Circuit Court for Montgomery County
Case No. 119964

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2535

September Term, 2017

RUSSELL ANDERSON

v.

STATE OF MARYLAND

Wright,
Graeff,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: March 7, 2019

*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.

This case is before us for the second time. In 2012, Russell Anderson, appellant, and a co-defendant, Timothy McLaughlin, were charged with raping Rosa M. on December 22, 1989. After a jury trial in the Circuit Court for Montgomery County, appellant was convicted of two counts of first-degree rape and sentenced to two consecutive life sentences. On appeal, we held that certain evidence had been improperly admitted at trial, reversed appellant's convictions, and remanded the case for a new trial. *Anderson v. State*, 220 Md. App. 509 (2014). After a new trial, appellant was again convicted by a jury of two counts of first-degree rape and sentenced to two consecutive life sentences. It is from those convictions that appellant noted this timely appeal.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the circuit court improperly precluded the defense from questioning Rosa M. about her testimony in the first trial. For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

In 1989, twenty-two-year-old Rosa M.[1] lived in a sixth-floor apartment at the Summit Hills apartment building in Silver Spring, Maryland.[2] On the morning of December 22, 1989, Rosa M. went to the laundry room, which was on either the 2nd floor

[1] Rosa M. testified at trial through a Spanish language interpreter.

[2] Initially, Rosa M. testified that she lived there with her husband and infant daughter in a two-bedroom apartment and that no one else lived with them. On cross-examination, however, she acknowledged that her husband's brother, his wife, Irma Melgar, and their two children also lived in the apartment.

or in the lobby of the apartment building. While she was checking on her laundry, the lights went off and the room became dark. When she turned around, she saw a man whose face was covered and she could see only his eyes. The man held a handgun to her temple and told her to move to the back of the room. Another man, whose face was also covered, entered the room and closed the door. The men, who spoke English, told her to lie down on the floor. Each man then raped Rosa M. as the other man held the gun to her head. Neither man wore a condom and both ejaculated in her. When they were finished, the men opened the laundry room door and quickly left. Rosa M. returned to her apartment, took off her clothes, and bathed. She waited for her husband to come home from work and then told him what had happened.

The police were called and, thereafter, two officers, one of whom spoke Spanish and served as a translator, questioned Rosa M. about the incident and collected her clothes. Rosa M. provided an oral statement in Spanish, that was written in English, and reviewed his statement with the Spanish-speaking officer before she signed it.

Rosa M. went to the hospital and was examined. Among other things, a vaginal swab and samples from the crotch of her shorts were collected and tested. Serology testing identified sperm on both the vaginal swab and the shorts. No DNA testing was done at that time, but the items were preserved for future testing. Police were unable to develop a suspect in the case.

Irma Melgar lived with her partner, who was Rosa M.'s brother-in-law, and their two children in the same apartment as Rosa M. and her family. On December 22, 1989, Ms. Melgar went to the laundry room about 10 to 15 minutes after Rosa M. When she

arrived, the door to the laundry room was locked, but she had a key. When she opened the door and turned on the lights, she saw a man with a gun. She also observed Rosa M. sitting in the corner by some washing machines. The man pointed the gun at Ms. Melgar and told her to give him her quarters and sit in the corner of the room. He told Ms. Melgar not to move and said that he was leaving, but would be back. After the man left, Ms. Melgar waited for "maybe two seconds," then opened the door, saw that the man was not there, and ran back to the apartment. Rosa M. followed Ms. Melgar back to the apartment. According to Ms. Melgar, Rosa M. never told her that she had been raped.

Years after the incident, appellant and McLaughlin's DNA were obtained "from a database that was accessible for search and comparison." Rosa M.'s case was reopened in 2012, and police obtained search warrants for buccal swabs from appellant and McLaughlin.

Erin Farr, a forensic scientist at the Montgomery County Police Crime Laboratory, who testified as an expert in forensic biology, conducted DNA testing on a number of items including a blood sample from Rosa M., buccal swabs obtained from appellant and McLaughlin, a sperm fraction from Rosa M.'s vaginal swab, a sperm fraction and non-sperm fraction from Rosa M.'s shorts, and a sperm fraction obtained from a tissue Rosa M. had used to wipe her vaginal area after the incident. Ms. Farr concluded that the DNA profiles obtained from the sperm fractions from the vaginal swab and the shorts were consistent with appellant's DNA. A mixed DNA profile was obtained from the sperm fraction on the tissue, and appellant "was included as the major contributor of that mixed

profile." In addition, testing of non-sperm material on the shorts revealed a mixed DNA profile consisting of at least three individuals, including appellant and McLaughlin.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant contends that the circuit court improperly restricted his cross-examination of Rosa M. The right of confrontation under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights includes a criminal defendant's opportunity to "'cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely.'" *Martin v. State*, 364 Md. 692, 698 (2001) (quoting *Marshall v. State*, 346 Md. 186, 192 (1997)). However, a criminal defendant's constitutional right to cross-examination is not boundless. *Pantazes v. State*, 376 Md. 661, 680 (2003). Trial judges have "'wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). We will not disturb the exercise of that discretion unless there is clear abuse. *Merzbacher v. State*, 346 Md. 391, 413-14 (1997).

