

Circuit Court for Prince George's County
Case No. CT190282X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1608

September Term, 2019

ALFREDO JACOBO

v.

STATE OF MARYLAND

Beachley,
Gould,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 1, 2021

*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.

— Unreported Opinion —

Convicted by a jury in the Circuit Court for Prince George’s County of second degree rape and related offenses, Alfredo Jacobo, appellant, presents for our review a single question: Did the court err in denying his motion for mistrial? For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, during which Mr. Jacobo was assisted by a Spanish-speaking interpreter, the State called Mr. Jacobo’s daughter J.M., who testified that on April 30, 2018, she was in her bed and “falling asleep” when Mr. Jacobo “walked inside [her] room[] and . . . laid next to” her. When J.M. “turned around and gave [Mr. Jacobo her] back,” Mr. Jacobo “started touching [her] breasts [and] legs, and . . . started getting closer to” her. J.M. “said that [Mr. Jacobo] should stop” and “[t]hat it’s not right,” but he “flipped [J.M.] and . . . got on top and . . . said [she] will do what he says.” Mr. Jacobo “started forcing [J.M.] down and . . . taking [her] underwear off,” then “penetrated his penis” into J.M.’s vagina and “suck[ed] on [her] breasts.” J.M. told Mr. Jacobo to stop, but he replied that “he didn’t need a wife when he had” J.M.. When J.M. “asked . . . to use the restroom,” Mr. Jacobo “got off.” J.M. “went to the restroom,” and when she returned, Mr. Jacobo “said goodnight and . . . left.” J.M. then “locked the door” and “texted [her] friend to call the police.”

The State also called Prince George’s County Police Corporal Lisa Shepperd, who testified that after the police department’s “Sexual Assault Unit” received a “call with regard to this case,” she “requested that all parties,” including J.M. and Mr. Jacobo, “be transported to the . . . Criminal Investigations Division” (hereinafter “CID”). The corporal subsequently interviewed J.M., who “appeared to be upset and . . . looked like she had been crying.” J.M. stated that after she “went into her room to go to bed,” Mr. Jacobo “laid

down on the bed next to her where he began to fondle her breasts and her buttocks.” J.M. “told [Mr. Jacobo] to stop repeatedly,” but “[h]e told her to be quiet otherwise it would get worse.” Mr. Jacobo “ended up . . . sucking or kissing on her breast . . . so hard that it had left a bruise, . . . and then . . . forced himself onto her and forced his penis into her vagina without her consent.” J.M. “finally convinced him that she had to go to the bathroom,” and “[w]hen she came back” and told Mr. Jacobo “that she needed to go to bed,” he “left the room.” The State submitted into evidence photographs of “scratches on [J.M.’s] neck” and “right shoulder,” and a “bruise on [her] breast.”

The State next called Prince George’s County Police Corporal Tyisha Gage, who testified that she transported J.M. from her home to the CID. During the ride, J.M. told Corporal Gage that while J.M. “was in bed, [Mr. Jacobo laid] in the bed with her” and “started touching her body parts.” Mr. Jacobo “then climbed on top of [J.M.] and held her down and raped her. And he told her if she screams, it will get worse. And he continued to touch her, and she told him she had to use the bathroom so he would stop.”

The State next called forensic nurse Arnita Shelton, who testified that on May 1, 2018, she “conduct[ed] a forensic or sexual assault exam on” J.M. at Prince George’s Hospital. During the examination, J.M. gave Ms. Shelton a statement, which Ms. Shelton recorded as follows:

4/13/18, at home laying in bed. Father got in bed with her, started feeling on her breasts. She asked him to stop; it was wrong. Told him he is her father; he shouldn’t do that. He had been drinking, always does. He finally stopped and got out of the bed.

Then date 4/30/18, she was in bed. He came in her room. She was asleep. [L]aying on back with long socks, t-shirt, underwear.

* * *

He got . . . into the bed with her. She was in the bed. She was trying to go back to sleep. He got behind her touching her. She said, [s]top. This is wrong. He flipped her on her back and said . . . [n]o sleep tonight.

She tried to get up and he said, [d]o what I say and pulled down her underwear. They were fighting. She was trying to keep her underwear up but couldn't. She put her knees up; he kept pulling them down saying . . . [d]o what I say.

He finally got her underwear off and got on top of her, pulling up her shirt, licking her breasts, neck. He told her, [y]ou will do what I say. He put his penis in her. She told him, [s]top it; it hurts. He told her, [t]ry not to scream or it will get worse.

He put his finger in her. He told her not to scream or it will get worse. He also told her, I don't need a wife when I have you.

She told him . . . he was hurting her. He finally got up, went to the bathroom, came back out, gave her her underwear and said goodnight.

Finally, the State called Mary Sanchez, a forensic chemist for the police department's "DNA-Serology Laboratory." Ms. Sanchez testified that a "sperm fraction of [a] vaginal swab" of J.M. "yielded a mixed DNA profile from at least two contributors," and the "deduced major male component . . . is consistent with the known DNA profile of [Mr.] Jacobo." Ms. Sanchez also testified that a "sperm fraction from . . . vaginal/cervical swabs" of J.M. "yielded a mixed DNA profile from at least two contributors," and the "deduced major male component . . . is consistent with the . . . known DNA profile of [Mr.] Jacobo." Ms. Sanchez further testified that a "bite mark/licking swab from [J.M.'s] upper, right breast yielded a mixed DNA profile from two contributors," that "at least one of the

contributors is male,” and Mr. Jacobo “cannot be executed [sic] as the possible contributor to this DNA profile.”

