Circuit Court for Prince George's County
Case No. CT180477X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3398

September Term, 2018

RODNEY ARMSTEAD

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: January 24, 2020

On March 27, 2018, a Prince George's County Circuit Court Grand Jury returned a seven-count indictment charging appellant, Rodney Armstead, with attempted first and second-degree rape, attempted third and fourth-degree sex offense, first and third-degree burglary and second-degree assault. Appellant was convicted by a jury on November 1, 2018, of attempted third-degree sex offense, attempted fourth-degree sex offense, and second-degree assault. He was sentenced to 10 years' incarceration, with all but 18 months suspended and 3 years of supervised probation.

Appellant timely filed a motion for reconsideration of sentence, which the court denied without a hearing. Appellant presents three questions for our review:

1. Did the circuit court abuse its discretion in prohibiting the appellant from introducing evidence of his impotence to prove a lack of intent to commit the charged offenses?

2. Did the circuit court abuse its discretion in precluding the appellant from introducing evidence of the rental dispute between himself and the complaining witness to show bias?

3. Did the trial court abuse its discretion in permitting the State to introduce hearsay evidence in the redirect examination of a police officer to rehabilitate that officer's testimony?

For reasons to follow, we affirm the judgment of the circuit court.

BACKGROUND

In November 2015, the victim ("J.A.") began renting a second-floor bedroom in appellant's home in Fort Washington, Maryland. Appellant and his wife were not living in the residence as they had relocated to North Carolina in 2013 upon their retirement. Appellant's stepson and daughter lived in the house periodically during J.A.'s tenancy. In

April 2016, appellant and his wife began having marital problems, and he moved back to Maryland into a downstairs bedroom in the home. J.A. and appellant were cordial and spoke to each other almost daily. Appellant occasionally drove J.A. to the bus stop when she needed to go to work.

On August 31, 2017, after J.A. finished her shift at a restaurant in Washington, DC, she met her friend Mohammed Kamara and the two went to TGI Friday's restaurant in Greenbelt, Maryland around 8:15p.m. J.A. consumed three mixed drinks while there. She described how she felt after consuming the drinks as "buzzed" but not drunk. J.A. left with Mohammed and arrived home around 10:00 p.m. J.A. testified that "[She] just went in the house and closed [her] door and went to sleep."

Around midnight:

> I was like being – I was asleep. And I was woken out of my sleep and I was – like, it was a big body on me. And my mouth was being covered. And I was like just basically getting attacked. Like, I was trying to realize if it was a dream or not. Because, like I said, when I opened my eyes, its dark in my room. So im just like squirming and squirming. Like, what – like, is this real, is this not real. Like, I was – trying to figure it out.

She testified that her room had blackout curtains and as a result she couldn't see a lot in her room. She stated:

> So like, basically, the body was on me, and one hand was on my mouth. Like, I was completely held down, so I couldn't like use my hands or anything. And I was just squirming and like trying to move and get out of whatever I was in.
>
> And like, it was just like a movie. Like – like, all this happened in seconds. But just slowing it down, it's just like everything stopped. Because like, he – he took his hand off my mouth for a second, but I was like screaming. So he had to cover my mouth back up again.

> And I was just like moving and squirming. And then like, a couple of seconds, its just like everything just stopped. Like, is this real. And like, then he said, "You either gone give me this pussy, or you're gonna die." And I said, "I'm gonna die." He had gave me like some leeway, because I said "I'm gonna die" And I tried to lean up at the same time that I said that, and he smacked me down.

J.A. made multiple attempts to punch her assailant with her left hand and eventually her knuckles brushed his cheek. After that, "everything stopped" and "he disappeared." J.A. could not see her attacker but testified that she believed it was the appellant because of "[his] body weight and voice." After the attack she went to the stairs and yelled to appellant to come back. He appeared at the bottom of the steps and stated "[J.A.], [J.A.], what happened? I was locked in my room. Somebody broke in. What happened?" Appellant then went upstairs and asked J.A. what was going on. He observed J.A. pacing back and forth in her room while talking on the phone, cursing, and yelling.

Appellant testified that he was not certain of the exact time he arrived home that night but believed it to be close to 12:30 a.m. He noticed that the lights in the upstairs hallway were on but did not know if his stepson or J.A. were home, so he listened while standing at the bottom of the stairs. He retreated to his room and took his medication for a back injury. He walked back to the bottom of the stairs and was about to turn the light off when he noticed a purse handle at the top of the steps. He walked up the steps and saw two bags of food and a drink on the floor. He also noticed J.A.'s bedroom door was open with her keys lodged in the lock. J.A. was laying on her bed fully clothed. He called out

to her but received no reply. He then set her purse inside her room, removed her keys from the doorknob, threw them on the floor and closed her bedroom door.

