Circuit Court for Prince George's County
Case No: CT180429A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1102

September Term, 2019

HARVIE LORENZO HENRY

v.

STATE OF MARYLAND

Arthur,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 2, 2020

A jury sitting in the Circuit Court for Prince George's County found Harvie Lorenzo Henry, appellant, guilty of first-degree assault, second-degree assault, use of a firearm in the commission of a crime of violence, and two counts of false imprisonment. The court sentenced him to a total term of 63 years' imprisonment, all but 40 years suspended, to be followed by a five-year term of supervised probation. On appeal, Mr. Henry contends that (1) the court relied on "improper considerations" in imposing the sentence and (2) the evidence is insufficient to support the false imprisonment convictions. For the reasons to be discussed, we disagree and shall affirm the judgments.

BACKGROUND

Trial

The evidence at trial established that, on February 11, 2018, then 17-year-old J.H. and her then 18-year-old friend A.S. were together at J.H.'s home when about midnight Dwight Cox (known by the nickname "Finese") responded to J.H.'s social media message for "someone [to] come, like, drive and come see us or come get us." Appellant and Mr. Cox drove to J.H's home and picked up the girls. J.H. and Mr. Cox knew each other, but the girls had never met appellant. The girls sat in the back seat of the vehicle and the four drove around smoking marijuana. At one point, appellant randomly fired two shots out of the car using a handgun in his possession. Mr. Cox then made appellant switch places with him and Mr. Cox took over the driving. About 2:00 a.m., Mr. Cox drove the group to appellant's home where they entered the basement. Up until that point in time, even though she wanted to leave, A.S. testified that no threats had been made against the girls and things were "still cool."

J.H. testified that, once they were in the house, appellant tried to "separate" her from A.S. by telling her to stay in his bedroom with Mr. Cox while he was in another room with A.S. A.S. testified that she kept telling J.H. to tell the men to take them home and J.H. made the request. A.S. did not have a phone and could feel it "getting, like, tense." J.H. refused to stay in the bedroom and she began arguing with appellant because she did not want to be separated from her girlfriend. Appellant "started yelling" at J.H. and "pushed [her] in the room" and then hit her in the mouth with a gun – the same gun appellant had used to fire the shots from the vehicle. J.H. started crying and Mr. Cox and A.S. tried to intervene "to stop him from hitting" her. A.S. testified that "we're all scared," and even Mr. Cox "looked like he was just in shock" and he "was scared of [appellant] himself."

When J.H. attempted to text someone "to find a ride home, call somebody," appellant took her phone and hit her again. He then removed, or had A.S. remove, the SIM card from the phone and flushed it down the toilet. Appellant then pointed the gun at Mr. Cox and at the girls and ordered the girls to remove all their clothes. He directed J.H. to have sex with Mr. Cox and recorded the encounter on his cell phone. According to the girls, appellant ordered them to "pretend like you're enjoying it" or he would "expose" them. J.H. testified that she complied "because there was a gun pointed to my head."

With the gun pointing at their heads, appellant also walked the girls to a closed bedroom where appellant's cousin, Romann Jackson was sleeping. Appellant woke up Mr. Jackson and directed the girls to engage in oral sex with him. Appellant "made" them have oral sex with himself as well. Both J.H. and A.S. denied that the sex with any of the men was consensual.

A.S. testified that that she did not feel free to leave the house because appellant "wouldn't let us do nothing. Wouldn't let us go to the bathroom. It was just, like, we had to be by his side."

Appellant called three friends to come over to have sex with the girls and when they arrived, A.S. recognized one as an acquaintance of her brother. A.S. managed to speak alone with the one she recognized and J.H. testified that "they made a plan to get us out of there." The girls left the house with the three other boys about 6:00 a.m. Appellant told the girls if they went to the police, the police would not believe their story because appellant had recorded their sexual encounter with Mr. Cox. The following day, both girls were examined at hospitals and then spoke to the police.

