Circuit Court for Baltimore County
Case No. 003-K-17-000724

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 202

September Term, 2018

DARRELL MANSUR WILSON

v.

STATE OF MARYLAND

Graeff,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: May 17, 2019

Darrell Mansur Wilson, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore County, of first-degree assault and sentenced to twenty-five years' imprisonment. He raises the following four[1] questions on appeal, which we have slightly rephrased:

I. Did the trial court err in permitting the victim to testify about appellant's alleged post-assault "bad acts"?

II. Did the trial court err during closing argument by precluding defense counsel from relating the defense witness's testimony?

III. Did the trial court err when it advised appellant that his prior conviction for second-degree murder could be used to impeach him should he choose to testify?

IV. Did the trial court err in denying appellant's motion for judgment of acquittal?

For the reasons that follow, we shall affirm.

FACTS

The State's theory of prosecution was that on September 25, 2016, appellant hit Sarah Cox with a handgun, fracturing the bones in her face. Ms. Cox and a Baltimore City police officer testified for the State. The defense theory was that Ms. Cox was not credible. The defense presented one witness who testified about a conversation she had with Ms. Cox several months after the assault. Viewing the evidence in the light most favorable to the State, the following was established.

Ms. Cox testified that she and appellant had been friends for many years, and about

[1] Appellant originally raised five questions on appeal but filed a line dismissing one of the allegations of error.

two to three weeks before the assault, they had a sexual encounter. From that time until the assault, appellant would bring his personal belongings to her apartment in Essex and leave them there, despite being told not to do so.

On September 25, appellant told Ms. Cox that he would leave and began gathering his belongings in her apartment. She left to pick up her five-year-old son and when they arrived home, appellant was still in her apartment. He appeared very angry and screamed at her, "Oh, you're smoking cigarettes. What do you take me for, a clown?" He then struck her on the left side of her face causing that side to "cave" in, and blood "started gushing" onto herself and her son, who had rushed to her side. Ms. Cox noticed a pistol in appellant's hand. Appellant then pushed Ms. Cox and her son onto the couch, placing his hand with the pistol over her mouth and his other hand over her son's mouth. He repeatedly told them to "Shut the 'F' up. Don't let the police come." For the next forty-five minutes, appellant beat Ms. Cox with his hands until she finally convinced him that she needed to go to the hospital.

Appellant dropped off Ms. Cox's son at her mother's house and then drove her to the hospital. While at the hospital, appellant repeatedly came in and out of the hospital room and told her not to talk to the police, threatening "it's going to be much worse." Too scared to tell the hospital personnel what had happened, Ms. Cox told them that she was beaten by someone she did not know. Ms. Cox was treated for multiple facial fractures, a subconjunctival hemorrhage, and a facial laceration.

Ms. Cox testified that appellant kept close to her after the assault, repeatedly telling her that if she told the police, he would hurt her. On October 4, appellant left her apartment

and, seizing the opportunity, she went to her mother's house in Baltimore. Appellant showed up at the house later and began beating on the door, yelling: "B,' come outside. . . . You're running. You think that you're hurt now, you're going to get hurt a lot more if [you] don't open the door." Ms. Cox refused to open the door and called the police. About the time the police arrived, she answered a cell phone call from appellant, who had since left and had been calling her repeatedly. She placed the call on speaker phone and appellant said, among other things: "You cannot hide behind the police. The police cannot save you. You think you're hurt now, how much worse do you think it could be?" The responding police officer testified that he heard appellant say, among other things, "Yeah, I'm going to kill you, [expletive]."

On October 6, Ms. Cox had facial surgery that included the insertion of implants. Pictures of her face a few days before, on the day of, and after surgery were admitted into evidence. Several text messages appellant sent to her shortly before and after the surgery were also admitted into evidence. Additionally, four voicemail messages appellant left for Ms. Cox shortly after her surgery were admitted into evidence. In these voicemail messages, appellant repeatedly referred to Ms. Cox as a "rat" and threatened to kill her. Appellant also admitted to beating her, saying: "Yeah, I know I'm wrong for putting my hands on you, but you's a dumb [expletive]. You deserved to get the [expletive] beat out you 'cause you is a dummy. . . . I beat the [expletive] out you 'cause you -- cause (indiscernible) you's a stupid, lying [expletive]."

