

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1906

September Term, 2014

BERNARD KING, JR.

v.

STATE OF MARYLAND

Woodward,
*Zarnoch,
Friedman,

JJ.

Opinion by Zarnoch, J.

Filed: January 8, 2016

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

** 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 Prince George’s County convicted Bernard King, Jr., appellant, of attempted first- and second-degree rape, fourth-degree sex offense, second-degree assault, and false imprisonment. He was sentenced to life with all but 25 years suspended for the attempted first-degree rape, a concurrent ten years for the false imprisonment, plus five years of supervised probation.¹ In this Court, appellant contends that the trial court erred in admitting incriminating DNA evidence because there was insufficient evidence to establish a chain of custody for DNA samples taken from him and the victim. Because appellant failed to preserve this challenge, and there is ample evidence establishing chain of custody, we shall affirm appellant’s convictions.

FACTS AND LEGAL PROCEEDINGS

At trial, the State’s prosecution theory was that on July 23, 2012, in the laundry room of an apartment building, appellant trapped sixteen-year-old Desiree M., then punched her, strangled her, and attempted to rape her. Asserting misidentification and alibi defenses, appellant objected to admission of both the victim’s identification of him in a photo array and DNA evidence identifying him as her assailant.

On Monday, July 23, 2012, Desiree M. lived with her mother in District Heights, on the fifth floor of an apartment building. Before 10 a.m. that morning, Desiree was alone in the laundry room, located three doors down from her apartment. The room was brightly lit and accessible only with a card key. While she was doing laundry, someone knocked on the door; Desiree opened it, thinking it was one of her neighbors who

¹ Appellant’s remaining convictions were merged for sentencing purposes.

frequently forgot her key. Instead, she encountered appellant, whom she had never seen. He entered and began to ask “personal questions,” including where she lived, her phone number, if she was a virgin, and if she had a boyfriend. Desiree felt nervous and tried to leave, but appellant blocked her from getting to the door.

Appellant then went behind her, took out his penis, and touched it to her lower back. When Desiree began to yell and scream, appellant punched her in the face. She fell and hit her head but got back up to fight. They “wrestled,” and she ended up on the floor with appellant on top of her. Appellant grabbed her robe from her laundry pile and put it over her face, blocking her vision. He told her that if she did not stop screaming and yelling, he would strangle her and kill her.

Appellant used his legs and knees to pry apart her legs, while continuing to hold her down and suffocate her with her robe. As Desiree became “weak and was losing consciousness” because she “couldn’t breathe,” appellant pulled down her gym shorts. She could feel his “erect” and “sweaty” penis pressed against her inner thighs. When he shifted his hands, she got “a little bit of air” and was able to fight him off and run back to her apartment.

Desiree was hysterically crying and immediately reported what happened to her mother, who called the police. After police came to their apartment, Desiree went to the police station, where she gave a statement and had DNA swabs taken from her back and inner thighs. She described her attacker as being African-American, approximately 6’1”, 19 to 21 years old, with brown skin and eyes, and wearing a “short bush hairstyle,” a

white “wife beater” and blue jeans. Although Desiree was later shown surveillance footage of a subject wearing the same clothes as the assailant, she could not see his face.

On June 4, 2013, Prince George’s County Police Department Detective Michael Genung showed Desiree a photo array with six potential suspects.² She “immediately” pointed to appellant’s photo, identifying him as her assailant. Over appellant’s objection, this photo identification was admitted into evidence.

Pursuant to a DNA search warrant, Det. Genung obtained a sample of appellant’s DNA using standardized collection materials and procedures. After forensic testing indicated that appellant’s DNA was on the swabs taken from Desiree M.’s upper thighs on the day of the assault, appellant was arrested and charged with attempted first-degree rape and related offenses.

At trial, Iresa King, appellant’s sister, testified that on the Sunday before the Monday morning assault on Desiree M., appellant stayed at her house. When she went to work at 5 a.m., he was still asleep, and he was also there when she returned at 3 p.m., but she could not account for his activities during the hours she was gone. In addition, she reported that appellant had large tattoos on his arms, which is a physical characteristic not mentioned by the victim. Appellant displayed his arms to the jury.

² On cross-examination, the detective acknowledged that the current “double blind” procedure for conducting photo arrays, which was implemented in May 2014, was not used for this photo array.

