Circuit Court for Baltimore City
Case No.115040033

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1254

September Term, 2016

CHRIST BISSEMO

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul, E.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 8, 2017

A jury in the Circuit Court for Baltimore City, Maryland, convicted Christ Bissemo, ("Appellant"), of second-degree rape. He was sentenced to incarceration for a term of twelve years, with all but eight years suspended, to be followed by five years of probation with special conditions. This timely appeal followed.

Appellant presents two questions for our consideration:

1. "Did the trial court err in finding no discovery violation after the State failed to disclose surveillance video reviewed by Detective Edward Carrington?"

2. "Is the evidence insufficient to convict appellant?"

For the reasons set forth below, we affirm.

BACKGROUND

A. The Night of the Alleged Rape

On January 13, 2015, at about 12:30 a.m., Tashan Bay Harvell and his wife were driving on Cathedral Street in Baltimore City when they came to a stop light at the intersection of Mulberry Street. While stopped at the light, Mr. Harvell observed two homeless women sitting on a bench in a bus shelter signaling to him the "phone signal." He rolled down his window and one of the women asked him to call the police.

Mr. Harvell pulled his car to the curb and noticed a woman lying on her back on the ground and a man, later identified as Appellant, Mr. Bissemo, on top of her. Mr. Harvell called 911 and reported a possible rape. Mr. Harvell drove across Mulberry Street, pulled over, and exited his vehicle. He walked toward the scene and heard moaning as if someone "was in agony." He asked the woman if she was "okay" and she responded "no." Mr. Harvell grabbed Appellant by his hoodie and pulled him off the woman. Appellant's pants

were at his knees and his genitals were exposed. Mr. Harvell used Appellant's hoodie to tie him to a pole and waited for the police to arrive.

The victim, whom we shall refer to as Ms. L, suffers from schizophrenia and takes Haldol, an antipsychotic drug, for her illness. She testified that her memory is "not too good." On the night of the incident, she had been sleeping in the bus shelter near the intersection of Cathedral and Mulberry Streets. After she woke up and started to smoke a cigarette, "some strange guy" entered the bus shelter and stared at her. When she asked the man what he wanted, he pulled off her boots and pants, got on top of her, and put his penis inside her vagina. The man held her down, punched her in the face twice, and told her she was going to cooperate with him. According to Ms. L, the man did not have "time to really get into it because a brother come up and snatched him off me and beat him up and held him there until police come."

At approximately 12:35 a.m., Detective Edward Carrington of the Baltimore City Police Department Sex Offense Unit was notified of the alleged sexual assault. Det. Carrington did not visit the crime scene, but instructed that Ms. L be transported to the hospital, and Appellant, who had not yet been identified, was transported to his office.

B. The Rape Kit and DNA Analysis

Ms. L went to Mercy Medical Center where Erin Pollit, a forensic nurse examiner, performed a limited sexual assault forensic examination ("SAFE"). Ms. L permitted Nurse Pollit to collect her boxer shorts and a toilet tissue she used after urinating, but refused any further examination. Nurse Pollit conducted a suspect's SAFE examination on Appellant. She collected oral swabs, bilateral finger swabs, swabs from the head and shaft of his penis,

hair from his head and pubic area, and blood from a finger prick. Nurse Pollit also collected Appellant's long johns.

DNA testing was performed on a portion of Appellant's blood card, his penal swabs, and a stain from the toilet tissue provided by Ms. L. Testing on the stain from the toilet tissue revealed a "single source, female DNA profile." Because no known DNA standard was provided for Ms. L, the DNA analyst relied on an inferred standard for her. That standard was derived from the single source of DNA from a female obtained from the toilet tissue sample and the fact that the toilet tissue was obtained from Ms. L's SAFE kit. DNA analysis of the penal swabs revealed a mixture of DNA consisting of a major female contributor and Appellant's DNA. Relying on the inferred standard, Ms. L was identified as the source of the major female profile obtained from Appellant's penal swabs.

While at Mercy Hospital, Det. Carrington, along with Detective Mateo, a fellow Baltimore City Detective in the sex offense unit, briefly interviewed Ms. L before returning to police headquarters. Later that morning, Detectives Carrington and Mateo visited the scene of the rape, noting that there is a "city watch camera in the area." That afternoon, Det. Carrington conducted taped interviews with both Ms. L and Mr. Harvell concerning the case.

