UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2802

September Term, 2014

SHAUN DEMETRAD TURNER

v.

STATE OF MARYLAND

Kehoe,
Berger,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: December 29, 2015

Following a jury trial in the Circuit Court for Harford County, appellant, Shaun Demetrad Turner, was found guilty of attempted second-degree rape, fourth-degree sexual offense, second-degree assault, and indecent exposure. The court sentenced appellant to 20 years imprisonment with all but 15 years suspended for attempted rape, plus a consecutive 3-year suspended sentence for indecent exposure, and 5 years probation upon release. The remaining convictions merged for sentencing purposes.

QUESTIONS PRESENTED

Appellant presents the following questions for our review:

1. Did the trial court err by permitting [a police officer] to recount the complainant's narrative of the events surrounding the assault under the prompt complaint [of sexually assaultive behavior] exception to the hearsay rule?

2. Did the trial court err by failing to declare a mistrial after the complainant testified the police showed her "mug photos" of appellant?

Discerning no error, we affirm.

FACTUAL BACKGROUND

In May 2013, at about 11 a.m., Jesse James Dolinger, who was on his way to a fishing and swimming hole, came upon the victim,[1] who he had never met before, as she sat under a bridge overpass on a piece of cardboard. Thereafter, Dolinger and the victim began heavily drinking vodka.

Several hours later, appellant arrived. Dolinger had previously seen appellant at the swimming hole, but did not know him. The victim and appellant had known each other for

[1]For privacy reasons we only refer to the victim as "the victim."

about eight years, as appellant had given her food and shelter at a time when she had been homeless.

At some point that afternoon, the victim, who had been swimming in her clothes, "almost drowned" but was rescued by Dolinger and appellant. She testified that she then fell asleep and woke up sometime in the evening. According to the victim, at some point appellant pushed her and she fell into a campfire they had started, causing a burn on her leg. She added, "I was too drunk to go get an ambulance, so I decided to stay." She then fell asleep.

The victim testified that, at about 5 a.m., appellant began flirting with her and laid his head on her lap. When she tried to get up he pushed her to the ground, pinned her down, and unzipped his pants. She "started pushing and kicking and screaming 'rape'[.]" She said "[h]e had managed to get my legs up in the air, and I was just kind of digging my combat boots in his face. He was trying to put his penis in me. So I grabbed ahold of his penis, and I yanked it as hard as I could, just started pulling and scratching and screaming."

Dolinger, who had "passed out" sometime around 11 p.m., woke up "still drunk and hung over" when he heard the victim screaming and saw appellant on top of her. He testified that appellant was "butt naked . . . trying to wiggle his way between her legs" and that appellant "had his hands on her wrists above her head holding her hands down against the sand." Dolinger told appellant to "get off of her," and appellant responded, "Stay out of this,

it's none of your business." After a ten minute struggle, appellant walked away. Dolinger gave the victim his cell phone, and she called 911.

Appellant testified to a decidedly different series of events at the swimming hole. He claimed that he visited the swimming hole after he got off work for only two to three hours in the evening. He said that no campfire was ever assembled or lit while he was there. Accordingly, he denied the victim's claim that he pushed her into the campfire. Appellant admitted that he had a physical altercation with the victim and said that she grabbed his face and he spat on her. She began yelling "rape" and "rubbed [his spittle] on her crotch," saying "I got you now." Appellant threw his hat at her because "she was yelling 'rape,' and I didn't do nothing to her, and that was like proof right there saying: Well if I did something wrong, you know. I did spit on her, and she took it and rubbed it on her crotch, so I said, 'Here is the DNA to match it.'"

Appellant said he left the scene at 8:00 p.m. and returned about a half hour later because he "wanted to see what was going on." He found no one there, and all of the items, including his hat and socks, were "cleaned up" and, he continued, "[e]verything was missing that was there in that area. They were nowhere in sight." When asked why he thought that Dolinger and the victim would have lied while testifying, appellant explained without further elaboration that "[t]his was pretty much pre-planned a while ago with these other two females."

A recording of the 911 call was played for the jury.[2] During that call, the victim described appellant and explained the events roughly consistent with her trial testimony. It seems clear that appellant was still within earshot of the victim at the outset of the 911 call as, among other things, the victim can be heard saying to him "you are going to jail."

When the police arrived at the scene early in the morning, they recovered a package of cigarettes, a hat, a pair of white socks, and some beverage bottles and cans. The DNA profile of the major contributor to the forensic sample derived from the hat matched the DNA profile of appellant's known reference sample. Because the victim had alleged only an attempted rape, the lead investigator did not order a rape exam by medical professionals. And because the victim's description of the attack did not involve blood or any other bodily fluid, the police did not take custody of the victim's clothing.

