Circuit Court for Baltimore County
Case No. 03-K-16-001647

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1031

September Term, 2017

BRIAN KEITH COOPER

v.

STATE OF MARYLAND

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

JJ.

Opinion by Raker, J.

Filed: April 22, 2019

Appellant Brian Keith Cooper was convicted in the Circuit Court for Baltimore County of second degree assault, impersonating a police officer, and extortion. Appellant presents the following questions for our review:

1. Did the trial court improperly restrict the defense's cross examination?

2. Did the trial court improperly exclude evidence of identity?

3. Did the trial court improperly order appellant to register as a sex offender?

The State concedes that the court erred in requiring appellant to register as a sex offender. Hence, we shall vacate that order. We shall affirm in all other respects.

I.

A jury in the Circuit Court for Baltimore County convicted appellant of second degree assault in violation of Maryland Code, Criminal Law Article, § 3-203,[1] impersonating a police officer in violation of Maryland Code, Public Safety Article, § 3-502(b), and extortion in violation of § 3-705(a)(2). The jury acquitted him of second degree rape. The court sentenced him to a term of ten years' incarceration for second degree assault, two years' incarceration for impersonating an officer, and ten years' incarceration for extortion, to be served consecutively. The court ordered him to register as a Tier III sex offender upon his release from incarceration.

[1] All subsequent statutory references herein, unless otherwise specified, shall be to Maryland Code, Criminal Article.

We set out the following facts elicited at trial. On February 21, 2016, appellant drove a blue Chevrolet to a street near Dundalk Avenue outside Baltimore City and picked up T.C.,[2] who was standing near the street. T.C. agreed to have sex with him for $40. Appellant drove her to a nearby dead-end street and asked her to pull down her pants. Before they had any sexual contact, he produced a "bronzish" badge and a pair of handcuffs. He told T.C. that other police officers were coming and recited *Miranda* warnings. As they stood next to his car, he asked her what she "was willing to do to stay out of jail." T.C. testified that when she replied that she was willing to go to jail, appellant bent her over his car and had non-consensual vaginal sex with her. She testified that appellant ejaculated on the ground near the car.

While appellant drove T.C. back to the place where he picked her up, he told her that his name was Officer O'Connor. When they returned to the place where appellant had picked up T.C., he permitted her to leave the car, and he drove away.

T.C. went to a hospital that night and reported that appellant had raped her. Medical records show that she tested positive for Hepatitis C. At trial, appellant asked the court during a bench conference to admit the evidence of T.C.'s Hepatitis C. Counsel told the court that "it shows a sort of callousness to go out and have sex with multiple people and knowingly have Hepatitis C," arguing that it was evidence relevant to her character and trustworthiness. When asked, he stated that he knew T.C. had Hepatitis C because her hospital record included a positive test for the disease. He told the court that he would ask

[2] As is our custom in sexual assault cases, we shall refer to the victim, T.C., and one witness, E.T., by their initials.

"on the day in question, you knew you were positive for Hepatitis C, correct, and you went out and had sex with men knowing that, correct? Just stuff like that just to put it on the record." He described the evidence as being relevant as a "current bad act." The trial court heard arguments on the issue and sustained the State's objection to the questions, refusing to admit the testimony.

The police interviewed T.C. at the hospital and surveyed the scene of the crime, where they were unable to find evidence of appellant's ejaculation or the cigarettes T.C. said he had smoked. One week after T.C.'s assault, a police officer found appellant sitting in the driver seat of a blue Chevrolet parked on the same street where T.C. said he raped her. The officer testified that when he approached the vehicle, the woman in the passenger seat of the vehicle had her head in his lap. After appellant and the woman exited the vehicle to speak with the police officer, handcuffs and a "silver" badge fell out of appellant's pants as he attempted to put them away.

T.C. identified appellant in a photo array shortly thereafter and identified him again at trial, noting that she remembered his "messed up" teeth and that he was a large man. Appellant is over six feet tall and weighs at least 250 pounds. From their investigation, the police learned that appellant is a security guard who carries handcuffs and a badge for his job. Despite his statement to the contrary, cell phone records showed that he was near the location of the assault on February 21, 2016. Lab technicians did not match appellant's DNA to the DNA samples taken from T.C. after appellant assaulted her. They established that he was not a "major contributor" to the DNA in the sample and were unable to determine if he was a "minor contributor."

