UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1161

September Term, 2014

BRIAN MAYE

v.

STATE of MARYLAND

Wright,
Reed,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: October 5, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Brian Maye, appellant, was charged with second degree rape, third degree sex offense, and second degree assault. A jury sitting in the Circuit Court for Baltimore City convicted him of third degree sex offense and found him not guilty of the other charges. The court sentenced appellant to six years imprisonment.

On appeal, appellant contends (1) the evidence is legally insufficient to demonstrate sexual contact and, thus, insufficient to sustain the conviction; (2) the court erred in refusing to give a jury instruction relating to mistake of fact; and (3) the court erred at sentencing in relying on documents and photographs relating to the victim's injuries that had not been disclosed to defense counsel prior to sentencing.

Perceiving no reversible error, we shall affirm.

Background

B.D. (the victim), age 13 at the time of the crime, testified as follows. On November 9, 2012, she walked home from school, called a friend, Mia Williams, and arranged to meet her at a Shell station, a point between their two houses. When she was walking on Edmondson Avenue, a car stopped. The driver, a male, later identified as appellant, asked if she wanted a ride. Initially, she said no, but then relented. While in the car, she gave the driver her name, and they exchanged phone numbers. He turned down a side street and stopped the car in the 400 block of Drury Lane. Appellant pulled down his pants and put on a condom. The victim resisted, but after a two minute struggle, he succeeded in removing her pants and had sexual intercourse with her. Appellant threw the condom out of the window of his car. The victim then called Ms. Williams on the phone

and told her she was almost at the Shell station. She got out of the car and walked to the Shell station.

At the station, Ms. Williams asked the victim what was wrong. She told Ms. Williams about the incident. Ms. Williams told her to call the police, but she did not want to do so. When Ms. Williams grabbed the victim's phone to call, the victim grabbed it back and called 911.

Sergeant Hillary Davis, the investigating police officer, arrived and took the victim to Mercy Hospital for a SAFE exam. Sergeant Davis was present when a forensic interviewer interviewed the victim. A SAFE nurse examined the victim and took samples.

Later, the victim met with Michael Streed, a sketch artist employed by the Baltimore City Police Department, who prepared a sketch. The victim gave her phone to the police, who used information contained therein in its investigation. Ultimately, the victim identified appellant as he was sitting in an interview room. At trial, she again identified appellant as her assailant.

Defense counsel cross examined the victim, largely on the question of her credibility, pointing out various factual inconsistencies in statements that she gave to police and in her testimony.

Ms. Williams, the victim's friend, testified that she and the victim had arranged to meet at a Shell station. When the victim arrived, her face was white, she was shaking, and she looked like she had been crying. She had to persuade the victim to call the police. On cross examination, she admitted that she did not tell the police about the victim's demeanor but explained that she was not asked.

Laurie Forney, a crime lab technician with the Baltimore City Police Department, went to Drury Lane and, in front of 404 Drury Lane, recovered a condom and torn wrapper.

Ashley Warren, a serologist, examined the SAFE kit and clothing of the victim, swabs from the condom and wrapper, and appellant's SAFE kit. Appellant's SAFE kit was prepared after he was identified as a suspect. Ms. Warren sent the five most probative samples for DNA analysis. Two of the samples were known samples from the victim and appellant.

Jennifer Bresett, a criminologist in the police crime lab, performed a DNA analysis on the samples. She concluded that appellant was the source of DNA on the samples from the inside and outside of the condom although there was an indeterminate minor contributor.

Sergeant Davis identified appellant as a suspect through the victim's cell phone records and sketch prepared with the victim's input. She took a statement from appellant which was introduced into evidence.

Appellant testified that the victim told him she was eighteen years old. He stated that she climbed on top of him, he put on a condom, she gyrated, and he ejaculated. He denied that there was penetration.

Discussion

1

Section 3-307 (a) (3) of the Criminal Law Article (CL), Maryland Code, provides that a third degree sex offense occurs when the defendant has sexual contact with a person under the age of fourteen if the person performing the sexual contact is four or more years

older. Sexual contact is an "intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." CL, section 3-301 (f) (1).

