 5:00 a.m., and during the call, S. told the dispatcher that the incident occurred approximately 15 minutes before she called. Officer Neel testified that he received the sexual assault call and arrived at the house at about 5:00 a.m. T. made her recorded statement to Officer Neel between 5:29 a.m. and 5:32 a.m. Based on the record, T. made her statement less than "several hours" after the incident.

> That's not a mistake. He didn't mean to go to the bathroom? It wasn't a mistake because he could have used that hall bathroom. He knew about that bathroom.
>
> He did not intend to go to a bathroom. It wasn't a mistake that he last -- locked the bedroom door, because he didn't intend to go to a bathroom. Not a mistake.

(Emphasis added). During trial, defense counsel made the following objection:

> I am going to object to the statement that [the State] made that [Mr. Escobar-Argueta] said I made a mistake. That is a Defendant's statement, I'm entitled to all Defendant's statements and I don't recall seeing that, I mean the discovery is 40 pages, I've gone through it quite a bit, I don't recall that statement being turned over, unless you can direct me as to where it is.
>
> ***
>
> So during the opening, she, [the State], said that my client stated I made a mistake; that's not in discovery, that's not a statement that was turned over to me. I'm entitled to all of my client's statements. That's not a statement that was ever, as far as I'm concerned, made, nor was it in discovery.
>
> So I'm going to ask that there be an instruction that the jury is to disregard that and to strike that from what they just heard because that was never -- that's, he's never said that.

The State acknowledged that Mr. Escobar-Argueta did not say "I made a mistake," but that the State was intending to describe Mr. Escobar-Argueta "end[ing] up in there, in the bed" as a mistake from his perspective. The court ruled:

> I'm not sure it was said that he said it was a mistake or he can't say it was a mistake, I'm not sure, but I think the appropriate thing to do is remind [the jury] that opening statements of lawyers are not evidence, they're only intended to help you to understand the evidence in the case.

Mr. Escobar-Argueta argues on appeal that "the circuit court committed clear error in allowing the [State] to attribute a statement to [Mr. Escobar-Argueta] that was not in

discovery." He also claims that the State "violated due process enshrined in both the Maryland and U.S. Constitution(s)" and the discovery principles in *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Escobar-Argueta further contends that "this clear error by the trial court was not harmless" and that the use of the "inadmissible evidence" in the State's opening statement "caused damage in the form of prejudice to [Mr. Escobar-Argueta] that transcended the curative effect of the trial court's instruction to the jury."

The State argues that there was no discovery violation because "[t]he State cannot fail to disclose non-existent evidence." The State contends that "[t]he record shows that [Mr.] Escobar-Argueta never said, 'I made a mistake.' Instead, the [State] sought to characterize [Mr.] Escobar-Argueta's statement that he was going to the bathroom as a claim of 'mistake' as to why he was in the master bedroom with T." The State also contends that the circuit court's instructions to the jury that "opening statements are not evidence" were curative, if there was anything to cure.

We agree with the State that "[Mr.] Escobar-Argueta failed to show a discovery violation, as the State could not fail to disclose a statement that did not exist."

In *Blake v. State*, the Supreme Court of Maryland defined a *Brady* violation as:

> [A] constitutional claim based on the Due Process Clauses of the Fifth and Fourteenth Amendments referring to the State's failure to disclose evidence in a criminal trial where: (1) the evidence at issue is favorable to the accused; (2) the evidence at issue was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued as a result of the suppression.

485 Md. 265, 277 n.6 (2023) (citation omitted).

Based on the record, the State did not intend to assert as a matter of evidentiary fact that Mr. Escobar-Argueta said "I made a mistake"; the State merely characterized Mr. Escobar-Argueta's claims that he mistook the bedroom for the bathroom. There was no resulting *Brady* violation as evidence that does not exist cannot be suppressed. And, though not necessary because there was no violation to cure, the circuit court's instruction to the jury ensured any confused jurors would not consider the State's opening statement to be evidence.

III. MR. ESCOBAR-ARGUETA WAIVED ANY ISSUE AS TO INCONSISTENT VERDICTS.

Mr. Escobar-Argueta argues that "[t]he jury's verdict of 'guilty' on count one (sexual solicitation of a minor) and 'not guilty' on count four (attempted third-degree sexual offense)" are "legally inconsistent and the evidence in the jury trial is not legally sufficient to sustain [Mr. Escobar-Argueta]'s conviction on count one." Mr. Escobar-Argueta acknowledges that defense counsel "failed to object . . . to the inconsistent verdicts before the jury was released" but continues that "the undersigned objected to the legally inconsistent verdict(s) in his timely motion for a new trial."

The State relies on *Givens v. State*, 449 Md. 433 (2016), to argue that Mr. Escobar-Argueta waived his inconsistent verdict claim because defense counsel did not object to the verdict before the jury was discharged. We agree.

In *Givens v. State*, the Supreme Court of Maryland held that "to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts before the verdicts are final and the trial court discharges the jury." 449 Md. at 486. If a defendant fails to do this, he

"waives any issue as to allegedly inconsistent verdicts[.]" *Id.* As Mr. Escobar-Argueta states in his appellate brief, and as the record reflects, defense counsel made no objection to the allegedly inconsistent verdicts before they were final and before the jury was discharged. Mr. Escobar-Argueta therefore waived the issue of inconsistent verdicts.

CONCLUSION

We hold that Mr. Escobar-Argueta's argument regarding the admissibility of Officer Neel's statements on the audio recording was not preserved for appellate review and that his argument with respect to T.'s statements on the audio recording was insufficiently briefed and, thus, is not reviewable. We hold that the circuit court did not err in allowing the State's opening statement because there was no discovery violation. We further hold that the issue of inconsistent verdicts was waived and is not preserved for appellate review.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.