UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1430

September Term, 2013

KELVIN COUSAR

v.

STATE OF MARYLAND

Meredith,
Woodward,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 15, 2015

Kelvin Cousar, appellant, was convicted, following a jury trial in the Circuit Court for Prince George's County, of a first-degree sex offense and kidnapping. Cousar raises three questions on appeal.

QUESTIONS PRESENTED

The questions Cousar presents in his appeal are as follows:

1. Was Cousar's right to be tried within 180 days violated?

2. Did the trial court abuse its discretion in denying Cousar's motion to strike a prospective juror for cause?

3. Was there insufficient evidence to sustain Cousar's kidnapping conviction?

We answer all questions in the negative, and affirm the judgments of the circuit court.

BACKGROUND

There was evidence to support the following. On September 28, 1998, the victim paged Cousar, an acquaintance whom she had recently met, and agreed to meet him that evening outside of her home in northeast Washington, D.C. Cousar drove in his car to the victim's house and met the victim as they had planned. He and the victim talked for about an hour, and then Cousar invited the victim into his car to continue their conversation and drive around the area. The victim accepted his invitation, and Cousar drove around her neighborhood for a while.

Eventually, however, Cousar drove beyond the victim's neighborhood and headed away from her home. Worried about her curfew, the victim asked Cousar to drive back to her neighborhood, but Cousar told her not to worry. Cousar exited the highway near Bowie,

Maryland. The victim made repeated requests to return home. Cousar ignored these requests and drove the car to an empty field.

Upon arriving at the empty field, Cousar parked the car and requested a kiss from the victim before returning to her home. The victim expressed her discomfort with the setting and repeated her requests for Cousar to take her home. When Cousar tried to kiss the victim, she exited the car and walked toward a house that she saw in the distance. Cousar followed the victim, grabbed her, and dragged her back to the car. He forcibly removed her shirt, and forced his penis into her mouth, where he ejaculated. He then drove the victim back to her home in northeast Washington, D.C. DNA evidence eventually linked Cousar to the sexual assault.

On January 17, 2012, Cousar was charged with two counts each of first-degree sex offense, second-degree sex offense, and third-degree sex offense; one count of kidnapping; and one count of false imprisonment.

Six months later, Cousar, who was being represented by an attorney in the Public Defender's Office, moved to discharge his counsel. At the hearing on this motion, Cousar expressed a desire to change counsel but withdrew his motion after a discussion with the circuit court judge. Cousar accepted the continued services of his assigned counsel, but understood that another attorney in the Public Defender's Office would soon join his case to serve as co-counsel.

On July 20, 2012, counsel for Cousar moved to continue the trial, which was then set for July 24, 2012. The requested postponement would delay the trial past the 180-day *Hicks*

date. In support of this motion, Cousar's counsel stated that the recently added co-counsel needed additional time to prepare for trial and was scheduled to appear in District Court on July 24 and 25. The motion recited that the State did not object to the proposed continuance. But the motion pointed out that the *Hicks* date was July 29, 2012, and that the defendant himself was unwilling to waive the *Hicks* date. Although the defendant was in the courthouse on the day of the hearing, he was not present during the consideration of his counsel's request for postponement. Defense counsel made it clear to the postponement judge that the defendant was not willing to waive the *Hicks* deadline even though counsel was of the opinion that more time was needed to prepare for trial. At the conclusion of the hearing, the court granted defense counsel's motion for continuance, finding "good cause to continue the case beyond the 180-day requirement of Md. Rule 4-271" because Cousar's "co-counsel [was] not prepared."

At a hearing on November 9, 2012, Cousar made a statement in court reaffirming that he had objected to the postponement and he "wanted that documented for the record." But he made no other request for relief with respect to the postponement or the fact that he was not present for the postponement hearing.

