Circuit Court for Montgomery County
Case No. 132872C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 840

September Term, 2018

JOVAN A. HIBBERT

v.

STATE OF MARYLAND

Meredith,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 29, 2019

Appellant Jovan A. Hibbert was convicted in the Circuit Court for Montgomery County of human trafficking by force and benefitting financially from human trafficking. He presents the following questions for our review:

> 1. Did the trial court err by admitting videos recovered from A.M.'s cell phone? [1]
>
> 2. Did the trial court err when it admitted testimony that appellant hit A.R. sometime after the alleged offenses?

Finding that any error was harmless beyond a reasonable doubt, we shall affirm.

I.

On May 21, 2018, appellant was convicted of human trafficking by force and benefitting financially from the same. The court sentenced him to a term of incarceration of ten years for human trafficking and ten years, concurrent, for benefitting financially.

We set out the following facts as established at trial. In October 2017, security cameras recorded appellant's distinctively marked Mercedes Benz dropping off A.R. and A.M. at a Motel 6 in Maryland. The vehicle had a diamond decal and a decal with the text "cross-country diamonds." In the days that followed, sixteen men entered the women's room and left after short periods of time. Officer Robert Johnson, a police expert, testified that the behavior was consistent with prostitution. A few days later, appellant drove the same vehicle into another motel's parking lot. While in the parking lot, he changed into a red velvet sportscoat and red velvet shoes—clothing the Officer Johnson described as

[1] As is our custom, we shall refer to the victims by their initials.

"stereotypical pimp attire." Appellant then drove to the Motel 6 and picked up A.R. and A.M.

The following day, appellant remained outside the motel room, observing it. A customer entered the room and exited seven minutes later. The customer admitted later to the police that he paid A.M. for sex after seeing a Backpage.com[2] advertisement for her services as a prostitute. Minutes after the customer departed, appellant returned and picked up A.M. They drove away from the motel, and the police arrested them shortly thereafter.

During their investigation, the police discovered Backpage.com advertisements for A.M. and A.R. The advertisements included a diamond logo and the monikers "diamond's girls" and "Sophia's diamonds." Officer Johnson testified that "Diamond" was likely appellant's "pimp name," as he had the moniker written on his vehicle and posted photographs of himself on a social media account under the name "cross-country diamonds." On that account, appellant posted two videos of himself in which he referred to himself as a pimp and described the ways in which he manages "hoes." In October 2017, appellant sent A.R. a video in which he filmed A.M. wearing a leash while he threatened her for disobeying him in his role as her pimp. The police recovered the videos from A.M.'s cell phone, and the court admitted all three videos at trial.

Although she told the police officers who arrested her that appellant was her boyfriend rather than her pimp and that she prostituted herself independently, A.R. testified

[2] Officer Robert Johnson testified that Backpage.com is a website that allows individuals to advertise goods and services for sale. He testified that it is used frequently for prostitution advertisements.

at trial that she discovered appellant through social media and worked as a prostitute for him. She explained that she and A.M. gave the money they earned as prostitutes to appellant, with whom the women did not have any romantic relationship. Pursuant to appellant's objection, the prosecutor did not inquire on direct examination as to whether appellant ever hit A.R. On cross examination, appellant's trial counsel asked A.R. (in the context of questions about October 2017) if appellant hit her, and she replied that he did not. On re-direct examination, the court allowed the prosecutor to inquire into the two previous incidents in which appellant hit her, finding that appellant "opened the door" on cross examination. She testified that after she left Maryland in October 2017, appellant hit her while she was in Texas "for not doing what [she] was supposed to do." She then testified that appellant hit her in Colorado "[w]ith a pistol."

As set out above, the jury convicted appellant, and this timely appeal followed.

II.

Appellant argues that the circuit court erred in admitting the two videos from social media in which he bragged about his status as a pimp. He argues also that the court erred in admitting testimony that he hit A.R. with a pistol.