Additional facts will be presented as relevant to the discussion below.

DISCUSSION

I.

Appellant contends that the trial court erred when it permitted a police officer to testify to what the victim told the police officer about the incident. The trial court admitted the evidence as a prompt complaint of sexually assaultive behavior hearsay exception pursuant to Md. Rule 5-802.1(d). Appellant complains that the court's ruling permitting the testimony

[2]Although not transcribed, the audio recording of the 911 call is part of the record on appeal, and we have reviewed it.

ran afoul of the applicable law because the hearsay exception does not permit testimony about the details of the sexually assaultive behavior and the officer's account included significant detail of the attack.

The State contends that (1) the allegation was waived when appellant argued a different theory of inadmissability at trial; (2) that the trial court was correct to admit the testimony, not under the theory advanced at trial, but under the theory that it was a prior consistent statement pursuant to Md. Rule 5-802.1(b),[3] and; (3) that any error was harmless beyond a reasonable doubt.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Absent an exception, hearsay is not admissible. Md. Rule 5-802. One exception to the hearsay rule, known as the prompt complaint of sexually assaultive behavior exception, is found in Md. Rule 5-802.1(d), which states:

> 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:
>
> * * *

[3] This argument of appellee is incorrect. While Md. Rule 5-802.1(b) contains an exception to the hearsay rule for a prior consistent statement when the statement is offered to rebut a charge of fabrication, such a prior consistent statement is only admissible if it was made before the motive to fabricate arose. *Holmes v. State*, 350 Md. 412, 424, 429 (1998). In the present case, the victim's prior consistent statement was not admissible under this theory because the statement was made after any motive to fabricate arose.

> (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

The prompt complaint of sexually assaultive behavior hearsay exception is subject to certain "limitations such as: 1) the requirement that the victim actually testify; 2) the timeliness of the complaint; and 3) the extent to which the references may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail." *Nelson v. State*, 137 Md. App. 402, 412 (2001) (quoting *Cole v. State*, 83 Md. App. 279, 289 (1990)). "The purpose of the exception is fulfilled by allowing the State to introduce, in its case-in-chief, the basics of the complaint, *i.e.*, the time, date, crime, and identity of the perpetrator. The narrative details of the complaint are not admissible, as they exceed the limited corroborative scope of the exception." *Muhammad v. State*, 223 Md. App. 255, 268 (2015).

In the present case, on direct examination the State asked a police officer to describe the victim's demeanor when he spoke with her after responding to the 911 call. The deputy testified that the victim was "upset" and that her "clothes were a little disheveled and dirty." The following then transpired:

> THE STATE. What, if anything, did she advise you?
>
> THE DEFENSE: Objection, Your Honor.
>
> THE STATE: May we approach?

THE COURT: Certainly.

(Counsel and Defendant approached the bench and the following occurred:)

THE STATE: Her comments to the deputy are an exception to the hearsay rule. Under 5-802.1, a complaint of a sexual assault is admissible.

THE DEFENSE: Your Honor, I would say the 911 call was the initial complaint. Pure hearsay offered for its truth. I would object.

THE COURT: Overruled.

(Counsel and Defendant returned to the trial tables, and the following occurred in open court:)

BY THE STATE:

Q. Deputy, what did [the victim] say happened?

A. The night prior about six o'clock she went into the woods, was hanging out with her friend Jesse. They were hanging out together and drinking. In the early morning hours, a male subject that she knows as Shaun came out through the woods. She did not know his last name. She said he immediately dropped his pants and sat down on her, and [the victim] said at that point, that's when a fight started for approximately ten minutes.

She went on to state that Shaun was holding her down at her chest trying to keep her on the ground, and she was trying to hit and kick him to get off. [The victim] stated several times that Shaun tried to lift her skirt and attempted to put his penis inside her vaginal area.

She stated he came close but never penetrated her, and that every time he got close, she grabbed his penis, and I quote, "I was trying to rip it off to stop him."

They continued to fight, and she advised she kept yelling, "Rape," and, "Get off of me," and was yelling through the whole time.

Her friend Jesse eventually called 911.

THE DEFENSE: Objection, Your Honor.

THE COURT: Overruled.

A. Her friend Jesse called 911, and she stated to me that's when she told Shaun that the cops were coming, and he ran off into the woods towards Route 7.

In Maryland, a general objection "to the admission of evidence ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence." *Boyd v. State*, 399 Md. 457, 476 (2007). Nevertheless, "[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999).

Maryland Rule 8-131(a) provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." "The application of the rule limiting the scope of appellate review to those issues and arguments raised in the court below is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice." *In re Kaleb K.*, 390 Md. 502, 513 (2006). *See also Alexis v. State*, 209 Md. App. 630, 667, *aff'd,* 437 Md. 457 (2014).

