UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 750

September Term, 2015

CHRISTOPHER GIBBS, JR.

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: March 31, 2017

*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.

Following a trial in the Circuit Court for Wicomico County, a jury convicted Christopher Gibbs, Jr., ("Appellant") of second-degree rape, robbery, third-degree sexual offense, first-degree assault, second-degree assault, reckless endangerment, first-degree burglary, fourth-degree burglary, fourth-degree burglary (theft), and theft of property with a value less than $300. The trial court sentenced Appellant to a total prison term of 40 years, after which he filed a timely notice of appeal.

Appellant presents the following question for our consideration:

> "Did the court err in permitting the State to cross-examine and impeach Mr. Gibbs with a fact it neither proved nor believed in good faith?"

For the following reasons, we affirm the trial court's judgment.

BACKGROUND

A. Investigation into the Rape

On July 22, 1999, a woman who we shall refer to as "Ms. C" called 911 and reported that an unknown assailant forced himself into her home at knifepoint, raped her, and robbed her. Salisbury City Police Department officers responded to Ms. C's apartment, took her statement, and transported her to Peninsula Regional Medical Center, where she underwent a sexual assault forensic exam and the completion of a rape kit, along with the administration of a "morning after" pill to prevent pregnancy and antibiotics to prevent sexual transmitted diseases.

After fifteen years without any solid leads, the police received "new information" in 2014. This new information led the police to apply for, secure, and execute a search warrant for Appellant's DNA. At trial, the parties stipulated that, to a reasonable degree

of scientific certainty, Appellant was "the source of the major contributor of the DNA profile of the vaginal cervical swabs" taken from Ms. C in 1999.

Detective Matthew Thompson interviewed Appellant in August 2014. Before Det. Thompson confronted Appellant with Ms. C's allegation of rape, Appellant told Det. Thompson that he did not know Ms. C and had never interacted with her. Additionally, he claimed that he did not recognize her from the driver's license photo the officers showed him. He further denied any familiarity with her apartment building or with anyone who lived there.

On September 22, 2014, the State filed a charging document in the Circuit Court for Wicomico County, indicting Appellant with: first-degree rape, armed robbery, first-degree sex offense, first-degree assault, reckless endangerment, openly carrying a deadly weapon with intent to injure, first-degree burglary, and several lesser-included charges.[1] The State tried the case before a jury on March 23, 2015.

B. Trial

At trial, Ms. C testified to the following account of the night of July 22, 1999. According to Ms. C, she returned home to her apartment building on East Isabella Street in Salisbury, Wicomico County after work at around 10:00 p.m. When she arrived home, she encountered in her building an "ordinary looking" African-American man, who had been hiding behind her neighbor's apartment door. The man, holding a large kitchen knife, instructed her to open her door and enter her apartment. Once inside the apartment, the

[1] The State entered a *nolle prosequi* on the charges of first- and second-degree sex offense.

man forced Ms. C to engage in sexual intercourse with her against her will. He then cut the cord to Ms. C's bedroom telephone and asked her if there were other phones in the apartment. She said there were no other phones, but there was one in the kitchen. After scanning the apartment, the man left, taking Ms. C's purse and the money, credit card, checkbook, and car keys contained therein. She used the kitchen phone to call 911 as soon as the man left the apartment.

Ms. C's next-door neighbor also testified at trial. She testified that when she returned home on the evening of July 22, 1999, she noticed that Ms. C's apartment door was slightly ajar. As she passed Ms. C's door, she got an uncomfortable feeling that someone was watching her, and hurried into her apartment. A few minutes later, she heard the front door to the apartment building slam, and, a few minutes after that, she received a call from Ms. C, who sounded shaken and told her she had been raped. She then went down to Ms. C's apartment and waited there with her for the police.

Appellant chose to testify in his own defense. He stated that on July 22, 1999, he had visited 109 East Isabella Street to visit a friend, Chris Maloney, to play chess, as he had on approximately six prior occasions. He claimed that he came into contact with Ms. C on the front porch of the apartment building before they both went to the second floor, she to her apartment and he to knock on Mr. Maloney's door across the hall.

