

Circuit Court for Frederick County
Case No. 10-K-15-057589

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1339

September Term, 2016

MELVIN LEE RAMEY, JR.

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: June 21, 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.

At issue in this appeal is the sufficiency of the evidence to support convictions of second-degree rape and second-degree assault based on the victim being a mentally incapacitated individual, as defined by Maryland Code (2002, 2012 Repl. Vol.) § 3-301(c) of the Criminal Law Article (CL).¹

Appellant, Melvin Lee Ramey, Jr., concedes that he engaged in consensual, commercial sexual activity with the complaining witness, T.R.,² and that the State's evidence was insufficient to sustain guilty verdicts rendered by the court, sitting without a jury in the Circuit Court for Frederick County.

Specifically, Ramey presents three questions, which we have recast for clarity:³

1. Did the State fail in its proof of T.R.'s incapacitation or of Ramey's awareness of her incapacitation?
2. Did the court err in excluding the proffered evidence of a defense witness on grounds of remoteness?

For the reasons that follow, we shall affirm the judgments of the circuit court.

¹ All subsequent statutory references, unless otherwise indicated, shall be to the Criminal Law Article of the Maryland Code (2002, 2012 Repl. Vol.), which reflects the version of the relevant statutes that were in effect at the time of the offense.

² In keeping with this Court's privacy policy, we do not provide the victim's identifying information, hence we refer to her throughout as "T.R."

³ In his opening brief, Ramey asks:

1. Was the evidence of second-degree rape insufficient where the State made no showing of incapacitation or that Mr. Ramey was aware of such incapacitation?
2. Was the evidence of second-degree assault insufficient for the same reasons?
3. Did the court err in excluding a defense witness on relevance grounds because his impeaching testimony was "too remote?"

BACKGROUND

The following was adduced at trial:⁴

In brief, we relate that Ramey and T.R. engaged in sexual intercourse during the late-night hours of May 27, 2015.⁵ T.R. could not remember the encounter; she was discovered the next morning unconscious and unclothed in public with a .199 blood alcohol content. Ramey testified that he exchanged money for sex with a conscious and consenting T.R. The State alleged a rape, but not one by force. Instead, the State’s theory of prosecution was that T.R. was mentally incapacitated at the time of the intercourse and that Ramey ought to have known as much.

T.R. testified on direct that in May 2015, she was living in a shelter in Frederick. During the afternoon, between 1:00 p.m. and 3:00 p.m., she ate lunch at a restaurant with three other individuals, during which she consumed “anywhere from three, maybe four,” large glasses of beer. Thereafter, she returned to the shelter at about “like 6:00 [p.m.] or 7:00 [p.m.], something like that,” but was denied entry because an employee detected alcohol on her breath, a violation of the shelter’s conditions for housing. T.R. therefore tried to catch a bus to get to her friend's home before dark, “but the bus stopped running” at that time – “7:00 or 8:00 [p.m.],” so she walked back to the shelter from the bus station and “sat there,” unable to call her friend because her phone was “completely dead.”

⁴ Our factual recitation is taken from the Statement of Facts set out in Appellant’s opening brief, which, with a limited exception having no bearing on the elements of the offense, the State accepts. We have edited where appropriate.

⁵ Although not charged, Ramey testified that they engaged in oral sex as well.

While sitting in front of the shelter, “[a] guy” approached her on foot and “asked [her] if [she] was doing anything and why [she] would be out there all by [her]self.” T.R. told him “about what was going on,” but couldn’t “remember everything that [they] talked about.” Eventually, though, the man “said that he would give [her]” a ride, so she followed him to his nearby car. At trial, T.R. identified Ramey as the man she met that evening.

T.R. further testified that, once in the car, Ramey asked if he could stop at a liquor store. T.R. replied [“t]hat was fine” and, when asked if she wanted anything, “told [Mr. Ramey] that [she] would take one of those canned margaritas, Straw-Ber-Ritas.” As Ramey exited the car, T.R. looked around for something to identify him because she “wasn’t buying what he told [her] his name was” – “Tom or Tim.” Eventually, T.R. found a pill bottle in the center console with a name “like Ramsey” on it, but at trial she could not remember clearly what she observed.

