UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0769

September Term, 2014

IN RE: CONNOR P.

Meredith,
Friedman,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: July 21, 2015

In this juvenile delinquency case, appellant, Connor P., was charged in the Circuit Court for Cecil County with committing an act that would constitute second degree rape if committed by an adult. Following an adjudicatory hearing, the court determined that Connor had violated § 3-304(a)(1) of Maryland's Criminal Law Article, and found him to be delinquent.

In his timely appeal to this Court, Connor challenges only the sufficiency of the evidence. Finding the evidence sufficient, we shall affirm the adjudication of the juvenile court.

BACKGROUND

In the State's case, 16 year-old complainant, Stephanie R., testified that she met Connor, then age 15, during the autumn of 2013 at the Rockford Center, where both were receiving treatment. They soon began dating. Their relationship was both good and bad, in light of Connor's tendency to be controlling. He would accuse her of cheating and look through her cell phone. They would often break up, but get back together again. Stephanie testified that it was difficult for her to testify in the hearing because she still really cared about Connor, but recognized her obligation to be truthful.

Prior to the incident resulting in the charges against Connor, they had consensual sexual intercourse on more than one occasion, after which Stephanie became concerned that she may be – or could become – pregnant. On February 20, 2014, the three-month anniversary of their relationship, they had a date. Stephanie testified that she expressly told Connor that she did not want to have sex with him that day. Together with his best friend,

Eric, the group went to Connor's house where they watched a movie in his bedroom. Connor's mother and younger sister were downstairs at the time.

Eric left after the movie, and Stephanie stayed with Connor, lying on his bed while they watched a movie on television. They began kissing, then he got on top of her. Stephanie testified as follows:

> We were kissing, and we were just in the moment, and I just couldn't stop, and we both pulled my pants down, and we started having sex, and I said "stop" because he knew I didn't want to, and I said, "no, get off."

She repeated her verbal command to stop and get off about "five to ten times," but did not physically resist. Connor did not say anything, but just continued for about ten minutes. Thereafter, she just wanted to go home. Connor ordered a pizza for them to eat, after which she called her father to come pick her up.

The following day, Stephanie began receiving text messages from Connor, in which he repeatedly stated:

> Babe im so ***sorry for raping you*** i know you didnt want to and ***i forced you*** I feel so bad babe it wont ever happen again I feel so bad. (sic)

(Emphasis added). In her undated text response, Stephanie told him, "Connor, no. I'm done . . . you hurt me so bad I can't do this anymore. . . ." Stephanie testified that in another text message, received about a week later while she was at her house with some friends, appellant accused her of cheating, to which she responded that "it doesn't matter what matters is you hurt me you raped me and you don't even care." Connor texted back: "I SAID IM SORRY AND IM SORRY JUST CALL ME LATER!!!!!"

Stephanie testified that she had not planned to report the rape. However, on the day after the incident, Connor called her, and she placed the call on speaker phone, as usual, while her best friend Kaylae L. was present. During this phone call, Connor said to Stephanie: "I am ***sorry for raping you.***" (Emphasis added.) She testified that it "just was really hard" but she was not saying anything to him. A few weeks later, her friend Kaylae reported the rape to a high school guidance counselor, who initiated the investigation.

Kaylae testified that she was Stephanie's best friend for two or three years, and had been living at her house for several months. After school on February 21, 2014, both were in the kitchen when Stephanie received a phone call from Connor. As usual, it was placed on speaker phone. When Kaylae heard him say, "I am sorry for raping you," she "took a double take" and looked at Stephanie in a funny way, as if to say, "are you kidding? . . . that's not something to kid about." Stephanie promptly ended the call and then told Kaylae what had taken place the previous night.

Kaylae testified that Stephanie described how she and Connor had been in a room, just "doing stuff," but when she told him she wanted him to stop and told him to get off her, he wouldn't listen, so she scratched him. Kaylae also saw his text messages to Stephanie in which he apologized for "raping you." Kaylae testified that since the incident, her friend Stephanie seemed a lot more depressed.

