Circuit Court for Howard County
Case No. 13-K-16-057342

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1476

September Term, 2017

EDWARD WITHERSPOON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 15, 2018

A Howard County jury found appellant Edward Witherspoon guilty of second-degree assault, but could not reach a verdict on charges of second-degree rape and third-degree sexual offense. The circuit court sentenced Witherspoon to incarceration for a term of 10 years, to be served consecutively to any sentences imposed against him for other offenses that he may have committed.[1] This timely appeal followed.

QUESTIONS PRESENTED

The sole question presented is whether the trial court erred in admitting the testimony of four witnesses under Md. Rule 5-802.1(d), the hearsay exception for prompt complaints of sexually assaultive behavior. For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

A.C. planned to move from one neighborhood in Baltimore City to another on Saturday, January 31, 2015. On the night before her move, Ms. C. made plans to go out with her friend, N.F.

Ms. C. drove to Ms. F.'s apartment. After eating dinner together, the two young women went to a bar. Each woman had two drinks.

After about 90 minutes to two hours, the women walked to another bar, where each had another drink. At one point, according to Ms. C., they left their drinks on the

[1] Shortly after his conviction in this case, Witherspoon was convicted of kidnapping and committing a second-degree sexual offense in another case. The court sentenced Witherspoon to an executed term of 30 years of imprisonment in that case. His appeal is pending before us in No. 1475 of the September 2017 Term.

bar and went to the restroom. Afterwards, they went outside, where Ms. C. smoked a cigarette.

When they decided to leave, Ms. F. went back inside the bar to get her jacket. Ms. F. testified that she had no memory of anything else that happened that night.

Ms. C.'s next memory was of waking up at about 5:00 a.m., completely naked, in a bed with red silk sheets, next to a man whom she had never seen before. The man, who was older and had white chest hair, told her that they were in Ellicott City. At trial, Ms. C. identified Witherspoon as the man in the bed.

Ms. C. told the man that she wanted to go home. She felt as though "something had happened sexually," specifically, that she "had had vaginal intercourse with someone." She asked Witherspoon what had happened. He responded that nothing had happened. She asked why it felt as if something had happened. He responded that he gave her a massage because she wanted one.

Ms. C.'s clothes were on the bedroom floor. She picked them up, put them on, walked up some stairs to leave the house, and got into Witherspoon's car. She found her purse in the car, with her underwear stuffed into it. Her cell phone was dead. She felt "[p]retty fuzzy," but noticed that the house was in a cul-de-sac.

Ms. C. asked Witherspoon why he had taken her to his house. He responded that he was helping her. He asked, "Would you rather me leave you on the side of the road?" "Yes," she replied.

As Witherspoon drove Ms. C. back to her car (which she had parked near Ms. F.'s apartment), she noticed signs for Route 70. When she and Witherspoon found her car, Ms. C. "jumped out, slammed the door, and ran."

Ms. C. drove home. Her boyfriend (now, her husband), A.J., was supposed to arrive about an hour later to help her move to her new residence. Ms. C. called Mr. J., who said he was on his way. But because someone was in the car with him, she did not tell him what had happened. Ms. C. then called Ms. F., who did not answer. Then she called her best friend, D.R. Ms. C. told Ms. R. what had happened to her.

Ms. R. testified that she received multiple phone calls from Ms. C. before 8:00 a.m. on January 31, 2015. When Ms. R. answered the phone, Ms. C. was "hysterically crying." For a while, Ms. R. could not understand what Ms. C. was saying. Eventually, Ms. C. was able to tell her that she had gone out the night before and had three drinks, and that the next thing she remembered was "waking up naked in a strange old man's bed." Ms. C. said that it felt as though she had had sex. Ms. R. told Ms. C. to call the police, to call Mr. J. (her boyfriend), and to save her clothing.

After speaking to Ms. R., Ms. C. spent an hour waiting for Mr. J. to arrive. During that time, she took a shower and cried.

Meanwhile, Ms. F. woke up in her own apartment, with no memory of how she had gotten there. When she checked her telephone messages, Ms. F. saw that Ms. C. had called. Over objection, Ms. F. testified that she returned the call and that Ms. C. was "hysterical." Ms. C. said, "[y]ou will not believe what just happened to me" and started crying. Ms. C. told her that she woke up with a strange man beside her and did not know

how she came to be in that place. The strange man drove her home, and she wanted to jump out of the car while he was driving. Ms. C. wanted to go to Planned Parenthood to "get checked out."

Mr. J., Ms. C.'s brother, and her brother's fiancée arrived at Ms. C.'s apartment to help move her belongings to the new apartment. Over objection, the fiancée, Ms. T., testified that, while she and Ms. C. were driving to the new apartment, Ms. C. told her that she had ended up in Ellicott City the night before and that she thought she had been raped because she had seen blood in her underwear. Ms. T. said that Ms. C. was "still in shock" and was "processing what had happened the night before" because she could not remember anything. Ms. T. wanted Ms. C. to go to the hospital, but Ms. C. was not sure that she could still go, because she had showered. Ms. T. wanted to tell Mr. J., but Ms. C. asked her not to tell anyone. According to Ms. T., Ms. C. remained "quiet" and "somber" and was "trying to keep it together" during the move.

