Circuit Court for Wicomico County
Case No. 22-K-16-000493

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 213

September Term, 2018

TEVIN LAMAR DENNIS

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 7, 2019

Tevin Lamar Dennis, appellant, was convicted by a jury, in the Circuit Court for Wicomico County, of first- and second-degree rape, third- and fourth-degree sexual offense, second-degree assault, and reckless endangerment. The court sentenced him to life imprisonment, with all but 50 years suspended, to be followed by five years' supervised probation. Dennis thereafter noted this appeal, raising two issues:

> I. Whether the trial court erred in precluding defense counsel from eliciting testimony from a State's witness that the victim had failed to indicate that she knew her assailant; and
>
> II. Whether the evidence was sufficient to sustain the convictions for first-degree rape and reckless endangerment.

Because we find no error, we shall affirm.

BACKGROUND

During the evening of May 23, 2016, the victim, J.C., then a thirteen-year-old cheerleader, was practicing dance with other team members at Pemberton Fairground in Salisbury, Maryland. Upon the conclusion of practice, shortly after 9:00 p.m., she left, alone, to go to the shelter where she then lived with her mother, which was approximately 15 or 20 minutes away by foot.

She soon encountered a "group of kids," on First Street, "[j]ust playing around." Among those in that group were Dennis, as well as one of her friends, Z., who lived there.

Z. called out to J.C., who then approached the group. Because it was dark, and J.C. "was scared" to walk home by herself, she asked Dennis and his friend, "Daquan," to walk home with her. They agreed to accompany her to a Wawa market on U.S. Route 13, near J.C.'s residence.

Shortly thereafter, Daquan left, and J.C. and Dennis continued east towards her home. As they were walking along a path, Dennis "put his arm around" her. Dennis "wanted to touch" her in a private area, but she refused. She nonetheless continued to walk with him, because she "was scared actually to walk home."

At a gravel parking lot near Peninsula Regional Medical Center, Dennis grabbed J.C.'s bookbag from behind and "started . . . hitting on [her] and choking [her] and trying to pull down [her] pants." Dennis then forced her onto a car, face-first. J.C. struggled, but Dennis managed to force her onto the ground, telling her that if she told anyone, such as her mother or brother, what had happened, "he was going to kill" her. Dennis then pulled down her pants and raped her from behind, while J.C. "was just screaming" and "crying, saying let me go." Finally, she "hit him with a glass bottle and ran" home, leaving all of her belongings behind.

Upon arriving home, J.C. told her mother what had just happened, and her mother called the police. Emergency responders arrived at the shelter soon thereafter and took J.C. to Peninsula General.

Several officers from the Salisbury Police Department responded to the hospital. Two of them, Officer Steven Schmidt and Officer Erica Brightbill, spoke with J.C. While Officer Brightbill remained with the victim, Officer Schmidt returned to the crime scene, where he "located a bookbag that matched identically to what" J.C. had described, complete with torn straps. Further corroborating J.C.'s narrative, Officer Schmidt noted that the "Hello Kitty" bookbag "was located approximately three feet" from a blue vehicle.

In Officer Schmidt's words, "the scene was exactly how she described it and the bookbag was exactly how she described it to [him] in the hospital."

While at the hospital, J.C. was examined by Christianna Bull, R.N., F.N.E., a forensic nurse examiner, who later was admitted as an expert at Dennis's trial. Nurse Bull performed a physical examination of J.C. and observed "significant swelling to her" neck, as well as "some swelling or some redness to her right breast," abrasions to both her knees, and swelling to her labia. The forensic nurse examiner also collected evidence from J.C. for a sexual assault kit that was later subjected to serological and DNA testing. J.C. was further examined by a doctor, who ordered several tests, including a CAT[1] scan of her neck.

Based upon J.C.'s initial statements, Salisbury police contacted J.C.'s friend, Z. Based upon the ensuing conversation with Z., Salisbury Police Detective Jason Caputo created a photographic array, with Dennis as the target.

Upon J.C.'s discharge from Peninsula General, she was taken to an interview room at the Salisbury Police Department, where she made "a much more detailed statement." There, Office Brightbill presented the photographic array to J.C., who selected Dennis's picture as that depicting her assailant.

A warrant was issued for Dennis's arrest, and, on May 25, 2016, he was administered *Miranda* advisements and interrogated by Detective First Class Anthony Foy at the Salisbury Police Department criminal investigative interview room. According to

[1] "CAT" stands for computerized axial tomography, a method of using multiple X-rays to produce cross-sectional images of an object. *Dorland's Illustrated Medical Dictionary* 302, 1935 (32d ed. 2012).

