Circuit Court for Prince George County
Case No. CT140897X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 163

September Term, 2017

JENE JOSEPH

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: April 18, 2018

*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.

Jene Joseph, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of second-degree rape, fourth-degree sexual offense, and second-degree assault. The court sentenced appellant to 20 years of imprisonment for rape and merged his remaining convictions. Appellant raises a single question on appeal: Did the trial court commit reversible error when it allowed the State, during cross-examination of appellant, to assert prejudicial facts not in evidence, depriving appellant of a fair trial? For the following reasons, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that appellant raped J.T., his wife's cousin, in the back of a car where she had fallen asleep. Testifying for the State, among others, was J.T.; a sexual assault forensic nurse examiner; an expert in DNA; and Detective Cleo Savoy with the Prince George's County Police Department. The theory of defense was that appellant never engaged in sexual intercourse with J.T. Appellant was the only witness for the defense. The evidence elicited at trial established the following.

On the late afternoon of March 30, 2014, J.T. went to a family baby shower at a recreational center in Prince George's County for appellant's son. Present at the gathering, among the many family and friends, were three men: appellant; Cordel Whren; and Lavar Tyree. J.T. was 22 years old and had known appellant, her cousin's husband who was around 40, her whole life. Whren was J.T.'s sister's ex-boyfriend, and Tyree was a family friend. J.T. testified that she had an alcoholic drink while at the baby shower.

Later that evening, Cordel drove appellant, Tyree, and J.T. to a restaurant to watch appellant's daughter in a fashion show. Tyree sat in the front passenger seat of the Chevy

Impala, appellant sat behind Cordel, and J.T. sat next to appellant in the middle back seat because a child's car seat was in the rear passenger side seat. While at the restaurant, the group drank and danced. J.T. had several drinks at the restaurant.

After an hour or so, the group left the restaurant and went to a bar. The group went inside, but after a short while, J.T. asked Whren to walk her to the car because she was tired. She fell asleep in the back seat but woke up to someone "tugging on my pants." She looked up and saw appellant on top of her. She told him to stop and tried to push him off of her, but he held her down and engaged in vaginal sex with her. He eventually stopped and then fled from the car.

J.T. exited the car and realized that it was not in the same location it had been when she had fallen asleep. She immediately texted her best friend, Princess Saunders, to "call me." She then texted, "Sonny raped me." Saunders testified that she received the texts and immediately called J.T., who was crying and sounded scared and very upset. J.T. told Saunders that "Sonny had just raped me[,]" explaining that she woke up to find appellant on top of her. Saunders' sister picked up J.T. and brought her to her house. J.T. called her mother, who told her to call 911, which she did. J.T.'s 911 call was admitted into evidence and played for the jury. She admitted on cross-examination, that she had texted appellant the morning of the rape, "[w]hy was my pants down when I woke up[?]" Appellant did not respond to her text.

J.T. was brought to the Prince George's County Police Department where she met Detective Savoy. The detective testified that during her interview J.T. was "very upset" and crying while relating that appellant had raped her. The detective took her to a hospital

where a S.A.F.E. nurse[1] conducted an interview and a physical examination; her report was admitted into evidence. The nurse observed three tears around J.T.'s genitals and bruising on the walls of her vagina and her cervix. The nurse testified that a tear is a result of blunt force trauma pulling or stretching the skin until it breaks. Swabs were taken from J.T.'s cervical area, vagina, external genitalia, and the crotch of her underwear. An expert in the fields of DNA and forensic testing testified that sperm matching appellant's DNA were found on each of those areas.

Appellant testified in his defense and denied that he had sexual intercourse with J.T. Appellant testified that during the ride to the restaurant, J.T. "rubb[ed] her hand up and down my leg and – and my penis." When asked how he reacted to J.T.'s conduct, he testified that he "just moved her hand" and he "didn't really, you know, think nothing of it." After an hour or so at the fashion show, the group left for a bar. During the ride, J.T. placed a coat over his lap and "began to massage my penis." She also placed his hand between her legs from the back. He testified that J.T. "jerked my dick off," and he eventually ejaculated. They then drove to Whren's grandmother's house. He and Whren left J.T. in the car while they went inside the grandmother's house and played cards for several hours. When appellant left the house with Whren around 7:00 a.m., J.T. was not in the car. He testified that he telephoned J.T. to see where she was, but she did not answer. He admitted to having two drinks at the baby shower and three glasses of wine at the restaurant.

[1] The acronym "S.A.F.E." stands for a sexual assault forensic examiner.

We shall provide additional facts below.

DISCUSSION

Appellant argues that the trial court committed reversible error when it allowed the State to cross-examine him and interject facts not in evidence. The State responds that appellant has failed to preserve his argument for our review because he did not object to an earlier question posed, and even if he has preserved his argument, there was no error because the State engaged in proper impeachment. Appellant's argument presents an interesting intersection of two areas of law: the proper form of prosecutorial questions, and impeachment. However, we need not address the argument raised because appellant failed to preserve it for our review, and even if he had, any error would have been harmless.

