UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0506

September Term, 2015

KERRY EVANS

v.

JOSHUA SHORES et al.

Reed,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: September 8, 2016

A jury sitting in the Circuit Court for Worcester County found that the appellant, Kerry Evans, plaintiff below, assumed the risk of her injuries suffered in a one-vehicle collision while a passenger in a pickup truck owned and operated by one of the appellees, Joshua Shores.[1] Shores admitted that he was intoxicated at the time of the collision.

On this appeal, Evans raises the four questions set forth below:

> "1. Did the trial court err in denying plaintiff's motion for judgment on liability and submitting the issue of assumption of the risk to the jury in the absence of any evidence that plaintiff had actual notice of defendant's intoxication?
>
> "2. Did the trial court err in overruling plaintiff's objection to Shores' testimony regarding his arrest, guilty plea, and time served?
>
> "3. Did the trial court err in allowing defendant's toxicologist's testimony that knowing a person has been drinking alcohol is sufficient notice of an adverse event?
>
> "4. Did the trial court err in allowing defendant's toxicologist's report into evidence?"

(Bold type changed).

As explained hereinafter, we find no error and affirm.

The Facts

Based on the evidence most favorable to Shores, the jury could have found the following facts.

[1]The other appellee, Progressive Select Insurance Company, is Evans's uninsured/underinsured coverage carrier.

The accident occurred on November 10, 2013, and trial was in May 2015. At the latter time, Evans was age thirty and Shores was twenty-eight. They were friends, but not "boyfriend" and "girlfriend." Evans resided her entire life with her parents. Her mother had discussed with her the probable danger of driving with someone who had been drinking. Several years before the accident, Evans had attended an alcohol education program. She knew on November 10, 2013, that Shores had a "prior DUI."

On the night of the accident Evans met Shores at his residence, his mother's home. Shores drove them to "the Oasis," a little bar in Whaleyville, to meet a group of his fellow employees from Ocean Downs who were saying farewell to an Alaska-bound colleague. Shores and Evans arrived about 8:00 p.m. and left about 10:00 p.m. At the Oasis, Shores consumed up to three twelve-ounce cans of Bud Light beer and a shot of Fireball (cinnamon flavored whiskey). The shot was part of a group toast, in which Evans joined. The lowest estimate by a witness of the size of the group was six.

The couple left the Oasis, with Shores driving, in order to go to a bonfire party in Newark, Maryland, at the home of Mrs. Jacqueline Riley, age twenty-five at the time of trial. On the way to the Rileys', Shores stopped to purchase, for off-premises consumption, a package of eighteen twelve-ounce cans of Bud Light beer. After the purchase, while en route to the Rileys', Shores consumed some "alcohol" and Evans had a Bud Light. (The fair inference is that each of the two consumed a can of Bud Light).

At the bonfire party, Evans and Shores separately mingled with the guests, estimated by Shores to be ten to twelve people, all of whom were in their mid-twenties. They were at the Rileys' perhaps one and one-half hours. Evans told an insurance claims representative that, while at the Rileys', she had two or three more cans of beer and, "probably," a shot of Fireball and a Jell-O shooter. Shores testified that, at the bonfire party, he was drinking Bud Light cans that he had brought and he had one shot.

Shores said that, over the course of the evening, he had up to ten beers and a couple of shots. Thus, at the Rileys', he may have consumed as many as six cans of beer and a shot in one and one-half hours. While in Evans's presence that evening, Shores estimated that he had four or five "alcoholic beverages."

Shores texted Evans that he was ready to leave the bonfire party. They met at his truck. He testified that he had no balance problems. Evans said that he seemed fine. Mrs. Riley concurred.

What then transpired was described by Evans in her recorded statement to an insurance representative who read it to the jury.

> "We're getting ready to leave. Joshua appeared to be okay to drive. He didn't say anything to where he knew he couldn't drive. We got ready to leave. He gets in the driver's seat. I get in the passenger's seat. He tries to back out of the driveway. It takes him four times to back up out of the driveway because he's either too drunk or he can't see where he's going because of this impaired state.