Beginning with the videos, appellant argues that the videos are disjointed collections of separate clips that have been edited. He argues that because the prosecutor did not offer testimony regarding the type of equipment used to film the clips, the videos' general reliability, and "the process by which it was focused," the court lacked the facts necessary to admit the videos under the "silent witness" theory of admissibility. He argues that

because he used profane, racially-charged language and confessed to being a pimp in the videos, their admission could not be harmless.

Turning to A.R.'s testimony that he hit her with a pistol, appellant presents three arguments against admissibility. He argues first that because his hitting A.R. was a prior bad act, the circuit court was required to conduct a three-step analysis under *State v. Faulkner*, 314 Md. 630, 634 (1989), and the court's failure to conduct the analysis rendered the evidence inadmissible. Second, appellant asserts that the court erred in admitting the evidence under the "opening the door" doctrine because the appropriate doctrine was "curative admissibility," a more limited doctrine that allows the admission of inadmissible evidence in response to the admission (without objection) of other inadmissible evidence. Under either standard, he contends, the evidence that he hit A.R. "with a pistol" was disproportionate to his offering A.R.'s testimony that he never hit her. Because it was disproportionate, he argues that it was inadmissible. He concludes the error was not harmless because it was strong evidence that he committed human trafficking "by force."

The State argues that the two videos were authenticated properly and that appellant "opened the door" to testimony that he hit A.R. with a pistol. Regarding the videos, the State emphasizes that appellant does not contest that he was the man in the videos and that the State did not edit the videos in any way. It argues that because the videos were found on A.M.'s cell phone, showed appellant clearly, were posted also on appellant's social media account, and were not edited by the police, there was sufficient evidence for a jury to conclude that the videos were what the prosecutor said—videos of appellant boasting about his status as a pimp. The State asserts that the fact that someone compiled the videos

by connecting clips from multiple videos—before the police discovered them—goes to the videos' weight, not admissibility.

On the issue of A.R.'s testimony, the State argues first that appellant failed to preserve the issue for appellate review. After the court allowed the prosecutor to inquire into the time or times that appellant previously hit A.R., it instructed appellant to "object to whatever [he] want[ed] to object to." Appellant objected to the State's questions on re-direct examination but failed to object to further questioning on the issue during the subsequent re-redirect examination. The State contends that appellant's failure to object to the re-redirect examination testimony precludes him from appealing the court's admission of the testimony.

Addressing the merits, the State argues that the circuit court exercised its discretion soundly in admitting the evidence. The State argues first that appellant opened the door to the testimony by asking A.R. repeatedly if appellant was a "nice guy" and whether he hit her. It notes that appellant "acquiesced" to the court's finding that the "opening the door" doctrine applied and asserts that he cannot now argue the doctrine's inapplicability. As to a *Faulkner* analysis, the State maintains that it was evident from the record that the court understood the law at issue. Regarding the proportionality of the testimony, the State argues that the testimony was proportional to the "plain implication" of appellant's cross examination—that he was a "nice guy" who had a good relationship with A.R. Assuming error arguendo, the State argues that any error was harmless, both because it was cumulative in that the court admitted without objection the same evidence and because of

the "overwhelming" evidence of appellant's guilt in the form of appellant's text messages and videos.

III.

We hold that the circuit court did not abuse its discretion in admitting the videos of appellant. Maryland Rule 5-901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." When making an authenticity determination, the court "need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Jackson v. State*, 460 Md. 107, 116 (2018). The quantum of evidence needed for admissibility under Rule 5-901(a) is slight. *Id.*

Videotapes and photographs are subject to the same authentication requirements for the purposes of admissibility. *Washington v. State*, 406 Md. 642, 651 (2008). Parties may authenticate a photograph or videotape through the testimony of a witness with first-hand knowledge or as a "silent" witness. *Id.* at 652. The "silent witness" theory of admissibility authenticates a video "as a 'mute' or 'silent' independent photographic witness because the photograph speaks with its own probative effect." *Id.* A video may be admissible "so long as sufficient foundational evidence is presented to show the circumstances under which it was taken and the reliability of the reproduction process." *Id.* In *Jackson*, the Court held that Maryland has yet to adopt any "rigid, fixed foundational requirements" for admitting evidence under the "silent witness" theory. *Jackson*, 460 Md. at 117. *Washington*, an

earlier Court of Appeals case addressing silent witness admissibility, implied that the authenticating witness *may* establish the foundational basis through testimony relative to the "type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Washington*, 406 Md. at 653.