Appellant contends that the evidence was legally insufficient to demonstrate sexual contact. Appellant was twenty-two years old, and thus, he does not challenge satisfaction of the age requirements. Appellant argues that, because the jury did not find appellant guilty of second degree rape, the only factual basis for the sexual offense conviction was appellant's own testimony that he had ejaculated into a condom while the victim, fully clothed, sat on him. Thus, according to appellant, there was no evidence of actual physical contact between bodies and no evidence that appellant performed any sexual contact, *i.e.*, the victim performed the contact.

The State first argues that the issue was not preserved for appellate review. We agree. In support of his motion for judgment of acquittal, appellant argued that the evidence was insufficient to establish the force element of rape in the second degree and insufficient to establish second degree assault because there was no evidence that the victim was afraid.

Assuming the issue were preserved, appellant would fare no better. In determining legal sufficiency, the question 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The jury was free to believe or disbelieve all or any part of a witness's testimony. The jury could have found insufficient evidence to satisfy the force element of rape but, based on the testimony of the victim and appellant's recorded statement, found that there was sexual contact performed by appellant. The victim testified that appellant pulled her pants down and put his penis inside of her vagina. In his recorded statement, appellant admitted that he had sex with the victim. The evidence was legally sufficient to sustain the conviction.

2

Appellant contends that the court erred in failing to give a mistake of fact instruction relating to the victim's age. Appellant testified that the victim told him she was eighteen, and that she looked like she was seventeen to nineteen. Appellant acknowledges that mistake as to age is not a legally cognizable defense to crimes involving sexual intercourse with underage females, *see Walker v. State*, 363 Md. 253 (2001); *Owens v. State*, 352 Md. 663 (1999); and *Garnett v. State*, 332 Md. 571 (1993), but argues that this case involves only sexual contact. Appellant further argues that the policy behind the holding in the cited cases does not apply when there is minor sexual contact.

The short and dispositive answer to appellant's contention is that *Walker* addressed the issue and held that a mistake of fact defense is not available "with respect to the age of victims of a sexual act or vaginal intercourse…." *Walker*, 363 Md. at 261 (defense of reasonable mistake of age is not available under a statute proscribing carnal knowledge between a 14 or 15 year old victim and a defendant age 21 or older).

3

Appellant contends that the court erred at sentencing in relying on documents and photos that had not been disclosed to the defense prior to sentencing. The information in question related to whether the victim suffered permanent injury, primarily emotional injury. The documents were printouts of therapy and hospitalization expenses incurred on the victim's behalf by her custodians. The photos depicted self-inflicted cut marks on the victim's arm. Appellant argues that the State improperly used the evidence to buttress its argument that the victim suffered from severe emotional distress as a result of the crime.

Rule 4-342(d) provides:

> Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information that the State expects to present to the court for consideration in sentencing. If the court finds that the information was not timely provided, the court shall postpone sentencing.

At the beginning of the sentencing hearing, defense counsel requested a postponement to permit a physician to examine appellant, explaining that the family had only recently saved enough money to pay for it. Observing that the defense had ample time to prepare, the court denied the request. The victim and the victim's custodians then gave victim impact statements, in which they emphasized the physical and emotional effect on the victim. The prosecutor argued that the victim was emotionally fine before the crime and suffered permanent psychological damage as a result of the crime. Over objection, the defense offered into evidence documents, arguing that the documents proved that the

victim was consensually sexually active prior to the crime. In response to that evidence, over objection, the prosecutor introduced the evidence in question.

The State argues that the evidence in question was "quickly gathered" in response to defense counsel's evidence and, thus, it was not evidence that the State "expect[ed] to present to the court." In addition, the State argues that any error was harmless because the court did not rely on the evidence.

We conclude that there was a violation of the Rule. Even though the evidence in question was presented in rebuttal, so to speak, it was available and supportive of the claim that the State expected to make and did make, *i.e.*, that the victim had sustained permanent psychological injury. The court expressly found permanent injury. We cannot conclude that the court's error in not granting a postponement, mandatory by Rule, was harmless. Thus, we vacate the sentence and remand for a new sentencing proceeding.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. SENTENCE VACATED. CASE REMANDED FOR NEW SENTENCING PROCEEDING. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY MAYOR AND CITY COUNCIL OF BALTIMORE CITY.