Circuit Court for Frederick County
Case No. 10-K-15-057491

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1897

September Term, 2016

JOEY LEON LASTER

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: April 24, 2018

Joey Leon Laster was convicted by a jury sitting in the Circuit Court for Frederick County of sexual abuse of a minor and third degree sexual offense, but acquitted of a charge of second degree sexual offense. He was sentenced to 20 years' incarceration, with all but seven years suspended for the sexual abuse of a minor, and a consecutive, but suspended, ten-year term for the third degree sex offense, with three years of probation to follow his time served.

On appeal, Laster presents two questions for this Court's consideration, which we have slightly recast for clarity. He asserts that:

1. The trial court erred in admitting expert testimony that the substance found on the child's genitalia was saliva and further erred in denying his motion for mistrial based on admission of that evidence.

2. The trial court erred in not excluding the video portion of the neighbor's security system recording, while excluding the audio portion of the recording.

We shall affirm the judgments of the circuit court for the reasons discussed below.

I. BACKGROUND

Because Laster does not challenge the sufficiency of the evidence and presents only procedural questions, we provide only a brief factual recitation for procedural context and relevant background. *See Washington v. State*, 190 Md. App. 168, 171 (2010). We will supplement with additional facts as necessary to our analysis.

The complaining witness for the State with respect to the charges against Laster was his 13-year old godson, whom we shall refer to as "X."[1] X. testified at trial, that on October 25, 2015, he spent the night with Laster, sharing a bed together as they regularly had in the past. X. explained that he had gone to sleep before Laster, and when Laster came to bed, he began to rub X.'s shoulders and buttocks, ultimately performing fellatio on X., while X. pretended to be asleep. When Laster finished and went into the bathroom, X. ran out of the house.

After unsuccessfully knocking on the doors of two other neighbors' houses, he was finally able to get an answer at the Nero home. Gordon Nero testified that on that night, "a young man, probably about 14-ish," had rung their doorbell around 2:30 a.m., dressed only in "his shorts and underwear with no socks, no shoes." Nero testified that his security system includes a video doorbell that rings on his phone. At X.'s request, the Nero's called 911 and Officer Joe Wheeler of the Frederick County Police Department responded shortly thereafter.

Wheeler and other responding officers investigated X.'s allegations and collected related evidence from Laster's house. A sexual assault evidence collection kit was completed on X.'s genitalia and underwear, which then underwent forensic testing. As a

[1] In keeping with this Court's policy, we do not provide identifying information of minor victims.

result of the police investigation, Laster was indicted for sexual abuse of a minor, second degree sexual offense,[2] and third degree sexual offense.

Prior to trial, Laster filed motions *in limine*, seeking to prevent the State from referencing the term "saliva," in relation to anticipated forensic evidence, and to exclude the video and audio recording from the neighbor's doorbell security camera. The court deferred its ruling on the motions relating to the use of the term "saliva" until the issue arose during trial. The court granted Laster's motion to exclude the doorbell evidence as to the audio portion of the recording, but allowed admission of the video portion.

At the conclusion of all the evidence, the jury acquitted Laster of second degree sexual offense, but convicted him of child sexual abuse and third degree sexual offense. This appeal followed.

II. DISCUSSION

Denial of the Motion for Mistrial

Laster's first challenge asks this Court to decide two questions that he presents as being essentially interrelated.[3]

When reviewing the denial of a motion for mistrial, we apply the following standard:

[2] Second degree sexual offense has since been repealed by the 2017 Md. Laws, ch. 161.

[3] However, it is clear from the record that these two questions, while relating to the same subject matter, require separate analysis. There are only two occasions when Laster discusses the possibility of a mistrial, neither of which were a direct result of the expert's testimony concerning the substance found on X.'s genitalia, which we will discuss further, *infra*.