The police interviewed E.T., a prostitute in the area of the assault. E.T. testified that in January or February of 2016, a man tried to rape her near Dundalk Avenue. The man weighed approximately 160 pounds. He picked her up in a car, told her that he was a police officer, and showed her a badge. He threatened to arrest her unless she had sex with him. When he tried to rape her, she stabbed him in the leg and ran away.[3] Appellant established these facts during E.T.'s direct examination, and the prosecutor confirmed on cross examination that she thought her assailant weighed 160 pounds. Appellant then asked E.T. on redirect examination "[Appellant] is not the person that you stabbed?" She replied "No," he was not. The prosecutor objected (*albeit* untimely, as the witness had answered the question), and the court sustained the objection. The prosecutor did not ask the court to strike the response from the record.

The jury acquitted appellant of rape but convicted him of assault, impersonating a police officer, and extortion. The court imposed sentence, which it later modified by ordering appellant to register as a Tier III sex offender. Appellant filed this timely appeal.

II.

Appellant presents three questions for our review. He argues first that the trial court restricted improperly his cross examination of T.C. regarding her Hepatitis C status. He makes "the narrow argument that the fact that T.C. had a communicable disease that she failed to disclose to sex partners was relevant to her character for untruthfulness." He

[3] At the time of his arrest, appellant did not have a stab wound.

argues that such conduct has an element of deceitfulness and that it "may amount to a crime," making the trial court's decision to exclude the evidence erroneous. He concludes that it could not be harmless error because T.C.'s testimony was crucial to the State's case.

He argues next that the trial court abused its discretion when it restricted his redirect examination of E.T. During redirect examination, appellant asked her if appellant was the person she stabbed, and she said that he was not. The prosecutor then objected, and the court sustained the prosecutor's untimely objection. Appellant contends that evidence of a similar crime committed in the same area and time was relevant *modus operandi* evidence of identity. As such evidence tended to show that someone other than appellant was T.C.'s assaulter, appellant argues that the trial court should have permitted his question on the issue on redirect examination. He argues that the error was not harmless because the evidence made it more likely that the jury would conclude that E.T.'s attacker, not appellant, assaulted T.C.

Third, appellant argues that the trial court erred in ordering him to register as a Tier III sex offender. Maryland requires sex offender registry for specifically enumerated sexual crimes. Regardless of the sexual nature underlying appellant's assault conviction, he was acquitted of rape. Because he was not convicted of an offense enumerated in the registry statute, appellant argues that the court erred in ordering him to register.

The State disagrees with appellant's first and second arguments but concedes that he should not be ordered to register as a sex offender. On the first issue, the State argues first that appellant failed to preserve his argument for appellate review. At trial, appellant asked the court in a bench conference if he could cross examine T.C. on the issue of her

sexual partners and Hepatitis C because it was "relevant to her character and whether or not she's trustworthy." The State argues that because he did not tell the court he planned to ask whether she failed to disclose the disease to her partners and because he failed to proffer T.C.'s answers, he did not preserve the issue for our review. On the merits, the State asserts that even if T.C. knew of her Hepatitis C status and failed to inform her sexual partners, such action was irrelevant to her credibility.

Turning to the redirect examination of E.T., the State argues that the ruling was proper and, if error, harmless. It emphasizes the trial court's discretion in controlling the scope of redirect examination and argues that appellant's question as to the identity of the man E.T. stabbed (as well as the substance of her testimony that another man attempted to rape her) was irrelevant. The State argues in the alternative that any error was harmless. First, the jury heard the answer to the question appellant asked, and because the prosecutor did not move to strike the testimony after the court sustained his objection, the jury could consider the response as evidence. Second, E.T. testified on direct and cross examination that the man she stabbed weighed approximately 160 pounds, and appellant weighed at least 250 pounds. The State argues that the jury "did not need to hear E.T. testify to the obvious" fact that her assailant was not appellant—the jury could make that determination from the testimony as to the assailant's weight, making any error harmless.

Finally, the State agrees that the trial court erred in requiring appellant to register as a Tier III sex offender upon his release because his three convictions fall outside the list of offenses which trigger registration. The State asks us to strike the registration order.

III.