> "So once he gets backed out of the driveway onto the road, he puts the truck in drive and just mashes down, he stomps on the accelerator to where we just go, you know, speeding fast. And we started going really, really fast and then out of control, and that's my last memory as far as I know what happened the night with him driving.
>
> "We go off the road, and I know we leave the road. We jump a ditch, and the last thing I remember is just that we're heading for trees and I black out."

And further:

> "My question, he attempted to back up four times and he couldn't back up correctly? Her response, yeah. I wasn't sure what was going on. He was, like, trying to back up and people were saying, you know, are you okay to drive? And he was, like, yeah. You know, I have this, or whatever. And it kind of made me nervous, you know, for him driving because it took so many times for him to back up properly and he couldn't – you know, he couldn't really see the driveway or where he was going."

The police arrived, Shores was arrested, and at some point registered a 0.15% blood-alcohol concentration on a breath test.

The defense called as an expert Yale H. Caplan, Ph.D., who is board certified in forensic toxicology. He explained the effects of ethyl alcohol on the central nervous system, the significance of a 0.15% blood-alcohol concentration, and expressed the following opinion.

> "His ability at .15 or lower to properly operate a motor vehicle would be significantly impaired and significantly affected, and it leads to a high risk of an adverse event or a high risk of not being able to control a situation which would lead to a failure to operate the vehicle, you know, properly. And it statistically leads to a much greater number of accidents."

Asked to describe what an alcohol education program consisted of, Dr. Caplan replied:

> "It's generally an awareness of some of the things I've talked about which is the effects of alcohol, the risk of alcohol being a factor in accidents, the risk of having impaired behavior, and the understanding that anybody that's drinking has the likelihood of being impaired by the alcohol and that you can't really perceive that yourself. I mean, you're not a scientist. You're not doing testing. So you cannot – you cannot predict the fact. Knowing that a person is drinking alcohol is sufficient notice to know that there's likely to be an adverse event."

Shores objected and moved to strike the "last part of his answer, [because] it's subjective opinion." The motion was denied.

In answer to a special interrogatory, the jury found that Evans assumed the risk of her injuries. Judgment was entered accordingly, and this appeal followed.

Additional facts will be stated as required by the discussion of the issues.

Discussion

I

There was sufficient evidence from which the jury could find that Evans had actual knowledge of Shores's intoxication.

> "The test in determining voluntary assumption of the risk is whether there was an intentional and unreasonable exposure to danger, which the plaintiff either knew or had reason to know. A guest is not negligent in riding with an intoxicated driver, if he is unaware of the intoxication or does not notice any facts which would arouse the suspicions of a person of ordinary prudence. **** So, on the issue of a guest's contributory negligence in riding with an intoxicated driver, such questions as the amount of intoxicating liquor

> the driver had consumed, the extent of the driver's intoxication, and how much the guest was aware of it, are usually questions for the jury in determining whether there was an assumption of risk."

Powers v. State u/o Reynolds, 178 Md. 23, 31-32, 11 A.2d 909, 913 (1940).

In *Powers*, plaintiff's decedent was killed while a passenger in an automobile crash. She, together with the vehicle owner and the eventual driver had spent a little over three and one-half hours drinking at a nightclub where the driver consumed three "Tom Collins." Thereafter, they had some food at a restaurant. The fatal crash was a one-car accident on a winding, mountain road on their trip home. After a plaintiff's verdict, the defendant contended on appeal that he was erroneously denied a directed verdict.

Rejecting that contention, the Court said:

> "In Maryland, even though it is testified that a driver was intoxicated, and there is evidence to the contrary, the question of contributory negligence of the plaintiff in entrusting her safety to the driver is a question which should be submitted to the jury."

Id. at 33, 11 A.2d at 913. Two judges dissented in *Powers*, believing that the plaintiff was contributorily negligent as a matter of law by joining with the owner in entrusting operation of the vehicle to the person in their group who was not as drunk as they.

The refusal to instruct on assumption of the risk as to a passenger/drunk driver claim was reversed in *Baltimore County, Md. v. State u/o Keenan*, 232 Md. 350, 193 A.2d 30 (1963). After leaving work on the night shift, the plaintiff's decedent and two of his co workers, including the driver, stopped at an inn where they were joined by a co-worker's

nephew. The uncontradicted testimony was that, in a two-hour period, they each consumed four twelve-ounce bottles of beer and the driver, in addition, had one ounce of whiskey. The fatal collision thereafter occurred when the driver rear-ended a municipal street sweeper. On the denial of the assumption of the risk instruction requested by appellant, Baltimore County, the Court held:

> "It is a rather close question whether the evidence admitted at trial was sufficient to go to the jury as showing that [the decedent] knew or ought to have known that [the driver] was too intoxicated to be in condition to drive safely when they left the inn, but we are inclined to think that it was."