Detective Foy, Dennis initially "denied knowing" the victim's name. Dennis further claimed that, on the evening in question, he was on West Main Street, near Sandy's One Stop, accompanied by his friend, Raquan Williams,[2] when a young girl approached him and asked him to walk home with her "because it was a late hour." According to Dennis, he and Raquan accompanied the girl as far as the Brew River restaurant, where the two men left her, and they then returned to Sandy's One Stop. Unbeknownst to Dennis, police had obtained surveillance video footage from a nearby camera that refuted his story, showing just him and the girl, "past the point of Brew River of where he said he left her."

At first, Dennis denied ever touching J.C. but subsequently changed his story, admitting that he had put his arm around her shoulder. Then, Detective Foy explained to Dennis that a sexual assault kit had been obtained from the victim, from which police could "obtain any type of DNA from the victim as evidence." As Detective Foy "explained to him what was going on," Dennis appeared to become "more uncomfortable" and "visibly nervous." Dennis then changed his story further, admitting that he had kissed the victim's neck and that "maybe she had kissed" him on the neck. Finally, when Detective Foy asked Dennis whether his DNA would be detected in the victim's sexual assault kit, he flatly denied it.

Dennis was charged, by criminal information, with rape in the first degree, rape in the second degree, sexual offense in the first degree, sexual offense in the second degree, sexual offense in the third degree, sexual offense in the fourth degree, assault in the first

[2] Viewing the evidence in a light most favorable to the State, we assume that "Raquan Williams" and "Daquan" were the same person.

degree, assault in the second degree, reckless endangerment, and false imprisonment. While Dennis was incarcerated and awaiting trial, two of his jailhouse telephone calls provided additional evidence of his guilt. In one of those calls, as related by Detective Foy, Dennis told his mother that "the police were lying"; that, during the night of the attack, he and Raquan had been at Raquan's home "all night"; and that he had not been at Sandy's One Stop. During another call, with an unidentified man, that man told Dennis "that he was going to take care of the girl for him," and Dennis replied, "multiple times," to "get that girl, man."

Ultimately, the case proceeded to a jury trial. During that trial, Teri Zerbe, a forensic scientist for the Maryland State Police who was admitted as an expert in forensic DNA analysis, testified that, to a reasonable degree of scientific certainty: Dennis's saliva and DNA were found in a sample taken from a bite mark on the victim's breast; Dennis's DNA was found in a sample taken from the victim's pubic hair; Dennis's Y-STR DNA, indicating that either he or another related male had been the source,[3] was found in a sample taken from the victim's vaginal and cervical swabs; and, finally, Dennis's Y-STR DNA was found in a sample taken from the victim's fingernails.

Dennis testified on his own behalf. Dennis acknowledged that J.C. had asked him to walk home with her, but he otherwise denied having put his arm around her, and he further denied that he ever kissed her or sexually assaulted her in any way.

[3] Ms. Zerbe explained that STR "stands for short term repeat," which are "short repeating markers" that occur throughout the entire DNA profile and are inherited from each parent. Y-STRs are inherited only from the father and are "passed from male to male," and, therefore, indicate the "paternal lineage" of a sample.

Upon the conclusion of the State's case, the court granted Dennis's motion for judgment of acquittal as to first-degree assault and false imprisonment, and then, at the close of all the evidence, it granted his motion for judgment of acquittal as to first- and second-degree sexual offense. Thus, only the counts charging first- and second-degree rape, third- and fourth-degree sexual offense, second-degree assault, and reckless endangerment went to the jury. The jury found Dennis guilty of all those charges, and the court thereafter sentenced him, for first-degree rape, to life imprisonment, with all but 50 years suspended, to be followed by five years' probation, and merged the remaining counts for sentencing purposes. This appeal followed.

DISCUSSION

I.

Dennis asserts that the circuit court erred in precluding him from eliciting testimony from a State's witness that J.C. had failed to indicate that she knew her assailant. The State counters that the court did not so err but that, in any event, any purported error was harmless.

We first set forth the context, beginning with testimony of the victim, J.C. During direct examination, J.C. testified that she had known Dennis "since [she] was little," because Dennis had been friends with her brother. Then, during cross-examination, the following occurred:

> [DEFENSE COUNSEL]: Ms. [C.], about what time did you say all of this happened on May 23rd?
>
> [J.C.]: 9 or 10.