Cousar's trial began in July 2013. During *voir dire* of the jury pool, one of the prospective jurors acknowledged a strong distaste for perpetrators of underage sexual assaults. When questioned further by the judge about this distaste, the juror stated that she would be able to set aside her feelings on the topic and decide the case fairly. Cousar moved to strike that juror for cause, but his motion was denied. Cousar later used a peremptory

challenge to excuse the juror in question. Cousar did not exhaust all twenty of his peremptory challenges.

During the trial, multiple witnesses, including the victim, testified on behalf of the State, and Cousar testified on his own behalf. The jury found Cousar guilty of several offenses. The court sentenced Cousar to life imprisonment for one count of first-degree sex offense, and a consecutive thirty years' imprisonment for the count of kidnapping. All other convictions were merged for sentencing.

Cousar filed this timely appeal.

DISCUSSION

1. Postponement

Cousar asserts that the circuit court erred by finding good cause for and granting the continuance request that his counsel made on July 20, 2012. The request, made contrary to Cousar's wishes and during a hearing at which Cousar was not personally present, postponed his trial past the 180-day date mandated by Maryland Rule 4-271 (the *Hicks* date). Cousar complains on appeal that he had a right under Maryland Rule 4-231(b) to be present at the postponement hearing. He also argues that, because he did not consent, and the postponement was granted outside of his presence, the court's decision to postpone his trial violated his right under Rule 4-271 to have a trial within 180 days of appearing before the circuit court. We disagree.

Although Rule 4-271 requires a trial to be held "not later than 180 days after" the defendant's "first appearance . . . before the circuit court," an administrative judge may avoid

the rule's requirement of dismissal if a postponement is granted "for good cause shown." Maryland Rule 4-271(a)(1). A good cause "determination carries a heavy presumption of validity," *Dalton v. State*, 87 Md. App. 673, 682 (1991) (citing *Marks v. State*, 84 Md. App. 269, 277 (1990)), and we will not disturb the postponement judge's determination absent "'a clear abuse of discretion or a lack of good cause as a matter of law.'" *Choate v. State*, 214 Md. App. 118, 139 (2013) (quoting *State v. Frazier*, 298 Md. 422, 454 (1984)). *Accord State v. Tomey,* 315 Md. 122, 129-30 (1989); *Ross v. State*, 117 Md. App. 357, 364-65 (1997); *State v. Green*, 54 Md. App. 260, 266 (1983), *aff'd*, 299 Md. 72 (1984).

Because Cousar's own counsel initiated the request for postponement, and supported the request with an assertion that defense counsel needed more time to prepare for trial, we discern no abuse of discretion in the court having granted defense counsel's request despite the defendant's lack of consent. Generally, if counsel seeks or expressly consents to a trial date past the *Hicks* date, the sanction of dismissal is inapplicable. *State v. Brown*, 307 Md. 651, 658 (1986) ("the sanction of dismissal is inapplicable 'where the defendant, either individually or by his attorney, seeks or expressly consents to a trial date in violation of'" the *Hicks* rule) (quoting *Hicks v. State*, 285 Md. 310, 335 (1979)). As the Court stated in *Brown*, it would be "entirely inappropriate for the defendant to gain advantage from a violation of the rule when he was a party to that violation." *Id.* (quoting *Hicks, supra*, 285 Md. at 335).

Cousar seeks to distance himself from the postponement request made by his counsel. In his brief, Cousar notes that, even though he was absent from the postponement hearing, he expressed his disagreement with the request and reiterated his dissatisfaction with the

postponement at the next hearing at which he was present. He also claims a violation of his rights under Rule 4-231(b), which entitles any criminal defendant "to be physically present in person at a preliminary hearing and every stage of the trial." But, because Cousar made no request in the circuit court for relief based upon an alleged violation of Rule 4-231(b), no issue is preserved regarding his absence from the postponement hearing. And, under circumstances where his defense counsel advised the postponement court that more time was needed to prepare for trial, the court did not err in finding good cause even though Cousar personally objected to the delay.

