IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 14, 2023

STATE OF TENNESSEE v. DOUGLAS MCARTHUR MCGILL

Appeal from the Circuit Court for Maury County
No. 27743 Stella L. Hargrove, Judge

No. M2022-00501-CCA-R3-CD

The Defendant, Douglas McArthur McGill,[1] was convicted by a jury of violating the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 by failing to register a secondary address. He was sentenced as a Range II, multiple offender to a term of two years and six months. On appeal, the Defendant seeks a new trial, arguing that the trial court improperly admitted hearsay evidence. The State concedes that reversible error exists in the record, and we agree. We respectfully reverse the judgment of the trial court, vacate the Defendant's conviction, and remand the case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Reversed and Remanded

TOM GREENHOLTZ, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Jennifer L. Fiola, Murfreesboro, Tennessee, for the appellant, Douglas McArthur McGill.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Senior Assistant Attorney General; Brent Cooper, District Attorney General; and Pamela Anderson and Jude Santana, Assistant District Attorneys General, for the appellee, State of Tennessee.

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[1] The Defendant's middle name is spelled differently in various parts of the record. We use the spelling that is reflected in the indictment and in the Defendant's brief in this Court.

OPINION

FACTUAL BACKGROUND

On September 17, 2019, the Maury County Grand Jury returned a presentment charging the Defendant with a violation of the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 ("Sex Offender Registry"). Tenn. Code Ann. § 40-39-201. More specifically, the indictment alleged that the Defendant failed to register 702 Freedom Lane, Columbia, Tennessee, as a secondary residence between January and July 2019. *See* Tenn. Code Ann. §§ 40-39-203(a)(1); 40-39-208.

A. STATE'S PROOF AT TRIAL

The trial of the case began on April 13, 2021, and the State called five witnesses to testify. The State's first witness, Officer Erick Solano, testified that he worked as a patrol officer with the Columbia Police Department. Officer Solano testified that he encountered the Defendant and his girlfriend, Ms. Shoshanna Patton, on March 19, 2019, at 702 Freedom Lane in Columbia, Tennessee. According to the officer, he was investigating a domestic disturbance call, and he learned that the Defendant was watching his child at Ms. Patton's house while Ms. Patton was away. When the officer asked the Defendant to leave, the Defendant said that he had "stuff" in the apartment. The Defendant did not specify the nature of the items, though the officer said that the Defendant could retrieve the items another time.

The State next called Officer Caleb Rubert to testify. Officer Rubert, who was also an officer with the Columbia Police Department, testified that, on May 1, 2019, he was dispatched to 702 Freedom Lane on a disturbance call. He encountered the Defendant at that address, and because the Defendant had an outstanding warrant for his arrest, the officer took the Defendant into custody. The officer could not testify whether he encountered the Defendant inside or outside of the apartment.

The State then called Detective Cheryl MacPherson to testify. Detective MacPherson, who was also with the Columbia Police Department, testified that she was investigating the Defendant on unrelated allegations and that she went to 702 Freedom Lane on July 3, 2019, to "follow up" on that investigation. The detective encountered the Defendant's girlfriend, Ms. Patton, and, in the process of discussing the unrelated allegations with her, began to suspect that the Defendant resided at this apartment as a secondary address. The detective testified that the Defendant had registered as a sex

offender in Davidson County because his primary residence was there and that he had not registered a secondary address.

B. DEFENSE OBJECTION TO HEARSAY TESTIMONY

Detective MacPherson started to testify as to the information that Ms. Patton gave her about the Defendant residing at the apartment when defense counsel objected to the testimony on the basis that it was inadmissible hearsay. The trial court took a recess and reconvened with the parties in chambers to address the objection.

In chambers, the State argued that Ms. Patton was an "unavailable witness" because she had evaded the State's attempts to compel her attendance through a subpoena. The State also argued that Rule "804 specifically provides if the State tries to subpoena someone and we have been unable to secure their attendance then we can use that as an exception to the hearsay rule. That's well settled and it's established in this case and the State believes that is applicable." The Defendant's counsel objected to the State's interpretation of the rules of evidence and further asserted that allowing the detective to testify to Ms. Patton's statements violated the Confrontation Clause of the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36 (2004).