On October 15, three weeks after appellant attacked Ms. Cox, she reported the assault to the police. Ms. Cox testified that the assault rendered the left side of her face permanently numb, and she is currently going blind in her left eye.

Theresa Bunk, appellant's child's mother, was the sole defense witness. She testified that Ms. Cox initiated a conversation with her at a prior court hearing, and that the two talked about Ms. Cox accepting money in exchange for not testifying at appellant's trial. The State impeached Ms. Bunk with a 2005 conviction for possession with intent to distribute a controlled dangerous substance and a 2008 conviction for distribution of a controlled dangerous substance. In rebuttal, Ms. Cox testified that she never asked for money in exchange for not testifying. We shall provide additional facts as necessary.

DISCUSSION

I.

Appellant first argues that the trial court erred in admitting "bad acts" evidence. Appellant also argues that the trial court erred in denying his motion for a mistrial regarding Ms. Cox's testimony that he broke her windows. Appellant's arguments lack merit.

We generally review a trial court's decision to admit evidence under a two-step analysis. *Smith v. State*, 218 Md. App. 689, 704 (2014). We first determine whether the evidence is relevant. *Id*. This is a question of law that we review *de novo. Id*. Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. After determining that the evidence is relevant, we then determine whether the lower court abused its discretion by admitting relevant evidence because it was unfairly

prejudicial, led to "confusion of the issues, [] misle[d] the jury, or [was outweighed] by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Whether evidence is "unfairly" prejudicial is not judged by whether the evidence hurts one's case but whether it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013).

Md. Rule 5-404(b) governs admission of other crimes, wrongs, or acts, and provides:

> Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

See also Hurst v. State, 400 Md. 397, 406-07 (2007) (stating that, although other crimes evidence is generally not admissible in Maryland, it may be admissible if the "evidence is substantially relevant to some contested issue in the case and is not offered to prove guilt based on propensity to commit crimes" (citing *Harris v. State*, 324 Md. 490, 496-97 (1991))). A three-part analysis is required before other crimes evidence is admitted. *Id*. at 408. First, the court must determine whether the evidence fits into one or more of the exceptions provided in Rule 5-404(b). Second, it must be shown by "clear and convincing" evidence that the defendant engaged in the alleged other crimes. *Id*. Third, the court must find that the probative value of the evidence outweighs any unfair prejudice. *Id*.

1. Admissibility of Prior Bad Acts

Prior to trial, defense counsel moved in limine to preclude the State from

introducing evidence that, after appellant banged on Ms. Cox's mother's door, the State filed fourth-degree burglary charges against him.[2] The court granted the motion, stating: "I agree with you there's to be no testimony about a fourth-degree burglary[.]"

During the State's direct examination of Ms. Cox, the State asked her about appellant's actions when she went to her mother's house on October 4, 2016. The following colloquy then occurred:

> [THE STATE]: All right. And did he -- well, what happened when he got to your mother's house?
>
> [THE WITNESS]: *When he got to my mother's house, he was beating on the door profusely trying to get in. So I was so shaken and petrified --*

(Emphasis added). Defense counsel objected, arguing that the testimony "concern[ed] matters we discussed in pre-trial motions." The following bench conference ensued:

> [DEFENSE COUNSEL]: She's describing a breaking and entering attempt, at least an attempted burglary. That's exactly what we were not to discuss before the jury.
>
> THE COURT: Well, I said we weren't going to talk about [the] charge. We're not going to talk about the fact that he was arrested. I don't think that anyone is going to leap from his banging on the door to it's a first-degree burglary.

After the bench conference, the following testimony was elicited:

> [THE STATE]: He -- he was beating on the door and what else?
>
> [THE WITNESS]: Yelling and screaming, threatening.
>
> [THE STATE]: Do you recall what he was saying?