2. Challenge for cause

Cousar contends that the circuit court erred in denying his motion to strike for cause one of the prospective jurors. Because the trial judge refused to strike the juror that Cousar believed was biased against him, Cousar was forced to use (and did use) one of his peremptory challenges to exclude that prospective juror. Cousar asserts that he eventually exhausted his supply of challenges and was bound to a jury panel that he did not accept. The record does not support Cousar's assertion that he ran out of peremptory strikes as a consequence of having to use one on this juror. Consequently, he was not prejudiced by the court's ruling regarding this juror, and any error the trial court committed in denying his motion to strike for cause was harmless beyond a reasonable doubt.

Cousar was "permitted 20 peremptory challenges" under Maryland Rule 4-313(a)(2). Cousar used only twelve of the twenty challenges allocated to him. Because Cousar had unused challenges remaining at the end of the jury selection process, he "cannot legitimately

complain about having to use a peremptory challenge unnecessarily." *Booze v. State*, 347 Md. 51, 71 (1997); *see also Ware v. State*, 360 Md. 650, 665 (2000) ("'If disqualification for cause is improperly denied, but the accused has not exercised all allowable peremptory challenges, there is no reversible error.'" (quoting *White v. State*, 300 Md. 719, 729 (1984))). Cousar's failure to exhaust his peremptory challenges eliminates any need for us to determine whether the court erred in declining to excuse the objectionable juror, because, "even if there was error, it was harmless beyond a reasonable doubt." *Ware*, 360 Md. at 665.

3. Evidence of kidnapping

The final contention Cousar raises on appeal relates to whether the State introduced sufficient evidence to sustain his kidnapping conviction. He asserts that the evidence established that the victim voluntarily accompanied him on the car ride leading up to the sexual assault. Because the victim voluntarily accompanied Cousar in his car to the location of the assault, Cousar argues, the State did not prove the forcible or fraudulent confinement element of kidnapping. We disagree.

To evaluate whether the State introduced "'sufficient evidence to sustain a conviction,'" we consider "'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.'" *Hobby v. State*, 436 Md. 526, 537-38 (2014) (quoting *Derr v. State*, 434 Md. 88, 129 (2013)). In our review of the evidence, we "'defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence.'" *Id.* at 538 (quoting *Derr*, 434 Md. at 129)

We have previously sustained kidnapping convictions in cases in which the victims voluntarily entered the vehicles used by their abductors and later withdrew any consent during the course of the car rides. *See, e.g., Dean v. State*, 46 Md. App. 536, 538-39 (1980) (the kidnapping victims voluntarily entered a truck, but later expressed a desire to be let out of the vehicle, which was ignored), *overruled on other grounds by Booze v. State*, 111 Md. App. 208 (1996); *Shrader v. State*, 10 Md. App. 94, 96-97, 99 (1970) (both victims "voluntarily entered the car used in their abduction."). When the voluntary car rides became "nonconsensual," the continued transportation of the victims became an act of kidnapping. *Dean*, 111 Md. App. at 539; *see also Shrader*, 10 Md. App. at 99-100.

In the present case, the evidence, when considered in a light most favorable to the State, was sufficient to permit a rational jury to conclude that, even if the victim may have begun the car ride as a willing passenger, the status of the ride changed as Cousar drove further and further from the victim's neighborhood despite requests to be taken home. Once Cousar left the victim's neighborhood and started driving on the highway, the victim told him that she wanted to go back to her home. Her protests increased in frequency and urgency as Cousar ignored her requests and continued driving away from her home. When they arrived at the field where the sexual assault took place (prior to Cousar physically grabbing Cousar to perpetrate the assault), the victim continued pleading with Cousar, expressing her discomfort with the setting and insisting that he allow her to return home.

Based on the testimony provided by the victim, the jury could have rationally found that she revoked her consent to the car ride, fulfilling the forcible or fraudulent confinement

element of kidnapping. *See generally State v. Stouffer*, 352 Md. 97, 113 (1998). Because Cousar does not challenge any other aspect of his kidnapping conviction, we affirm the conviction.

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