The trial court asked the State to provide "a better record" by presenting the testimony of the State's process server, Maury County Sheriff's Deputy Jeremy Hight, to establish the efforts taken to serve Ms. Patton. The State agreed, and it called the deputy to testify with the jury back in the courtroom. The deputy testified that he received a subpoena for Ms. Patton and that he attempted to serve the subpoena at the address listed on the day before the trial. The deputy stated that he was unable to contact Ms. Patton, though neighbors confirmed that she and the Defendant lived at the place identified on the subpoena. The deputy did not leave a business card.

C. RESUMPTION OF STATE'S PROOF

After Deputy Hight's testimony, the trial court ruled that the hearsay testimony was admissible, and it allowed Detective MacPherson to continue testifying. The detective then explained to the jury what a "secondary residence" was for purposes of the Sex Offender Registry, and she explained the need to register that secondary address with the appropriate authorities. She also confirmed that the Defendant had not registered a secondary address.

Detective MacPherson also testified as to the details of her conversation with Ms. Patton. According to the detective, Ms. Patton said that she and the Defendant had been

together "on and off for five years" and that they had a child together. The detective said that Ms. Patton reported that the Defendant was living with her at 702 Freedom Lane and that he helped pay utilities at that address. Detective MacPherson also testified that Ms. Patton told her that the Defendant was aware of the requirements to register a secondary address.

Detective MacPherson further stated that she made additional efforts to confirm that the Defendant was living at 702 Freedom Lane. She said that she consulted an electronic database containing various police reports and that she discovered three police reports involving the Defendant at 702 Freedom Lane from March, May, and June of 2019. She testified that, because of these reports, she "felt that more likely than not [the Defendant] was in violation of the not disclosing his secondary address."

On cross-examination, Detective MacPherson confirmed that she had not had any contact, whether directly or indirectly, with the Defendant and that she was not involved in his reporting requirements. She also confirmed that her belief that the Defendant was violating the Sex Offender Registry was based upon the statements made to her by Ms. Patton.

Finally, the State called to testify Sergeant Brandon Schroeder with the Columbia Police Department. Sergeant Schroeder testified that he received a "delayed shoplifting" call from Walmart on June 12, 2019. During the investigation, the officer and his partner identified a vehicle associated with 702 Freedom Lane as being involved in the theft, and they visited that address the next day.

When the officers arrived at 702 Freedom Lane on June 13, they encountered the Defendant. According to the sergeant, the Defendant denied living at the address, though he stated that his girlfriend and their child lived there. On cross-examination, Sergeant Schroeder agreed that he did not go to the apartment itself and that he encountered the Defendant in "the apartment area."

D. DEFENSE PROOF

After the State rested its case, the Defendant called his mother, Ms. Ada Jones, to testify. Ms. Jones testified that she and her son resided in Nashville and that the Defendant had lived with her for nearly ten years. She also stated that she owned the house in Nashville and that the Defendant helped to pay utilities. Ms. Jones also testified that the Defendant was working for an electrician in Nashville.

On cross-examination, Ms. Jones testified that her son would sometimes stay with his brother or sister, both of whom also lived in Nashville, for a few nights. However, Ms. Jones stated that the Defendant stayed with her most of the time. She estimated that her son had spent four or five nights away from her between January 2019 and July 2019.

Ms. Jones testified that she essentially functioned as a "taxi" for her son and that her son did not have a car after his previous car was wrecked. She stated that she took her son to Columbia on occasion because she has family there. However, she denied knowing that her son had contact with Columbia police officers in March and May 2019.

E. JUDGMENT, SENTENCE, AND APPEAL

Upon the conclusion of the proof, the jury returned a verdict finding the Defendant guilty of violating the Sex Offender Registry. On January 27, 2022, the trial court later sentenced the Defendant as a Range II, multiple offender to a sentence of two years and six months, to be served on probation after service of 180 days in custody. The Defendant filed a motion for a new trial contesting the admission of Ms. Patton's hearsay statements under Tennessee Rule of Evidence 804 and the Sixth Amendment. After that motion was denied on March 31, 2022, the Defendant filed a timely notice of appeal on April 21, 2022.

STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). The principal issue in this case concerns whether the trial court properly admitted hearsay evidence pursuant to Tennessee Rule of Evidence 804. Typically, we review questions involving the admission of evidence for an abuse of discretion. *State v. Dotson*, 254 S.W.3d 378, 392 (Tenn. 2008) (in the context of addressing Tenn. R. Evid. 804, recognizing that "questions concerning the admissibility of evidence rest within the sound discretion of the trial court, and this Court will not interfere in the absence of abuse appearing on the face of the record."). However, "[t]rial courts must conduct layered inquiries when determining the admissibility of evidence objected to on the grounds of hearsay," *State v. Jones*, 568 S.W.3d 101, 128 (Tenn. 2019), and the standard of review varies accordingly:

> "Initially, the trial court must determine whether the statement is hearsay. If the statement is hearsay, then the trial court must then determine whether the hearsay statement fits within one of the exceptions. To answer these questions, the trial court may need to receive evidence and hear testimony. When the trial court makes factual findings and credibility determinations in

> the course of ruling on an evidentiary motion, these factual and credibility findings are binding on a reviewing court unless the evidence in the record preponderates against them. Once the trial court has made its factual findings, the next questions—whether the facts prove that the statement (1) was hearsay and (2) fits under one [of] the exceptions to the hearsay rule—are questions of law subject to de novo review."

Id. (quoting *Kendrick v. State*, 454 S.W.3d 450, 479 (Tenn. 2015)) (internal citations omitted and alterations in original).

Our supreme court has emphasized that "[d]iscretionary decisions must take the applicable law and relevant facts into account." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). To that end, "'an abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision.'" *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019) (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). "'A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.'" *Moore v. Lee*, 644 S.W.3d 59, 63 (Tenn. 2022) (quoting *Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020)).

ANALYSIS

In this appeal, the Defendant argues that the trial court erred in admitting the hearsay statements of Ms. Shoshanna Patton that the Defendant lived with her through the testimony of Detective MacPherson. More specifically, the Defendant argues that the State failed to show that Ms. Patton was an "unavailable" witness. The Defendant also argues that the admission of Ms. Patton's hearsay statements violated his rights guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution.

In response, the State agrees that the hearsay statements of Ms. Patton were not properly admissible pursuant to Tennessee Rule of Evidence 804. It also agrees with the Defendant that the judgment should be reversed and that a new trial should be ordered. Upon our independent review, we agree with both parties that Ms. Patton's hearsay statements were inadmissible, and because we also find that the error was not harmless, we order that a new trial be held.

A. ADMISSIBILITY PURSUANT TO THE TENNESSEE RULES OF EVIDENCE

As defined by our Rules of Evidence, a hearsay statement is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Our supreme court has provided a three-part inquiry for determining whether a particular statement is hearsay: "(1) the statement must be made out-of-court; (2) the statement must qualify as an assertion; and (3) the statement must be offered to prove the truth of the matter asserted therein. Stated another way, Does the purpose of the offer require the out-of-court statement to be taken as true?" *State v. McCoy*, 459 S.W.3d 1, 11 (Tenn. 2014) (internal citations and quotation marks omitted).

No party disputes that Detective MacPherson's testimony about what Ms. Patton told her was subject to the hearsay rules. Ms. Patton's statements about the Defendant living at 702 Freedom Lane were made out-of-court, and they were offered by the State for their truth. Indeed, Ms. Patton's statements about the Defendant's residency only had relevance to the extent that they were true. *See State v. Padgett*, No. E2018-00447-CCA-R3-CD, 2019 WL 2233890, at *7 (Tenn. Crim. App. May 23, 2019) ("Here, the statement would only be relevant if it was true, and thus, the statements do not have any probative value outside of their truthfulness. Said another way, there is no probative value in the mere fact that the statement was made. In short, it is inadmissible hearsay."). As such, we conclude that Detective MacPherson's testimony was properly subject to a hearsay objection.

