UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 984

September Term, 2016

ROBERT BROWN

v.

STATE OF MARYLAND

Berger,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 5, 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.

Robert Brown, appellant, was convicted by a jury in the Circuit Court for Prince George's County of second-degree assault of his then-girlfriend. The court imposed the maximum sentence of ten years' imprisonment, and suspended all but 18 months of that sentence, to be followed by five years of supervised probation. On appeal, Brown claims (1) that the trial court impermissibly influenced his decision whether or not to testify; and (2) that the sentencing court relied on "impermissible considerations." For the following reasons, we shall affirm the conviction, but vacate his sentence and remand to the circuit court for resentencing.

I.

At the conclusion of the State's case, the court granted Brown a ten-minute recess to confer with defense counsel as to whether or not he would testify. When court reconvened, one of his two attorneys advised him, on the record, of his constitutional right to testify, and Brown confirmed that it was his intention to waive that right. The court then briefly addressed evidentiary issues with counsel and summoned the jury, at which point defense counsel asked to approach the bench and informed the court that Brown may have changed his mind about testifying, prompting this exchange:

> [DEFENSE COUNSEL]: We may have a change of heart on the testifying or not testifying question.
>
> THE COURT: Mr. Brown, so let me say this.
>
> [BROWN]: Yes. Yes, sir.
>
> THE COURT: I understand, this is a very serious decision for you.
>
> [BROWN]: Yes.

THE COURT: I understand that there are a myriad of factors, feelings, and elements that go into this decision that I cannot relate to.

[BROWN]: Yes.

THE COURT: But I can tell you this: The dynamics of this decision –

[BROWN]: Yes.

THE COURT: – haven't really changed. I would be very surprised if there is anything that has taken place in this trial that you and your attorneys did not expect.

So the factors that you would use to make this decision have been there. Examine those factors and make your decision and move on. All right?

[BROWN]: Yes.

THE COURT: All right. What are you doing?

[BROWN]: I'm going to leave it to you guys. I'm sorry.

[DEFENSE COUNSEL]: It's all right. I understand.

[BROWN]: I'm sorry. I do not wish to testify.

THE COURT: You do what? I'm sorry, I didn't hear you.

[BROWN]: I wish not to testify.

Brown claims on appeal that the judge's comments impermissibly influenced his decision to waive his right to testify and, therefore, that his waiver was invalid.[1] This claim is not preserved for appellate review, however, because defense counsel did not object to the court's comments, nor make any request for further action from the court in order to ensure that Brown fully understood the right he was waiving. *See* Md. Rule 8-131(a)

[1] "Because the right to testify is essential to due process . . . it may only be waived knowingly and intelligently[.]" *Gregory v. State*, 189 Md. App. 20, 32 (2009).

("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.")

Even if the issue had been preserved, it lacks merit. Contrary to what Brown claims, the court did not offer a personal opinion as to whether or not he should testify; in fact, the court made it clear that it "could not relate to" the factors that Brown would have to consider. Nor do we agree with Brown's assertion that the court "advis[ed] him that there was no reason to change his mind about not testifying." The court gave no advice as to whether or not he should testify, but only cautioned Brown to think carefully about what he had discussed with defense counsel that had led to his decision not to testify, and noted that those factors had not changed.

II.

Brown claims next that he is entitled to a resentencing hearing because the sentencing court "impermissibly considered a bare list of charges" against him. We agree.

At the sentencing hearing, the prosecutor argued for the court to impose the maximum sentence and emphasized that Brown had ten unrelated assault charges on his record. The prosecutor did not provide any information about the details or circumstances of those charges. According to the presentence investigation report, one of the assault cases had resulted in Brown's acquittal, five were *nol prossed* by the State, and three had been put on the stet docket. Regarding the one remaining assault charge, which was then pending in Wicomico County, the prosecutor told the court only that "[t]he State's understanding is that also involves a domestic issue."

The prosecutor recommended that the court impose the maximum sentence of ten years, based on Brown's "repeated history of being involved in assaults, [and] based on the fact that he committed – or is at least alleged to have committed – another assault while he was out on this offense[.]" The prosecutor also noted the "heinous nature" of the assault for which Brown was then being sentenced. Prior to announcing the sentence, the court asked the prosecutor to confirm that the pending assault charge was a domestic case, and the prosecutor responded that "it was my understanding that it did involve another female. I don't have a lot of details on it."