After receiving no answer to his knock, Appellant heard a woman's voice say that she did not know whether Mr. Maloney still lived there. As he turned around, he saw Ms. C standing at the top of the stairs to her apartment, wearing only her underwear. He alleged that she invited him into her apartment and the two had consensual sex. Afterward, while

Ms. C was in the bathroom, Appellant left discretely and took her purse on his way out. He denied having a knife or threatening Ms. C in any way. Appellant's testimony fit his with theory of the case contained in his counsel's opening statement: Appellant was at the apartment building to visit Chris Maloney when he encountered Ms. C, and she invited him in for a consensual one night stand, thereafter leaving unchivalrously while she was in the bathroom and stealing her purse on his way out.

C. The Allegedly Improper Question on Cross-Examination

During cross-examination, Appellant conceded that he had never told that story to the police, stating that it was only when he was charged with rape that he remembered the details of the encounter with Ms. C. Also during cross-examination, the State began to focus on the reason for Appellant's presence at the building. The State asked:

> Q. Did you tell Detective Thompson about Chris Maloney?
>
> A. No, I didn't.
>
> Q. Did you know about Chris Maloney when you talked to Detective Thompson or did you figure that out later, too?
>
> A. No, I knew about Chris Maloney.
>
> Q. You just lied to Detective Thompson?
>
> A. No, I didn't remember the house or the person he was talking about at the time.
>
> Q. How is that you remember that house and Chris Maloney now?
>
> A. It's not hard to do.
>
> Q. It's not hard to make up a story, no. Did you ever -- strike that. So what were you going to see Chris Maloney for?

A. He's a chess buddy.

Q. So you were going to play chess with him?

A. Yes.

Q. How often did you play chess with Mr. Maloney?

A. Maybe once, twice a month.

Q. Where did you play chess at?

A. At his apartment.

Q. So you were at 109 East Isabella Street once or twice a month?

A. I had been there before.

After cross-examining Appellant about the details of his sexual encounter with Ms. C, the State continued:

Q. July 22nd of 1999 you're telling me you went over to play chess with Mr. Maloney?

A. Yes, that's why I was there.

Q. What if I told you Mr. Maloney moved out of that building two years before July of 1999? Is your testimony still that you went over to play chess with Mr. Maloney at 109 East Isabella Street, Apartment 1?

Before Appellant answered, defense counsel—without objecting—asked the court for permission to approach the bench, where the following discussion occurred:

[DEFENSE COUNSEL]: I'm asking if she has a good faith basis for the question.

[THE STATE]: **I asked Detective Thompson to find out.**

THE COURT: What difference does it make?

[DEFENSE COUNSEL]: She needs to have a good faith basis to ask the question.

[THE STATE]: **I asked Detective Thompson to run him.**

THE COURT: Why? Why can't she just ask the question?

[DEFENSE COUNSEL]: You need to have a good faith basis to ask the question?

THE COURT: Why? No you don't.

[THE STATE]: **I asked Detective Thompson to run the name.**

[DEFENSE COUNSEL]: **And it's been run?**

[THE STATE]: **Yes.**

THE COURT: What difference does it make?

[THE STATE]: I haven't had that name until opening, you threw it out in opening.

THE COURT: A good faith basis, that's the first time I've ever heard there has to be a good faith basis to ask a question on cross-examination.

[DEFENSE COUNSEL]: Oh, absolutely, Your Honor.

THE COURT: No, you can fish, you can try to trip up a witness.

[DEFENSE COUNSEL]: Fishing for sure, but you have to have a good faith basis to ask the question. It would be like saying --

THE COURT: *You haven't asked me to do anything.*

[DEFENSE COUNSEL]: It's inventing facts that are not in evidence. Unless it is a fact that is true. And it might be, I don't know if that is true.

THE COURT: You both may step back.

(Emphases added).

Defense counsel then returned to his table without ever noting an objection or asking the court for relief. Nevertheless, the State did not repeat its question and Appellant never responded to the question. The Defense then rested its case, Appellant stepped down from

the stand, and the court provided the jury its instructions, one of which was: "In making your decision you consider the evidence in the case. **The evidence is the testimony from the witness stand**, the exhibits which were introduced into evidence, which you will have with you when you deliberate, and the one stipulation between counsel." (Emphasis added).

