UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0068

September Term, 2016

CHARLES EDWARD GIBSON

v.

STATE OF MARYLAND

Arthur,
Reed,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: December 5, 2016

*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.

Charles Gibson, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of three counts each of both first-degree sex offense and second-degree sex offense; four counts each of both first-degree assault and second-degree assault; and one count of carrying a concealed and dangerous weapon.[1] Appellant asks two questions on appeal:

I. Was the evidence sufficient to support his four convictions (first- and second-degree sex offense and first- and second-degree assault) regarding the fourth incident?

II. Did the trial court err in limiting his cross-examination of the complaining witness?

For the reasons that follow, we shall affirm.

FACTS

The State's theory of prosecution was that on December 7, 2013, appellant sexually assaulted L.B. four times over several hours while the two were cell mates at Prince George's County Detention Center (PGCDC). The first incident consisted of anal penetration by appellant with a baby oil bottle while the two men were locked in their cell after dinner. The second incident occurred after the first and consisted of anal penetration by appellant with his penis during that same period. The third incident consisted of anal

[1] The jury acquitted appellant of one count each of first-degree and second-degree sex offense, which was based on the first sexual incident.

Appellant was subsequently sentenced to a total term of 30 years of imprisonment: 25 years of imprisonment for each first-degree assault conviction; life, all but 30 years suspended, for each first-degree sex offense conviction; and a one-year sentence for his weapon conviction. All sentences were to be concurrent. Appellant's remaining convictions were merged for sentencing purposes. He was also ordered to serve five years of supervised probation upon his release from prison.

penetration by appellant with his penis while the victim was bent over a toilet after they were locked in for the night. The fourth incident occurred after the third and consisted of anal penetration by appellant with his penis while the victim was on the lower bunk bed. Among others, L.B. and PGCDC officers testified for the State. The theory of defense was L.B. was not credible and no assaults occurred. The defense called no witnesses. Viewing the evidence in the light most favorable to the prevailing party, the State, the following was elicited at trial.

L.B. testified that on December 6, 2013, appellant, his PGCDC cell mate of about two-and-a-half weeks, told him that "some guys" were going to beat him up because he was incarcerated on a rape conviction. Appellant suggested L.B. speak to a correctional officer about the threat so he could be placed in the segregation unit. L.B. did, but he was not placed in segregation because he did not know who was going to attack him.

The next evening after dinner, around 6:15 p.m., appellant became angry and said he needed to "get[] revenge" for L.B.'s rape victim. Appellant retrieved a shank, described as a homemade knife, from behind the mirror in their cell and told L.B. "to bend over and pull [his] pants down." When L.B. refused, appellant pressed the shank against L.B.'s thigh. L.B. complied. Appellant poured baby oil on L.B.'s anus and then pushed the cap end of the bottle into his anus. After several minutes, appellant removed the bottle, poured oil on his penis, and pushed his penis inside L.B.'s anus for several minutes. When L.B. protested, appellant responded by holding the shank against his neck and telling him that he would kill him if he did not cooperate. When appellant stopped, he told L.B. to "wash up," which he did. Appellant then told L.B. that he would "do this" to him whenever he

wanted, and that it was "going to happen twice a day." Although L.B. was let out of his cell for more than an hour after the incident, L.B. testified that he did not say anything because he was afraid.

Around 11:30 p.m. that night, after the cells were locked and the officers had performed an inmate count, appellant again told LB. to "bend over and take your pants off." When L.B. refused, appellant "made a move" to retrieve the shank from behind the mirror. L.B. in response said, "okay" because he was "still afraid" of what appellant would do if he refused. Appellant directed L.B. to bend over the toilet, which he did, and appellant had anal sex with him for about 10 minutes. Appellant then ordered L.B. to the lower bunkbed where he had anal sex with L.B. in a spoon position and while bent over the lower bunk of the bunk bed. When appellant stopped, he again told L.B. to wash himself, which he did. After breakfast the next morning, L.B. told a correctional officer what had happened, and both L.B. and appellant were taken to the Prince George's County Hospital.

A sexual assault forensic nurse examiner testified that she examined L.B. at the hospital and observed several tears around his anus and an abrasion on his buttocks. While appellant was at the hospital, a search of his and L.B.'s prison cell was conducted and a sharp metal shank was found inside a hole in appellant's slipper.