The court followed the prosecutor's recommendation and sentenced Brown to the maximum of ten years, and explained:

> The reason I went above guidelines in this case is because of your repeated contacts for second degree assaults and allegations of a prior - - contact also for violation of ex parte order.
>
> It seems to me, sir, you keep getting involved in these domestic violence situations. I believe you have genuine remorse right now, but I believe when you get into these stressful circumstances that we all encounter, the manner in which you respond is inappropriate, to say the least.

"[A] trial judge has 'very broad discretion in sentencing.'" *Abdul-Maleek v. State*, 426 Md. 59, 71 (2012) (citations omitted). "This Court, therefore, will only review a sentence on three grounds: '(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) *whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations;* and (3) whether the sentence is within statutory limits.'" *Id.* (emphasis in original) (citations omitted).

In determining an appropriate sentence, "a judge is not limited to reviewing past conduct whose occurrence has been judicially established[.] *Hamwright v. State*, 142 Md. App. 17, 42 (2001) (citation omitted), *cert. denied*, 369 Md. 180 (2002). Accordingly, a court may consider "reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried." *Id.* at 42-43 (citation omitted) (emphasis added). But "bald accusations of criminal conduct for which a person either has not been tried or has been tried and acquitted[,]" standing alone, may not be considered, in order to avoid the possibility that the sentencing court may be influenced by "inaccurate or false information." *Brown v. State*, 85 Md. App. 523, 539 (1991), *aff'd and remanded*, 327 Md. 81 (1992).

The record in this case, including the presentence investigation report, contains no "reliable evidence" or "details and circumstances" relating to any of the charges on Brown's arrest record. And we disagree with the State's assertion that the prosecutor's "understanding" that the pending case "did involve another female" amounts to "more than [a] bald accusation" because, as an attorney, her representation was "trustworthy."[2] We

[2] The State asserts preliminarily that Brown's contentions are not preserved for appellate review because he lodged no objection to the sentencing court's comments concerning Brown's unrelated charges for assault and violations of court orders. We agree with Brown that the issue was preserved when defense counsel responded to the State's suggestion that the maximum sentence was appropriate based on Brown's "repeated history of being involved in assaults" when she pointed out that the court was unable to evaluate the merits of the unrelated charges. *See Sharp v. State*, 446 Md. 669, 683-84 (2016) (holding that defense counsel's statement – "I don't believe in punishing someone for wanting to go to trial" – made during the sentencing hearing, was sufficient to preserve for appellate review an objection to the sentencing court's alleged impermissible consideration of defendant's election to decline to a plea offer.)

do not doubt the prosecutor's trustworthiness as to her understanding, but assuming it was accurate, that understanding does not qualify as "reliable evidence" of criminal conduct, nor was it sufficient to inform the court of the "details and circumstances" of the pending assault charge. *See Smith v. State*, 308 Md. 162, 171 (1986) (holding that evidence that the defendant, who was being sentenced for rape, had previously attempted another rape, although he had not been charged, was "more than a bald allegation" where the victim of the attempted rape was called as a witness and gave "specific facts" concerning her encounter with the defendant); *Henry v. State*, 273 Md. 131, 150-51 (1974) (concluding that it was permissible for the sentencing judge to consider evidence of criminal conduct that the same judge had heard during the trial, even though the jury did not convict the defendant of offenses he was charged with that were based on that conduct.)

Because it is clear from the court's comment that it imposed a more severe sentence based on Brown's arrest record, without reliable evidence of the details and circumstances of the charges contained in that record, we are constrained to vacate the sentence and remand to the circuit court for resentencing. *See Abdul-Maleek*, 426 Md. at 74 (concluding that remand for resentencing was required where court's comments could "lead a

reasonable person to infer that [the court] might have been motivated by an impermissible consideration.") (citation and emphasis omitted).

SENTENCE IMPOSED ON SECOND DEGREE ASSAULT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR RESENTENCING IN ACCORDANCE WITH THIS OPINION. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE SPLIT EQUALLY BETWEEN APPELLANT AND PRINCE GEORGE'S COUNTY.