D. The Jury Note

After the jury began deliberating, however, the jury sent the court a note, asking: "Do we consider statement of Mr. Maloney has not lived there in two years as testimony/fact?" Additionally, the note asked for a copy of the judge's instructions for the crimes charged. This note prompted the following exchange between the court and counsel:

> THE COURT: . . . My suggestion is I give them these charges, the ones I read. Is there anything else that should be addressed, in your opinion?
>
> [DEFENSE COUNSEL]: I think the technical true answer to their question is no, but *I'm not saying that the Court needs to respond to that*.
>
> THE COURT: There's nothing I can say about that.
>
> [DEFENSE COUNSEL]: *I'm not suggesting that.*
>
> [THE STATE]: I think no response is the best, just saying that you can't respond or the Court doesn't respond or something.
>
> THE COURT: So I can either have the Bailiff just take these instructions back and have her tell the jury that's all I can do is give them copies.
>
> [THE STATE]: That's acceptable.
>
> [DEFENSE COUNSEL]: *That's fine.*

(Emphasis added).

Without a request from the defense for a curative instruction or any other response, the court had the bailiff bring the jury a copy of the judge's instructions and provided no response to the jury's question. The jury then returned its verdict about 45 minutes later, finding Appellant guilty of second-degree rape, robbery, third-degree sex offense, first- and second-degree assault, reckless endangerment, first-degree burglary, fourth-degree burglary, fourth-degree burglary (theft), and theft under $300; and finding Appellant not guilty of first-degree rape, armed robbery, and openly carrying a deadly weapon with intent to injure.

The court imposed a 20-year prison term for the rape conviction, a consecutive 10 years for the robbery conviction, and a consecutive 10 years for the first-degree burglary conviction. The remaining convictions merged for sentencing purposes. Appellant noted his timely appeal to this Court on June 5, 2015.

DISCUSSION

Appellant's sole contention on appeal is that the trial court erred by permitting the prosecutor to impeach Appellant with a fact neither supported by the evidence nor believed in good faith by the State to be true. To demonstrate the gravity of this error, Appellant points us to the jury's note asking whether it could consider the prosecutor's question as evidence, arguing that the note makes clear that the prosecutor's improper question affected the jury. Appellant contends that the court should have stricken the State's question or instructed the jury not to consider it.

The State counters that Appellant failed to ask for any such relief of the trial court and, consequently, has not preserved his claim of error. The State also contends that,

because defense counsel indicated that there was no need to address the jury note, it has waived any argument concerning the State's question on cross-examination concerning Mr. Maloney. Regardless, the State continues, the State's attorney established during the bench conference that she had a good faith basis for asking the question.

"Under Maryland Rule 8–131(a), a defendant must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding." *Sharp v. State*, 446 Md. 669, 683 (2016) (citing *Abdul–Maleek v. State,* 426 Md. 59, 69 (2012) ("[T]here is no good reason why either the circumstances presented here should be exempt from the preservation requirement or the trial court should not have been given the opportunity to address at the time the concern that [the defendant] now raises." (footnote omitted)). Similarly, Maryland Rule 4-323(c) explains that a party in a criminal trial objecting to an issue other than the admission of evidence should "make[] known to the court the action that the party desires the court to take[.]"

Thus, a defendant must "make 'timely objections in the lower court,' or 'he will be considered to have waived them and he cannot now raise such objections on appeal.'" *Brice v. State*, 225 Md. App. 666, 678 (2015) (citations omitted), *cert. denied,* 447 Md. 298 (2016); *see also Leuschner v. State*, 41 Md. App. 423, 436 (1979) (citing *Sutton v. State*, 25 Md. App. 309, 334 (1975)) ("It is axiomatic that to preserve an issue for appeal some objection must be made or a party will be deemed to have waived an objection."). Waiver "extinguishes the waiving party's ability to raise any claim of error based upon that right." *Brockington v. Grimstead,* 176 Md. App. 327, 355 (2007) (citing *United States v. Olano*, 507 U.S. 725, 733-34 (1993)), *aff'd sub nom. Grimstead v. Brockington*, 417 Md. 332

(2010). Once a party waives their claim, he or she "may not complain on appeal that the court erred in denying him the right he waived, in part because, in that situation, the court's denial of the right was not error." *Brockington,* 176 Md. App. at 355; *Brice*, 225 Md. App. at 79 (citation omitted) ("If a defendant does not object to the court's decision to not read a proposed question, he cannot 'complain about the court's refusal to ask the exact question he requested.'").