Clearly, at trial, appellant did not make the argument now being made on appeal. When contesting admissibility of the evidence at trial, appellant said: "Your Honor, I would say the 911 call was the initial complaint. Pure hearsay offered for its truth. I would object." It seems obvious to us that trial counsel was objecting on the basis that the complaint of sexually assaultive behavior was not "prompt" enough to fit the hearsay exception. On appeal, appellant complains that the officer's account was inadmissible not because it was not sufficiently prompt, but because it went far beyond the "the identity of the culprit, and the circumstances under which it was made." *Cole*, 83 Md. App. at 289. As a result, appellant's complaint is waived because he advanced a different theory of inadmissibility at trial than being advanced on appeal.

II.

Appellant complains that the trial court should have granted a mistrial when the victim blurted out that she picked the appellant's photograph from "the mug photos." The State contends that the court soundly exercised its broad discretion in not granting a mistrial.

"'A request for a mistrial in a criminal case is addressed to the sound discretion of the trial court and the exercise of its discretion, in a case involving a question of prejudice which might infringe upon the right of the defendant to a fair trial, is reviewable on appeal to determine whether or not there has been an abuse of that discretion by the trial court in denying the mistrial.'" *Cooley v. State*, 385 Md. 165, 173 (2005) (quoting *Wilhelm v. State*,

272 Md. 404, 429 (1974)). The "declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Id*.

"The applicable test for prejudice is whether we can say, 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.' The decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." *Id*. At 173-74. (quoting *Wilhelm*, 272 Md. at 416) (some quotation marks omitted).

In the present case, although identity was not a contested issue in the case, the State sought to elicit testimony on direct examination of the victim that the victim had identified appellant's photograph in a photo array conducted by the police. The following transpired:

STATE: And did there come a time when the police brought you photographs? Well, you provided a name to the police; did you not?

VICTIM: What's that?

STATE: You provided his name to the police?

VICTIM: **I saw him in the mug photos**.

DEFENSE: Objection, Your Honor. May we approach?

COURT: Certainly.

(Counsel and the defendant approached the bench and the following occurred:)

DEFENSE: She mentioned mug photos. That means he has a record. That implies he has a criminal history. Extremely prejudicial to the jury, especially in a case involving credibility. I would make a Motion for Mistrial. In the alternative, an objection with a curative instruction.[4] But to hear that she identifies Mr. Turner based on a mug shot, I don't know how you fix that.

STATE: I simply said "photos." I don't know where that came from, Your Honor. The mug comment, I didn't expect it myself.

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COURT: Well, I am not going to grant a mistrial at this point. [The State], you certainly are capable of clarifying that they were simply photos. At this point, although there may be suggestion that he has a criminal record. If they were just photos, that will cure any confusion in the jury's mind.

DEFENSE: She indicated mug shots.

COURT: She said – she did say that. I am not disputing that. But both you and The State, either of you have an opportunity to clarify that they were just simply photos. Some people may call whatever they are seeing mug shots. It may be just a colloquial term. It doesn't necessarily mean it's grounds for a mistrial at this point.

(Counsel returned to trial tables, and the following occurred in open court:)

STATE: When the police showed you photos, did you recognize one of the those photos to be the defendant, Shaun Turner?

VICTIM: Yeah.

[4]While defense counsel asked the trial court for the lesser relief of a curative instruction at trial, on appeal, the appellant has not raised a claim that the trial court erred or abused its discretion by not giving a curative instruction to the jury. Appellant only argues that the court should have granted a mistrial.

In *Straughn v. State*, 297 Md. 329 (1983), the State introduced into evidence a photographic array from which the victim selected the defendant's picture as the robber. Each of the photographs in the array contained a front and a profile view of the person with a height chart faintly visible behind the person. *Id*. at 332. In affirming the conviction, the Court of Appeals stated that generally the introduction of a police identification photographic array coupled with testimony about the extrajudicial identification are "independently relevant substantive evidence which may be introduced under certain circumstances[.]" *Id*. at 333-34. The Court noted, however, that the evidence also has the potential for undue prejudice "by implying to the jury that [the defendant] has a prior criminal record[,]" a form of prohibited "other crimes" evidence. *Id*. The Court explained:

