Circuit Court for Baltimore City
Case No.117138024

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2886

September Term, 2018

TAYLOR MCMILLIAN

v.

STATE OF MARYLAND

Graeff,
Beachley,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: November 25, 2019

A jury sitting in the Circuit Court for Baltimore City convicted Taylor McMillian, appellant, of first-degree rape, first-degree sexual offense, second-degree assault, kidnapping, false imprisonment, robbery, and theft of property valued at less than $500.[1] Appellant raises three arguments on appeal, which we have slightly rephrased for clarity:

I. Did the trial court abuse its discretion when it allowed a State's DNA analyst to offer her expert opinion based on data generated by other analysts?

II. Did the trial court err when it admitted testimony based on DNA evidence that lacked a proper chain of custody?

III. Did the trial court err when it denied appellant's motion for judgment of acquittal?

For the following reasons, we shall affirm.

FACTS

Kenneth Thomas testified that on the evening of November 19, 2006, he was working on a family member's car near the corner of Lafayette Street and Braddish Avenue in Baltimore when a "girl came running from the side of the school, and she was all disheveled[.]" When she approached, he saw that her clothing was ripped and she hysterically repeated, "he just raped me." He called the police and waited with her until they arrived.

[1] Appellant was sentenced by the court to 35 years of imprisonment for first-degree rape; a consecutive 35 years for first-degree sexual offense; and a concurrent ten years for robbery. The court merged his remaining convictions for sentencing purposes.

N.P.[2] testified that on the evening of November 19, 2006, she was walking from her home to a nearby store when someone ran up to her from behind. As she turned around, a man pointed a gun at her face. She had never seen the man before. He told her to turn back around, and she did. He pressed the gun into her back and told her to keep walking, forcing her down an alley. She repeatedly begged for him to let her go, but he did not. When they reached the steps of a school, he told her to get on her knees and with the gun to her head, forced her to perform oral sex on him. He then forced his penis into her vagina, after which he again forced his penis into her mouth. Before letting her go, he took her cash and told her, "If you tell anybody, I will find you[.]" She then ran away. When the police arrived, she was taken to a hospital.

Mary Davidson, who was accepted as an expert in the field of forensic nursing, testified that she currently works as a registered nurse but was employed in 2006 as a SAFE nurse, having specialized training in the collection of evidence from victims of sexual assault. She testified that she performed a physical examination of N.P. but noted no physical injury. She collected lip swabs from the inner part of the victim's lips and "circumoral swabs" from around the victim's mouth. She placed the swabs in separate sealed envelopes marked with the central complaint number, which she then placed in a larger envelope. She placed the envelope in a cabinet, and security personnel locked the cabinet. She testified that protocol dictated that when the police picked up the evidence, hospital security retrieved the evidence from the locked cabinet, both the officer and

[2] To protect the victim's privacy, we shall use initials to identify her.

hospital security signed paperwork, and the officer took the evidence to a secured location called the "vault."

Jennifer Ingbretson, who was accepted as an expert in serology, testified that she currently works as a Forensic Scientist II with the Baltimore Police Department, but in 2006 she was a serologist and DNA analyst with the department. She testified that in 2006, she retrieved from the "vault" a large sealed envelope inside of which were smaller sealed envelopes with a complaint number written on them. She tested the swabs for sperm and found sperm on both the lip and circumoral swabs. She then placed the evidence in sealed envelopes marked with the central complaint number and sent it to a secure location to await transfer to Bode Technology for DNA analysis.

Michelle Donohue, who was admitted as an expert in DNA analysis, testified that she currently works as a program manager at a non-profit biotech company but from 2002 until 2016 she worked as a DNA analyst at Bode Technology. She testified that in 2006, she was assigned to this case and she received the sealed envelope marked with the central complaint number. She obtained sperm fractions from the swabs and then performed a DNA analysis on the fractions. She testified that the circumoral swab contained two DNA profiles, consisting of DNA from the victim and a major male contributor. The lip swab likewise contained two DNA profiles, consisting of the victim's profile and a partial DNA profile that was consistent with the male profile found on the circumoral swab. The male profile remained unidentified because no suspect was known at the time. After her testing was completed, the evidence was returned to the Baltimore Police Department.

More than a decade later, in 2017, Detective Justin Stinnett began investigating the crime as a "cold case." Based on information he received, he obtained a search warrant for appellant's DNA. The detective also obtained a photograph of appellant from around 2006 and placed it in a photographic array that he showed to the victim. She was unable to identify her assailant from the array.