Because the sole question raised in this appeal is whether there was sufficient evidence to establish a chain of custody for the DNA samples, we shall present the evidence pertinent to that issue in our discussion.

DISCUSSION

Maryland Rule 5-901(a) provides that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Appellant contends that “the trial court erred in admitting evidence relating to DNA samples where the chain of custody was not sufficiently established.” The State counters that appellant “waived his complaint about an inadequate chain of custody when he failed to object to the DNA analyst’s testimony[.]” In any event, the State maintains, “[t]he chain of custody was sufficient to establish a reasonable probability that the samples were not altered.” For the reasons explained below, we agree with the State in both respects.

Chain of Custody Standards

Addressing an analogous chain of custody challenge, this Court recently summarized the standards applicable to this appeal, as follows:

Determinations regarding the admissibility of evidence generally are left to the sound discretion of the trial court. This Court reviews a trial court’s evidentiary rulings for abuse of discretion. A trial court abuses its discretion only when “no reasonable person would take the view adopted by the [trial] court,” or when the court acts “without reference to any guiding rules or principles.”

Chain of custody evidence is necessary to demonstrate the “ultimate integrity of the physical evidence.” In most cases, an adequate chain of custody is established through the testimony of key witnesses who were

responsible for the safekeeping of the evidence, i.e., those who can “negate a possibility of ‘tampering’ . . . and thus preclude a likelihood that the thing’s condition was changed.” What is necessary to negate the likelihood of tampering or of change of condition will vary from case to case. The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law.

Easter v. State, 223 Md. App. 65, 74-75 (2015) (Citations omitted).

Appellant Failed to Preserve His Chain of Custody Challenge

“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 the objection become apparent. Otherwise the objection is waived.” Md. Rule 4-323(a). Even though an initial objection may have been timely made, such “[o]bjections are waived if, at another point during the trial, evidence on the same point is later admitted without objection.” *DeLeon v. State*, 407 Md. 16, 31 (2008); *cf. Robeson v. State*, 285 Md. 498, 507 (1979) (“[W]here a witness later gives testimony, without objection, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless”). In this case, the record shows that appellant waived his chain of custody objection to the DNA evidence linking him to the attempted rape, by failing to object when the State’s DNA expert testified that appellant was the major contributor of DNA collected from the victim shortly after the assault.

On July 23, 2012, Prince George’s County Police Department crime scene investigator Lauren Berry took DNA swabs from Desiree M.’s lower back and the upper area of her inner right and left thighs. In accordance with established protocols for

collection of sexual assault evidence, she separately collected, sealed, signed, and submitted each swab to a locked evidence vault. She did not immediately send the samples for DNA testing because at that time, there was no suspect to conduct a comparison.

Prince George’s County Police Department serologist Nicole Miulli processed the evidence swabs taken from Desiree M. on the day of the assault, which she obtained from still-sealed evidence packages stored in the secure DNA evidence vault. Ms. Miulli prepared each sample for subsequent “touch DNA” testing, by taking cuttings from the swabs and placing them into test tubes. During Ms. Miulli’s testimony, defense counsel objected to the admission of those swabs and cuttings, on the ground that the State failed to adequately establish their chain of custody. The trial court overruled those objections and admitted the swabs and related cuttings into evidence.

The State then presented expert testimony by Prince George’s County Police Department forensic analyst, Tyiesha Moore, who performed DNA tests on the cuttings prepared by Ms. Miulli. During Ms. Moore’s testimony, defense counsel again objected that chain of custody was not sufficiently established, arguing that the State failed to introduce into evidence the actual test tubes that held the cuttings. The trial court overruled that objection. Later, over appellant’s general objection, the trial court admitted Ms. Moore’s written report of her DNA test procedures and findings.

Thereafter, Ms. Moore testified that the swabs taken from the victim’s left and right thighs had two different DNA profiles, with the minor contributor being Desiree M.

and the major contributor being appellant. According to Ms. Moore, there was virtually no chance – one in 958 quadrillion, which is greater than the Earth’s population – that someone other than appellant was the major contributor of the DNA samples taken from the victim’s thighs within hours of the assault.

Although defense counsel did object to the admission of the DNA swabs and Ms. Moore’s written report, he did not object to Ms. Moore’s testimony relating her DNA testing procedures, results, and conclusions. Having failed to object to this expert testimony that appellant’s DNA was found on the victim’s body, appellant cannot complain that the trial court erred in admitting that evidence. *See DeLeon*, 407 Md. at 31.