Detective Lindsey Ziegenfuss of the Elkton Police Department, Criminal Investigation Department, testified that she arrested Connor in March 2014, after receiving

information from Stephanie. During a consensual audio-recorded interview, Connor told her that he did have sex with Stephanie several weeks ago in his bedroom, during which he got on top of her, she pulled down her own pants, and they started having sex for about five minutes. He told her that he did not ejaculate and he got off Stephanie when she told him to stop. He said that after the sex, they both went downstairs and watched a movie. Stephanie seemed fine, then she left. The following day, he said she acted weird and totally different.

Asked why Stephanie would claim that he raped her, Connor told Ziegenfuss "I guess I felt – I guess she felt like I did." When she asked Connor if Stephanie had told him she did not want to have sex anymore, he responded "yeah, she said it the day I supposedly raped her, but then [we] had sex." He explained to the detective that "I guess we got caught up in the moment or something." When asked what made him stop, Connor told the detective that it was because she told him to stop, so he got off her. He said Stephanie "felt like I was overpowering her."

When asked if he had raped Stephanie or if she was lying, he stated, "I feel like she feels like she was raped." When asked to explain his text messages in which he apologized to Stephanie for raping her, Connor said he really couldn't explain it, but was just going to apologize because she felt like she was raped. When Ziegenfuss told him that was not something she would say unless it were true, he did not respond.

Connor's 11-year-old sister testified that after coming downstairs that night, Stephanie did not appear to be upset, but sat on the couch with Connor and kissed his neck, leaving a mark. They all ordered a pizza and then Stephanie left.

Based upon the totality of the evidence before it, the juvenile court concluded that Connor had committed the acts constituting second degree rape and found him to be delinquent. This appeal followed.

DISCUSSION

Appellant argues that the evidence was insufficient to sustain the court's finding that he was involved in a second degree rape, because the State failed to prove the essential element of force. He contends that he and Stephanie began "in the moment" by mutually kissing and her pulling down her pants, which led to his just being unable to stop. Although Stephanie said "no" several times, she did nothing to physically resist, and there was no evidence of any fear on her part or any threats which would lead to an objectively reasonable fear.

The State maintains that it produced sufficient evidence, both direct and circumstantial, to sustain the juvenile court's finding beyond a reasonable doubt. Contrary to his assertion, the State argues, the record established that Connor used actual force, despite the fact that Stephanie repeatedly resisted his advances only verbally. Well aware of his use of force, Connor contacted the victim by both text message and phone call in

which he repeatedly communicated that he was "sorry for raping you" and "I know you didn't want to and I forced you."

When this Court is faced with a challenge to the sufficiency of the evidence in a juvenile delinquency case, we apply the same evidentiary standard of review as in criminal cases. *In re James R.,* 220 Md. App. 132, 137 (2014). The delinquent act, like the criminal act, must be proven beyond a reasonable doubt. *In re Timothy F.,* 343 Md. 371, 380 (1996). In reaching our conclusion of sufficiency, we determine "'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.'" *In re James,* 220 Md. App. at 137 (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original)).

We review the case on both law and evidence, giving "due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). Deferring to this unique opportunity of the fact-finder, "'it is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case.'" *State v. Mayers,* 417 Md. 449, 466 (2010) (quoting *State v. Albrecht,* 336 Md. 475, 478 (1994)). Absent clear error or an abuse of discretion, we will not disturb the judgment of the hearing court. *In re Elrich S.,* 416 Md. 15, 30 (2010); *accord, In re James,* 220 Md. App. at 137-38 (rejecting argument that record was insufficient to support any inference that he employed force to compel the victim to engage in intercourse).

The delinquency petition charged acts that would constitute the crime of second degree rape if committed by an adult. Rape in the second degree is proscribed by Section 3-304 of Maryland's Criminal Law Article in relevant part as follows:

> (a) *Prohibited.* – A person may not engage in vaginal intercourse with another:
> (1) by force, or the threat of force, without the consent of the other[.]

Md. Code Ann., Crim. Law § 3-304(a)(1) (2002, 2012 Repl. Vol.).

Connor argues that the State failed to establish sufficient evidence of force, or the threat of force, which is essential to sustain a conviction for this offense. The Court of Appeals has established a definition of force in the context of rape as follows:

> Force is an essential element of the crime and to justify a conviction, the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety. But no particular amount of force, either actual or constructive, is required to constitute rape. Necessarily that fact must depend upon the prevailing circumstances. . . .[F]orce may exist without violence. If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim – having regard to the circumstances in which she was placed – a real apprehension, due to fear, of imminent bodily harm, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.