Appellant testified he fell asleep but was awakened by a loud crashing sound. He ran into the living room, looked around the house, and saw an open kitchen door and a motion-activated light outside the door that was illuminated. He assumed the sound came from someone slamming the door. When he walked back to his room, he heard J.A. yelling and cursing upstairs.

Appellant called 911 and waited to allow the officers to enter the house. J.A. left the house and went to a nearby store to wait for a friend to pick her up. Appellant testified that he suspected a breaking and entering, based on what J.A. told him. The officers noted there was no damage to the outer perimeter of the house.

While waiting for her friend, J.A. noticed a marked patrol car in a commercial parking lot and she approached the officers. The officers had just left appellant's house after responding to the 911 call. Corporal Wyche described J.A. as hysterical. She told the officers that appellant had tried to rape her. Wyche's written incident report about the interaction indicated that J.A. could not provide suspect information. Wyche called a detective to inform him of what J.A. had reported.

After talking with the officers for approximately fifteen minutes and Corporal Wyche for over two hours, the officers sent her home with her friend and advised her to call the police station in the morning. The following day, J.A. made a call to the police

station and then made seven to nine calls more over the next two weeks. A detective asked her to come to the station to meet with him.

Appellant called his wife, Tawana Armstead and told her about the incident. Mrs. Armstead then called J.A. and identified herself. Before she could tell her the reason for the call J.A. stated, "I'm not paying no rent." Mrs. Armstead indicated that she was not calling to discuss the rent but was calling to discuss the incident at the house the night before. J.A. replied, "I think your husband tried to rape me last night." Mrs. Armstead retorted, "Wait a minute. You think?" J.A. replied, "Well, I don't know, somebody was in my room. I was turned up." J.A. then clarified that by "turned up" she meant "drunk." Mrs. Armstead ended the conversation by inquiring whether J.A. was ok and asked her to call if she needed anything.

STANDARD OF REVIEW

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Matthews v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 91 (2002); see also *Figgins v. Cochrane*, 403 Md. 392, 419 (2008).

> "(A) ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."
>
> "Even when our review of a record leads us to determine that the trial court abused its discretion, we yet may affirm the trial court's decision if we are able to conclude, beyond a reasonable doubt, that the error in no way influenced the verdict.

King v. State, 407 Md. 682, 697(2009) (citation omitted).

DISCUSSION

I. The circuit court did not abuse its discretion in prohibiting appellant from introducing evidence of his impotence.

Appellant argues the circuit court erroneously prohibited him from introducing evidence of his impotence as a defense. He contends the evidence was probative of his lack of intent to commit the charged offenses of attempted rape and attempted sex offenses. Appellant maintains the error so prejudiced his ability to present a defense that a new trial is required to correct the error and preserve his due process rights.

The State argues evidence of appellant's impotence was not relevant to his intent to have sexual contact or intercourse with the victim. Further, as to the attempted sexual offense charges, appellant's argument is not preserved as he only argued that evidence of his impotence was a defense to the attempted rape charges. To the extent appellant's evidence of impotence was relevant to the rape charges, the State argues, if there was error, it was harmless beyond a reasonable doubt because appellant was acquitted of those charges.

We first examine whether appellant properly preserved his argument that the court erred in denying evidence of his impotence as a defense to the attempted sexual offenses. Maryland Rule 8-131(a) provides that appellate courts "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." To preserve an issue as to whether a court acted properly in excluding evidence, "ordinarily, a formal proffer of the contents and relevance of the excluded evidence must

be made in order to preserve for review." *Ndunguru v. State*, 233 Md. App 630,637 (2017) (citation omitted).

Here appellant elected to testify in his defense and while on the witness stand, his counsel sought to ask questions about his impotence. The State objected, and the court sustained the objection. While at the bench, appellant's counsel specifically argued that his client's inability to have sexual relations was relevant to the attempted rape charges, stating, "the State is alleging that this man attempted to rape…That means sexual intercourse." Following a response from the State, the court declined to change its initial decision to sustain the objection.

Prior to resting his case, appellant's counsel asked the court to reconsider its ruling, arguing that the jury should hear about his inability to complete an act of rape, "a person who cannot engage in sexual intercourse, a man that is unable to obtain an erection to begin to enter into intercourse is not likely to have attempted as the State has alleged." The court denied the motion ruling that impotence was irrelevant to his intent to rape.

Appellant confined his arguments, on both occasions, to the attempted rape charges. As such, he did not preserve the issue as to the sexual offense charges. However, even if appellant's arguments were preserved, we hold the evidence was irrelevant to his intent to commit either the sexual offenses or the attempted rape charges.