The motion for mistrial at issue in this case occurred following the testimony of Corporal Shepperd. During direct examination, Corporal Shepperd testified that, following her interview of J.M., the corporal “arranged to have [J.M.] have a forensic exam completed at Prince George’s Hospital,” “took DNA swabs of the inside of [J.M.’s] mouth,” “obtained a DNA search warrant for” Mr. Jacobo, “took DNA swabs from [Mr. Jacobo’s] mouth,” collected “the bedding from [J.M.’s] room,” and took “screenshots” of text messages on J.M.’s phone. The following colloquy then occurred:

[PROSECUTOR:] Is there anything else you did with regard to the investigation in this case?

[CPL. SHEPPERD:] I attempted to interview [Mr. Jacobo].

[PROSECUTOR:] Is there anything else with regard to witnesses, DNA testing, collection of evidence that you did in this case?

[CPL. SHEPPERD:] No.

Following Corporal Shepperd’s testimony, defense counsel asked the court “to declare a mistrial based on” the corporal’s testimony that she “attempted to interview” Mr. Jacobo, on the ground “that the damage to [Mr. Jacobo] and his right to remain silent and his presumption of innocence is . . . irreparable.” Defense counsel argued:

In this case, it’s clear that based on the testimony, that [Mr. Jacobo] was under arrest. The way the facts are in this case, in terms of the officers assisting the victim to exit the location, the fact that [Mr. Jacobo], according to the testimony of the victim and the officer, was in the house at the time, it’s clear that he was arrested and taken to the police station.

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Evidence of a post-arrest silence after Miranda warnings are given is inadmissible for any purpose. Allowing such evidence would . . . be fundamentally unfair and a deprivation of due process as an evidentiary matter. And as an evidentiary matter, such evidence is also inadmissible.

* * *

The problem we have is that you can't fix it. If I object, if I make a big noise about it, I'm making it worse. If you give a curative instruction, you're drawing more attention to . . . the issue of the fact that he decided, based on his Fifth Amendment right, to not be interviewed by the police. I don't think that it's possible; it's too late; it can't be fixed.

I think the State realized – when the officer made the statement, the State realized that that was not a good thing . . . that the officer testified to.

* * *

And I think the State – by their actions, it was clear that they were trying to cure it. [O]ur position is that it can't be cured. It's too late and a mistrial is the only solution.

Denying defense counsel's request, the court stated:

Clearly, throughout the course of this case, [Mr. Jacobo] has been assisted with the use of an interpreter. There's no testimony with regard to whether or not [Corporal] Shepperd speaks Spanish, what attempts she actually made to speak with [Mr. Jacobo], if those efforts were thwarted either by his invocation of the Fifth Amendment or by other means.

There is also no testimony that [Mr. Jacobo] in this case was actually under arrest. Her testimony was that all the parties involved in this incident were asked to be transported to CID.

There is no indication that she was the one who was actually conducting the questioning of [Mr. Jacobo] in this case or what the circumstances were with regard to her interactions, if any, with regard to him. We don't know if she had any contact with him, we don't know if she spoke with him, if she was able to speak with him or not.

There was no specific testimony from the [corporal] that because [Mr. Jacobo] invoked his Fifth Amendment right was the reason why she was unable to speak with him.

So I don't believe that the jury can draw an inference in this matter that he did invoke his Fifth Amendment right or that the reason that she was unable to speak with him was because of that or his right to remain silent, which he invoked.

Mr. Jacobo contends the court erred in denying the motion for mistrial, because "a reasonable inference drawn from Corporal Shepperd's testimony is that Mr. Jacobo remained silent in the face of accusations that he sexually assaulted J.M.." We disagree. Although Corporal Shepperd stated that she "attempted to interview" Mr. Jacobo, the corporal did not testify that she ever spoke directly to Mr. Jacobo. Even if the jury concluded that Corporal Shepperd spoke directly to Mr. Jacobo, the corporal did not testify that she advised Mr. Jacobo of his right to remain silent, that Mr. Jacobo failed to respond, or that Mr. Jacobo made any effort to invoke his right to remain silent. Corporal Shepperd also did not testify that she spoke to Mr. Jacobo in Spanish, that Mr. Jacobo understood her when she spoke in English, or that a Spanish-speaking interpreter was present. In short, there was no testimony that the corporal was unable to interview Mr. Jacobo because he invoked his Fifth Amendment privilege. In the absence of such testimony, we cannot conclude that the jury inferred that Mr. Jacobo invoked his right to remain silent. Moreover, we concur with the trial court that there was no testimony that Mr. Jacobo was under arrest at the time of his alleged invocation.

Even if the court's conclusion regarding whether Corporal Shepperd commented on Mr. Jacobo's post-arrest silence was erroneous, we would find any error in failing to strike the corporal's testimony to be harmless. The State presented considerable evidence outside of Corporal Shepperd's testimony, including lengthy and detailed testimony by J.M.,

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evidence of her consistent statements to Corporal Gage and Ms. Shelton, photographs of J.M.’s injuries, and evidence related to Mr. Jacobo’s DNA. In light of the strength of this evidence, we are satisfied that there is no reasonable possibility that Corporal Shepperd’s testimony may have contributed to the rendition of the guilty verdicts.

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