Circuit Court for Charles County
Case No. C-08-CR-18-000466

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2362

September Term, 2019

KEITH ALLAN KRIKSTAN

v.

STATE OF MARYLAND

Kehoe,
Zic,
Raker, J.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 8, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Charles County convicted appellant Keith Allan Krikstan of sexual abuse of a minor, production of child pornography, and conducting visual surveillance of a private area with prurient intent. Appellant presents the following questions for our review:

> "1. Did the lower court err in denying appellant's motion for a continuance following the State's late disclosure of evidence?
>
> 2. Did the trial court err in admitting hearsay statements recorded by police officers into evidence?"

I.

Appellant was indicted by the Grand Jury for Charles County on charges of sexual abuse of a minor, production of child pornography, conducting visual surveillance of a private area with prurient intent, and three counts of possession of obscene matter with the intent to distribute. Appellant was accused of sexually exploiting L.[1] while he was babysitting her over the summer of 2017. At the time of the relevant events, appellant was 29 and 30 years old, and L. was 12 and 13 years old. The jury acquitted him of the three counts of possession of obscene matter with the intent to distribute and convicted him of all other charges. The court sentenced appellant to a term of incarceration of twelve years for sexual abuse, three years for pornography production, and one year for conducting visual surveillance of a private area, all consecutive.

[1] Because this case involves a minor and for privacy considerations, we will not use her actual name and will refer to her as "L."

On January 11, 2018, Officer Sheilagh Cook, the school resource officer at Middle School,[2] seized appellant's cellphone in response to a complaint that appellant was having inappropriate communications with a minor student. Officer Cook testified that appellant was working as a substitute teacher at the school that day. Shortly thereafter, another officer arrived to collect appellant's phone and deliver it to the police department for extraction.

The extraction of the phone's contents included images of an unidentified young female who was identified the next day by Officer Cook as L., a student at Middle School. The extraction uncovered a video of L. "being coached on how to perform oral sex on a banana" by a male voice off-screen. Appellant's phone also contained an application that allows the user to stream videos on the phone as they are recorded by another device.

On January 13, 2018, Sergeant George Higgs executed a search warrant at appellant's home and recovered two laptop computers. Sergeant June Lee, an expert in digital examination, performed a forensic analysis of the laptops. Eleven images of L. were recovered from one of the laptops that showed L. in her bathroom, preparing to shower or sitting on the toilet. Some of the photos showed L. fully or partially unclothed. The photos were dated June 14, 15, and 19, 2017. L. testified that she did not give permission for anyone to record her in the bathroom.

Sergeant Higgs spoke with Ms. R. W., L.'s mother, about the video and images found of her daughter on appellant's devices. Ms. R.W. testified that she met appellant

[2] To protect the victim's privacy, we refer to the school only as "Middle School."

through her job at appellant's father's skating rink and they became friends. She testified that she would sometimes ask appellant to watch her children while she was out of the house and considered him a babysitter, although she admitted that she did not pay him. She testified that during the summer of 2017, appellant was at her house and watched her children almost every day. Appellant testified that Ms. R.W. was always present in the house when he came over, and he was not a babysitter.

Sergeant Higgs spoke to Ms. R.W. again on February 9, 2018, when he was informed that appellant's father had asked her to meet with appellant. Ms. R.W. agreed to allow Sergeant Higgs to surreptitiously audio record her meeting with appellant in her car. During the two hour conversation, Ms. R.W. made several allegations about appellant's relations with L., including many that were not the basis of the criminal charges against appellant. Ms. R.W. referred to out-of-court statements allegedly made by L. or the police, repeatedly accusing appellant of touching L. or masturbating in front of L., and voicing fears that L. was pregnant from sexual intercourse with appellant. In this conversation, appellant admitted to recording the banana video and to taking the photos of L. in the bathroom with a recording device he had placed there but denied that he ever touched L., masturbated in front of her, or had sexual intercourse with her.

Over appellant's objection, at trial, the State played the audio recording of the conversation between Ms. R.W. and appellant. The court instructed the jury at that time as to how to consider the audio recording:

> "Okay, all right. So, ladies and gentlemen, the State is going to play Exhibit 24, which is audio only… It's audio only. There

> are two people on the exhibit or two people on the audio. The - - there will be a male and a female on the audio. The voice of the female or the questions, I should say, the questions, statements, or comments of the female are not evidence, okay? So they're not evidence. They are only to give context to the responses of Mr. Krikstan. So don't consider them for their truth. They are only to give context to his responses. Does that make sense? All right."