Kimberly Morrow, who was admitted as an expert in DNA analysis, testified that she works as a Forensic Scientist III with the Baltimore Police Department. She testified that she was the technical reviewer of the report generated by the DNA technician with the Baltimore Police Department, who had compared appellant's DNA that Detective Stinnett had collected, to the DNA profiles generated by Bode Technology in 2006.[3] Ms. Morrow testified that, as the technician's clinical reviewer, she reviewed all the data, ensured that all of the controls had appropriate results and the correct reagents were used, and independently confirmed all of the conclusions and statistics recorded in the technician's report. She concluded, like the DNA technician, that appellant was the source of the DNA profile found on the circumoral swab and the partial DNA profile found on the lip swab. She did not perform any testing herself.

The defense did not produce any witnesses.

[3] The report was not admitted into evidence.

DISCUSSION

I.

Appellant argues that trial court erred in admitting the testimony of Ms. Morrow about the DNA evidence in this case because she "never handled, touched, or saw the DNA evidence[.]" Although appellant admits that the Court of Appeals has held that an expert witness is permitted to offer expert opinions based on data generated by others, he nonetheless maintains that the trial court abused its discretion in admitting her testimony. The State disagrees, as do we.

It has long been the law in Maryland "'to permit an expert to express [an] opinion upon facts in the evidence which [the expert] has heard or read, upon the assumption that these facts are true.'" *Cooper v. State*, 434 Md. 209, 230 (2013) (quoting *Quimby v. Greenhawk*, 166 Md. 335, 338 (1934) (brackets omitted)), *cert. denied*, 573 U.S. 903 (2014). Md. Rule 5-703 on expert opinion testimony codifies this law and provides:

> **(a) Admissibility of Opinion.** An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If the court finds on the record that experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

The admission of expert opinion testimony is reviewed for an abuse of discretion. *Cooper*, 434 Md. at 231.

Appellant's argument is controlled by *Cooper*. In that case, the defendant's DNA matched biological material recovered on a napkin on which the victim had spit during a sexual assault. 434 Md. at 214-17. On appeal, Cooper argued, among other things, that the DNA results were inadmissible because the laboratory supervisor, rather than the

employee who analyzed the DNA, testified at trial. *Id.* The Court of Appeals rejected this argument and upheld admission of the expert's testimony. *Id.* at 231. The Court explained that the expert, as part of her employment as reviewer, testified that the DNA technician had performed the correct procedures and she agreed with the results stated in the report. *Id.*

The same is true here. Ms. Morrow testified that she ensured that the DNA technician followed the correct procedures and she reviewed all the data he used. She likewise ultimately concurred with his conclusion. Appellant has suggested no reasons why we should reach a different outcome than that in *Cooper*. Accordingly, we hold that the trial court did not abuse its discretion in admitting Ms. Morrow's opinion that appellant was the source of the DNA profiles found on the swabs taken from the victim.

II.

Appellant argues that the trial court abused its discretion in admitting the DNA evidence because the State failed to show an adequate chain of custody. Specifically, appellant argues that the State failed to establish who transported the evidence from the hospital cabinet to the vault at the Baltimore Police Department's laboratory and from the vault to Bode Technology. The State initially argues that appellant has failed to preserve this argument for our review because at the time of his objection, "all of the evidence derived from the rape kit had been admitted through earlier witnesses." Even if preserved, however, the State argues that appellant's argument lacks merit because it had established a reasonable probability that no tampering occurred. Assuming without deciding that

appellant has preserved his argument for our review, we agree with the State that appellant's argument has no merit.

"The law requires a party to establish a 'chain of custody' when offering certain items of evidence, in order to assure that the particular item is in substantially the same condition as it was when it was seized." *Wagner v. State*, 160 Md. App. 531, 552 (2005) (citation omitted). *See also* Md. Rule 5-901 (stating that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). Therefore, the circumstances surrounding evidence between the time of seizure and its admission at trial need only prove a "reasonable probability, and in most instances is established by responsible parties who can negate a possibility of tampering and thus preclude a likelihood that the thing's condition was changed." *Wheeler v. State*, 459 Md. 555, 567 (2018) (quotation marks, citations, and brackets omitted). What is necessary to negate the likelihood of tampering or a change of condition will vary from case to case. *Easter v. State*, 223 Md. App. 65, 75 (citation omitted), *cert. denied*, 445 Md. 488 (2015).

Like other evidentiary rulings, determinations about the adequacy of the chain of custody are left to the sound discretion of the trial court, which we review for an abuse of discretion. *Id.* at 74-75. "A trial court abuses its discretion only when no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Id.* at 75 (quotation marks and citations omitted). *See also Alexis v. State*, 437 Md. 457, 478 (2014) ("A court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond

the fringe of what that court deems minimally acceptable.") (quotation marks and citation omitted). "The existence of gaps or weaknesses in the chain of custody generally go to the weight of the evidence and do not require exclusion of the evidence as a matter of law." *Easter*, 223 Md. App. at 675 (citation omitted).