We review a trial court's ruling on the admissibility of video evidence for abuse of discretion because "[t]he circumstances surrounding the making of the photographic evidence and its intended use at trial will vary greatly from case to case." *Dept. of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 26 (1996). An abuse of discretion occurs where "no reasonable person would take the view adopted by the court." *Metheny v. State*, 359 Md. 576, 604 (2000).

In *Jackson*, the State sought to admit surveillance video which showed the defendant making withdrawals from a bank ATM with a time stamp between 11:15–11:35 p.m. 460 Md. at 119. The authenticating witness was a bank employee who described the process he used to access the ATM video. *Id*. at 117. He testified that he accessed a recording program and opened the bank branch's cameras for the date and times corresponding to an ATM receipt. *Id*. He stated that the video introduced at trial was what he viewed when he accessed the bank's recording system. *Id.* at 119.

The trial judge recognized that "the State had sufficiently established the foundation for the video footage's authenticity, even if the video's relevance remained conditional on the rest of the State's case." *Id.* at 120 (noting that, while properly authenticated, the video was not necessarily relevant to the 11:43 p.m. transaction because it showed a time period

before the transaction). The Court of Appeals affirmed, holding that the State authenticated the video because it elicited through the authenticating witness's testimony "the process of reproduction, the reliability of that process, and whether the reproduction was a fair and accurate representation of what the witness had viewed when he submitted a request for the video footage." *Id.* at 119. The fact that the video footage did not show the transaction at issue was an issue of relevance, not authentication. *Id.* at 120.

Here, Detective Juan Marquez, an expert in digital forensic investigation who extracted the videos of appellant, testified that he copied the videos from A.M.'s cell phone to police computers. Det. Marquez testified that the police did not edit the videos in any way and that he copied from A.M.'s phone using top-of-the-line software. Detective Robin Hyatt testified that she received the videos from Det. Marquez and that the videos at trial were the ones Det. Marquez copied from A.M.'s phone.

Appellant concedes that he was the man in the videos and that the police did not edit them. He cites *Washington*, 406 Md. at 642, arguing that the videos were not authenticated properly because the police witnesses did not testify to "the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Id.* at 653. In effect, he argues that they were inadmissible because Det. Marquez did not know how the videos were compiled from separate video clips.

A trial court's authentication finding is a threshold determination and does not require exhaustive testimony bearing on technical matters if the moving party presents other foundational proof sufficient to enable the court to find that the video is what it

purports to be. *See Washington*, 406 Md. at 654–55 ("Any concerns that the defendant had regarding the surveillance procedures, and the method of storing and reproducing the video material, 'were properly the subject of cross-examination and affected the weight, not the admissibility, of the CD.'" (quoting *Commonwealth v. Leneski*, 846 N.E.2d 1195, 1199 (Mass. App. Ct. 2006))). The factors appellant cites from *Washington* were examples of the type of testimony used in authenticating videos, not an exclusive list of mandatory factors.

At trial, the court heard that appellant was the man in the video and that the police copied the video from A.M.'s phone without editing it. Appellant concedes also that the videos "appear to have been posted to a social media account associated with Appellant." There was sufficient proof for a rational jury to conclude that the videos were what they purported to be—disjointed but entirely comprehensible clips of appellant boasting about being a pimp. Unlike the video clips in *Washington*, the video here did not purport to show a chronology of events culminating in a murder. Appellant's arguments that someone edited the videos and that his words were taken out of context went to the evidentiary weight of the videos, not their admissibility. The circuit court did not abuse its discretion in admitting the videos of appellant recovered from A.M.'s phone.

IV.