In the case at hand, the defense's theory was that appellant and Rosa M. engaged in consensual sexual intercourse and that she falsely accused him of rape because she was

concerned about how her husband would react if he found out. In support of that theory, the defense sought to use certain testimony from appellant's first trial to establish that Rosa M. was afraid that her husband would beat her if he found out that she had sexual intercourse with another man.

During cross-examination, Rosa M. testified that she was nervous about telling her husband what had happened and that she was afraid of his reaction, "but at the same time, I said to myself, 'I hope he understands,' that it was something that really [sic] didn't want it, there wasn't, I wasn't looking for it." Immediately following that testimony, defense counsel asked Rosa M., "if you were unfaithful to your husband, he would be upset, would he not?" The circuit court sustained the State's objection to that question.

At a subsequent bench conference, defense counsel proffered that, at appellant's first trial, Rosa M. gave the following testimony:

> [Defense Counsel at First Trial]: And he expects you to be faithful?
>
> [Rosa M.]: Yes.
>
> Q.: And if you weren't faithful, he would be upset?
>
> A.: Yes.
>
> Q.: He would be angry?
>
> A.: Yes.
>
> Q.: He might beat you?
>
> A.: Yes.

Defense counsel sought to ask Rosa M. the last three of the questions asked at the prior trial and advised the circuit court that he would be willing to rephrase the questions if their form was objectionable. Specifically, defense counsel offered to rephrase the challenged question as, "And you would be afraid that your husband would be upset if you were unfaithful?" The court explained that it had sustained the objection to the question posed because it asked about the "sentiments of [Rosa M.'s] husband" as opposed to her own sentiments. The following exchange occurred:

> THE COURT: So it didn't have anything to do with the sentiments of this witness; it had to do with the sentiments of her husband.
>
> [DEFENSE COUNSEL]: That's correct, and I was proposing to rephrase them in that manner about her sentiments, because I recognize that – I can understand the objection. My prior phrasing was, "And if your husband thought you had been unfaithful, he would be upset?" And acknowledging the objection, I would propose to rephrase it in the manner in which I just phrased it.
>
> THE COURT: Okay. So we're not, at this point, starting with the prior inconsistent statement; we're just starting with the question, another version of the question?
>
> [DEFENSE COUNSEL]: Correct. And if she says, no, that she would not be afraid of that, then I was planning to impeach her with her prior statement.
>
> THE COURT: Okay. Let's take it step by step. Does the State have an objection to the new question?
>
> [PROSECUTOR]: No. I think that one of them was already asked about her fear of telling him what had happened, and she said yes. There was no objection to him asking if she was afraid of whatever.

The circuit court and counsel then discussed what would happen if Rosa M. testified that she was not afraid that her husband would get upset:

> THE COURT: Okay. So let's go to the next – so let's assume, for the sake of argument, that her answer is, "No, I am not afraid of that."
>
> [PROSECUTOR]: Right.
>
> THE COURT: So now, what is the Defense view as to what will, where do you – so that we're not having to do bench conferences –
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: -- where do you intend to go?
>
> [DEFENSE COUNSEL]: So if I asked, "And you would be afraid that he would be upset if he learned you were unfaithful," and she says "No," I would say, "Well, in the prior proceeding in this matter, you testified that you weren't faithful [sic], he would be upset." And I'm just quoting, I mean, the question was, "And if you weren't faithful, he would be upset," and her answer was, "Yes."
>
> THE COURT: Does the State object to that?
>
> [PROSECUTOR]: Yes, Your Honor. That's not proper impeachment. It's not the same question.
>
> * * *
>
> [PROSECUTOR]: -- the fact is that that, the question that he's posing to impeach with, the State has the same objection to that question that Your Honor sustained for the reason that she can't know what's in someone else's mind.
>
> THE COURT: Well, that was the basis of my –
>
> [PROSECUTOR]: Right.
>
> THE COURT: -- sustaining it.

[PROSECUTOR]: So –

THE COURT: It would have been speculative as to what he –

[PROSECUTOR]: And indeed, trying to impeach her with something that is speculative is not the same question as whether or not that was a fear of hers. If he wants to, if she said, and I honestly don't know, but if she said last time that she was afraid of that, and she answers differently, then that is proper impeachment. But that's not the question that he just read.

*   *   *

THE COURT: Okay. So there's no element in that question about her fear as to him being upset. Correct?

[DEFENSE COUNSEL]: That is correct.

THE COURT: Okay. So tell me, given the question that was asked in the prior proceeding, tell me how you think that is an appropriate, tell me –

*   *   *

THE COURT: -- Tell me on how that's an appropriate way of impeaching her at this point.

[DEFENSE COUNSEL]: Well, Your Honor, I'm happy to rephrase it so it's precisely the same question, and to ask her "Ms. [M.], if you weren't faithful, your husband would be upset?" Exactly the same way. "If you weren't faithful," but instead of saying "he," I would say "your husband," just because you know, we need the context. But other than that, identical. "If you weren't faithful, your husband would be upset?"