Hazel v. State, 221 Md. 464, 469 (1960); *Accord, State v. Rusk,* 289 Md. 230, 242 (1981); *See also, State v. Baby,* 404 Md. 220, 269 (2008), in which the Court of Appeals held that "a woman may withdraw consent for vaginal intercourse after penetration has occurred and that, after consent has been withdrawn, the continuation of vaginal intercourse by force or the threat of force may constitute rape."

Based upon standards long-recognized by Maryland courts, some degree of resistance by the victim is "necessary to establish the absence of consent." *Hazel,* 221 Md. at 469. No particular test of resistance exists because the absence of consent "must depend on the facts and circumstances in each case." *Id.* at 470. "There is, however, a wide difference between consent and a submission to the act. Consent may involve submission, but submission does not necessarily imply consent." *Id.* at 470.

Appellant compares his case to *Goldberg v. State,* 41 Md. App. 58, 59 (1979), in which the complainant was persuaded to accompany Goldberg to his home by his claim that it was a "studio" and that she was an "excellent prospect to become a successful model." This Court found insufficient evidence of force or the threat of force to sustain the defendant's second degree rape conviction, concluding as follows:

> Without proof of force, actual or constructive, evidenced by words or conduct of the defendant or those acting in consort with him, sexual intercourse is not rape. This is so even though the intercourse may have occurred without the actual consent and against the actual will of the alleged victim. Thus it is that in the absence of actual force, unreasonable subjective fear of resisting cannot convert the conduct of the defendant from that which is non-criminal to that which is criminal.

Id. at 69 (footnote omitted). Based upon the evidence before the court in the case *sub judice,* we consider *Goldberg* to be inapposite.

In *Mayers, supra,* 417 Md. at 474-76, the petitioner was convicted of second degree sexual assault and related offenses, but argued there was insufficient evidence of force, verbal threats, or any physical injury by the victim. In its rejection of his argument that his

conviction should be reversed based upon a comparison to *Goldberg,* the Court of Appeals wrote:

> [In *Goldberg*] there was nothing in the record demonstrating that the victim offered any resistance and the prosecuting witness did not threaten her in any way. In contrast, however, in the present case, [the complainant] resisted both verbally, saying "no" over and over again, and also physically, by pushing Mayers's hands away from her breast and vagina, while experiencing fear that Mayers would force her to perform fellatio on him or that she would contract a sexually transmitted disease in the absence of a condom.

Id. at 476.

Similarly, "[a]lthough the complainant's resistance was not as strenuous as was the victim's in *Mayers,*" in *In re James, supra,* we concluded that there had been sufficient evidence to permit the juvenile court, "sitting as the trier-of-fact, to find that appellant exercised 'force, or the threat of force,' and that [the victim] did not consent to the intercourse." 220 Md. App. at 145.

Evidence of the parties' post-incident conduct is often considered relevant to a defendant's consciousness of guilt. *Parker v. State,* 156 Md. App. 252, 271 (2004) (prompt hearsay statements by victim regarding rape were admissible). Likewise, a victim's "mood and actions following the (alleged) rape demonstrated, albeit circumstantially, that [the victim] had not engaged in consensual sex with her ex-boyfriend." *Parker,* 156 Md. App. at 273. Similar to the case *sub judice,* the evidence in *In re James* included apologies for acting like a "monster" after the act via both text message and phone call, which he reiterated in a recorded phone call. 220 Md. App. at 135, 145.

The record before us established that Connor used actual force when having intercourse with Stephanie, who repeatedly resisted his advances. In addition to telling him earlier that she did not wish to engage in sex, she told him "no" and "get off of me" once he began, and repeatedly told him "no – get off" as he continued for several minutes. Based on his words to the police, she apparently "felt overpowered" by him. The following day, Connor sent Stephanie two text messages in which he expressly apologized for "raping" her, knowing he had "forced" her to have sex against her will. In addition, well aware that she was upset by his actions, he also apologized for "raping you" in the phone call on February 21, 2014. The totality of the record before the juvenile court, sitting as trier-of-fact, was sufficient to permit a conclusion that Connor had committed the delinquent act of second degree rape.

We affirm the judgment of the juvenile court.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED;
COSTS TO BE PAID BY APPELLANT.