The move was completed by mid-afternoon, and Mr. J. had to leave to get to his job on the Eastern Shore. Ms. C. took another shower, drove to Mr. J.'s workplace, and waited for him to get off work.

At about 9:30 p.m., Mr. J. met Ms. C. Over objection, Mr. J. testified that Ms. C. got into his car and started crying. She told him that when she had woken up that morning she did not recognize where she was and did not remember how she had gotten there. She implied that something of a sexual nature had been done to her. She did not know the perpetrator.

Mr. J. called 911 and took Ms. C. to Mercy Hospital in Baltimore. According to Mr. J., Ms. C. cried the entire time they were driving to the hospital, was very upset, and said "she wished that he had killed her."

At Mercy Hospital, a certified sexual assault forensic examiner ("SAFE") nurse examined Ms. C. Ms. C. gave a narrative of what had happened to her. The SAFE nurse noted some redness on Ms. C.'s labia and some abrasions. Among other things, the SAFE nurse collected samples from Ms. C. for DNA testing.

A Howard County police officer interviewed Ms. C. on February 19, 2015. At that time, Ms. C. gave the officer the shirt and underwear that she had been wearing on the night of the incident.

In the summer of 2016, the Howard County Police identified Witherspoon as a suspect. The police secured a search warrant and went to Witherspoon's basement apartment in a house on a cul-de-sac in Laurel. In addition, the police obtained a buccal swab from Witherspoon.

The police also obtained a buccal swab from Mr. J., collected Ms. C.'s SAFE kit from Mercy Hospital, and submitted the SAFE kit, the buccal swabs, and other items, including Ms. C.'s underwear, for DNA analysis. The DNA analysis of Ms. C.'s underwear revealed a skin-cell fraction containing a mixture of two people. Ms. C. was a major contributor; Witherspoon was a minor contributor.

DISCUSSION

Witherspoon contends that the trial court erred in admitting testimony from Ms. F., Ms. R., Ms. T., and Mr. J. about the statements that Ms. C. made to them. He asserts

that the statements do not fall within the hearsay exception for prompt complaints of sexually assaultive behavior set forth in Md. Rule 5-802.1(d).[2] Specifically, Witherspoon argues that Ms. C. delayed in making any complaint "until well after her encounter with" him and did not include specific details of sexually assaultive behavior. In our view, the circuit court did not err or abuse its discretion in finding that the reports were sufficiently detailed and timely to satisfy the hearsay exception.

As a preliminary matter, the State contends that Witherspoon has waived his objection to the reports of sexual assault, because he objected only when Ms. F., Ms. T., and Mr. J. testified, and not when Ms. R. testified. We agree that Witherspoon waived his objection to Ms. R.'s testimony when he failed to object to it at trial. *See* Md. Rule 4-323(a) (an objection "is waived" unless it is "made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent"). We do not agree, however, that Witherspoon waived his right to object to the testimony of the three other witnesses merely because he did not object to Ms. R.'s. It was untenable to deny that Ms. R. received a prompt report of sexual assault, because Ms. C. spoke to Ms. R. almost as

[2] Rule 5-802.1(d) provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> * * *
>
> (d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]

soon as she was free to speak to anyone. Witherspoon probably thought it best to challenge only the later reports, which occurred anywhere from about an hour to 14 hours after the report to Ms. R. Witherspoon did not waive his right to challenge later reports by not challenging an earlier report that was unquestionably prompt. If the law were otherwise, a defendant might waive an objection to a report that occurred a year after the assault if he did not object to a report that occurred an hour after the assault.

In the alternative, the State contends that even if the court erred in admitting the testimony of Ms. F., Ms. T., and Mr. J., the error was harmless, because their testimony was substantially similar to Ms. R.'s, and thus cumulative. We disagree, because the State's argument does not recognize the extent to which it was able to bolster Ms. C.'s testimony through the repeated assertion of her prior consistent statements. "[E]ven though the prior consistent statements were cumulative 'that does not make them harmless because it is their consistency that is the very nature of the harm.'" *Thomas v. State*, 429 Md. 85, 111 (2012) (quoting *McCray v. State*, 122 Md. App. 598, 610 (1998)).

