

Circuit Court for Anne Arundel County
Case No. C-02-CR-19-000804

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1968

September Term, 2019

VERGIL WHITE, JR.

v.

STATE OF MARYLAND

Arthur,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 22, 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.

An Anne Arundel County jury convicted appellant Vergil White, Jr., of robbery, second-degree assault, reckless endangerment, and theft of property valued at less than \$100. The jury acquitted White of armed robbery, first-degree assault, and conspiracy to commit first-degree assault.

On the robbery conviction, the court sentenced White to fifteen years of imprisonment, with all but five years suspended, and five years of probation upon his release from prison. For sentencing purposes, the remaining convictions merged into the robbery conviction.

White raises a single question on appeal: Did the trial court err in ruling that the proffered testimony of two defense witnesses would open the door to [evidence about] an unrelated case involving White and the victim? For the following reasons, we shall affirm the judgments.

FACTUAL BACKGROUND

On the evening of February 13, 2019, Ryan Doy was assaulted and robbed by a man and two women. At the man's direction, one of the women used a taser on her. When the police responded, Doy accused White, a former co-worker, of being one of the assailants.

Doy and White had been involved in a sexual relationship that had recently ended. At the time of the assault, White was involved in a sexual relationship with another one of Doy's former co-workers.

This was not the first criminal case in which Doy had accused White of assaulting her: he had previously been charged with assaulting Doy about a month earlier, on

January 11, 2019. By the time of the trial in this case, the previous charges had been “stetted” – i.e., placed on the inactive docket. Before the trial in this case began, the parties informed the court of the other case and agreed not to elicit any information about it.

The court endeavored to respect the parties’ agreement. During the cross-examination of Doy, some confusion arose as to whether she had given two or three written statements. Sensing that Doy might have given one of the statements in connection with the earlier incident, the court called the attorneys to the bench and warned defense counsel not to open the door to evidence about that incident.

White’s principal defense, as outlined in defense counsel’s opening statement, was that Doy was (in counsel’s words) a “woman scorned,” who had announced her intention to “get” White and to “make him pay for throwing her over” and “starting to date someone else.” In addition, White advanced an alibi defense, calling two witnesses, including his new girlfriend, to testify that he was asleep at home when the assault occurred.

White intended to call two of his former co-workers, Angela Huber and Noel Hayes. When the State objected that their testimony was irrelevant, White proffered that Huber and Hayes would testify that “shortly before” February 13, 2019, Doy had said that “she was going to get Mr. White sent to jail,” or “something of that nature.”

According to the proffer, Huber would also testify that “pretty close in time” to February 13, 2019, she had seen Doy “carry and display a stun gun at the workplace.”¹

White argued that the evidence of Doy’s alleged statements was probative of her bias against him. He also argued that the evidence that she had carried a stun gun was relevant to show that Doy’s own weapon might have been involved in the alleged assault. The court found that the proffered testimony was admissible for purposes of impeachment.

When Huber took the stand, she testified that Doy said that she was “going to have Vergil – try to have Vergil arrested.” Huber testified that Doy made that statement “[a]round January, maybe the end of January.” At that point, the State objected and asked for a bench conference.

At the bench, the State argued that Huber’s testimony concerned the January incident, which the parties had agreed not to discuss. Defense counsel responded that she was “trying to nail her down,” but counsel admitted that she did not know when in January Huber would say she heard the alleged statement. The court remarked that the testimony “invite[d] confusion” and that the State should be allowed to cross-examine Huber about whether Doy was allegedly talking about the first incident (in January) or the second incident (in February). Defense counsel responded by requesting permission to establish whether Doy made the alleged statement before January 11, 2019, the date of the first incident. As the discussion continued, the court observed that evidence of the

¹ On cross-examination, Doy had denied that she carried a taser or stun gun.

first incident might establish a motive for White to assault Doy in the second incident, because he “felt that he had . . . been on the receiving end of some bogus allegations.”

The court called a recess and questioned Huber outside the presence of the jury:

THE COURT: [T]o the best of your recollection, when did that statement take place?

[HUBER]: I think that it was *around January*.

THE COURT: Okay. And –

[HUBER]: I don’t – *maybe in the middle of January*, somewhere around there.