On February 9, 2015, the State filed an indictment in the Circuit Court of Baltimore City, charging Appellant with: second-degree rape, third-degree sexual offense, fourth-degree sexual offense, and second degree assault.

C. The Video Surveillance Testimony

At trial in the circuit court, Det. Carrington testified as to the contents of the video surveillance footage captured during the rape. Appellant objected to the testimony as there was nothing "in discovery about any footage ever being trying to be pulled or requested." Over Appellant's objection, the court permitted Det. Carrington to testify that the camera's view of the inside of the bus stop was obstructed by the top of the bus shelter, preventing him from observing the crime.

Appellant was found guilty of second-degree rape,[1] and on July 25, 2015, the court sentenced him to 12 years, all but 8 years suspended, followed by 5 years of probation. This timely appeal followed.

We shall include additional details as necessary in the following discussion.

DISCUSSION

Appellant raises two issues on appeal, which we will address in the order presented. First, Appellant argues that the trial court erred in determining that the failure to disclose the security footage that Det. Carrington had watched from a camera located behind the bus stop did not amount to a discovery violation. Second, Appellant argues that the trial court's failure to grant his motion for judgment of acquittal was in error as Ms. L did not specifically testify in detail as to the rape, rendering the evidence against him insufficient to support a conviction.

[1] Appellant was found not guilty of second-degree assault. Appellant was found guilty of the lesser-included crimes of third and fourth degree sex offense.

I.

Disclosure of the Surveillance Video

As relevant to Appellant's allegation that the state committed a discovery violation, defense counsel stated the following during her opening statement:

> I'm going to tell you what you're not going to hear, what you're not going to hear in this courtroom and what is important.
>
> So you've already heard as crazy as it is, this incident happens outside the Pratt Library at a bus shelter out in public view, cameras, lights, other people there, passerby [sic]. A very unlikely place for someone . . . to commit a rape. **You're going to hear that the police never got any security cameras.** You are going to hear that the police never talked to the other people[.] . . . **These are serious charges and the State did very - - the State and the police did very little to investigate it**.

(Emphasis added).

Later on in the trial, the following colloquy occurred during the direct examination of Det. Carrington, who investigated the case:

> [PROSECUTOR]: Okay. And when you got to the scene did you observe whether there was any surveillance equipment in the area?
>
> [DET. CARRINGTON]: There are – there's a camera on one of the poles and I can't recall exactly which one, but there is a camera, a city owned camera – city watch camera in the area.
>
> [PROSECUTOR]: And to your knowledge was any footage captured?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Again, grounds?
>
> [DEFENSE COUNSEL]: If we can approach?
>
> THE COURT: Yeah.
>
> (Counsel approached the bench and the following ensued):

[DEFENSE COUNSEL]: I don't have anything in discovery about any footage ever being trying to be pulled or requested.

THE COURT: What are you going to be asking?

[PROSECUTOR]: May I ask him whether there was any footage recovered? Whether he observed any footage and the answer to that is no. It's a –

THE COURT: You mean he looked and he couldn't find anything or he didn't look?

[PROSECUTOR]: It's my understanding he looked and he didn't find anything.

[DEFENSE COUNSEL]: I don't have that in my discovery that he looked.

[PROSECUTOR]: Even if it's not in the discovery, that doesn't mean that it's not admissible. I mean that's certainly grounds for, you know, on cross examination, but.

THE COURT: Okay. I'm going to permit the question. Go ahead.

Thereafter, the prosecutor questioned Detective Carrington as follows:

[PROSECUTOR]: Detective Carrington, to your knowledge, was any footage of the – was any footage captured from the incident on that surveillance equipment?

[DET. CARRINGTON]: No.

Q. Did you check the surveillance equipment?

A. Yes.

Q. Okay. And what, if anything were you able to see on the cameras?

A. The – the actual bus stop. So the bus stop is a sheltered bus stop, so with the sheltered bus stop you can't see the interior of the sheltered bus stop on the video.