Turning to the merits, the reports of sexual assault are obviously hearsay, because they are statements, other than one made by the declarant (Ms. C.) while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Md. Rule 5-801(c). A trial court "'has no discretion to admit hearsay in the absence of a provision providing for its admissibility.'" *Gordon v. State*, 431 Md. 527, 536 (2013) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)). To the contrary, "[h]earsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule . . . or is 'permitted by applicable constitutional provisions or statutes.'" *Bernadyn v.*

State, 390 Md. at 8 (quoting Md. Rule 5-802) (emphasis in original); *accord Gordon v. State*, 431 Md. at 535. We thus conduct a de novo review of whether the evidence at issue was hearsay. *Gordon v. State*, 431 Md. at 533 ("'[w]hether evidence is hearsay is an issue of law reviewed de novo'") (quoting *Bernadyn v. State*, 390 Md. at 8); *see also Parker v. State*, 408 Md. 428, 437 (2009).

"But not all aspects of a hearsay ruling need be purely legal[,]" because "[a] hearsay ruling may involve several layers of analysis." *Gordon v. State*, 431 Md. at 536. In particular, when a party contends that a hearsay assertion falls within some exception to the general prohibition against hearsay, the trial court may need "to make both factual and legal findings." *Id.* For example, in *Gordon v. State*, 431 Md. at 548, the circuit court found that, in presenting his driver's license in response to a detective's request for identification, the defendant made an adoptive admission of the information on the license, including his date of birth. The Court of Appeals reviewed that "preliminary factual determination" (*id.* at 550) under the deferential standard for clear error. *See id.* at 548, 550.

A purpose of the hearsay exception for prompt complaints of sexual assault is to aid in the corroboration of the victim's story. *See Gaerian v. State*, 159 Md. App. 527, 537 (2004). "The question [of] whether a complaint is sufficiently prompt to be presented to the jury is one that is best committed to the sound discretion of the [trial] court." *Id.* at 545.

"[P]romptness is a flexible concept, tied to the circumstances of the particular case." *Id.* at 540. In determining whether a complaint is sufficiently prompt, a trial court

"should consider whether the complaint is prompt as 'measured by the expectation of what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so.'" *Id.* at 545 (quoting *Nelson v. State*, 137 Md. App. 402, 418 (2001)). "[T]he requirement of promptness is not defeated by some delay in the reporting, so long as the delay is adequately explained." *Id.* at 542. "Once the court determines that the report is 'prompt,' it is for the jury to determine what weight to give it." *Id.* at 545.

In this case, Ms. C. was assaulted while she was unconscious, sometime before 5:00 a.m. on January 31, 2015. Once she awoke and realized what had occurred, she escaped as quickly as possible, arriving home sometime before 6:30 a.m. She immediately called Ms. F., the person whom she had been out with the night before, to report the assault. When she could not get through to Ms. F., she immediately called her best friend, Ms. R., and reported the assault. When Ms. F. woke up and returned her call at about 8:00 a.m., Ms. C. reported the assault to her as well. She did not immediately report the assault to her boyfriend, Mr. J., because he was not alone when she first spoke to him and because she wanted to get through the process of moving. She did, however, report the assault to her brother's fiancée, Ms. T., while they were alone during the move. She reported the assault to Mr. J. that evening, as soon as she was alone with him and the difficult work of the move was over.

In explaining the basis for her discretionary conclusion that the reports of assaultive behavior were sufficiently prompt to satisfy the exception, the trial judge stated:

> I would say human nature for a relatively young woman would be to talk first to her girlfriends and then at the opportunity when she had a chance to speak privately with her boyfriend after he got off work. That was her first chance to speak with him alone and to tell him rather than blurting it out and having him try to go to work with that knowledge. I think under human nature that it was reasonable for her to do it at that time.
>
> The trial judge's conclusion was clearly correct, not clearly erroneous.

Ms. C. reported the assault to two of her friends, Ms. R. and Ms. F., as soon as she reasonably could. She reported the assault to another friend, Ms. T., as soon as she was alone with her. She reported the assault to her boyfriend, Mr. J., as soon she could speak privately to him after he had gotten off work. There was no unexplained delay. *See Hyman v. State*, 158 Md. App. 618, 634 (2004) (affirming admission of report of sexual assault made by an adult to a co-worker on the day after the crime).

Finally, the circuit court was not clearly erroneous in implicitly finding that the reports of sexual assault were sufficiently detailed to qualify for the hearsay exception. Ms. C. told Ms. F. that she had woken up in a strange man's bed, that she did not know how she had gotten there, that she wanted to escape from him, and that she wanted to go to Planned Parenthood to "get checked out" – perhaps to get a morning-after pill or to find out whether she had contracted a sexually-transmitted infection. Ms. C. told Ms. T. that she thought she had been raped because she had seen blood in her underwear. She told Mr. J. that she did not know where she was when she woke up that morning and did not know how she had gotten there, but that something of a sexual nature had been done to her. On this record, there is no serious question that Ms. C. complained of sexually assaultive behavior.

For those reasons, we conclude that the trial court did not abuse its discretion in permitting Ms. F., Ms. T., and Mr. J. to testify about Ms. C.'s reports of sexually assaultive behavior under Md. Rule 5-802.1.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.