Although we agree with Appellant—and the State concedes—that the circuit court stated erroneously that the prosecutor did not require a good faith belief in the factual predicate for the question she posed to appellant,[2] Appellant asks this Court on appeal for relief he did not seek in the circuit court.

When the State asked the question that Appellant alleges lacked an improper basis, Appellant did not object or ask the trial court for any of the relief he now complains that the trial court failed to provide. Rather than stating an objection on the record, defense counsel asked the prosecutor if she had a basis for her question. The prosecutor explained that when defense counsel disclosed Chris Maloney's name during his opening statement,

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[2] *See Clark v. State*, 364 Md. 611, 655 (2001) (quoting B. Bergman and N. Hollander, 2 Wharton's Criminal Evidence § 9:07, at 598-99 (15th ed. 1998)) ("'The witness may be asked about anything that tends to show an inability to recall and to testify accurately, provided counsel has a good faith basis for the question.'"); *Elmer v. State*, 353 Md. 1, 14-15 (1999) (holding that that the trial court improperly permitted a prosecutor's questions because "the prosecutor's questions suggested the existence of facts which he could not prove, and indeed, after the bench conference, he *knew* he could not prove. Following the bench conference where defense counsel articulated the source of the information, the prosecutor lacked a good faith belief in the factual predicate implied in the question.") (emphasis in original).

she asked Detective Thompson to "run the name." [3] When defense counsel asked if the detective had run the name, the prosecutor responded affirmatively.

Even after the court reminded defense counsel that he had not "asked [the court] to do anything," counsel did not state an objection on the record or ask the court for relief. Instead, after the prosecutor confirmed for defense counsel that she had a factual basis for her question, defense counsel returned to his table. He did not ask the prosecutor for a proffer, he made no request that the court take any specific action in response to the prosecutor's allegedly improper question, and he did not ask the court to strike the question or instruct the jury to disregard it. Yet, now, before this Court, Appellant argues that the State failed to provide a factual basis the question and that the court erred by not striking it from the record. Because Appellant did not object, ask for a proffer,[4] or request some corrective action before the trial court, Appellant waived this issue and we will not consider it on appeal. *See Brockington,* 176 Md. App. at 355.

Nor shall we consider Appellant's ancillary implication that the circuit court erred by not responding to the jury's question concerning Chris Maloney. Given the opportunity to seek relief from court below at the time the issue arose, the defense chose not to.[5] Again,

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[3] Perhaps anticipating that the issue would arise during Appellant's cross-examination, the State had already advised the court that she may "need to recall" Det. Thompson as a rebuttal witness.

[4] Had the State been requested to supplement its proffer, the trial court and this Court on appeal would be able to more accurately gauge the sufficiency of the prosecutor's good-faith basis for the question.

[5] Appellant suggests in his brief that he suffered ineffective assistance of counsel "[t]o the extent that defense counsel's shortcoming to sufficiently challenge this issue

we will not consider Appellant's issue for the first time on appeal. Maryland Rule 8-131(a); *Brockington,* 176 Md. App. at 355. Moreover, the court instructed the jury, "In making your decision you consider the evidence in the case. The evidence is the testimony from the witness stand, the exhibits which were introduced into evidence, which you will have with you when you deliberate, and the one stipulation between counsel." In the absence of evidence to the contrary, of which we find none, we presume the jury followed the instruction of the trial court and considered only the admissible evidence. *See Matthews v. State*, 106 Md. App. 725, 743 (1995) (citation omitted) ("We presume that juries follow the instructions of trial judges.").

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

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prejudiced Mr. Gibbs," but a claim for ineffective assistance of counsel is a collateral issue unsuited for review on direct appeal. *See Smith v. State*, 394 Md. 184, 199-200 (2006).