THE COURT: *Do you have an exact date?*

[HUBER]: *No*.

THE COURT: And why do you believe that it was somewhere around January.

[HUBER]: I think it was – I’m pretty sure – *I’m almost certain that it was right after December*, because I know it wasn’t that much before I stopped working there.

THE COURT: And when did you stop working there?

[HUBER]: In March.

THE COURT: Okay. *But you don’t have an exact recollection when in January?*

[HUBER]: *No*.

THE COURT: *Do you know whether it was before or after the Martin Luther King Jr. holiday?*

[HUBER]: *No*. I don’t think it was the beginning of the month. I’m pretty sure it was like the middle of the month

(Emphasis added.)

In further questioning, the court established that Huber knew, in her words, of another “altercation” between Doy and White, which occurred at work. Huber did not know whether the workplace altercation resulted in any charges.

The court called counsel to the bench and told them that the next question would be whether Doy made the alleged statements before or after the workplace altercation. Counsel for the State agreed; defense counsel did not respond.

When counsel returned to their seats, the court asked whether Doy made the alleged statements before or after the incident at the workplace. Huber responded, “*It was before that.*” (Emphasis added.) Immediately thereafter, she added, “*Pretty sure it was before that. I’m not sure though.*” (Emphasis added.) Huber agreed with the court’s summary that she believed that Doy had made the alleged statements before the workplace incident, but didn’t know and wasn’t sure when they were made.

After directing Huber to step into the hallway, the court addressed her testimony. The court remarked that, although it was “not clear” from Huber’s testimony when Doy made the alleged statements, the statements “may have occurred” and “probably” did occur in connection with the workplace incident in January. Hence, the court perceived that Huber’s testimony could lead to a “false inference” that Doy had falsely accused White of assaulting her in the later incident, on February 13, 2019. In addition, the court reiterated its observation that White might have been motivated to assault Doy in February because he believed that she had falsely accused him of a crime in January. The court invited argument from the parties about how to proceed.

On the basis of the parties’ presentations, the court concluded that Huber’s testimony would open the door to testimony about the January incident. In response, defense counsel opted not to question Huber any further about Doy’s alleged statement and to allow the court to strike Huber’s testimony. Defense counsel also opted not to call Noel Hayes, the other witness who was to testify that Doy said that “she was going to get Mr. White sent to jail.”

After the court ruled, it allowed defense counsel to elicit additional testimony from Huber, outside the presence of the jury, concerning whether she had seen Doy with a stun gun shortly before February 13, 2019. In response to counsel’s questions, Huber testified that on one occasion she had seen Doy at their workplace with a dark purple or black stun gun. Again, however, Huber was vague about the timing. When asked when she saw the gun, Huber responded:

Around the beginning of January like not the very beginning, but not the end, maybe around the 12th. I don’t know – or the 10th through the, I don’t know, 20th or something. It wasn’t the end. It wasn’t the beginning.

When the jurors returned, the court informed them that it had stricken Ms. Huber’s testimony in its entirety.

DISCUSSION

In substance, the court ruled that Huber’s testimony (and Hayes’s anticipated testimony) would open the door to evidence concerning the incident on January 11, 2019, when White allegedly assaulted Doy. In other words, the court ruled that, notwithstanding the parties’ agreement that the earlier incident was inadmissible for the purpose of proving that White had assaulted and robbed Doy a month later on February

13, 2019, the testimony of Huber and Hayes would make the earlier incident relevant. Because that ruling involves a determination of relevance, a pure question of law, we review it without deference to the trial court. *See Robertson v. State*, 463 Md. 342, 352-53 (2019).

As a preliminary matter, the State argues that White did not preserve his objection to the court’s ruling. The State reasons that because the ruling prompted White to forgo the testimony concerning Doy’s alleged threat to have White arrested, “no door was opened,” and “no evidence about the January incident was actually presented to the jury.”