On cross-examination, the State asked appellant about the events that occurred when he and Whren returned to Whren's empty car after having played cards at Whren's grandmother's house. The following colloquy occurred:

[THE STATE]: Did you call [J.T.] to ask her where she was?

[APPELLANT]: Yes.

[THE STATE]: What did she say?

[APPELLANT]: She didn't answer.

[THE STATE]: Okay. Did you ask [Whren], hey, where did [J.T.] go?

[APPELLANT]: Yes.

[THE STATE]: Okay. Did you text [J.T.]?

[APPELLANT]: I don't recall if I text her at that time.

[THE STATE]: Okay. Did you text her at any other time?

> [APPELLANT]: Yes.
>
> [THE STATE]: *When you called [J.T.], is that when you left the message saying, You know what happens when you get drunk and stuff, sometimes you don't care? Is that when you left that message*?
>
> [APPELLANT]: *I don't recall leaving her that message*.
>
> [THE STATE]: So you don't recall whether or not you asked [Whren] to borrow the car or the keys. You don't recall . . .
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: *You don't recall whether or not you asked to go to the ATM. You don't recall whether or not you called and left a message saying that's what happens sometimes when you are drinking*?
>
> [DEFENSE COUNSEL]: *Objection*.
>
> THE COURT: *Overruled*.
>
> [THE STATE]: Right?
>
> [APPELLANT]: *I don't recall leaving her no message*.

During closing argument, the State argued, without objection:

> Of course, when push comes to shove, well, do you remember asking for the keys from [Whren]? Uh, I don't recall. Okay. Do you remember telling [Whren] that you wanted to go to the ATM? Uh, I don't recall. Do you remember leaving a message on [J.T.'s] phone saying, that's what happens sometimes when you're drinking? No, that, I don't recall.
>
> So you're being accused of rape, and you wouldn't remember whether or not you had called and left a voicemail essentially admitting that you did it? If it doesn't make sense, it's not true. That makes absolutely no sense whatsoever. None.

Preservation

Md. Rule 4–323(a) provides: "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 objection

become apparent. Otherwise, the objection is waived." This is because a fundamental tenet of appellate review is that the alleged error must generally be an act of commission or omission by a trial court: "Only a judge can commit error. Lawyers do not commit error. Witnesses do not commit error. Jurors do not commit error. . . . Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling." *DeLuca v. State*, 78 Md. App. 395, 397-98 (1989). Moreover, Md. Rule 8-131(a) provides: "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[.]"

Maryland appellate courts have held that even objected to alleged errors are not preserved for our review where the alleged inadmissible evidence is admitted earlier or later without objection. *Tichnell v. State*, 287 Md. 695, 715-16 (1980) (citations omitted). *See also Williams v. State*, 231 Md. App. 156, 195 (2016)("By not objecting later when the same conviction was entered into evidence, appellant has waived any objection to the contested evidence."); *Williams v. State*, 131 Md. App. 1, 17(evidence coming in either earlier or later without objection waives admission of evidence), *cert. denied*, 359 Md. 335 (2000); *Clark v. State*, 97 Md. App. 381, 394–95 (1993)(even though defense objected at times to certain testimony, failure to object both before and after elicitation of the same testimony waived objection for appeal).

Because appellant did not object to a similar question posed earlier, he has failed to preserve his argument for our review. Even if appellant had, however, and even if we

assume, without deciding, that the question constituted error, we would have found the error harmless.

Harmless error

In Maryland, harmless error is governed by the standard first adopted by the Court of Appeals in *Dorsey v. State*, 276 Md. 638 (1976).

> We conclude that when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent view of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded — may have contributed to the rendition of the guilty verdict.

State v. Hart, 449 Md. 246, 262-63 (2016) (quoting *Dorsey*, 276 Md. at 659) (footnote omitted)). Maryland appellate courts have "steadfastly maintained" that the State has the burden to prove harmlessness. *State v. Yancey*, 442 Md. 616, 628 (2015). "The harmless error standard is highly favorable to the defendant[.]" *Perez v. State*, 420 Md. 57, 66 (2011) (citation omitted).

Even if appellant had preserved his argument for our review and established error, we would have found the error harmless. Given J.T.'s testimony and the strong scientific evidence which supported her version of events, *i.e.*, that appellant's semen was found in her vagina, either the vaginal intercourse was consensual or not. Appellant, however, offered an incredulous defense -- that he did not engage in sexual intercourse with appellant at all. We are persuaded that under the circumstances of this case, even if the single

question posed was in error, there was no reasonable possibility that the error may have contributed to the guilty verdict. Accordingly, we shall affirm.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.