> [E]vidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial. *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980); *State v. Jones*, 284 Md. 232, 395 A.2d 1 182 (1979); *Cross v. State*, 282 Md. 468, 386 A.2d 757 (1978); *McKnight v. State*, 280 Md. 604, 375 A.2d 551 (1977); *Ross v. State*, 276 Md. 664, 350 A.2d 680 (1976). There are two reasons for the rule. First, if a jury considers a defendant's prior criminal activity, it may decide to convict and punish him for having a criminal disposition. Second, a jury might infer that because the defendant has committed crimes in the past, he is more likely to have committed the crime for which he is being tried. *Tichnell*, *supra*, 287 Md. at 711, 415 A.2d 830. Consequently, any probative value that the evidence might have is outweighed by the potential prejudice to the defendant and is properly excluded. Evidence of a defendant's prior crimes may be admissible, however, if it is independently relevant. Nevertheless, such evidence is not per se admissible in all circumstances. The trial court has discretion to exclude admissible independently relevant evidence of prior crimes. *Cross, supra* , 282 Md. at 474, 386 A.2d 757. In the exercise of its discretion, the trial court must weigh carefully the need for and the probative value of the evidence against

> the potential prejudice to the defendant. *Id*. *See McCormick on Evidence*, § 190 (2d ed. 1972).

Id. (footnote omitted).

Under the circumstances presented in *Straughn*, the Court held that the admission of the mug shot array was not an abuse of discretion. The Court found that "[t]here was a real need for the evidence in this case" because "[t]he prime issue at trial was the identity of the person who committed the crime." *Id*. at 336.

In *Arca v. State*, 11 Md. App. 102, *cert. denied*, 310 Md. 276 (1987), the defendant was charged with first-degree murder. Although self-defense, not identity, was the issue at trial, the State introduced into evidence a photographic array, which included what was "obviously a police 'mug shot'" of the defendant. *Id.* at 104. The photographs showed the front and profile view "commonly associated with police 'mug shots.'" *Id* . at 106. The defendant was acquitted of first-degree murder but convicted of manslaughter. The defendant appealed and we reversed his conviction.

Mindful of the decision in *Straughn*, we stated that "[a] critical element in any balancing process, of course, is . . . the State's need for the photographs: Were they relevant to other unimpeached evidence? If the State has no real need to introduce the photographs, there is nothing against which to balance any prejudice to the accused." *Id*. at 105. We reasoned that, because the State had absolutely no need for the photographs (as self-defense, not identity was an issue), the "State's side of the scale" had a weight of zero. *Id*. at 106. We reasoned further that the potential for undue prejudice was more than speculative, noting that

"[w]ith the defense being self-defense, the jury's decision could well have been influenced by the thought that [the defendant] had a prior record and was consequently a bad person." *Id*. We reversed the defendant's conviction and emphasized:

> We have tried on occasion to caution prosecutors against overkill, against pounding so many nails into the defendant's coffin that they split the wood and have to start again. We recognize, of course, that, as an appellate court, we get to view the case from the enviable position of hindsight, and that what may seem to us to be unnecessary overkill may not seem so to the participants in a hotly contested trial. That is why, especially on matters relating to the conduct of the trial and the allowance or disallowance of evidence, we accord considerable deference to discretionary rulings of the trial judge and do not reverse unless there is manifest error. Here, we think, the court allowed the State to go too far[.]

Id. at 102-03.

Appellant contends that, like *Arca*, his identity was never at issue, and therefore there was no need for any evidence about his identity. From that premise, appellant reasons that, like *Arca*, in balancing the admissibility of the evidence, the State's side of the scale has a weight of zero. Unlike *Acra*, however, this case did not involve the introduction of what were "obviously" mug shot photographs. Rather, this case involved a lone remark wherein the victim characterized all of the photographs she was asked to look at by the police as "the mug photos." The photographs used in the photo array were admitted (without objection) into evidence through a police officer and are part of the record in this case, and none of them is "obviously" a mug shot.

Moreover, the jury would later learn anyway that appellant had a criminal past. The very first question asked of appellant when he took the witness stand in his own defense was

"you plead guilty to a theft in 2009; is that right?" to which appellant responded "Yes, I have."

Last, there were two versions of events presented to the jury. One version was the victim's which was corroborated by an otherwise uninterested eyewitness, the 911 call, the victim's statement to the authorities, and the physical evidence including the victim's injuries. The other version was appellant's, which was internally inconsistent and contradicted by other evidence. For example, it seems obvious that the victim is speaking to appellant during the 911 call, which is completely inconsistent with appellant's claim that he left the scene the night before. Moreover, appellant claimed that his hat and the other items he left at the scene were all "cleaned-up" the night before, yet they somehow reappeared in the morning and the police collected them.

In the present case, we can say with fair assurance that, "after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Cooley v. State*, 385 Md. 165, 173-74 (2005). We are persuaded that the trial court, who was in the best position to ascertain any prejudice to appellant from the "mug photos" remark, did not abuse its discretion in not granting a mistrial.

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