Ramey returned from the store and handed T.R. her canned drink. She testified that she “[thought] it was already open.” Ramey thereafter put a bag from the store in the back of the car and the two sat there while T.R. consumed the drink. As T.R. drank, the two “talk[ed].” T.R. also spoke on the phone with her boyfriend, but could not remember what about.⁶

T.R. next recalled waking up in the hospital on the morning of May 28. Her head hurt – “it really felt like I had been hit in my head” – and she was bruised and scratched in

⁶ Earlier, T.R. testified that her phone was “completely dead.” Ramey later testified that he had permitted her to charge her phone in his car when he had picked her up.

a number of places. T.R. also experienced soreness in her vagina, but recalled nothing about how she sustained such soreness or how she arrived at the hospital.

T.R. was, however, able to provide contextual testimony about her living circumstances and sexual habits. She explained that she possessed a prescription for Ambien – a sleep aid – and would consume five milligrams at night, an hour before bed, “to help [her] sleep.” She testified that the Ambien was held by the shelter, though, so “to the best of [her] recollection,” she could not recall taking it during the evening of May 27.

T.R. also testified that she had engaged in consensual sex with another partner sometime before the early morning hours of May 28, but could not recall when that encounter happened. She also refused, over defense counsel objection, to identify with whom she had engaged in consensual intercourse. T.R. was able to testify, however, that she “kn[e]w” she did not give Ramey consent to have sex, because she “was taught [her] entire life to never mix your race, and [she had] never, in all of [her] years of ever being sexually active, [she had] never.”

On cross-examination, T.R. testified that the beers she drank at lunch on May 27 did not make her feel drunk; only “bloated.” She also admitted on cross-examination to a conviction for theft of less than \$100 in 2014. Finally, T.R. could not recall telling detectives that she had been picked up by “Mike” – presumably, her boyfriend Michael Carroll⁷ – on the night in question and had engaged in a physical altercation with him.

⁷ The record contains inconsistent testimony as to the identity of “Mike” who was referred to by T.R. on various occasions.

T.R. was found the next morning around 6:30 a.m., lying unconscious and unresponsive beneath a picnic bench next to the parking lot of a medical office park, by employees who were reporting to work, who contacted 911. They observed that she was nearly naked, her pants and underwear around her ankles. They also observed an empty condom box near where T.R. was lying.

First responders to the scene testified that T.R. was alert, but unresponsive and somewhat intoxicated. A paramedic who treated her related on cross-examination that T.R. indicated “she had been drinking and was spending time with a guy.” Finally, the officers observed and collected a number of items found in the area near where T.R. was found, including: cigarette butts, a beer can, charms from a broken necklace or bracelet, a used condom, a clear straw with “powder residue” on it, and spice packets. Only the used condom was examined and tested for its forensic value to the case.

Medical professionals provided further details about T.R.’s wellbeing on the morning of May 28. She presented with multiple minor abrasions on her knees, arms and torso. She reported that she had been drinking the night before and was experiencing pain in her anal and vaginal area. A blood test revealed a .199 blood alcohol content, but no other narcotic substances.⁸ A gynecological examination revealed redness in her vagina, but no bleeding, tearing, or trauma.

⁸ The doctor qualified his testimony by relating that the “very plain tox screen” performed on T.R. does not “pick up the more ... recent synthetic medications and things like that.” The doctor also opined that the tox screen would not pick up “something like date rape drugs.”

On cross-examination, the sexual assault forensic examination nurse related that T.R. reported not being able to remember what had happened the night before, but did state: “I remember Michael hitting me on the back of my head.” Finally, the examining physician testified that T.R. reported to him directly that she drank alcohol and consumed Ambien the evening before.

DNA testing confirmed that Ramey and T.R. engaged in intercourse. DNA collected from a vaginal swab also indicated the presence of a second male DNA profile, but at levels too low for any meaningful analysis.

Detective Gregory Loftis testified for the State as the lead investigator on the case. He related obtaining a buccal swab from Ramey through a search warrant, for DNA testing, at Ramey’s home and asking Ramey to join him at the police station for an interview. Ramey did so voluntarily, and gave a brief statement in which he claimed not to know T.R.

The State also entered into evidence phone calls made from the jail between Ramey and his wife, during which Ramey expressed embarrassment and the need for forgiveness. Immediately prior, on the recorded phone call, Ramey had been speaking to his wife about a prior extramarital affair that resulted in the birth an out-of-wedlock child.