"Generally, in order for evidence to be admissible, it must be relevant." *Thomas v. State*, 429 Md. 85, 95 (2012). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less

probable than it would be without the evidence." Md. Rule 5-401. In other words, "[e]vidence is relevant (and/or material) when it has a tendency to prove a proposition at issue in the case." *Johnson v. State*, 332 Md. 456, 474 n.7 (1993). Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Md. Rule 5-403.

The essence of a third or fourth-degree sexual offense is "sexual contact without the consent of the other." *See* Md. Code, Crim. Law § 3-307(a)(1)(i); *see also* Md. Code, Crim. Law § 3-308(b)(1). Sexual contact is defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." Md. Code, Crim. Law § 3-301(f). As the court explained the law to the jury during its instructions:

> "In order to convict the defendant of [attempt crimes] the State must prove that the defendant took a substantial step, beyond mere preparation, towards the commission of the crime of attempted first-degree rape, attempted second-degree rape, attempted third-degree sexual offense or attempted fourth-degree sexual offense. And that the defendant intended to commit the [attempt crimes]."

To be sure, the statute defining sexual contact does not require erection but rather touching for sexual arousal, gratification or abuse of the victim. The crime of attempt merely requires a step toward the commission of the charged crime. Thus, the trial judge properly ruled the evidence was not relevant and excluded it.

As to the rape charges, appellant asserts *Waters v. State*, is instructive. 2 Md. App. 216 (1967). The *Waters* Court, in discussing whether there was legally sufficient evidence to sustain a conviction for assault with intent to rape, remarked:

> While there can be no attempt in a case involving legal impossibility, as attempting to do what is not a crime is not attempting to commit a crime, factual impossibility of success does not prevent the attempt from being made. Physical incapacity to commit a crime does not affect the capacity of one to be guilty of an attempt. Thus, a man who is physically impotent may be guilty of an attempt to commit rape.

Id. at 226–27. The Court continued in discussing the crime of assault with intent to rape, "…evidence of known impotency is admissible as relevant to the question of intent to commit rape as a matter to be considered by the trier of facts with other relevant evidence." *Id.* at 227.

In our view, *Waters* is not persuasive. It differs from the case at bar as the charge there was assault with intent to commit rape whereas here appellant was charged with attempted rape. Further, the language of the Court, relied upon by appellant was dicta as the issue was sufficiency of the evidence to sustain the conviction. The Court also noted "…in the instant case, there was no evidence that the appellant was impotent or that he was incapable of copulation or penetration." *Id.* As a result, we find *Waters* to be limited in its application.

Here, the court acted within its discretion in ruling that the evidence was not relevant to the attempted rape charges. The rape statutes require penetration, however, slight and as this was an attempted rape case, actual contact was not an element necessary for conviction. Alternatively, we hold any error was harmless beyond a reasonable doubt as the jury acquitted appellant of the attempted first and second-degree rape charges. There was, thus, no reasonable possibility that the excluded evidence contributed to the guilty verdict.

II. The circuit court did not abuse its discretion in precluding the appellant from introducing evidence of the rental dispute.

Appellant argues the circuit court abused its discretion in precluding him from introducing evidence of an "ongoing" rental dispute between J.A. and himself. He contends the evidence would have established that J.A. was biased and had a motive to fabricate the charges against him. The State argues the proffered testimony about the rental dispute had little probative value and admitting the evidence risked confusing the issues and misleading the jury.

The Confrontation Clause of the Sixth Amendment and Article 21 of the Maryland Declaration of Rights guarantees a criminal defendant the right to confront witnesses against him and permits the defense to expose the jury to facts from which jurors could draw inferences relating to the reliability of the witness. *Marshall v. State*, 346 Md. 186, 192–94 (1997). The ability to cross-examine witnesses, however, is not unrestricted. *Smallwood v. State*, 320 Md. 300, 307 (1990) (citing *Delaware* v. *Van Arsdall,* 475 U.S., 673, 679 (1986). A trial court may impose reasonable limits on cross-examination when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant. *Lyba v. State*, 321 Md. 564, 570 (1991). The court, nevertheless, "must allow a defendant wide latitude to cross-examine a witness as to bias or prejudices" so long as the questioning does not "obscure the trial issues and lead to the factfinder's confusion." *Smallwood,* 320 Md. at 307–08 (citations omitted).

Here, appellant's counsel sought to introduce evidence about an "ongoing" rental dispute between J.A., appellant, and his wife, specifically, Mrs. Armstead's written Notice

to Quit that had been issued J.A. and her testimony about a conversation she had with J.A. approximately one week prior to the incident. The proffered testimony from Mrs. Armstead would have been:

> [S]he talked to [J.A.] approximately a week before this incident, and [J.A.] was stating that she didn't – she wasn't sure she had a place to stay. And if – and Mrs. Armstead told her, if you're not out by the 31st, you'll have to – you'll be responsible for another month.