[2] The State dropped the burglary charge in a separate case.

[THE WITNESS]: Telling me, "B," come outside. Like he -- he was telling me to come outside, why'd I leave, he was just trying to get to me. Then repeatedly saying, You're running. You think that you're hurt now, you're going to get hurt a lot more if I don't open the door.

On appeal, appellant argues that the evidence that he was "beating on the door" was erroneously admitted "bad acts" evidence that impugned or reflected adversely on his character because it suggested he committed an attempted burglary.

Contrary to appellant's argument, the act of banging on the door is not the same as committing the crime of attempted burglary. The crime of attempted burglary requires, at the very least, that a person attempt to break and enter the dwelling/storehouse of another. *See* Md. Code (2002, 2012 Repl. Vol.), § 6-205 of the Criminal Law Article ("CL") (describing fourth-degree burglary). Although Ms. Cox initially stated that appellant "was beating on the door profusely trying to get in," she immediately clarified that appellant wanted her to open the door and "come outside." In context, we fail to see how Ms. Cox's testimony equated to evidence of an attempted burglary. Moreover, we note that the trial court's ruling on appellant's motion in limine only precluded any reference to the criminal *charges* for fourth-degree burglary. Ms. Cox's testimony did not violate that ruling. In addition, we do not believe that under the circumstances presented, appellant's act of banging on the door constituted a bad act within the meaning of the rule. *Cf. Klauenberg v. State*, 355 Md. 528, 551 (1999) (stating that "[r]aising one's voice and poking someone in the chest alone is not [bad acts] conduct that tends to impugn someone's character").

Additionally, the evidence was admissible pursuant to Rule 5-403, which bars the admission of evidence when its probative value is outweighed by the danger of unfair prejudice. The Court of Appeals has made clear that "[i]n balancing probative value against prejudice we keep in mind that the fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403." *Burris*, 435 Md. at 392 (internal quotation marks omitted) (quoting *Odum v. State*, 412 Md. 593, 615 (2010)). "Rather, evidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Id.* (quoting *Odum*, 412 Md. at 615). Here, in opening statements, the defense emphasized the fact that Ms. Cox delayed reporting the assault. Evidence that appellant banged on Ms. Cox's mother's door and threatened her was relevant to explain why Ms. Cox delayed reporting the assault. Under these circumstances, evidence that appellant banged on Ms. Cox's door was not unfairly prejudicial within the meaning of Rule 5-403. Accordingly, the trial court did not err in admitting the testimony.

2. Motion for Mistrial

Appellant also argues that the trial court erred in denying his motion for mistrial. During the State's direct examination of Ms. Cox, she testified that

> He would not stop threatening, the voice mails did not stop, the text messages did not stop. . . . And I would have reported it immediately, but when I came out of surgery, I was on bedrest. And then I was scared to go back to my house *because every time I went back to my house, I had broken windows*, my neighbor said that they saw the Defendant --

(Emphasis added). Defense counsel objected, and the trial court sustained the objection.[3] At the ensuing bench conference, defense counsel moved for a mistrial "based on the statements . . . [that] she was scared to go back and scared to report because of broken windows, because of things from neighbors." The court denied the motion, and agreed, at defense counsel's request, to provide a jury instruction on the matter.

Appellate courts review a trial court's decision regarding a motion for a mistrial for an abuse of discretion. *Nash v. State*, 439 Md. 53, 66-67 (2014). Furthermore, "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." *Id*. at 67. "Regarding the range of a trial judge's discretion in ruling on a mistrial motion, reviewing appellate courts afford generally a wide berth." *Id.* at 68 (citing *Alexis v. State*, 437 Md. 457, 478 (2014)). "Because [a mistrial] is an extraordinary measure, it should only be granted where manifest necessity as opposed to light or transitory reasons, is shown." *Id*. at 69 (quoting *Ezenwa v. State*, 82 Md. App. 489, 518 (1990)).