Loftis also testified about the evidence he gathered from T.R. He related that, initially, T.R. claimed not to know what had happened to her during the night of May 27-28, but later told him that she had been in an altercation with her boyfriend, Michael Carroll. Loftis later learned that the altercation she had been speaking about occurred two weeks prior to May 27. T.R. also told Loftis that she went to a park with a man named Tim, but that she and Tim did not have sex. Finally, T.R. claimed that her last sexual

interaction was two months prior to May 27, with her boyfriend Michael. When later confronted with DNA analysis, though, T.R. admitted she had engaged in intercourse during the day of May 27 with a man she knew from the shelter named “Jim.”

The defense presented evidence that Ramey paid T.R. for sex, and that T.R.’s testimony was not a reliable basis for a conviction. The defense recalled Loftis to further relate information learned from T.R. during his investigation. He described an interview with T.R., during which he took handwritten notes that documented T.R.’s claim that she went to the park and had unplanned sex with Michael Carroll. T.R. reported that she tried to choke and backhand him during the encounter. His notes further revealed that T.R. and Carroll had an argument, that Carroll called T.R. a “Nazi-loving bitch,” and that alcohol “and possibly Ambien” were “involved.” Loftis later clarified, under the State’s examination, that he learned of an altercation where T.R. had scratched Carroll, but that altercation happened “a week or two earlier.”

Officer Randy Lawson testified for the defense about coming into contact with T.R. on December 1, 2015, when he responded to a disturbance report in the parking lot behind a Petco store. At that time, he observed T.R. calling for help with scratches on her face, neck, and wrist. He knew T.R. from “past calls for service” and asked her if she had cut herself. T.R. responded “yes.” T.R. then told him that she had been at a pizza shop, blacked out, and awakened in a nearby apartment building. T.R. had been drinking alcohol at the restaurant, but did not appear to him to be drunk. Based on his observations and T.R.’s behavior, Lawson contacted EMS “to conduct an emergency petition” (seemingly for involuntary mental health commitment).

Ramey testified in his own defense. He explained to the court that on May 27, 2015, he was driving home late from his job in Montgomery County and visiting his parents in Virginia. Sometime after 9:30 p.m., as he was driving on South Street he was “flagged down by a white female.” The woman – T.R. – asked for “a lift,” so he agreed to give her a ride.

Once in the car, T.R. asked Ramey “if [he] was po-po, meaning police.” When he responded in the negative, T.R. asked him whether he knew “where [she could] get some dirt,” meaning heroin. Ramey responded that he did not sell drugs. T.R. reiterated that “she really needed ... money,” so Ramey offered to pay her for sex. T.R. agreed, offering oral sex for \$20 and intercourse for “\$30, \$40.”

Ramey agreed and drove to a nearby Exxon gas station to purchase condoms, as T.R. demanded. He then drove T.R. to a “cool spot” she identified – an office complex on Thomas Johnson Drive. Once parked, Ramey exited the car, walked around to the passenger side of the vehicle, and handed T.R. \$30. T.R. put the money in her purse and proceeded to perform oral sex on Ramey from the passenger seat of the vehicle. After approximately 10 minutes, Ramey ejaculated. The two therefore smoked cigarettes together until Ramey was able to perform intercourse. T.R. explained that they could not have sex in the car because “it’s not enough space.” Ramey saw a picnic table in the grass near the parking lot and offered that as a “good spot.”

T.R. and Ramey walked over to the picnic table, where T.R. first “went to the bathroom.” T.R. then removed her pants and underpants, bent over the picnic table, and

the two engaged in intercourse. The sexual encounter ended when “the condom broke” and T.R. proclaimed “that’s it,” so Ramey withdrew and “discarded” the condom.

T.R. and Ramey returned to his car where they smoked more cigarettes. Ramey offered to drive T.R. back to South Street, but she declined. T.R. explained that she “[could] make a phone call,” so she grabbed her purse, “proceeded to make a phone call,” and the two parted ways. Ramey arrived at his home at 11:30 p.m.

In court, Ramey confirmed that he did not smell alcohol on T.R. while he was with her. He also observed no indication that “she was impaired by alcohol,” or that she was “not cognizant and competent as to what was going on.” Finally, Ramey testified that he did not “see any indication of any drug use” by T.R. and did not purchase alcohol for her to drink.