THE COURT: And how is that proper impeachment, given the fact that the basic question is speculative? Today, the basic question is speculative?

[DEFENSE COUNSEL]: Well, if today, Your Honor were to rule that the question is speculative and improper, and sustain the objection, then I would, you know, then I can't proceed in that manner.

THE COURT: Okay. That has been my ruling. I mean, I sustained the State's objection. I didn't give a basis for my objection[sic]. Nobody asked for one. But that is the basis of my ruling, which is for her to say what's in her husband's mind is speculative. So that's my ruling.

After this exchange, defense counsel did not question Rosa M. any further.

Appellant contends that the circuit court erred in precluding defense counsel's proposed cross-examination of Rosa M. He argues that if Rosa M. denied that she was afraid her husband might become upset and beat her if he learned that she had been unfaithful, defense counsel should have been permitted to introduce her testimony from the first trial. According to appellant, the circuit court should have admitted Rosa M.'s prior testimony as either substantive evidence under Md. Rule 5-802.1[3] or as

---

[3] Md. Rule 5-802.1 provides, in part:

> 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:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

impeachment evidence under Md. Rules 5-613[4] and 5-616,[5] because it was an expression of her fear of how her husband might react and provided a motivation for her to accuse him falsely of rape following a consensual encounter. For several reasons, appellant's argument is without merit.

---

[4] Md. Rule 5-613 provides:

(a) **Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

(b) **Extrinsic evidence of prior inconsistent statement of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

[5] Md. Rule 5-616 provides, in part:

(a) **Impeachment by inquiry of the witness**. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:

(1) Proving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony;

* * *

(4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely[.]

Preliminarily, as the State points out, appellant never offered Rosa M.'s prior testimony as substantive evidence and, as a result, that issue is not properly before us. Md. Rule 8-131(a). Further, the possibility that Rosa M.'s prior testimony could be used to impeach her was discussed by the circuit court and counsel as a hypothetical that was conditioned on her testifying that she was not afraid that her husband would be upset if she was unfaithful to him. Rosa M. never gave such testimony. Rather, she testified that she was nervous about telling her husband what happened and afraid of what his reaction might be. The circuit court explained that it would not permit defense counsel to question Rosa M. about the thoughts and feelings of her husband because such testimony would require speculation on her part.

Defense counsel did not attempt to rephrase the challenged line of questioning or lay a proper foundation to impeach Rosa M. Thus, there was no testimony to impeach. *See generally Hardison v. State*, 118 Md. App. 225, 237-38 (1997) ("[b]efore the requirements of Md. Rule 5-613(b) come into play, however, the prior statement of the witness must be established as inconsistent with his [or her] trial testimony.") (citing *Stevenson v. State*, 94 Md. App. 715, 721 (1993)). The same would be true had appellant sought to admit the statements substantively. *See Tyler v. State*, 342 Md. 766, 775 (1996) ("[A] witness's prior testimony is admissible as substantive evidence when the prior testimony is *inconsistent* with the witness's in-court testimony, and the witness is subject to cross-examination concerning the statement at the trial where the statement is admitted") (emphasis in original) (citing *Nance v. State*, 331 Md. 549, 570-71 (1993)).

As the record does not reveal any inconsistent statement on the part of Rosa M., neither Md. Rule 5-802.1(a) nor 5-613 applied.

Moreover, although appellant asserts that Rosa M.'s testimony from the first trial "obviously reflected her personal belief regarding how her husband would react," counsel never made that argument before the trial judge. Even if he had, he would fare no better because Rosa M.'s husband testified, specifically, that he would have been upset if he learned that his wife had been unfaithful. On cross-examination, defense counsel questioned Rosa M.'s husband, Felipe M., as follows:

> [DEFENSE COUNSEL]: [Mr. M.], you love your wife, don't you?
>
> [Mr. M.]: Yes.
>
> Q.: And it's important to you that she remain faithful to you, isn't it?
>
> A.: Yes.
>
> Q.: Just as it's important that you remain faithful to her correct?
>
> A.: Exactly.
>
> * * *
>
> Q.: [Mr. M.], if you learned that your wife had been unfaithful to you, you would be upset, wouldn't you?
>
> A.: Yes, but the way that this problem happened, there is no reason to get upset.
>
> Q.: Okay. If you could just answer yes or no to my question. If you learned that your wife had been unfaithful to you, you'd be upset, wouldn't you?
>
> A.: In a different way, yes.

Q.: Okay. You would be angry, wouldn't you?

A.: Yes.

Defense counsel argued to the jury that Rosa M.'s fear of her husband's reaction gave her a motivation to falsely accuse appellant of rape and specifically pointed to Mr. M's testimony, stating, "[a]nd he would have been angry if she had been unfaithful. You heard him say that." Accordingly, even assuming that the circuit court erred in prohibiting defense counsel from using Rosa M.'s prior testimony as substantive or impeachment evidence, any error would have been harmless beyond a reasonable doubt because the excluded evidence was admitted through Mr. M.'s testimony. *Dorsey v. State*, 276 Md. 638, 659 (1976).

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.