While hearsay is generally inadmissible at trial, *see* Tenn. R. Evid. 802, the Rules of Evidence contain several exceptions to this general principle. The effect of these exceptions is to admit some types of hearsay evidence even though the out-of-court statements were not made under oath and are not subject to cross-examination at trial. *Chambers v. Mississippi*, 410 U.S. 284, 298-99 (1973) ("A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."). In other words, despite the general prohibition on receiving hearsay evidence at trial, some hearsay statements are nevertheless admissible if "they fall within one of the evidentiary exceptions or some other law renders them admissible." *State v. Perry*, No. M2020-01407-CCA-R3-CD, 2022 WL 1195311, at *4 (Tenn. Crim. App. Apr. 22, 2022) (citing Tenn. R. Evid. 802), *perm. app. denied* (Tenn. Nov. 16, 2022).

1. Tennessee Rule of Evidence 804

One category of exceptions to the hearsay rule is found in Tennessee Rule of Evidence 804. This rule allows a hearsay statement to be admitted into evidence and considered by the jury when the hearsay declarant is "unavailable" as defined in Rule 804(a) and the evidence "also satisfies one of the narrow exceptions provided in Rule 804(b)." *Carter v. Quality Outdoor Prod., Inc.*, 303 S.W.3d 265, 268 (Tenn. 2010). As the comments to the substantially identical Federal Rule of Evidence 804 note, this rule "is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility." Fed. R. Evid. 804, advisory committee's note.

At trial, the State argued that it could seek admission of Ms. Patton's hearsay statements simply by showing that she was "unavailable," even going so far as to declare the principle to be "well settled." We respectfully disagree. It is true that "[i]n order for hearsay to qualify for any exception under Rule 804, the declarant must be 'unavailable.'" *Dotson*, 254 S.W.3d at 392 (citing Tenn. R. Evid. 804(a)). However, while that condition is necessary for this hearsay exception to apply, it is not alone sufficient. On the contrary, our supreme court has expressly recognized that the definition of "unavailable" in Rule 804(a) "is not an exception to the hearsay rule. Rather, Rule 804(a) describes the situations in which a witness will be considered unavailable for purposes of the hearsay exceptions provided in Rule 804(b)(1)-(4), (6)." *Carter*, 303 S.W.3d at 268. Thus, hearsay evidence is admissible under this Rule only when both (1) the declarant is "unavailable"; and (2) the evidence "satisfies one of the exceptions to the hearsay rule for unavailable declarants provided in Rule 804(b)." *Id.*

Setting aside whether the State made a sufficient showing at trial that Ms. Patton was actually unavailable, the trial court did not find, and the State at trial did not argue, that Ms. Patton's hearsay statements fell within any one of the five categories identified in Rule 804(b). For example, the trial court made no finding that Ms. Patton's statements were made against her pecuniary or proprietary interests or that they tended to subject her to civil or criminal liability. *See* Tenn. R. Evid. 804(b)(3). In addition, because the grand jury brought this case by way of presentment, Ms. Patton had not previously testified about these events in a preliminary hearing or otherwise. *See* Tenn. R. Evid. 804(b)(1). Without any showing that Ms. Patton's hearsay statements fell within one of the five narrow categories identified in Rule 804(b), we agree with the parties that Detective MacPherson should not have been permitted to testify as to what Ms. Patton told her about the Defendant residing at 702 Freedom Lane. Accordingly, we hold that Ms. Patton's hearsay statements were not admissible through any exception contained in Tennessee Rule of Evidence 804(b).

2. Impact of Evidentiary Error on Trial

Errors in the admission of evidence do not "automatically entitle [the] Defendant to relief." *Padgett*, 2019 WL 2233890, at *8. Rather, when a trial court "admits evidence in violation of the Tennessee Rules of Evidence, we ordinarily address this non-constitutional error using the harmless error analysis of Rule 36(b) of the Tennessee Rules of Appellate Procedure." *State v. Reynolds*, 635 S.W.3d 893, 928 (Tenn. 2021).

Under this standard, relief is warranted only if the error "more probably than not affected the judgment or would result in prejudice to the judicial process." *State v. Rodriquez*, 254 S.W.3d 361, 374 (Tenn. 2008). As our supreme court has recognized, "[t]he 'line between harmless and prejudicial error is in direct proportion to the degree of the margin by which the proof exceeds the standard required to convict, beyond a reasonable doubt.'" *State v. Shirley*, 6 S.W.3d 243, 250 (Tenn. 1999) (quoting *Delk v. State*, 590 S.W.2d 435, 442 (Tenn. 1979)). Thus,

> when looking to the effect of an error on the trial, we will evaluate that error in light of all of the other proof introduced at trial. The more the proof exceeds that which is necessary to support a finding of guilt beyond a reasonable doubt, the less likely it becomes that an error affirmatively affected the outcome of the trial on its merits.