[DEFENSE COUNSEL]: Between 9 and 10? And you initially saw Mr. Dennis in a group of people?

[J.C.]: Yes.

[DEFENSE COUNSEL]: Did you have occasion to talk to him at that point?

[J.C.]: No, because I don't know him. I know him but like I didn't know him, remember him at that time.

[DEFENSE COUNSEL]: So you knew who he was.

[J.C.]: Yeah, but I didn't speak to him.

[DEFENSE COUNSEL]: You recognized his face?

[J.C.]: Uh-huh.

[DEFENSE COUNSEL]: Okay. How many times had you seen him before this evening?

[J.C.]: Like that same day?

[DEFENSE COUNSEL]: No.

[J.C.]: Like anytime?

[DEFENSE COUNSEL]: Your entire life.

[J.C.]: I don't remember, I've known him since I was little but I don't remember how many times it could be. But I know I seen him like at the age of 13 I seen him like several times at like stores in Pemberton.

[DEFENSE COUNSEL]: So quite a few times?

[J.C.]: Yeah.

[DEFENSE COUNSEL]: Have you ever spoken to him before?

[J.C.]: I said hi to him that night because he was with my friends.

[DEFENSE COUNSEL]: With your friends. Now when you went to your friend's, what was her name again?

[J.C.]: [Z.]

[DEFENSE COUNSEL]: [Z.], yeah. And how long were you at your friend's house?

[J.C.]: Not that long, like only a couple minutes because I had to hurry up and get home.

[DEFENSE COUNSEL]: Okay. And Mr. Dennis was there, wasn't he?

[J.C.]: Yes, sir.

[DEFENSE COUNSEL]: Okay. And did you talk to him then?

[J.C.]: I said hi.

[DEFENSE COUNSEL]: At the house, at [Z.'s] house?

[J.C.]: Uh-huh.

[DEFENSE COUNSEL]: Now when you first reported this to the police you didn't tell them this, did you?

[J.C.]: They didn't ask.

[DEFENSE COUNSEL]: I'm sorry?

[J.C.]: They didn't ask.

[DEFENSE COUNSEL]: They didn't ask?

[J.C.]: Huh-uh.

[DEFENSE COUNSEL]: You just told them you were walking home and someone grabbed you and raped you?

[J.C.]: Yes.

[DEFENSE COUNSEL]: But you didn't mention, you didn't even say who the person was?

[J.C.]: I don't remember the person, my mom told me I knew him since I was little.

[DEFENSE COUNSEL]: Okay. And you didn't tell them you knew who it was at that first interview?

[J.C.]: Like I don't understand your question.

[DEFENSE COUNSEL]: And you didn't tell them that you had arranged to walk home with this person?

[J.C.]: Huh-uh.

Subsequently, during defense cross-examination of Officer Brightbill, who had responded to the emergency department at Peninsula Regional and had then spoken with J.C. about the rape, the following occurred:

[DEFENSE COUNSEL]: Okay. And did she indicate to you at any time when she told you what happened that she knew the person that had assaulted her?

[STATE]: Objection. That's hearsay.

[DEFENSE COUNSEL]: I just asked if she told her whether or not she knew him. I don't think that's hearsay, Your Honor.

THE COURT: Yeah, okay.

[DEFENSE COUNSEL]: And it's not for the truth of the matter asserted.

[STATE]: It's an out of court statement offered for what, if not for the truth of what she said.

THE COURT: Well, why don't you come up for a moment.

A bench conference ensued:

> [DEFENSE COUNSEL]: Your Honor, the victim in this case gave two what I believe are clearly conflictive statements to officers. I'm not asking the officer what she said, but in any case I'm not offering it for the truth of the matter asserted, in fact just the opposite, that I consider that it was something made up, more of a verbal act. And I think I'm entitled to discuss with these officers who took her statements that she made differing statements at differing times to differing officers.
>
> THE COURT: Well, the question you've asked is whether she did or did not identify someone, is that the question?
>
> [DEFENSE COUNSEL]: Yeah, did she tell you that she knew this person.
>
> [STATE]: I think that the proper method for that would be to confront [J.C.] about whether or not she said that specific thing, and then ask the officers if it's going to bias, but that was never asked of [J.C.]
>
> THE COURT: Uh-huh.
>
> [STATE]: She has to have the opportunity to deny it.
>
> [DEFENSE COUNSEL]: Well, the State could certainly put [J.C.] back on, but I think I'm entitled to ask the officer whether she told him something or not.
>
> THE COURT: Well, I think the rule is the person who is alleged to have made the statement has to have the opportunity to either confirm or deny or explain and then you can impeach the statement and here you're trying to skip over the first part of that.
>
> [DEFENSE COUNSEL]: Well, I did ask [J.C], you know, she made two different statements, whether or not she told the officers that, she goes, well, they never asked me[.]
>
> THE COURT: Uh-huh.