Here, Ms. Cox only mentioned that she "had broken windows" once. Although she appeared to be on the cusp of suggesting that appellant was responsible for the broken windows, she did not finish her sentence because defense counsel objected. We note that the State did not solicit information regarding the broken windows. Instead, the State simply asked Ms. Cox why she reported appellant's attack three weeks later. In light of

[3] Appellant also argued in his brief that the trial court improperly admitted Ms. Cox's statement that appellant broke her windows. The transcript clearly shows, however, that the trial court sustained appellant's objections to the admission of that testimony.

the highly deferential standard of review, and the fact that a mistrial is an extraordinary remedy, we decline to disturb the trial court's denial of the motion for a mistrial.

II.

Appellant next argues that the trial court erred in sustaining the State's objection to a remark his counsel made during closing argument. In order to explain the context of the remark, we first turn to Ms. Bunk's testimony, where the following colloquy occurred:

[DEFENSE COUNSEL]:	Okay. And when you went outside to smoke, did a conversation take place?
[THE WITNESS]:	Yes.
[DEFENSE COUNSEL]:	And what was the nature of that conversation?
[THE WITNESS]:	About the case, about the money situation, about her accepting money to not come.
[DEFENSE COUNSEL]:	Okay. And who instigated that conversation?
[THE WITNESS]:	[Ms. Cox] did.
[DEFENSE COUNSEL]:	And what did she say exactly?
[THE WITNESS]:	Along the lines of if they would have dropped her off 1500 the night before, she wouldn't have showed up that day. Then she said something else about --
[THE STATE]:	I'm going to object.
THE COURT:	Sustained.
[DEFENSE COUNSEL]:	Did there -- did Ms. Cox ever suggest that she would be willing to not come to court for an exchange of money?
[THE STATE]:	Objection.

[THE WITNESS]: Absolutely.

THE COURT: Sustained.

After additional questions, the court called the parties to the bench. The court advised defense counsel that it would not permit Ms. Bunk to testify about out-of-court statements Ms. Cox allegedly made to her, absent a pertinent hearsay exception. Defense counsel responded, "Right."

Despite the trial court sustaining objections to Ms. Bunk's hearsay testimony, defense counsel attempted to rely on that testimony in closing argument. Defense counsel argued:

> [DEFENSE COUNSEL]: The explanation that makes sense of all that is that there was a lot of anger, there was a lot of confusion, a lot of emotions running high, and that [Ms. Cox] wanted something. And that's where Theresa Bunk comes in.
>
> You heard from Theresa Bunk that Sarah Cox was asking for money.
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

Appellant argues that the trial court improperly sustained the State's objection to his closing argument. In his brief, appellant cites *Holmes v. State*, 119 Md. App. 518, 523 (1998), for the proposition that "[a]n objection must be made when the question is asked or, if objectionable material comes in unexpectedly in the answer, then at that time by motion to strike." He asserts that because the State did not move to strike Ms. Bunk's testimony after the court sustained the State's objection, the trial court erred when it refused

to allow defense counsel to refer to the testimony in closing argument. Appellant's argument lacks merit.

Counsel are generally afforded wide latitude to engage in oratorical flourishes during closing argument. *Degren v. State*, 352 Md. 400, 430 (1999). "Despite this latitude, counsel may not comment upon facts not in evidence . . . ." *Francis v. State*, 208 Md. App. 1, 15 (2012). As shown above, Ms. Bunk's testimony that Ms. Cox requested money did not come into evidence because the State timely objected, and the court sustained the objections on hearsay grounds.

Here, the trial court appropriately instructed the jury: "The following things are not evidence and you should not give them any weight or consideration: Any testimony that I struck or told you to disregard, and . . . questions that the witnesses were not permitted to answer, and objections of the lawyers." Furthermore, the court specifically admonished appellant's trial counsel that Ms. Bunk's testimony on this issue constituted hearsay and would not be admitted absent an applicable exception. Appellant's counsel never proffered an applicable exception, simply responding "Right." We see no error in the court consistently excluding mention of Ms. Bunk's inadmissible testimony during appellant's closing argument.