> The determination whether to grant a mistrial "is addressed to the sound discretion of the trial court." [*Cooley v. State*, 385 Md. 165, 173 (2005)] (quoting *Wilhelm v. State*, [272 Md. 404, 429] (1974)). "Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused," and "[i]n order to warrant a mistrial, the prejudice to the accused must be real and substantial." *Washington v. State*, [191 Md. App. 48, 99] (2010) (quoting *Wilson v. State*, [148 Md. App. 601, 666] (2002)).

Wagner v. State, 213 Md. App. 419, 462 (2013).

We also acknowledge that "a mistrial is generally an extraordinary remedy and that, under most circumstances, the trial judge has considerable discretion regarding when to invoke it." *Whack v. State*, 433 Md. 728, 751–52 (2013) (quoting *Powell v. State*, 406 Md. 679, 694 (2008)).

Laster claims that the trial court erred in denying his motion for mistrial, which was based on the admission of expert testimony identifying a substance found on X.'s genitalia as "saliva." He asserts that "[t]wice in [his] trial the State adduced that saliva was found on [X.'s] genitalia[,]" and that "[t]he trial court's clearly erroneous decision to admit this testimony was not supported by the expert's testing or opinion and was prejudicial to [his] case." Laster contends that through pretrial motions *in limine*, "the parties agreed that the testing performed by the forensic chemist could not establish that the substance recovered in the swabbings taken from [X.'s] genitalia was actually saliva." Further, he posits, the State "agreed that the expert could only testify that the swabbings revealed the presence of amylase, an enzyme found in saliva." He claims that "[d]espite this pre-trial concession, the State twice referred to the substance found [sic] the swabbings as saliva."

Laster identifies the State's inappropriate references to the term "saliva" as having occurred during its opening statement and again during the testimony of its expert forensic chemist, Catherine Bush.

The State's Opening Statement

The first and only occasion when Laster actually moved for a mistrial,[4] occurred as a result of a statement made in the State's opening statement.

Therein, the State explained to the jury the evidence to be presented:

> Forensic tests from swabs taken from the victim's penis at the hospital tested positive for an enzyme that is found in high quantities in saliva, and that evidence was sent on for DNA testing, and it matches the defendant -- statistically, so much so that there's no one other than the defendant on this planet who has the same profile.
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> * * *
>
> Ladies and gentlemen, during this trial, in addition to the Neros, you will, of course, hear from police officers, you'll hear from a forensic nurse at Frederick Memorial Hospital who actually did the examination and took the evidentiary swabs, and you'll hear from a chemist from Maryland State Police's crime laboratory, and she's the one who will tell you about the saliva and the DNA and why it matches the defendant.

The use of the word "saliva" in that context, elicited Laster's objection and the following colloquy ensued:

DEFENSE 1: Objection, Your Honor.

[4] The only other occasion where Laster identifies the possibility of a motion for mistrial in relation to the expert's testimony, occurred the day after the State's forensic expert, Bush, had testified. Laster made a belated objection to Bush's testimony on redirect that she could have run tests for the defense or the State, but only the State had asked. That, Laster suggests, shifted the burden of proof to the defense. Following the discussion, Laster ultimately declined to move for a mistrial and asked for a curative instruction on the burden of proof for the jury instead, which was given.

THE COURT: Approach.

DEFENSE 1: She just referred to saliva.

THE COURT: I thought you weren't going to do that.

STATE: I, I --

DEFENSE 1: About the saliva --

THE COURT: Because I asked if you were going to do it --

DEFENSE 1: Yes.

THE COURT: -- at closing.

STATE: Judge, I said that -- and I've already spoken about saliva -- I said earlier that the test, that the test showed an enzyme in a high concentration in saliva. I didn't say that I wasn't going to do that now, I mean, and that's all I've said --

THE COURT: Okay. All right.

STATE: -- and I've just said that the -- and I said that the DNA matches him.

THE COURT: Right.

DEFENSE 1: She said the saliva and the DNA --

DEFENSE 2: And the saliva and DNA.