On November 18, 2019, the morning of the first day of trial, defense counsel received an email from the prosecutor informing him that Ms. R.W. could now recall specific dates and times during which she was either teleworking or away from home and appellant was babysitting her children. The list of specific dates included June 14, 15, and 19, 2017, the dates that ten of the photos of L. recovered from appellant's computer were captured. Defense counsel moved to prohibit the State from using this new evidence at trial and, in the alternative, moved for a continuance to have time to investigate the new information. The court denied appellant's motion for continuance, ruling that a postponement would be futile and the case was ready to proceed as is.

Ms. R.W. testified at trial that on June 14, 15, and 19 of 2017, she was either teleworking at the house or away from home and that she would have asked appellant to babysit her children on those days. Defense counsel used the skating rink calendar provided by Ms. R.W. in cross-examination of Ms. R.W. about the June dates. The State referenced the dates and Ms. R.W.'s testimony regarding those specific dates in its closing argument.

Appellant was convicted and sentenced as above, and this timely appeal followed.

II.

Appellant argues that the court abused its discretion in denying his motion for continuance. Appellant maintains that because the new information about dates and times was divulged by the State on the eve of trial, with the defense learning of it on the morning of trial, the defense was deprived of the needed additional time to obtain evidence regarding the care and custody of the minor child. Appellant argues that the court's denial of the motion for continuance was prejudicial error because it deprived appellant of the needed time to prepare proper cross-examination of Ms. R.W., the ability to retrieve records to refute her claims, and the opportunity to call his own witnesses.

Appellant argues that this error was not harmless because the new evidence addressed a required element of sexual abuse of a minor, the most serious offense charged. The State was required to establish that L. was in appellant's care and custody as an element of sexual abuse of a minor, and the new evidence introduced by the State on the first day of trial related directly to appellant's care and custody of L. Appellant maintains that any error that would deprive him of his ability to prepare and present a defense to those allegations cannot be harmless.

Next appellant argues that the circuit court erred in admitting into evidence irrelevant and prejudicial hearsay statements on the audio recording. According to appellant, the State never alleged that appellant touched or had physical sexual contact with L. and those statements were probative only to accentuate appellant's criminal propensity. Furthermore, even if these statements had the non-hearsay purpose of providing context to

appellant's responses, the risk of unfair prejudice to appellant far outweighed any probative value. Appellant argues that the prejudicial impact of these allegations of physical sexual activity was so severe that it deprived appellant of a fair trial.

The State responds that the court exercised its discretion properly in denying appellant's motion for continuance because the late-disclosed evidence did not contain any significant new information. Defense counsel acknowledged that he had been aware that those particular dates in June 2017 were connected to the photos taken of L., as they were the same dates that the photographs of L. that were collected from appellant's computer were captured. In addition, appellant's statements placed him at L.'s house almost every day during that time frame. Further, Ms. R.W. was planning to testify that appellant was babysitting her children nearly every day in the summer of 2017. The State argues that defense counsel had ample notice to prepare a defense regarding the custody issue and the new evidence did not reveal any previously unknown information. Further, the State argues that despite the denial of the continuance, because Ms. R.W. did not testify until two days later, defense counsel had two days to investigate and prepare for the new evidence.

As to appellant's hearsay argument, the State asserts first that the issue is not preserved for our review. The State argues that defense counsel's hearsay objection to the admission of the audio recording was not preserved under Md. Rule 4-323(A), which states as follows:

> "An 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 State argues that, because defense counsel did not object until after the exhibit had been admitted into evidence, he waived the objection. The State further argues that even if the objection was preserved initially, defense counsel waived the objection later by failing to object when the State re-played parts of the recording during appellant's cross-examination.

The State argues that, assuming the hearsay issue is preserved, the court did not err in admitting the audio recording into evidence because Ms. R.W.'s statements were not prejudicial hearsay. The State maintains that the statements were not admitted for their truth, but rather to provide context to the conversation. The State argues that the statements were not prejudicial because in the conversation, appellant firmly denied all the allegations of physical sexual activity with L. alleged by Ms. R.W. Further, the State argues that any possible prejudicial impact of the statements was resolved by the curative instruction the court gave to the jury.

The State argues that even if the admission of the recording was error, it was harmless in that appellant admitted he filmed the banana video, placed the recording device in L.'s bathroom, and transferred the images to his computer. Based on the totality of the evidence, the State maintains that there is no reasonable possibility that the statements contributed to the guilty verdict.

III.

We turn first to appellant's argument that the trial court abused its discretion in denying his motion for continuance. We agree with the State that the trial court exercised its discretion properly to deny the motion for continuance.