Further facts pertinent to the issues are included in the discussion that follows.

1. Sufficiency of the Evidence

The standard for our review of evidentiary sufficiency is well-established. Evidence is sufficient to support conviction if, “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.” *Derr v. State*, 434 Md. 88, 129 (2013) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in *Jackson*), *cert. denied*, 134 S.Ct. 2723 (2014)). The same standard exists in all criminal cases, “regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone.” *Smith v. State*, 415 Md. 174, 185 (2010) (citing *State v.*

Smith, 374 Md. 527, 534 (2003). That is so because “generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts.” *State v. Suddith*, 379 Md. 425, 430 (2004) (internal quotation and citation omitted). But, the Court of Appeals has cautioned, because “[b]y definition, circumstantial evidence requires the trier of fact to make inferences, but those inferences must have a sounder basis than ‘speculation or conjecture.’” *Bible v. State*, 411 Md. 138, 157 (2009) (quoting *Taylor v. State*, 346 Md. 452, 458 (1997)). More recently, we have reinforced the axiom that “no greater degree of certainty is required when the evidence is circumstantial than when it is direct[.]” *Martin v. State*, 218 Md. App. 1, 35, *cert. denied*, 440 Md. 463 (2014), *cert. denied*, 135 S.Ct. 2068 (2015). Finally, when reviewing a sufficiency challenge from a bench trial, the ruling of the trial court will be reversed only on a showing that it was clearly erroneous. *Taylor*, 346 Md. at 457.

Ramey was charged with violation of Md. Code, CL § 3-304, which provided, in relevant part:

(a) A person may not engage in vaginal intercourse with another:

(1) by force, or the threat of force, without the consent of the other;

(2) if the victim is ... a mentally incapacitated individual, ... and the person performing the act knows or reasonably should know that the victim is ... a mentally incapacitated individual....

Relevant to the instant case, CL § 3-301 provided:

(c) “Mentally incapacitated individual” means an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual’s consent or awareness, is rendered substantially incapable of:

- (1) appraising the nature of the individual’s conduct; or
- (2) resisting vaginal intercourse, a sexual act, or sexual contact.

Thus, the State’s burden was to prove that: *first*, Ramey engaged in vaginal intercourse with T.R., which he concedes; *second*, that at the time T.R. was mentally incapacitated and was substantially incapable of appraising the nature of her conduct or resisting vaginal intercourse; and *third*, that Ramey knew, or reasonably should have known, that T.R. was mentally incapacitated.

Ramey concedes that the State has met the first of its tripartite burdens, but asserts that it has failed regarding the latter two. The State, he posits, failed to negate every reasonable hypothesis of innocence and, therefore, the court was left to speculate. He relies on the Court’s observation in *Bible v. State, supra*, that, ““when the evidence equally supports two versions of events, and a finding of guilt requires speculation as to which of the two versions is correct, a conviction cannot be sustained.”” *Bible*, 411 Md. at 157 (quoting *Taylor*, 346 Md. at 458).

We agree with the parties that this is, substantially, a circumstantial evidence case. The State excepts to Ramey’s reliance on the notion that, in a clearly “she said, he said” circumstance, the State must negate every reasonable hypothesis of innocence and, in this case, the only path to a guilty verdict was for the court to have engaged in speculation. The State refers us to our recent opinion in *Ross v. State*, 232 Md. App. 72, 98 (2017), in which Judge Moylan wrote:

Even in a case resting solely on circumstantial evidence, ... if two inferences reasonably could be drawn, one consistent with guilt and the other consistent

with innocence, the choice of which of these inferences to draw is exclusively that of the fact-find[er] ... and not that of a court assessing the legal sufficiency of the evidence. The State is **NOT** required to negate the inference of innocence. It is enough that the [fact-finder] must be persuaded to draw the inference of guilt.

(Capitalization and boldface emphasis in original).