Finally, during the State's rebuttal closing argument, the following occurred:

> Why is there no footage? Because he picked the perfect victim in the perfect place; in a bus shelter that the detective stated is enclosed and the angel the cameras are on it cannot get into that bus shelter.

Appellant argues that Detective Carrington's testimony about reviewing surveillance footage surprised and prejudiced the defense. He maintains that the State's failure to disclose that evidence violated Md. Rule 4-263(d)(9)[2], that the court failed to determine, explicitly, whether there was a discovery violation, and erroneously concluded that there was no violation. In support of his contention that the testimony surprised and prejudiced him, Appellant argues that if defense counsel had known that the detective had reviewed the surveillance footage, she would not have attempted to undermine the State's investigation of the case by pointing to its failure to obtain or review street camera footage.

A. Preservation of the Issue

As a preliminary matter, the State argues that Appellant's contention that the State violated Rule 4-263(d)(9) was not preserved properly for our consideration. We disagree. Defense counsel objected on two occasions that she had not been provided with any

[2] Maryland Rule 4-263(d)(9) provides:

> (d) **Disclosure by the State's Attorney.** Without the necessity of a request, the State's Attorney shall provide to the defense:
>
> * * *
>
> (9) Evidence for use at trial. The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial.

discovery concerning video surveillance footage examined by Det. Carrington. Pursuant to Rule 4-323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." It is well-established that Maryland's appellate courts will not ordinarily consider "any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court[.]'" *King v. State*, 434 Md. 472, 479 (2013) (quoting Md. Rule 8-131(a)). The Court of Appeals has explained that

> [t]he purpose of [Md. Rule 8-131(a)] is to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings and to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

Univ. Sys. of Maryland v. Mooney, 407 Md. 390, 401 (2009) (citations and quotations omitted).

In the case at hand, although defense counsel did not specifically reference Rule 4-263(d)(9), the arguments raised below sufficiently apprised the trial court of defense counsel's contention that the discovery rules had been violated. Accordingly, the issue is properly before us.

B. Mandatory Discovery Disclosures During Criminal Cases

Although the trial court did not explicitly determine that no discovery violation had occurred, it implicitly made such a finding when it allowed the State to question Detective Carrington about his review of video footage obtained from a City Watch camera. We review the record *de novo* to determine whether a discovery violation occurred. *Thomas*

v. State, 168 Md. App. 682, 693 (2006) (citing *Cole v. State*, 378 Md. 42, 56 (2003)), *aff'd on other grounds*, 397 Md. 557 (2007)).

Rule 4-263(d)(9) requires the State to provide to the defense, among other things, all "recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial[.]" The purpose of Rule 4-263 is to "aid[] the defendant in preparing his or her defense and protect[] him or her from surprise at trial." *Johnson v. State*, 360 Md. 250, 265 (2000). The record established during trial is clear that the State did not intend to use the video that Det. Carrington had viewed at trial because the video did not capture any images of the interior of the bus shelter where the alleged crime occurred. Specifically, Det. Carrington reviewed the City Watch video, and related that he "did not retrieve it because it didn't have anything of evidentiary value on it." Clearly, the plain language of Rule 4-263 did not require disclosure of the surveillance video if it did not capture any images inside the bus shelter and the State had no intention of using it at trial.

Additionally, there is nothing in the record to suggest that the State failed to provide the defense with information about Det. Carrington so he could be interviewed, that he refused to speak with defense counsel prior to trial, or that the video constituted exculpatory evidence. Appellant's counsel decided to pursue the trial strategy that the police failed to check surveillance footage of the surrounding area, and did so at her own peril. *See Ware v. State*, 348 Md. 19, 39 (1997) (noting that even in the context of possible *Brady* rule violations, the "rule does not relieve the defendant from the obligation to investigate the

case and prepare for trial.") For these reasons, we find no error in the trial court's implicit determination that no discovery violation occurred.

II.

Sufficiency of the Evidence Presented

Appellant contends that the evidence was not sufficient to sustain his conviction for second-degree rape because there was no evidence of vaginal penetration. (Appellant's Brief at 10). He maintains that Ms. L did not testify that he penetrated her vagina with his penis, that there was no physical evidence of vaginal penetration, and that the epithelial or skin cells collected from his penis "could have been produced by incidental transfer having nothing to do with genital copulation." (Appellant's Brief at 11-12) This issue is not properly before us.