III.

Appellant's third allegation of error stems from the trial court's discussion with him regarding his right to testify. Specifically, appellant argues that the trial court incorrectly advised him that his conviction for second-degree murder could be used to impeach his testimony should he choose to testify. In his brief, appellant cites *Jones v. State*, 217 Md.

App. 676 (2014), where the Court held that a witness generally cannot be impeached under Md. Rule 5-609 for a conviction for *attempted* second-degree murder because it is neither an infamous crime nor a crime relevant to credibility. From that proposition, appellant argues that a witness also cannot be impeached for a conviction for second-degree murder. The State argues that appellant has not preserved his argument for our review because he did not object below, but that, in any event, the argument is incorrect. Although we agree that the argument is not properly preserved, we nevertheless conclude that it lacks merit.

Md. Rule 5-609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) *the crime was an infamous crime* or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.

(Emphasis added). In *Jones*, we distinguished, for impeachment purposes, between attempted murder convictions and actual murder convictions, explaining that murder, unlike attempted murder, is a common law felony and therefore an infamous crime. *Jones*, 217 Md. App. at 705. Accordingly, *Jones* reaffirms that second-degree murder is an infamous crime and one that the State could use for impeachment. Therefore, we find no error by the trial court.

IV.

Finally, appellant argues that the trial court erred in denying his motion for judgment of acquittal. Citing *Kucharczyk v. State*, 235 Md. 334 (1964), appellant argues that we must reverse his conviction because Ms. Cox was not credible and provided inconsistent

testimony on whether appellant was the person who assaulted her. Appellant points out that Ms. Cox told the treating medical personnel that an unknown person hit her, and then she reported to the police, almost three weeks after the assault occurred, that appellant was the assailant. Appellant's argument is meritless.

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) (citing *State v. Smith*, 374 Md. 527, 534 (2003)). "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) (citation and quotation marks omitted). 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) (citations and quotation marks 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." *Scriber*

v. State, 236 Md. App. 332, 344 (2018) (quoting *Darling v. State*, 232 Md. App. 430, 465 (2017)).

Ms. Cox's purported inconsistencies—that she told treating medical personnel that she was hit by an unknown person and that it took her nearly three weeks to report the assault to the police—go to the weight of her testimony, not its sufficiency. *See Owens v. State*, 170 Md. App. 35, 103 (2006) (observing that "a witness's credibility goes to the weight of the evidence, not its sufficiency") (citations omitted), *aff'd*, 399 Md. 388 (2007). Additionally, appellant's reliance on *Kucharczyk* is misplaced because the extreme facts in that case are not present here.

In *Kucharczyk*, the Court of Appeals reversed a conviction for an unnatural and perverted sex act that was based exclusively upon the testimony of a sixteen-year-old victim, who had a full-scale I.Q. of fifty-six and who repeatedly provided conflicting answers to the same repeated question. *Kucharczyk*, 235 Md. at 336. The Court of Appeals wrote that the victim's testimony "was so contradictory that it lacked probative force and was thus insufficient to support a finding beyond a reasonable doubt of the facts required to be proven." *Id*. at 337.

The facts and reasoning in *Kucharczyk* are extremely unique. We are unaware of any criminal case in which the *Kucharczyk* reasoning has been applied since it was decided. *See Bailey v. State*, 16 Md. App. 83, 95-97 (1972) (describing the myriad situations where *Kucharczyk* does not apply and observing that it has not been applied since it was decided), *see also Pittman v. Atl. Realty Co.*, 359 Md. 513, 546 (2000) (recognizing that no Maryland appellate opinion has encountered facts justifying the *Kucharczyk* approach) and *Brown v.*

State, 182 Md. App. 138, 184 (2008) (observing that "we are unaware of any such opinion [applying *Kucharczyk*] in the intervening years between *Pittman* and this case"). Accordingly, we discern no error by the trial court's denial of appellant's motion for judgment of acquittal as the evidence was sufficient to support his conviction for first-degree assault.

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