> [DEFENSE COUNSEL]: So she has sort of had her opportunity.
>
> [STATE]: You asked one general question about that.
>
> THE COURT: Yeah, I understand. I'm going to sustain the objection.

Maryland Rule 5-616(a)(1) provides that a witness's credibility "may be attacked through questions asked of the witness, including questions that are directed at . . . [p]roving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony[.]" Maryland Rule 5-616(b)(1) provides that "[e]xtrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 5-613(b)."

Maryland Rule 5-613, in turn, provides:

> **(a) Examining Witness Concerning Prior Statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> **(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

Under Rule 5-613, a party who wishes to examine a witness about her prior oral statement need not disclose it to her at that time, provided that, prior to the end of the

witness's examination, the contents of that statement and "the circumstances under which it was made, including the persons to whom it was made," are disclosed to the witness, and, moreover, she must be "given an opportunity to explain or deny it." Md. Rule 5-613(a). It is debatable, at best, that those foundational prerequisites were satisfied during cross-examination of J.C., as she was only made aware in general terms of the contents of her prior statement to Officer Brightbill.

Moreover, for extrinsic evidence of her prior (and purportedly) inconsistent statement to be admissible under Rule 5-613(b), Dennis had to establish that J.C.'s testimony was inconsistent with her prior statement and that she then "failed to admit having made" the prior statement. He failed to do so.

J.C. testified, "I don't know [Dennis]. I know him but like I didn't know him, remember him at that time." When pressed, she further explained, "I don't remember the person, my mom told me I knew him since I was little." This testimony is not necessarily inconsistent with J.C.'s purported failure to inform the police that she knew her assailant. And, in any event, J.C. did not "fail[] to admit having made" her prior statement to Officer Brightbill. Given the defense's failure to satisfy the requirements of Rule 5-613(b), we conclude that the circuit court did not err in excluding extrinsic evidence of J.C.'s prior (and purportedly) inconsistent statement.

Furthermore, we agree with the State that, even if the court had so erred, any error would have been harmless beyond a reasonable doubt. For one thing, defense counsel *was* able to impeach J.C. with her initial failure to inform the police that Dennis had been her assailant, minimizing any effect of the claimed error. And, more importantly, any

purported error was utterly insignificant within the context of the case. There was overwhelming forensic evidence pointing to Dennis's guilt: his DNA was detected in a sample of J.C.'s pubic hair; DNA sharing the same Y-STR profile as his was found in vaginal and cervical swabs, as well as fingernail scrapings, taken from J.C.; and his saliva and DNA were detected in a sample taken from a bite mark found on J.C.'s breast. Other evidence corroborated J.C.'s account, including the recovery of a "Hello Kitty" backpack, complete with torn straps, in a parking lot where J.C. said that she had been attacked,[4] as well as Nurse Bull's testimony about the "abrasions" on J.C.'s knees, which were consistent with her testimony that Dennis had taken her backpack, pulled down her pants, thrown her to the ground, and penetrated her from behind. Dennis's steadfast denials, before and during trial, that he had had sexual contact with J.C., despite the overwhelming forensic evidence, were strong circumstantial evidence of his consciousness of guilt. Yet more circumstantial evidence of his guilt was provided by jailhouse telephone calls he made, while incarcerated and awaiting trial. In one of those calls, he denied having been with J.C. at all on the night in question, contrary to his testimony at trial. In another call, he requested to a friend that he "get that girl," once again indicating his consciousness of guilt. And, finally, the jury deliberated a mere 20 minutes before returning a verdict of guilty of all charges presented to it. *See Dionas v. State*, 436 Md. 97, 112 (2013) (observing that "the length of jury deliberations is a relevant factor in the harmless error analysis").

[4] Indeed, Officer Schmidt, who responded to the crime scene shortly after his initial interview with J.C. at Peninsula General, stated that J.C.'s descriptions of the crime scene and her bookbag "matched identically" with his own observations.