The State points to the findings of the trial court that support a reasonable inference that T.R. was mentally incapacitated:

- T.R.’s consumption of three or four beers that day;
- T.R. was intoxicated to the extent that she was turned away from the shelter after she was found to have alcohol on her breath, in violation of the shelter’s housing conditions;
- Ramey provided T.R. with more alcohol;
- T.R.’s last recall of the evening’s events was the cell phone call to her “boyfriend” after meeting Ramey;
- T.R. had no recall of having had sex with Ramey;
- T.R. was certain that she would not have had sex with Ramey, presumably on a racial basis;
- When discovered early the next day, unresponsive and nearly naked, those who found her feared that she was dead;
- T.R. had no recollection of having been discovered and, at the time, she was intoxicated, her speech was slurred, and she was confused.
- At 7:30 a.m., her blood alcohol level was .199;
- Her speech was still slurred several hours later.

Accumulating that evidence, the State posits, any fact-finder could reasonably conclude that T.R. was sufficiently intoxicated to be mentally incapacitated. We agree.

Notwithstanding the considerable evidence to the contrary, Ramey argues that the State has failed in its proof of incapacity. Even assuming sufficiency of the evidence as to T.R.'s incapacity, he argues that the court had to make a "leap to the conclusion" that Ramey was aware, or ought to have been aware, of her incapacity and that she was unable to consent. The trial court disagreed, and we do as well.

In the rendition of its verdict, the court noted the essential elements of the statute and the State's burden of proof. Accepting that vaginal intercourse occurred, as Ramey admitted, the court addressed the remaining elements.

The court found, based on the evidence to which we have referred, that T.R.'s high blood alcohol level, her confusion, lack of recall of the events, supports a conclusion that she was mentally incapacitated at the time of the interlude with Ramey. As to the element of Ramey's knowledge, the court found:

Mr. Ramey's testimony, quite candidly, is - - as I said, I'm to assess credibility - - I just don't believe much of what Mr. Ramey said. I can believe the part he said where they met each other, or not how they met, but that they met each other. I can believe that they had sex, but I don't believe his testimony as to how it occurred.

Although the facts do not present a clear instance of diametrically opposed testimony because T.R. did not recall the sexual activity, when the evidence may lead the court to one result or the opposite, the fact that the court made an adverse credibility assessment as to Ramey's testimony clearly supports the court's satisfaction as to the sufficiency of the evidence. In that regard, we refer to Md. Rule 8-131(c):

Action tried without a jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly

erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

(Emphasis added).

In a close case, credibility can tip the scale one way or the other.

2. Proffered impeachment testimony

Defense counsel called a witness⁹ whose proffered testimony was that, in January 2016, he responded to a report by T.R. that she had been attacked by a person with a gun, resulting in the need to barricade herself in her room. An investigation revealed that no such event occurred. That, counsel argued, proved that T.R. had a history of fabrication, which was admissible as impeachment evidence. In response, the State contended that the evidence was irrelevant and that T.R.'s credibility had not been made an issue because her testimony was as to her lack of recollection of the incident, not that it had in fact occurred or who was responsible.

Responding to the State's objection, the court ruled that:

I accept the proffer that this is another incident, as you described, where the police were called and she claimed someone was after her with a weapon ... but it's too remote ... to be allowable in terms of her credibility.

The court essentially ruled that specific incidents are not admissible on questions of a witness's trustworthiness, without specific reference to Md. Rule 5-608(a)(1) and (a)(3)(B), which provide:

⁹ The witness is identified in the record only as "Officer Kemp" who, presumably, was a law enforcement officer in Frederick County.

(1) ... In order to attack the credibility of a witness, a character witness may testify (A) that the witness has a reputation for untruthfulness, or (B) that, in the character witness's opinion, the witness is an untruthful person.

* * *

(3) ... (B) On direct examination, a character witness ... may not testify to specific instances of truthfulness or untruthfulness by the witness.

See also Jensen v. State, 355 Md. 692, 699-708 (1999).

The defense witness was being offered for the exclusive purpose of introducing the circumstances of a subsequent unrelated event, solely in an effort to challenge T.R.'s credibility. The Rule is clear as to the admission of this form of testimony. The court did not abuse its discretion in excluding the proffered testimony.

Finding neither error in the court's finding of fact, nor abuse of discretion in its evidentiary rulings, we affirm the judgments of the circuit court.

**JUDGMENTS OF THE CIRCUIT COURT
FOR FREDERICK COUNTY AFFIRMED.
COSTS ASSESSED TO APPELLANT.**