State v. Gilliland, 22 S.W.3d 266, 274 (Tenn. 2000); *see State v. Brooks*, 249 S.W.3d 323, 329 (Tenn. 2008) (quoting *Gilliland* in the context of the erroneous admission of hearsay evidence under Rule 804). Ultimately, "[t]he key question is whether the error likely had an injurious effect on the jury's decision-making process. If the answer is yes, the error cannot be harmless." *State v. Brown*, No. M2017-00904-CCA-R3-CD, 2019 WL 1514551, at *30 (Tenn. Crim. App. Apr. 8, 2019) (citing *Dotson*, 254 S.W.3d at 389).

In this case, we cannot find that the error in admitting Ms. Patton's statements was harmless. Before it could return a verdict of guilty, the jury was required to find beyond a reasonable doubt, among other things, that the Defendant actually maintained a secondary residence. *See* Tenn. Code Ann. § 40-39-202(18) (defining a "secondary residence" as "a place where the person abides, lodges, resides or establishes any other living accommodations in this state for a period of fourteen (14) or more days in the aggregate during any calendar year and that is not the person's primary residence; . . . or a place where the person routinely abides, lodges or resides for a period of four (4) or more consecutive or nonconsecutive days in any month and that is not the person's primary residence . . . .").

As the State acknowledges in this appeal, the hearsay statements from Ms. Patton "were the heart of the State's proof that [the Defendant] was actually maintaining an unregistered secondary residence at [Ms. Patton's] apartment." Indeed, the only other proof tending to link the Defendant with 702 Freedom Lane consisted of his three encounters with officers in different months and his admissions to Officer Solano that his child lived there and that he had "stuff" at the apartment. While this proof clearly associated the Defendant with the address, it did nothing to establish that the Defendant resided at the apartment for fourteen calendar days or more during a year or that he "routinely" stayed there for four days or more in any month.

Without Ms. Patton's hearsay statements, the jury would not have had a sufficient basis to find that the State had proven the fact of a "secondary residence" beyond a reasonable doubt. Because an essential element of the charged offense could only have been satisfied with the inadmissible evidence, we conclude that the error in admitting Ms. Patton's hearsay statements "more probably than not had a substantial and injurious impact on the jury's decision-making" process. *Rodriguez*, 254 S.W.3d at 372. As such, we must vacate the Defendant's conviction and remand his case for a new trial.

B. CONFRONTATION CLAUSE ISSUES

Of course, the unavailability exceptions for hearsay evidence established in Rule 804 also touch upon a defendant's right to confront witnesses against him. *State v. Summers*, 159 S.W.3d 586, 597 (Tenn. Crim. App. 2004) (recognizing that hearsay testimony from an unavailable declarant is not admissible unless it satisfies both Rule 804 and the Sixth Amendment). Recognizing this principle, the Defendant also argues that the trial court's admission of Ms. Patton's hearsay statements violated his rights as guaranteed by the Sixth Amendment's Confrontation Clause.

Generally, however, "courts should avoid resolving constitutional issues if an appeal may be resolved on non-constitutional grounds." *Keough v. State*, 356 S.W.3d 366, 371-72 (Tenn. 2011); *see Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995) (stating that "under Tennessee law, courts do not decide constitutional questions unless [the] resolution is absolutely necessary for determination of the case and the rights of the parties."). Because we have held that the hearsay statements of Ms. Patton regarding the Defendant's residence were not admissible pursuant to Tennessee Rule of Evidence 804, it is unnecessary to resolve related issues arising under the Sixth Amendment. As such, we respectfully pretermit this issue.

CONCLUSION

In summary, we hold that the hearsay statements of Ms. Patton regarding the Defendant's residence were inadmissible and that their admission affirmatively affected the outcome of the trial. As such, we respectfully reverse the judgment of the trial court, vacate the Defendant's conviction, and remand the case to the trial court for a new trial.

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TOM GREENHOLTZ, JUDGE