We turn next to the issue of whether the court committed reversible error in admitting on re-direct and re-redirect the testimony that appellant struck A.R. with a pistol. As an initial matter, we reject the State's argument that appellant failed to preserve the

issue for appeal. The State argues that appellant waived his argument that the "opening the door" doctrine was inapplicable and waived his objection to the testimony. First, in response to his first objection to the testimony, the trial judge said during a bench conference that appellant opened the door to the testimony, and appellant's counsel replied that "you could [call it opening the door], I guess, but I don't think—." The trial judge then spoke over counsel, insisting that she opened the door, and counsel replied, "Well, then I would have a lot more questions after this." The State argues that when counsel "acquiesced" to the judge, she waived any argument that the doctrine did not apply. Second, appellant failed to object to A.R.'s testimony in a single-question re-redirect examination that appellant came to Colorado "[t]o beat [her] with a pistol." The State argues that his failure to object waived his right to appeal the admission of the testimony.

Trial counsel did not accede to the trial judge's characterization at the bench conference. When the judge told her she opened the door to the testimony, she replied that the judge "could" say she opened the door. She then began to disagree, but the trial judge spoke over her in disagreement. Rather than argue further to an obviously unreceptive judge, counsel said that if the judge admitted the testimony, she would like to re-cross examine the witness based on the new testimony. We cannot say that counsel's statements waived any argument against the doctrine's applicability.

Further, appellant did not waive his objection to the testimony itself. Counsel objected and moved for a mistrial when the prosecutor asked A.R. her first question about appellant hitting A.R. After a lengthy bench conference in which the trial judge was unreceptive to defense counsel's arguments, the trial judge told counsel to "object to

whatever [she wanted] to object to." Counsel did so, objecting five more times and moving again for a mistrial. After brief re-cross examination, the prosecutor posed a single question on re-redirect examination: "Why did [appellant] come to Colorado?" A.R. replied, "To hit me with a pistol." Appellant offered no objection.

To preserve an objection, a party must generally assert a timely objection each time the testimony is elicited. Md. Rule 4-323(a). A party should either object timely to each question or request from the judge a continuing objection to the line of questioning. *State v. Robertson*, ___ Md. ___, 2019 WL 1449748, at *12 (filed April 2, 2019). But when a party's objection is overruled, the nature of the objection is clear to the court, and further objections would be futile and serve only to "spotlight for the jury the remarks," a subsequent failure to object does not waive the objection. *Id.*

Appellant's trial counsel objected to the testimony in the first instance, arguing at a bench conference that the evidence was inadmissible. The judge was unreceptive to her arguments. When counsel insisted that she then be allowed a re-cross examination, the judge told her to object to whatever she found objectionable, pre-empting a request for a continuing objection. During re-direct examination, counsel objected to the testimony five times, requesting a mistrial when A.R. testified again that appellant hit her with a pistol. Plainly, the court knew that appellant objected to testimony about the incident in Colorado, further objections would have been futile, and continuing to object would only "spotlight" the testimony for the jury. Appellant's objection was preserved.

Turning to the merits, we shall avoid getting mired in the evidentiary distinctions between "opening the door" to evidence and "curative admissions." We also need not

address appellant's argument that the trial court erred in admitting the testimony without first conducting a weighing and balancing *Faulkner* hearing. *See Faulkner*, 314 Md. at 634–35. We shall assume *arguendo* that the trial court erred in admitting the testimony that appellant used a pistol to hit A.R. but hold that any error is harmless beyond a reasonable doubt. An error is harmless where "a reviewing court, upon its own independent review of the record, is able to declare belief beyond a reasonable doubt that the error in no way influence[d] the verdict." *Dorsey v. State*, 276 Md. 638 (1976).

The trial record shows, in videos and testimony from A.R. and Officer Johnson, that appellant took A.M. and A.R. to a Maryland motel for prostitution. Appellant coerced A.M. and A.R. into acts of prostitution. He sent text messages instructing A.M. not to eat until she earned him a certain amount of money from customers. He filmed a video depicting him holding a leash attached to A.M., telling her not to use social media without his approval, and warning her not to "talk down on" a pimp who "lead[s]" her. A.R. testified that she submitted to appellant's authority because of the "unwritten" rules of prostitution. Based upon the record before us, the arguably erroneous admission of testimony that appellant hit A.R. with a pistol in no way influenced this verdict.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.