DEFENSE 1: -- matches him, and that absolute, positively is misleading and prejudicial, absolutely. There's no way they can think than that they had saliva. They can say amylase was found --

STATE: Well --

DEFENSE 1: -- she can testify as to what amylase is --

THE COURT: All right.

DEFENSE 1: -- but to say that --

* * *

DEFENSE 1: I know. We're going to move for a mistrial.

* * *

THE COURT: This is not anything that's cat's out of the bag because she's already said that it's, that it is -- the enzyme amylase is found in a high concentration in saliva and not as others; so that if you -- if anywhere, for instance, saliva has to be taken within that context. That's the only context it can be taken in.

STATE: And I said that earlier.

* * *

THE COURT: -- because I'm going to give the curative instruction. I understand you're objecting.

DEFENSE 1: I'm objecting --

THE COURT: Yes.

DEFENSE 1: -- going to move for a mistrial. I --

THE COURT: Your objection is noted.

DEFENSE 2: And --

THE COURT: No, denied.

* * *

DEFENSE 2: We've made a motion for a mistrial.

THE COURT: I did. I said denied.

After denying Laster's motion for mistrial, the trial court issued the following curative instruction for the jury:

> Ladies and gentlemen, during the course of this and through the course of the trial, you may find reference -- you may hear reference to the term saliva. The information that the -- what the State has told you earlier is that they expect to place into evidence a report that indicates that amylase -- it's an enzyme --
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> * * *
>
> -- called amylase -- was detected on the alleged victim's genitalia and underwear and that, that such amylase is found in high concentrations in saliva and lower concentrations in, in other. So any reference to saliva has to be within that context and not that it is in fact saliva. Understand?

In his opening statement, defense counsel addressed the amylase enzyme, its connection to saliva, and the limitations of the test used to identify its presence. He emphasized, in relevant part, that:

> The mere existence of DNA or lack of DNA is … just very little evidentiary value whatsoever, and the same applies, what the State's talking about, this amylase. Amylase is an enzyme that's found in a number of, of substances. You're going to hear about that. Now, she says it's in high doses in saliva, but it's also in a lot of other substances, and you'll hear that through both our witness and the State's witness as well.

We have said "[a] mistrial 'is an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Wagner*, 213 Md. App. at 462 (quoting *Cooley*, 385 Md. at 173). It is also implicit, that "'[i]n the environment of the trial the trial court is peculiarly in a superior position to judge the effect of any … alleged improper remarks.'" *Howard v. State*, 232 Md. App. 125, 161 (quoting *Simmons v. State*, 436 Md. 202, 212 (2013)), *cert. denied*, 453 Md. 366 (2017). In our review, we ask "the key question[,] … whether the defendant was so prejudiced by the improper reference that he was deprived of a fair trial." *Id*. (quoting *Parker v. State*, 189 Md. App. 474, 494 (2009)). We find no such prejudice.

The State's reference to saliva in its opening statement began with a qualifying explanation that the "[f]orensic tests from swabs taken from the victim's penis at the hospital tested positive for an enzyme that is found in high quantities in saliva, and that evidence was sent on for DNA testing, and it matches the defendant -- statistically[.]" Its subsequent reference, that its forensic expert "will tell you about the saliva and the DNA and why it matches the defendant[,]" clearly followed from that qualifying explanation. The trial court agreed, noting that "she's already said that … the enzyme amylase is found in a high concentration in saliva and not as others; so that if you -- if anywhere, for instance, saliva has to be taken within that context … [t]hat's the only context it can be taken in." Nonetheless, exercising its discretion, the court gave a curative instruction to the jury to ensure that any use of the term "saliva," would be taken within that context.

The court's timely curative instruction and Laster's ability to thoroughly address the issue in his opening statement, were sufficient to cure any potential undue prejudice resulting from such an error, as we shall discuss, *infra*.

Expert Testimony

Laster further contends that the State inappropriately referenced the term "saliva" during the testimony of the State's forensic expert,[5] Bush, whose qualifications had been admitted without objection.