The jury found appellant guilty of first and second-degree assault of J.H., use of a firearm in a crime of violence against J.H., false imprisonment of J.H., and false imprisonment of A.S. The jury acquitted him of first and second-degree rape of J.H. and A.S., first and second-degree assault of A.S., and use of a firearm in a crime of violence against A.S.

Sentencing

At sentencing, the State informed the court that the "overall guidelines" were five to 17 years' imprisonment. The State informed the court that appellant was on probation at the time he committed the crimes in this case, related to an incident in 2015 when he punched a woman "numerous times in her face causing her nose to bleed profusely" and stole $1,900 from the woman's purse. Appellant had pled guilty to assault and theft in that case. The State also informed the court that, three days after the incident in this case,

appellant "is alleged and has been charged with rape first degree, kidnapping, where he under the guise of telling an innocent woman who was home minding her business that, 'I'm your neighbor. Someone just hit your car. You need to come out,' when she opened that door, Mr. Henry put a gun to her head and said, 'You're coming with me.'" The prosecutor related that the case was pending, but "it's another allegation of yet another act of violence against yet another woman." Accordingly, the State urged the court to sentence appellant to "50 years flat, executed." Defense counsel asked the court to impose "a guidelines sentence," noting among other things, that appellant "even has a good reputation as evidenced by the character letters" submitted to the court.

The court informed counsel that it had carefully read the character letters. The court continued:

> And the individual described in these letters doesn't match the individual who I saw on the film, or whose actions were told by the two young ladies in this case in terms of what happened to them. I don't know where the disconnect comes from, but there's no way that this is – that they know who Mr. Henry is. They just don't.
>
> He described that he's already on probation for an assault on a young lady, then I have a trial where these two young ladies – bad decisions. They just wanted to go out and have a good time – I understand that – and instead of that, they were taken some place where they didn't want to go, there was a gun that was put to them. And I accept the jury's verdict. I don't necessarily agree with the jury's verdict, but I accept it because that's how our system works. But no way in the world – and I think about how young they were, to be honest with you. It's disturbing how these men thought it was okay – whether you want to put it by force or consensual – to keep these young ladies at a place that they didn't know where they were and engage in such sexual acts with them. It's horrible, it's horrific, and I will never fault these young ladies for what happened to them.
>
> And I've been watching you, Mr. Henry, today, and I have to admit you don't seem concerned about this at all. In fact, at one point I thought I

> saw you yawning, like, you know, you're keeping me awake. I'm going to keep you awake for a little bit longer, okay, because what you did, you will pay a price for.

The court then sentenced appellant to 25 years, suspending all but 12 years (with credit for time served) for first-degree assault. The court merged the second-degree assault conviction. The court imposed a 20-year term, suspending all but 10 years (with the first five years served without possibility of parole) for use of a firearm in the commission of a felony or crime of violence, to run consecutively to the first-degree assault sentence. For the false imprisonment convictions, the court imposed two terms of nine years' each, to run consecutively. The court concluded:

> The total is 40 years [active time], and it's 40 years because of what you did. That was an awful, awful incident for those two young girls to be taken off the street and kept and sexually assaulted. It's something that they will never ever get over, and I don't think you really care, and I think that really it is in you, and I don't know of any way that you are not going to be a menace if you are out on the street.

DISCUSSION

Sentencing Considerations

Appellant maintains that the sentencing hearing transcript excerpts cited above demonstrate that the court relied on "impermissible sentencing considerations" when imposing a sentence that exceeded the guidelines. He asserts that "the judge's comments showed that she based appellant's sentence on the belief that he had committed sexual offenses against both girls, charges based on conduct that the jury rejected." He claims that, at the least, "there was an appearance that the court was motivated by improper considerations" and urges this Court to vacate the sentence and remand for a new

sentencing hearing "despite defense counsel's failure to object to the judge's improper comments during sentencing."

The State responds that appellant's claim is not preserved for appellate review and, in any event, lacks merit. We agree with the State.