The Evidence Was Sufficient to Establish Chain of Custody

Even if appellant had properly objected to this DNA evidence, we are not persuaded that the trial court erred in admitting it. As discussed, the chain of custody question is whether the DNA samples were properly handled and stored. *See Easter*, 223 Md. App. at 74-75. In appellant’s view, the State failed to “negate the possibility that tampering or cross-contamination occurred.” We disagree.

As a threshold matter, such definitive proof of impossibility is not required. Rather, the challenged DNA evidence was properly admitted if the record, viewed in the light most favorable to the State as the prevailing party, established a reasonable probability that there was no tampering or contamination. *See generally Cooper v. State*, 434 Md. 209, 227-28 (2013) (“When determining whether a proper chain of custody has

been established courts examine whether there is a ‘reasonable probability that no tampering occurred’”) (Citation omitted), *cert. denied*, 134 S. Ct. 2723 (2014).

Here, there was ample evidence to establish a reasonable probability that the DNA samples tested and analyzed by Ms. Moore were not corrupted by cross-contamination or tampering. Within hours of the attempted rape, Lauren Berry, a trained sexual assault investigator, swabbed the victim’s inner thighs for possible DNA, using the Department’s standardized procedures to preclude contamination and tampering. She detailed, step-by-step, the collection process during which she used separate sterile-packaged collection kits for each swab. After sealing the swabs inside separate, numbered evidence envelopes sealed with tamper-proof tape, she signed, initialed, and dated the back of the evidence tape so that any break in the seal would be evident. The sealed envelopes were submitted to the locked DNA evidence vault, where access is restricted to trained and certified evidence technicians and their supervisors.

Detective Michael Genung similarly authenticated the two buccal reference swabs obtained from appellant on September 2, 2013, pursuant to a warrant. He followed the same procedures and identified as the sealed envelope that he initialed and placed into a locked container inside the Criminal Investigation Division evidence room, which is secured by two door locks that require a numeric combination to enter. Detective Malinowski provided comparable testimony about the two buccal reference swabs obtained from Desiree M. on September 20, 2013, which were delivered directly to the secured DNA lab.

Ms. Miulli, an expert serologist, testified that she screened and processed all of these DNA swabs on September 19 and 23, 2013. She processed the evidence swabs taken from the upper area of Desiree M.'s right and left thighs, before processing the DNA reference samples obtained from the victim and appellant. She cleaned her work site and instruments with a ten percent bleach solution before and after processing each individual sample. Handling each item separately, she visually inspected each one to ensure that evidence seals were intact and then labeled each envelope with a unique number, as well as her identification number, initials, and the date. After opening each envelope, she removed the swab, cut a portion of it, then placed the cutting into a separate test tube. These test tubes were secured with a screw-on cap, separately numbered, and stored for later DNA testing in the locked DNA evidence vault, located in the secure DNA lab. When finished with each swab, Ms. Miulli returned it to its evidence envelope, sealed that envelope, then signed her initials, identification number, and the date across that seal. These envelopes were returned to the DNA evidence vault, which can be accessed only by a few members of the DNA laboratory staff.

DNA analyst Tyiesha Moore, an expert forensic chemist, testified that she retrieved and tested the test tubes prepared by Miulli, all of which remained capped with intact seals inside sealed envelopes obtained from the locked DNA vault. She followed the standardized procedures for analyzing DNA and for preventing and detecting cross-contamination during that process. These included testing each sample separately and

using controls that would negate any cross-contamination. There was no contamination noted for any of the samples tested by Ms. Moore.

Collectively, this evidence is sufficient to establish a reasonable probability that the DNA samples tested by Ms. Moore were not contaminated or tampered with after they were collected from the victim and appellant. Through law enforcement personnel trained in the proper collection, storage, and testing of these challenged samples, the State accounted for the handling of that evidence in a manner ensuring that the condition of each test sample was unchanged. The trial court correctly ruled that because there was no supporting evidence or proffer, appellant's claims that there could have been tampering or cross-contamination went to the weight of that evidence, not its admissibility. *See Easter*, 226 Md. App. at 74-75.

Because there was sufficient evidence to establish a chain of custody for the challenged DNA samples, the trial court did not abuse its discretion in finding a reasonable probability that there was no tampering or contamination of the DNA samples and in admitting DNA evidence based on those samples.

**JUDGMENTS OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**