At the close of the State's case, defense counsel moved for judgment of acquittal, arguing that "at this point . . . the State has not met its burden." The court denied that motion on the ground that "there is sufficient evidence in the record taken in the best light to the State by which a rational jury could decide that [Appellant] was guilty beyond a reasonable doubt." Appellant exercised his right not to testify on his own behalf, and court adjourned for the day. The following morning, before the jury entered the courtroom, defense counsel stated, "I don't think I officially rested and renewed my motion, so at this time . . . I'm resting and renewing my motion." The court denied the motion "for the reasons expressed" the day before.

When a criminal defendant moves for judgment of acquittal either at the close of the State's case or the close of all the evidence, he or she must "state with particularity all

reasons why the motion should be granted." Md. Rule 4-324(a). Failure to do so precludes the defendant from challenging the sufficiency of the evidence on appeal. *See Tarray v. State*, 410 Md. 594, 613 (2009) (failure to articulate particularized ground renders claim unpreserved); *Byrd v. State*, 140 Md. App. 488, 494 (2001) (sufficiency challenge not preserved where defense counsel failed to state with particularity reasons motion for judgment of acquittal should be granted). The purpose of limiting appellate review to challenges that were actually argued in the trial court is to "prevent[ ] unfairness and requir[e] that all issues be raised in and decided by the trial court[.]" *Conyers v. State*, 354 Md. 132, 150 (1999)..

At both the close of the State's case and the close of all the evidence, Appellant failed to state with particularity the reasons why his motion for judgment of acquittal should be granted. At no time did he raise in the trial court the argument that there was insufficient evidence of vaginal penetration.

Even if this issue had been preserved properly for our consideration, Appellant would fare no better. In *Donati v. State*, 215 Md. App. 686 (2014), we outlined the standard of appellate review for a challenge to the sufficiency of the evidence as follows:

> The test of appellate review of evidentiary sufficiency is 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." *State v. Coleman*, 423 Md. 666, 672 (2011). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give deference to all reasonable inferences [that] the fact-

> finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011). Further, we do not "distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence." *Montgomery v. State*, 206 Md. App. 357, 385 (2012).

Donati, 215 Md. App. at 716 (some internal citations and quotations omitted).

Appellant was convicted of second-degree rape in violation of Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.), Criminal Law Article ("CL"), § 3-301(g)(1), which prohibits a person from engaging in vaginal intercourse with another by, *inter alia*, "force, or the threat of force, without the consent of the other[.]" The Code defines "[v]aginal intercourse" as "genital copulation, whether or not semen is emitted[,]" and "includes penetration, however slight, of the vagina." CL §3-301(g)(1) and (2). *See also Barber v. State*, 231 Md. App. 490, 502 (2017) (invasion of the labia majora, however slight, is sufficient to establish penetration) (citing *Kackley v. State*, 63 Md. App. 523, 537 (1985)). Ms. L testified that Appellant "put his thing in me." When asked what she meant by "his thing," Ms. L specifically said, "I mean his penis." Further, when asked where Appellant put his penis, Ms. L stated, "[i]n my vagina."

Additionally, Nurse Pollitt corroborated Ms. L's in-court testimony by reading a statement that Ms. L made when she arrived at the hospital. When reading from the report made on the night in question, which was admitted as a certified record, Nurse Pollitt recited the following:

> She stated quote, "I was raped. It's just something that happened. He came over and raped me. I don't want to talk about it. I don't want an exam. I'm not going to – I'm not taking my clothes off. I just want to go home." She then said, "He took it out." And I confirmed to her what is it and she

> confirmed a penis. So she said, "He took it out and put it in me, humped a few times and took it out again. He was touching me." And I clarified where was he touching you. She indicated her vagina.

That testimony, coupled with Ms. L's courtroom testimony and Mr. Harvell's eye-witness testimony, if believed, would have been sufficient to sustain Appellant's conviction for second-degree rape.

CONCLUSION

For the foregoing reasons, we hold that the failure to disclose the surveillance video was harmless error that did not affect the verdict and that there was sufficient evidence in order to convict Appellant of second degree rape.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.