We conclude, on this record, that any alleged error "was unimportant in relation to everything else the jury considered in reaching its verdict" and was, therefore, harmless beyond a reasonable doubt. *Id.* at 118 (footnote omitted).

II.

Dennis contends that the evidence was insufficient to sustain his convictions for first-degree rape and reckless endangerment. As to first-degree rape, he maintains that "the State failed to prove that he suffocated, strangled, disfigured, or inflicted serious physical injury on J.C. or that he placed or threatened to place her in fear of imminent death, suffocation, strangulation, disfigurement, or serious physical injury." Similarly, as to reckless endangerment, Dennis asserts that "the State failed to establish that he created a substantial risk of death or serious physical injury to J.C."[5]

In reviewing a claim that the evidence is insufficient to sustain a conviction, we must determine "whether, after considering 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

We begin with Criminal Law Article ("CL"), § 3-303, the first-degree rape statute, which, at the time of the offenses,[6] provided that a person may not "engage in vaginal intercourse with another by force, or the threat of force, without the consent of the other,"

[5] These claims are properly before us, as Dennis made a particularized motion for judgment of acquittal, raising these contentions.

[6] In 2017, after the offenses at issue in this case, the General Assembly amended CL § 3-303 by, in effect, combining it with CL § 3-305, the former statute proscribing first-degree sexual offense. 2017 Md. Laws, ch. 161, 162.

and, in so doing, "suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime[.]" Dennis concedes that the evidence was sufficient to establish second-degree rape, that is, forcible non-consensual intercourse, but he maintains that the evidence of an aggravating element (in this case, to "suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime," CL § 3-303(a)(2)(ii)) was insufficient. We disagree.

J.C.'s testimony that, during the rape, she had been choked, and Nurse Bull's testimony that, later the same evening, she had observed "significant swelling to" J.C.'s neck, were, in our view, sufficient evidence of strangulation, an aggravating element that elevates second-degree rape to first-degree rape. First, a definition of "strangle" is "[t]o constrict painfully (the neck or throat)." 16 *Oxford English Dictionary* 845 (2d ed. 1989). In this sense, "strangle" and "choke" are largely synonymous. *See Roget's Int'l Thesaurus* 727 (6th ed. 2001). Certainly, from this evidence, a reasonable jury could conclude that J.C.'s throat had been "painfully" constricted, given the visible wound she had suffered, which prompted emergency room physicians to perform a CAT scan because of their concern that J.C. may have suffered internal injuries.

Second, the acts in CL § 3-303(a)(2)(ii) are listed in the disjunctive, which means that the State is required to prove only one of those acts. We expressly reject Dennis's contention that the choking must have been such as to cause disfigurement or serious physical injury, because that interpretation of CL § 3-303(a)(2)(ii) would require the State to prove both strangulation and either disfigurement or the infliction of serious physical

injury, rendering superfluous the term "strangle." We hold that the evidence was sufficient to sustain his conviction of first-degree rape.

As for reckless endangerment, Dennis raises a similar argument, namely, that there was no evidence that, as a result of having been choked, J.C. was subjected to a risk of serious physical injury, because "her airway was not restricted, she did not faint or lose consciousness, and she did not have lasting pain or signs of injury apart from the swelling to the soft tissue of her neck."

We look to CL § 3-204(a)(1), which states that a person "may not recklessly . . . engage in conduct that creates a substantial risk of death or serious physical injury to another[.]" In turn, CL § 3-201(d) defines "serious physical injury" as physical injury that "creates a substantial risk of death" or "causes permanent or protracted serious . . . disfigurement," "loss of the function of any bodily member or organ," or "impairment of the function of any bodily member or organ."

An alternative definition of "strangle" is "[t]o kill by stoppage of breath; to smother, suffocate, choke." 16 *Oxford English Dictionary* 845. We think it plain on its face that a reasonable jury could conclude that Dennis, by "choking" J.C., recklessly subjected her to a substantial risk of death or serious physical injury. Just because J.C. survived the attack in apparent good physical health is fortuitous, but that happenstance does not mean that Dennis's conduct did not subject her to a substantial risk of serious physical injury or even death. In other words, although the choking did not actually result in serious physical injury, it created a substantial risk of such injury, which was all the State was required to

prove. We hold that the evidence was sufficient to sustain his conviction of reckless endangerment.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.