The decision whether to grant a continuance lies within the discretion of the trial judge. *See Abeokuto v. State*, 391 Md. 289, 329 (2006). We review a trial court's discretionary ruling under an abuse of discretion standard. *See Alexis v. State*, 437 Md. 457, 478 (2014). Absent an abuse of that discretion, we will not disturb the trial court's decision to deny a continuance. *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006).

An abuse of discretion occurs when the trial court's ruling was "manifestly unreasonable, or exercised on untenable grounds, or [made] for untenable reasons." *State v. Sayles*, 472 Md. 207, 230 (2021) (quoting *Appraicio v. State*, 431 Md. 42, 51 (2013)). The Court of Appeals has recognized that "it would be an abuse of discretion for a trial judge to deny a continuance when . . . counsel was taken by surprise by an unforeseen event at trial, when he had acted diligently to prepare for trial." *Touzeau*, 394 Md. at 669. Likewise, a denial of a motion for continuance is not an abuse of discretion where "the moving party has failed to demonstrate due diligence to mitigate the effects of what was alleged to be a surprise." *Touzeau*, 394 Md. at 672; *see also Hughes v. Averza*, 223 Md. 12, 19 (1960) (holding that "the failure of trial counsel to adequately prepare for trial was not a ground for a continuance"); *Butkus v. McClendon*, 259 Md. 170, 175 (1970) (holding that there was no abuse of discretion in denying the motion for continuance because there was no surprise).

In *Touzeau v. Deffinbaugh*, the appellant, proceeding *pro se*, filed a motion for continuance in order to allow her enough time to secure pro bono counsel. 394 Md. at 659. She argued that a continuance was necessary because the findings of the court's evaluation report had been a surprise, and she was prompted to find pro bono representation in light of those findings. *Id.* The trial judge denied the motion, ruling that appellant had ample time to find representation. *Id.* at 662. On appeal, the Court of Appeals affirmed the trial judge's denial of the motion, finding no surprise or due diligence. *Id.* at 678. The results of the court evaluation report were no surprise; appellant was aware that unfavorable report results are common in contested custody proceedings, and she had previously experienced an unfavorable court evaluation report. *Id.* at 675. Appellant's failure to timely secure counsel despite ample notice of the potentially unfavorable evaluation results was due to her own lack of due diligence. *Id.* at 678.

Similarly, the trial court here did not abuse its discretion in denying appellant's motion for continuance because the dates recalled by Ms. R.W. on the eve of trial were not a surprise---defense counsel could have investigated those dates before trial. Defense counsel acknowledged that he had been well aware of those specific dates, as the photographs of L. extracted from appellant's computer were captured on those same dates. Further, even prior to the alleged new information, Ms. R.W. would have testified that by the summer of 2017 appellant was at her house every day and he was her primary babysitter when she was teleworking or at the office. Defense counsel had ample notice and time to investigate those dates and appellant's potential alibis before the first day of trial. Defense

counsel's failure to adequately prepare for trial is not a valid ground for a continuance, and therefore the trial court's denial of the motion for continuance was not an abuse of discretion.

III.

We next turn to appellant's argument that the trial court erred in admitting into evidence hearsay statements recorded by the police. We agree with the State that the statements recorded by the police were not hearsay, were relevant, and were not prejudicial. Therefore, the trial court did not err in admitting the statements into evidence.

As a preliminary issue, we address whether defense counsel's hearsay objection is preserved for our review. The State argues first, that the objection was not initially preserved because defense counsel only raised a hearsay objection after the recording was already admitted into evidence, and second, that even if the hearsay objection was initially preserved, defense counsel waived the objection by failing to object when the state used the recording later at trial. The objection was preserved and was not waived.

At trial, the State offered the audio recording of the conversation between Ms. R.W. and appellant into evidence as State's Exhibit 24. Defense counsel objected to the admission of the exhibit on authentication grounds and asked that the court give a statement to the jury explaining that he was not the lawyer referred to in appellant's statements on the recording. Defense counsel objected also to the admission of the exhibit on hearsay grounds:

THE COURT: Okay, the bigger question – I think it's fine. The bigger question I have for you is do you want me to tell the jury that the statements of the lady on the audio are not evidence, they only give context to the responses of Mr. Krikstan?

[DEFENSE COUNSEL]: Yeah, I mean, I – while we're up here, I have – I have a couple issues –

THE COURT: Okay.

[DEFENSE COUNSEL]: -- that I still think we need to address.

THE COURT: Do you want me to send the jury back?

[DEFENSE COUNSEL]: Well, I don't think I need but a minute or two.