We turn to appellant's argument that the trial court restricted improperly his cross-examination of T.C. on the grounds of relevancy. Appellant wanted to show that because T.C. had sex with men while Hepatitis C positive, she was not a truthful person. We cannot say the trial court abused its discretion in restricting the examination and excluding the evidence. *See Pantazes v. State*, 376 Md. 661, 686–87 (2003) (explaining the requirements and standards of review for the admission of Md. Rule 5-608(b) evidence). It appears that the trial court found that being Hepatitis C positive and having sexual contact with another does not, standing alone, affect truth and veracity. There was no evidence or proffer that T.C. knew of the diagnosis or that, even if she knew, she did not inform her partners. The substance and relevance of the testimony now complained of was not readily apparent to the trial court. We find no error. Moreover, even if error, the exclusion of evidence that a prostitute might have an undisclosed communicable disease is harmless beyond a reasonable doubt. [4]

We turn next to appellant's argument that the trial court abused its discretion in restricting his redirect examination of E.T. We disagree. Trial courts have considerable discretion in controlling the scope of redirect examination, and we do not disturb those decisions absent a clear abuse of discretion. *Daniel v. State*, 132 Md. App. 576, 583 (2000). Generally, redirect examination must be limited to matters elicited on cross examination,

[4] We note also that, except for enumerated reasons not relevant here, evidence of a specific instance of a victim's prior sexual conduct may not be offered by a defendant in a prosecution for second degree rape. Section 3-319(b).

although it is within the court's discretion to permit something new or forgotten if justice demands. *Fisher Body Div., General Motors Corp. v. Alston*, 252 Md. 51, 56 (1969).

During appellant's brief direct examination of E.T., he elicited her assailant's size and race. He did not ask any other questions regarding her assailant's identity. On cross examination, the prosecutor's first question was "So you said [E.T.'s assailant] is about 160 pounds?" E.T. answered affirmatively. Aside from that repetition of her earlier testimony, his questions related only to the location of the assault and the knife E.T. used to stab her assailant. When appellant asked E.T. on redirect examination if appellant was the person she stabbed, she answered that he was not. The prosecutor objected to the question after the witness answered, and the court sustained the objection.

Appellant wished to ask the ultimate question of the identity of E.T.'s assailant on re-direct. Arguably, the time to elicit such important testimony was during appellant's *direct* examination of E.T. But the prosecutor's first question on cross examination went to the physical size of E.T.'s assailant, a question relevant only to identity. Appellant's question, then, was probably within the scope of the cross examination.

But any error is harmless beyond a reasonable doubt because, most significantly, the jury heard the witness's answer. The witness, in response to defense counsel's question, answered "No," that the person she stabbed was not appellant. The State's objection followed the witness's answer, and the State never asked the court to strike the response, nor was the jury instructed to disregard the answer. Hence, the jury heard the evidence and could consider it. *Mack v. State*, 300 Md. 583, 603 (1984), *overruled on other grounds by Price v. State*, 405 Md. 10, 29 (2008).

Third, appellant argues that the court erred in ordering him to register as a Tier III sex offender upon his release from incarceration. A person qualifies for registry as a Tier III sex offender if he commits one of several offenses enumerated in the Code. Maryland Code, Crim. Proc. Art., § 11-701(q). The facts underlying a crime do not matter for the purposes of Tier III registry—only a conviction of an enumerated crime supports registry. *See Cain v. State*, 386 Md. 320, 338–39 (2005). When the court enters erroneously an order to register as a sex offender, the remedy is to strike the order. *State v. Duran*, 407 Md. 532, 556 (2009). Appellant's convictions for second degree assault, impersonating a police officer, and extortion are not listed in § 11-701 of the Criminal Procedure Article.

As noted, the State concedes the error. We appreciate and accept the State's concession. We shall vacate the order that appellant register as a sex offender based on his convictions in the instant case.[5]

THE CIRCUIT COURT FOR BALTIMORE COUNTY ORDER THAT APPELLANT REGISTER AS A SEX OFFENDER ON THE BASIS OF HIS CONVICTIONS IN THIS CASE VACATED. ALL OTHER JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID ONE THIRD BY BALTIMORE COUNTY, TWO THIRDS BY APPELLANT.

[5] The State notes in its brief that appellant is required to register as a Tier III sex offender based on his guilty plea for a sex offense in another case. Our opinion in this case does not affect that court's registry order.