The court, in precluding the testimony stated:

> [The Court]: Okay, so this is not a landlord and tenant case. The fact of the matter is she left. If she was supposed to be out by midnight on August 31st, this happened September 1st.
>
> [Defense Counsel]: Just after midnight, just after midnight
>
> [The Court]: Right. So she stayed, what an hour past the time she was supposed to? Come on, it really doesn't matter.
>
> [Defense Counsel]: I'm sorry.
>
> [The Court]: If you want to ask [Mrs. Armstead] about the statement [J.A.] made, that's fine but to get into the rent history and why they wanted her to vacate is not relevant to the case. And if you do that, the probative value would be outweighed by unfair prejudice at that point.

We agree. The judge properly accorded latitude to the defense in presenting the issue of bias. The judge allowed cross examination of J.A. about the issue as well as some testimony from Mrs. Armstead, but the court declined additional testimony which would have been cumulative and confusing. The judge carefully weighed whether the probative value of the evidence would be outweighed by its prejudicial effect. Thus, the trial court did not abuse its discretion.

III. The trial court did not abuse its discretion in permitting the State to introduce testimony to rehabilitate the testimony of Officer Wyche.

Next, appellant argues the trial court prevented him from impeaching Officer Wyche when he tried to show "glaring and highly consequential inconsistencies between her incident report and her direct testimony." Appellant contends the court improperly "permitted the State to rehabilitate [Officer] Wyche and the elicited testimony was "both hearsay and irrelevant." The State argues Officer Wyche was impeached on cross-examination and the State was properly permitted to ask questions to rehabilitate her testimony. Further, Officer Wyche's explanation was not inadmissible hearsay and it was relevant.

"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). Hearsay is not admissible as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is "permitted by applicable constitutional provisions or statutes." Md. Rule 5-802. Out-of-court statements are generally not admissible to prove the truth of the matter asserted. They can be admitted, however, if the statements are "relevant and proffered not to establish the truth of the matter asserted therein, but simply to establish that the statement was made[.]" *Lunsford v. Bd. of Educ. of Prince George's Cty.*, 280 Md. 665, 670 (1977) (citations omitted). While the abuse of discretion standard is ordinarily applied when reviewing evidentiary rulings, "whether evidence is hearsay is an issue of law reviewed de novo." *Bernadyn v. State*, 309 Md. 1, 8 (2005).

Appellant contends the court limited his attempt to point out discrepancies. As we see it, the court merely ruled on an objection lodged by the State related to hearsay. The court did not limit appellant's ability to ask questions. Officer Wyche had testified on direct examination that J.A. reported to her that she "almost got raped" by "her roommate." The following colloquy occurred during cross-examination:

[Defense Counsel]:	Now, I'd like you to take a look at your report, especially the last page, and tell me and the ladies and gentlemen of the jury, where in there does it indicate that she told you, that is [J.A.] told you, that her roommate attempted to rape her?
[Officer Wyche]:	Sir, after making contact with the victim and so forth, whatever the detective decide should be on the report, that's what we're going to write down. He clearly said that the case would not go forward for the simple fact that –
[The State]:	Objection, your honor.
[The Court]:	Sustained. Disregard that response.
[Defense Counsel]:	All right. You put down on your report that she couldn't provide suspect information; isn't that correct?
[Officer Wyche]:	That's correct.
[Defense Counsel]:	Okay. You also put down in your report that the assault could not be verified, didn't you?
[Officer Wyche]:	Yes, sir. That's based on what the detective advised to do.

We conclude the witness was impeached. As to rehabilitation of the witness and whether the testimony elicited was both "hearsay and irrelevant," we examine the following:

[The State]:	Can you explain how on direct you stated that she did identify who attacked her, but in your report, you wrote this? Was that a mistake?
[Wyche]:	No, its not a mistake. After speaking to the detective, she – at that point, its still an allegation unless the detective is willing to take the case forward.
[Defense Counsel]:	Objection. Objection.

At the bench, defense counsel stated that his objection was based on hearsay as it was an attempt by the State to introduce what the non-testifying detective said. The State noted that the testimony was being elicited to "explain the discrepancy" after the officer had been impeached on cross-examination, and that it was not being offered for the "truth of the matter asserted as to what the detective said." The court remarked "[S]he didn't say specifically what the detective said," and overruled the objection.

We agree. Officer Wyche did not provide testimony about an out-of-court statement made by the detective. Rather, she clarified what she wrote in the incident report. As such, her response was not hearsay. In addition, even if the officer had repeated the detective's statement, the statement was not offered to prove the truth of the matter asserted. We hold the trial court did not err in admitting Officer Wyche's testimony in response to her impeachment on direct examination.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.