Rule 4–323(c), applicable to rulings and orders other than evidentiary rulings, provides that an objection must be made "at the time the ruling or order is made or sought" in order to be preserved for appellate review. Thus, challenges to sentencing determinations are generally waived if not raised during the sentencing proceeding. *Bryant v. State*, 436 Md. 653, 660 (2014).

As we stated in *Reiger v. State*,

> [w]hen . . . a judge's statement from the bench about the reasons for the sentence gives rise to the claim of impermissible sentencing considerations, defense counsel has good reason to speak up. A timely objection serves an important purpose in this context. Specifically, it gives the court opportunity to reconsider the sentence in light of the defendant's complaint that it is premised upon improper factors, or otherwise to clarify the reasons for the sentence in order to alleviate such concerns. . . . Simply stated, when there is time to object, there is opportunity to correct.

170 Md. App. 693, 701 (2006) (footnote and citations omitted).

The waiver rule and its rationale apply to cases involving both failure to object to the sentencing court's consideration of impermissible factors and to its consideration of improper evidence. *Id.* at 700. *See also Abdul-Maleek v. State*, 426 Md. 59, 69 (2012) (a claim of impermissible considerations at sentencing is subject to the normal preservation requirements). Here, because the defense failed to note any objection at sentencing, the issue raised on appeal is not preserved for our review.

Even if the issue were preserved, appellant would fare no better. A trial judge "has very broad discretion in sentencing." *Abdul-Maleek*, 426 Md. at 71 (quotation marks and citation omitted). And the Court of Appeals has instructed that a judge "should fashion a sentence based upon the facts and circumstances of the crime committed and the background of the defendant, including his or her reputation, prior offenses, health, habits, mental and moral propensities, and social background." *Id.* (quotation marks and citation omitted). Here, the court focused on the "the facts and circumstances" of the crimes for which appellant was convicted, including "how these men thought it was okay – whether you want to put it by force or consensual – to keep these young ladies at a place that they didn't know where they were and engage in such sexual acts with them." Although disagreeing with the jury's acquittal of the most serious charges against appellant, we are not persuaded that the court disregarded the jury's verdicts. The court clearly was concerned with the victims' ages and the fact that the false imprisonment perpetrated by appellant facilitated the sexual activity, whether it was "by force or consensual."

False Imprisonment

Appellant maintains that "the evidence was insufficient to show that the girls were confined by force or threat of force." He claims that, once "inside the house, there was no testimony offered that appellant told the girls that they were not allowed to leave or that the girls asked to leave." The State responds that "there was a plethora of evidence to support Henry's convictions for false imprisonment." We agree with the State.

In considering a challenge to the sufficiency of the evidence, we ask "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt." *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quotation marks and citation omitted). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). "[T]he limited question before us is not whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Smith v. State*, 232 Md. App. 583, 594 (2017) (quotation marks and citation omitted).

"To obtain a conviction for false imprisonment, the State was required to prove: (1) that appellant confined or detained [the victim]; (2) that [the victim] was confined or detained against her will; and (3) that the confinement or detention was accomplished by force, threat of force, or deception." *Jones-Harris v. State*, 179 Md. App. 72, 99, *cert. denied*, 405 Md. 64 (2008).

Here, the State presented evidence that, when the group arrived at appellant's house, appellant attempted to separate the young women, directing J.H. to stay in the bedroom with Mr. Cox despite her assertions that she did not want to be in that room. There was also evidence that appellant took J.H.'s phone and removed the SIM card when she attempted to use it to seek a ride home; that appellant struck J.H. with the gun when she argued with him about being there; and that appellant held the gun to J.H.'s head and walked her to his cousin's bedroom. In addition, A.S.'s testified that she did not feel free to leave the house because appellant "wouldn't let us do nothing. Wouldn't let us go to the

bathroom. It was just, like, we had to be by his side." Finally, both young women testified that, when the three additional men arrived, A.S. took one aside and told him what had been happening and they "made a plan to get us out of there." In sum, we hold that the evidence was sufficient to support the convictions for false imprisonment.

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