Id. at 366, 193 A.2d at 40. The nephew's testimony that the driver was sober was not conclusive. The apparently reckless manner in which the car was driven "was in itself suggestive of intoxication." *Id.*[2]

This Court held that there was sufficient evidence to support a jury's finding of assumption of the risk in a passenger's action against a drunk host driver in *Bliss v. Wiatrowski*, 125 Md. App. 258, 724 A.2d 1264 (1999). The female plaintiff was sixteen-years-old when the accident occurred. Reviewing the evidence, we said that the plaintiff

[2]Baltimore County's principal appellate argument, with which the Court of Appeals also agreed, was that the trial court erred in excluding the testimony of a toxicologist whose autopsy of the driver reported a blood alcohol content of .13%. The witness would have testified that this converted to a minimum consumption of seven to eight bottles of beer over two to two and one-half hours.

> was with [the driver] when he purchased alcohol that night; she observed his heavy drinking[3] throughout the night; she had been in a car accident two years earlier where alcohol use had been a factor; she testified that her mother asked her not to ride with people who had been drinking alcohol; and she was aware that a person's reaction time was not as quick after drinking alcohol."

Id. at 273, 724 A.2d at 1271.

Here, the fact that none of the eyewitnesses who were at one or the other of the two parties directly testified that Shores appeared intoxicated is more a testament to his alcohol tolerance than dispositive of the issue before us. Under the cases reviewed above, the jury could find that Evans knew or ought to have known that Shores was not fit to drive, based on the length of time that the two were partying, the relatively small size of the partying groups, the mixing of shots with beer drinking, Shore's admitted consumption of ten beers and two shots, his blood-alcohol concentration of .15%, and Evans's knowledge of the risk of driving after drinking immoderately. The jury could find that Evans assumed the risk of injury by getting into the truck for the trip home with Shores driving.

Once in the truck, according to Evans's statement, it took Shores four tries to back out of the Rileys' driveway, "because he's either too drunk or he can't see where he's going, because of this impaired state." Other guests at the scene were questioning whether Shores was "okay to drive." His futile attempts to navigate the driveway made Evans "kind of ... nervous." At trial, Evans testified that "there was just no time to say or do anything and the

[3]After the accident, the driver's blood-alcohol concentration measured 0.10%.

truck lost control." The jury, however, need not accept that conclusion. It could have found that after attempt number one, or attempt number two, or attempt number three, Evans should have insisted that Shores stop and let her out of the truck. There was no evidence that she attempted to do so.

Further, Dr. Caplan testified that a 0.15% blood-alcohol concentration represents "a significant state of marked intoxication." He opined, without objection, that as the concentration of blood-alcohol increases from 0.08% "the risk of adverse events and the impairment increases disproportionately and exponentially."

Evans argued to the jury based on a portion of Dr. Caplan's testimony where he said that at .2% blood-alcohol concentration one would expect to see, in all individuals, "noticeable outward gross manifestations," such as "stumbling, major balance difficulties, slurring the speech." But, as the Maryland appellate cases reviewed above made plain, a driver need not be "falling down drunk" before a jury can find, on all of the evidence, that a passenger assumed the risk of injury where the passenger was on notice that the driver had consumed enough alcohol unreasonably to impair reflexes and reaction time.

II

Evans asserts that the trial court erred in allowing in evidence, over objection, "Shores['s] testimony regarding his arrest, guilty plea, and time served." Appellant argues that the testimony was immaterial, because the defense conceded liability in its opening

statement. As the editors of *1 McCormick on Evidence* § 185, at 125 (7th ed., 2016 Supp.), explain:

> "[S]ome evidence that is merely ancillary to evidence that bears directly on the issues may be admissible. Leeway is allowed even on direct examination for proof of facts that merely fill in the background of the narrative and give it interest, color, and lifelikeness."