Cooper, *supra*, also controls appellant's second argument. As stated above, in *Cooper*, the defendant's DNA matched biological material recovered on a napkin on which the victim had spit during a sexual assault. 434 Md. at 214-17. On appeal, Cooper had also argued that the State had failed to account for how the napkin was transferred from the police laboratory to an independent laboratory for analysis. *Id.* at 224. In holding that there was sufficient evidence to establish a chain of custody as to the napkin, the Court of Appeals noted that the State had established through its witnesses that the police laboratory used sealed packaging and an identifying complaint number throughout its handling of the evidence. *Id.* at 226-27. The Court also credited evidence in the record that the laboratory had undertaken safeguards to ensure the reliability of the DNA results, and that the final report had the same identifying case number as the victim's rape kit. *Id.* The Court concluded that "the chances of Cooper's DNA being placed on the napkin through tampering when the napkin had been transferred from the [v]ictim to a locker behind locked doors at the hospital to the evidence control unit to the police laboratory and then to [an independent laboratory] is remote." *Id.* at 228.

Appellant makes only a bald assertion of possible contamination or tampering because the State did not identify who transported the evidence from the hospital cabinet

to the Baltimore Police Department and from the department to Bode Technology. Our careful review of the record reveals no support for his claim.

The SAFE nurse testified that she placed the evidence in sealed, protective envelopes marked with the central complaint number, that were then placed in a locked cabinet. The same day as the rape exam, the envelopes were delivered to the Evidence Control Unit at the Baltimore Police Department. Ms. Ingretson, a serologist with the Baltimore Police Department laboratory, testified that she received the envelope with the same complaint number and that all of the envelopes were sealed. After processing the evidence, she placed each item in sealed envelopes marked with the complaint number, which were then sent to a secure location to await transfer for DNA testing at Bode Technology. Ms. Donohue, the DNA analyst at Bode Technology, testified that she received the evidence in sealed envelopes with the same complaint number.

Under the circumstances presented, we hold that the trial court did not abuse its discretion in admitting the DNA evidence because the State presented an adequate chain of custody. *Cf. Cooper*, 434 Md. at 223–28 (the State established an adequate chain of custody for napkin containing semen of attacker even though State presented sparse testimony about forwarding of particular samples to outside laboratory); *Bey v. State*, 228 Md. App. 521, 535-38 (the State established an adequate chain of custody for DNA sample even though analyst could not remember name of officer to whom she delivered sample), *cert. denied*, 450 Md. 105 (2016); *Easter*, 223 Md. App. at 73-76 (the State established an adequate chain of custody for the blood sample taken from defendant even though much of documentation about transfers of sample was arguably incomplete); *Jones v. State*, 172

Md. App. 444, 460-63 (2007) (the State established an adequate chain of custody for swabs recovered from sexual assault victim even though "there were details on the chain of custody sheet that some witnesses did not know").

III.

Appellant argues that there was insufficient evidence to sustain all his convictions because the State failed to prove his identity as the assailant. Appellant also argues that there was insufficient evidence to sustain his first-degree rape conviction because there was insufficient evidence of force. The State disagrees, as do we.

The standard for 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.'" *Taylor v. State*, 346 Md. 452, 457 (1997) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "That standard applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted).

> Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence.

State v. Suddith, 379 Md. 425, 447 (2004) (quotation marks and citation omitted) (brackets in *Suddith*). This is because weighing "the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact." *In re Heather B.*, 369 Md. 257, 270 (2002) (quotation marks and citations omitted). Thus, "the

limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted).

Appellant's DNA matched the DNA found on the swabs and supported a rational inference that appellant was the criminal agent. *See Derr v. State*, 434 Md. 88, 131 (2013) (concluding that a rational juror could rely on evidence of a DNA match and "conclude beyond a reasonable doubt, without resorting to speculation or conjecture, that Derr was the victim's attacker, and that is how his semen was found on her" and that questions of potential laboratory error went to the weight of the evidence and not its sufficiency), *cert. denied*, 573 U.S. 903 (2014). Additionally, there was sufficient evidence of force. *See* Md. Code Ann., Crim. Law, § 3-303(a)(1) (defining first-degree rape as a person "engag[ing] in vaginal intercourse with another by force, or the threat of force, without the consent of the other[.]"). The victim testified that her attacker pointed a gun at her, forced her off her path, twice forced her to perform fellatio on him, and placed his penis in her vagina. "[It] is well established in Maryland that the testimony of even a single eyewitness, if believed, is sufficient evidence to support a conviction." *See Marlin v. State*, 192 Md. App. 134, 153 (citation omitted), *cert. denied*, 415 Md. 339 (2010).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.