[5] Maryland Rule 5-702 governs the admissibility expert testimony, providing that it "may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Md. Rule 5-702. The rule also goes on to delineate "three factors a court must evaluate for the admission of expert testimony: (1) an expert must be qualified (Rule 5– (continued)

Bush testified that:

> Additionally, I tested for amylase and amylase is a component that's present in relatively high concentrations in saliva and that was also positive.
>
> * * *
>
> [A]nd I generally make a note about the color that I see, about how dark it is. The amylase test is not a quantitative test. It doesn't specifically tell me how much amylase is there, but I do note whether or not the color changes mild, medium or dark blue, which is a general indication of how much saliva is there, but it's not an accurate determination.

This testimony also elicited an objection from Laster, in which he asked the court to instruct the witness

> to not use the word saliva if she can't say that it is saliva. In this case, it leads to a prejudicial impression on the jury. What she, all she can say, all she testified to, it's relatively high. It's found in relatively high amounts. [S]he can't say its saliva. And every time that word is said incorrectly it creates a prejudicial effect on this jury.

In response, the State argued that the testimony "goes to the weight … not to the admissibility," and "that is the one and only test that there is no definitive test." The court agreed with the State and, although not expressly ruling on the motion, allowed the continued use of the term "saliva." The State then asked Bush to confirm that the test used "to indicate the presence of saliva[,]" is the test generally used in the relevant scientific community. On cross-examination, Bush testified that the test used is a presumptive test for saliva, meaning that "when you get a positive result, you can

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702(1)); [(2)] the expert testimony must be appropriate for the particular subject (Rule 5–702(2)); and (3) a sufficient factual basis must exist to support that testimony (Rule 5–702(3)." *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182 (2003) (footnote omitted).

presume that the thing you're testing for is there[,]" but that "[t]here's no absolute here[,] [i]t's just the most likely scenario given my testing[.]"

Laster now argues that Bush "admitted that her scientific testing did not establish that the substance recovered on the swabbings was in fact saliva, [and that,] any testimony that there was saliva found on [X.'s] genitalia was not scientifically accurate[.]" He also contends that "it was incompetent and inadmissible testimony which should have been excluded by the trial court." However, no objection was made to Bush's forensic opinions that "the most likely scenario for these results, including the amylase testing and the DNA testing is that the source of non-victim contributor would be saliva from Joey Laster."

Laster contends that the trial court made a "clearly erroneous decision to admit this testimony[,]" relating to the substance found on X.'s genitalia being saliva. He asserts that this testimony "was not supported by the expert's testing or opinion and was prejudicial to [his] case[,]" and further, that "[i]ts admission was grounds for the granting of a mistrial request by the defense."

To this point, the State correctly suggests that "this portion of the mistrial argument is unpreserved because Laster never renewed the motion in response to Bush's testimony." We agree.

Despite his objection to Bush's testimony and the high risk for prejudice that comes with the weight of expert testimony, Laster did not move to strike Bush's testimony or renew his request for a mistrial. Thus, the record is left with Laster's only motion for mistrial having been in response to the State's opening statement.

Even if Laster had renewed his motion for mistrial following his objection to Bush's statement, our conclusion would still remain the same.

In determining whether Laster suffered any undue prejudice in relation to either instance where he claims the term "saliva" was used inappropriately, we recognize, as the State points out, "the jury acquitted Laster of second-degree sexual offense,[6] which depended specifically on finding that Laster had committed fellatio." Rather, he was convicted of third degree sexual offense,[7] which prohibits sexual contact,[8] and child sexual abuse,[9] which consists of any degree of sexual offense. *See* Crim. Law §§ 3-

[6] The court issued the following jury instructions for second degree sexual offense:

> In order to convict the defendant of second degree sexual offense, the State must prove: 1) that the defendant committed fellatio with [X.]; 2) that [X.] was under 14 years of age at the time of the act; and 3) that the defendant was then at least four years older than [X.].
>
> Fellatio means that the defendant applied his mouth to the sexual organ of the male victim.