In support of its non-preservation argument, the State relies primarily on *Jordan v. State*, 323 Md. 151 (1991). In that case, the trial court held that the defendant’s pretrial statement was voluntary, but that it was inadmissible except for purposes of impeachment, because the State did not prove that he had knowingly and voluntarily waived the right to counsel before he made it. *Id.* at 154. Taking the lead from Supreme Court precedent, the Court of Appeals held that because the defendant did not testify at trial (and thus was not impeached with his statement), he waived his right to contest the ruling concerning the voluntariness of the statement. *Id.* at 157-59. In reaching its decision, the Court made some broad statements about the undesirability of appellate review when a defendant reacts to an adverse evidentiary ruling by precluding the State from introducing harmful evidence:

It is axiomatic that courts have traditionally reviewed decisions that permit the admission of evidence in criminal trials only where the evidence is *used* to convict. We are not inclined to review a trial court’s decision authorizing the State to use particular evidence when, as a result of a

tactical decision by the defendant, the State ultimately was precluded from utilizing that same evidence.

Id. at 156 (emphasis in original).

Despite its broad language, however, the *Jordan* decision rested, in part, on the “remote and speculative nature” of the defendant’s alleged injury in that case. *Id.* For example, if the defendant had testified, he might not have contradicted his statement (and thus might not have given the State the opportunity to use the statement to impeach him); or the State might have opted not to use the statement to impeach him even if it had opportunity; or the use of the statement might have amounted to harmless error in the circumstances of the case. *Id.*

This case is a bit different. Here, there is no question that if defense counsel had proceeded to elicit Huber’s (and Hayes’s) testimony about Doy’s alleged threat to have White arrested, the court would have allowed the State to introduce evidence about the earlier incident between White and Doy in January. That evidence would weaken White’s contention that Doy’s threats pertained to the February incident, for which White was actually on trial. It would allow the State to argue that White had assaulted Doy in February because he was angry about being falsely accused of a crime in January. And it would result in the introduction of otherwise inadmissible evidence of other crimes, wrongs, or acts – specifically, the alleged assault in January. *See* Md. Rule 5-404(b). The ruling was obviously harmful to White’s case because it deterred him from introducing evidence that defense counsel had promised the jury that White would present – evidence that Doy had announced that she was going to have him arrested. In

these circumstances, we shall assume without deciding that White has adequately preserved his objection to the court’s evidentiary ruling.

On the merits, we see no error. The court correctly decided that Huber’s testimony (and Hayes’s expected testimony) would open the door to evidence about the January incident.

“[T]he open door doctrine is a ‘rule of expanded relevancy[.]’” *Robertson v. State*, 463 Md. at 352 (quoting *Clark v. State*, 332 Md. 77, 84 (1993)). The doctrine applies when a party argues that competent but otherwise irrelevant evidence has become relevant because its adversary has injected an issue into the case. *See id.*

In this case, White premised his defense on the contention that Doy was a “woman scorned,” who had falsely accused him of assaulting her on February 13, 2019. White proffered that Huber and Hayes would support that defense by testifying that Doy had threatened to have him arrested for a crime that he did not commit. In those circumstances, it was obviously relevant for the jury to hear that Doy’s alleged threats pertained to the incident on January 11, 2019, and not to the incident on February 13, 2019, for which White was on actually on trial. *See* Md. Rule 5-401 (“[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence[.]”). As the State puts it, “When White sought to elicit testimony about Doy’s statement to support a theory that she had a preconceived plan to frame White, this opened the door to evidence that would place the statement in context by showing that it related to another incident entirely.”

Furthermore, the trial court correctly observed that the earlier incident was relevant to whether White was motivated to assault Doy in February because she had brought charges against him in January. *Cf. Thomas v. State*, 213 Md. App 388, 411-12 (2013) (holding that evidence of defendant’s pending criminal charges had special relevance, under Md. Rule 5-404(b), to whether defendant was motivated to murder co-defendant who was preventing defendant from obtaining a favorable plea agreement).

White argues that the probative value of evidence of the earlier incident would be substantially outweighed by the danger of unfair prejudice. For two reasons, we are unable to evaluate this argument. First, because White did not present it to the trial court, he has not preserved it for appellate review. *See* Md. Rule 8-131(a). We cannot fault the court for failing to credit an argument that wasn’t made. Second, because White opted to avoid the introduction of any testimony about the earlier incident, the court did not have an opportunity to minimize the danger of unfair prejudice in controlling the presentation of that testimony. We cannot fault the court for abusing its discretion in a ruling that it didn’t have the opportunity to make.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.