In his opening statement, defense counsel told the jury: "My client caused the accident. There's no doubt about it .... He had too much to drink .... He was intoxicated. And he went to jail for it for four and a half months."

At trial, Shores testified, without objection, that he accepted "responsibility for the accident." He said that the police came, he told them he had been drinking, they arrested him, and he went to court where he pled guilty. Then:

> "Q. Were you sent to jail?
>
> "A. Yes.
>
> "Q. How much time did you serve in jail?
>
> "[PLAINTIFF'S COUNSEL]: Objection.
>
> "[THE COURT]: Overruled.
>
> "THE WITNESS: Four and a half months."

The only fact admitted over objection was the period of incarceration. There was no abuse of the court's discretion in allowing the defense to complete, in a matter of seconds, the subject of Shores's confinement through testimony confirming information the jurors had

heard in the opening statement. Further, even if the evidence was not strictly relevant, it was not unfairly prejudicial to Evans and not a basis for reversal.

III

Appellant also contends that the court erred in admitting Dr. Caplan's testimony that "[k]nowing a person is drinking alcohol is sufficient notice to know that there's likely to be an adverse event." The objection specified that the statement was "subjective opinion." This evidence was not prejudicial because it was cumulative. That Evans had completed, several years earlier, an alcohol education course had been established. Earlier in the same answer, Dr. Caplan spoke of "the understanding [from school education courses] that anybody that's drinking has the likelihood of being impaired by alcohol and that you can't really perceive that yourself."

"Drinking" should be understood in the context of this case as involving two social gatherings at which beer and shots were consumed. Dr. Caplan's challenged testimony was simply repeating that a prospective passenger's evaluation of a prospective driver should include the amount of alcohol consumed that is known to the prospective passenger. That is why these cases are ordinarily jury questions.

Further, there is no error in allowing an expert to opine on the ultimate issue. Md. Rule 5-704.

IV

Appellant unsuccessfully objected to the introduction into evidence of the written report that Dr. Caplan had furnished to counsel for Shores.

After the witness had been qualified as an expert, and he very briefly explained what his engagement was, the defense had his written report marked for identification. Direct examination of the witness proceeded for thirteen pages of transcript. The testimony was substantially consistent with the report. Evans's cross-examination consumed about fifteen pages of transcript. It included utilizing in part an email from defense counsel to Dr. Caplan and utilizing in part the report.

On redirect, the defense had Dr. Caplan read, over objection, a passage from his report, including this sentence. "Mr. Shores was markedly intoxicated and it is likely his intoxication was noticeable." The report was then placed in evidence over Evans's objection that "[i]t's hearsay and cumulative."

In this Court appellant continues to assert that the report was inadmissible hearsay and "also cumulative evidence." Neither party cites Maryland Rule 5-616(c)(2) which controls. It provides:

> "**Rehabilitation**. A witness whose credibility has been attacked may be rehabilitated by:
>
> ....

> "(2) ... evidence of the witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]"

Thus, if Dr. Caplan's direct testimony had been impeached by an apparent inconsistent statement in his report, the report would have been admissible in rebuttal for the limited purpose of showing consistency. *Holmes v. State*, 350 Md. 412, 416-17, 712 A.2d 554, 556 (1998). Evans would have been entitled to a limiting instruction, but she did not request one. On this analysis, there was no error.

If Dr. Caplan had not been impeached on cross-examination by reference to the report, then the report and the testimony are consistent and introduction of the report for rehabilitation was inadmissible hearsay. "[P]rior out-of-court statements by a witness that are consistent with the witness's trial testimony, generally, are not admissible to bolster the credibility of the witness." *Thomas v. State*, 429 Md. 85, 96, 55 A.3d 10, 16 (2012). But, as Evans admits, the report was cumulative, meaning "[b]y definition a witness's or declarant's prior statement must be consistent with the witness's trial testimony ... that has been admitted as substantive evidence. For that reason one can often argue that the erroneous admission of a prior consistent statement is merely cumulative and thus harmless." 6 L. McLain, *Maryland Evidence, State and Federal*, § 613:2e (2015). Here, particularly in light of Evans's recorded statement, we hold that the duplication was not unfairly prejudicial and was harmless.

For these reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.