THE COURT: Okay, go ahead.

[DEFENSE COUNSEL]: Issue number one is – and maybe – I do believe some of the statements on there are hearsay.

THE COURT: Um-hum.

[DEFENSE COUNSEL]: Two --

THE COURT: Some statements made by who?

[DEFENSE COUNSEL]: [R.W.].

THE COURT: Okay.

State's Exhibit 24 was then admitted into evidence

Appellant clearly objected to the admission of Exhibit 24 on two grounds---authentication and hearsay. He did not waive his objection and the hearsay issue is preserved for our review.

Defense counsel did not waive his hearsay objection by failing to object when the state re-played portions of the recording later at trial. The determination of whether a

waiver exists depends on the specific context of each case. *See Huggins v. State*, 2022 Md. LEXIS 263, 20 (2022); *Smith v. State*, 375 Md. 365, 380 (2003); *Abeokuto*, 391 Md. at 318. In evaluating whether a waiver exists, a reviewing court must keep in mind that the "purpose behind Rule 4-323's requirement of timely objections is to 'prevent[] unfairness and requir[e] that all issues be raised in and decided by the trial court[.]'" *Huggins*, 2022 Md. LEXIS at 20 (quoting *Conyers v. State*, 354 Md. 132, 150 (1999)).

The general rule is that an objection to the admissibility of evidence is not preserved for appeal unless a contemporaneous objection is made each time the contested evidence is raised at trial. *See Clemons v. State*, 392 Md. 339, 361 (2006). However, when an objection would be obviously futile, that general rule is inapplicable. *Standifur v. State*, 64 Md. App. 570, 579-80 (1985); *see also State v. Robertson*, 463 Md. 342, 367 (2019) (holding that defense counsel's initial objection sufficed to preserve it for appeal because "[c]ontinuing objections would have been futile"). Judge Edward O. Weant Jr., writing for the Court in *Standifur v. State*, explained as follows:

> "Here we have one transaction -- a proffer of evidence, a ruling, and an objection after which the prosecutor posed his question. This is no different in substance from the scenario in which a question is asked, an objection is made, counsel approach and argue at the bench, the objection is overruled, and the same question is posed again to the witness. In that situation our review would certainly not be precluded by counsel's failure to renew his objection to the repeated question, so long as the grounds argued on appeal were the same as those 'tried and decided' by the trial court."

64 Md. App. at 580.

In the instant case, the State proffered the recording as evidence, the court ruled it was admissible, and defense counsel objected strongly to the admission. The State then

used the same evidence later at trial, where defense counsel did not object to its use. It was clear to all that defense counsel objected to the evidence, and another objection would have been useless and futile. "To require another objection immediately [after the initial objection] would be pointless and would be tantamount to the reinstitution of the requirement that objecting counsel take formal exception to the overruling of their objections." *Id.* Accordingly, we find that appellant did not waive his hearsay objection when defense counsel failed to object to the State's use of the contested evidence at trial after the court's ruling on the evidence.

We now turn to whether Ms. R.W.'s statements were irrelevant and prejudicial hearsay. Whether evidence is hearsay is reviewed *de novo*. *Bernadyn v. State*, 390 Md. 1, 8 (2005). We hold that Ms. R.W.'s statements were not irrelevant or prejudicial hearsay.

Hearsay is defined as "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). "Except as otherwise provided by [the Maryland rules] or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802.

Ms. R.W.'s statements on the recording were not admitted for their truth, but rather for the non-hearsay purpose of helping the jurors understand the conversation between Ms. R.W. and appellant. Over the course of the recorded conversation, appellant made multiple relevant statements, including admitting to filming the banana video, admitting he placed

the recording device in L.'s bathroom, and describing his emotional attachment toward L. Without Ms. R.W.'s statements, appellant's side of the conversation would not make any sense to the jury. Furthermore, the court gave a curative instruction to the jury that Ms. R.W.'s statements should only be considered for their context to ensure that they would not be considered for their truth.

Ms. R.W.'s statements were relevant and provided context for appellant's responses in the recording.

Ms. R.W.'s statements were not unfairly prejudicial under Md. Rule 5-403[3] because the probative value outweighed any possibility of unfair prejudice toward appellant. Given the relevant information gleaned from the conversation, the probative value of providing the conversation's complete context was high and any potential for unfair prejudice was mitigated by appellant's steadfast denials of all the allegations throughout the recording and the curative instruction telling the jury not to consider Ms. R.W.'s statements for their truth.

Accordingly, we hold that the trial court did not err in admitting the statements into evidence.

[3] Md. Rule 5-403 provides as follows:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

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