[7] The court issued the following jury instruction for third degree sexual offense:

> In order to convict the defendant of third degree sexual offense, the State must prove: 1) that the defendant had sexual contact with [X.]; 2) that [X.] was under 14 years of age at the time of the act; and 3) that the defendant is at least four years older than [X.].

[8] The court also explained to the jury that "[s]exual contact means the intentional touching of [X.'s] genital, or anal area, or other intimate parts for the purpose of sexual arousal or gratification, or for abuse of either party…."

[9] The court issued the following jury instruction for child sexual abuse:

> In order to convict the defendant of child sexual abuse, the State must prove: 1) the defendant sexually abused [X.] by committing either a

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307(a); 3-602(b). It is easily apparent from the verdicts that the jury was not persuaded that the evidence offered relating to the enzyme amylase established the offense beyond a reasonable doubt. Therefore, we cannot conclude that he suffered any undue prejudice as a result of those two instances where he objected to the word "saliva" being used.

We find no abuse of discretion in the admission of that evidence or error in the court's denial of the single motion for mistrial.

The Admission of Video Evidence

After he fled from Laster's home, X. attempted to rouse several neighbors. Eventually, he went to the home of the Nero family, whose house was equipped with a security system that recorded, both audio and video, when the doorbell was rung. As we have noted, the court, in response to Laster's motion *in limine*, precluded admission of the audio recording that resulted when X. rang the doorbell, but allowed the video recording.

Laster next argues that the trial court erred in admitting the video portion of the recording made by the doorbell camera, when it had excluded the audio portion in response to his motion *in limine*. He asserts that, pursuant to the Maryland wiretap

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> second or third degree sexual abuse …; 2) that, at the time of the abuse, [X.] was under 18 years of age; and 3) that, at the time of the abuse, the defendant was a person with permanent or temporary care, custody, or responsibility for the supervision of [X.].

laws,[10] "all such images and other data is [sic] excluded from all criminal proceedings," and because of that, "the trial court erred in admitting the images of [X.] outside the Neros' house into evidence." He argues further, that the "erroneous admission of the photos of [X.] at the Neros' front door cannot be said to in no way [sic] influenced the jury's verdict in this case."

In response, the State argues that, while the "trial court determined before trial that it would admit the security footage without accompanying audio[,]" the State "never introduced the silent footage[,]" just "photo stills taken from the footage[.]" Further, that Laster "never interposed a contemporaneous objection to their admission[,]" so his "attack on the in limine ruling concerning video footage is, therefore, moot, and any challenge to the photos' admission is unpreserved." (Citation omitted). We agree and decline to address the merits of his arguments, albeit with some elaboration of the proceedings related to the question. *See* Md. Rule 8-131(a).

The State presented only the series of five photographs captured from the recording. The court asked Laster if he was going to object to them being published to the jury prior to being admitted into evidence, to which he responded, "Yes[,]" but only as to the order of presentation. He was, however, "not going to ultimately have an objection." He asserted no objection to their admission. At no point did the State offer any portion of the video.

[10] Md. Code (1974, 2013 Repl. Vol.), §§ 10-401 to 10-414 of the Courts and Judicial Proceedings Article.

Maryland Rules are clear, "[e]rror may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and … [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record[.]" Md. Rule 5-103(a)(1). *See also* Md. Rule 4-323(a) (deeming an objection waived unless it is "made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent"); *Cure v. State*, 195 Md. App. 557, 571 n.4 (2010) (explaining the "contemporaneous objection rule" and its derivation from Rule 4-323(a)). Maryland courts have interpreted this requirement to mean that, "'when a motion in limine to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial.'" *Morton v. State*, 200 Md. App. 529, 540–41 (2011) (quoting *Klauenberg v. State*, 355 Md. 528, 539 (1999)).

Laster did not only fail to object, he acquiesced to the admission of the photographs. Because he did not interpose a contemporaneous objection to the introduction of the still photos, and because the State did not offer the video, we find no merit to his argument.

We shall affirm.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.