DISCUSSION

I.

Appellant argues on appeal that there was insufficient evidence to support the sex offense and assault convictions regarding the fourth incident. Specifically, he argues that we must reverse his first- and second-degree sex offense convictions because the third and

fourth incidents were "a continuing course of anal sex" with no change in the act and only a "slight relocation from one part of the cell to another[.]" He also argues that we must reverse his first- and second-degree assault convictions because there was no evidence that appellant threatened the victim. Initially, the State argues that appellant has failed to preserve his argument for our review as to the assault convictions because he moved for judgment of acquittal on other grounds at trial, but in any event, the State argues that all of appellant's sufficiency arguments are without merit.

When reviewing the sufficiency of the evidence, our task is to determine "'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.'" *Hobby v. State*, 436 Md. 526, 537-38 (2014)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)(emphasis in *Jackson*)). This standard applies regardless of whether the verdict rests upon circumstantial or direct evidence "since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *State v. Suddith*, 379 Md. 425, 430 (2004)(quotation marks and citation omitted). "[R]esolving conflicts in the evidence and weighing the credibility of witnesses, is properly reserved for the fact finder." *Longshore v. State*, 399 Md. 486, 499 (2007)(citations omitted). A jury is given the responsibility to "choose among different inferences that might possibly be made from a factual situation and [a reviewing court] must give deference to all reasonable inferences the fact-finder draws, regardless of whether we would have chosen a different reasonable inference." *Suddith*, 379 Md. at 430-31 (quotation marks and citations omitted).

A. First- and second-degree sex offense

In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the United States Supreme Court defined the double jeopardy clause of the Fifth Amendment as affording a defendant three basic protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. We are concerned with the third protection here.

The crime of first-degree sex offense provides that a person shall not "engage in a sexual act with another by force, or the threat of force, without the consent of the other" **and** "employ or display a dangerous weapon" or "threaten, or place the victim in fear[] that the victim . . . imminently will be subject to . . . serious physical injury[.]" Md. Code Ann., Crim. Law (CL) Art., § 3-305(a)(2)(i), (iii). A "sexual act" includes anal intercourse. *See* CL § 3-301(d)(1)(iv). The Court of Appeals has said that the "gravamen" of rape "is the unlawful 'vaginal intercourse.'" *West v. State*, 369 Md. 150, 162 (2002) (citation omitted). Likewise, "[t]he proscribed and harmful contact in a first[-]degree sexual offense is the coerced 'sexual act.'" *Id*. (citation omitted).

In *State v. Boozer*, 304 Md. 98 (1985), which both parties cite, the question before the Court of Appeals was whether the defendant, having once been placed in jeopardy on a charge of committing a fourth-degree sex offense in one manner could be subjected to a subsequent prosecution for attempted fourth-degree sex offense of a different type -- different acts -- arising out of the same criminal episode. *Boozer*, 304 Md. at 99. The Court held that the second prosecution was permitted.

> The courts of this country have had little difficulty in concluding that separate acts resulting in separate insults to the person of the victim may be separately charged and punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction.

Id. at 105. Thus, we are in accord with most State jurisdictions that hold that rape, vaginal or anal, is not a continuous offense but constitutes separate and distinct acts. *Cf. State v. Tili*, 985 P.2d 365, 371-72 (WA 1999); *State v. Phillips*, 924 S.W.2d 662, 664-65 (TN 1996); *Carter v. Com.*, 428 S.E.2d 34, 41-42 (Va.App. 1993); *State v. Dudley*, 356 S.E.2d 361, 363 (NC 1987). *See also People v. Garcia*, 141 A.D.3d 861, 865 (N.Y.App.Div. 2016) (declining to dismiss one of two counts of first-degree sexual abuse where two instances of sexual contact occurred in different parts of homes within minutes of each other).

Appellant cites no case law to support his argument that the fourth incident was part of the third incident and the only support he offers is an attempt to distinguish the facts of his case from the language of *Boozer*. Appellant suggests that because the type of act -- sodomy -- was the same between the third and fourth incident and because there was only a slight change in location, there was a continuing course of conduct. We disagree and are persuaded that a rational juror could have found, based on the evidence presented, that the fourth sexual assault was a separate act of forced anal intercourse. Here there was a reasonable inference that appellant, after sodomizing L.B. over the toilet, disengaged and instructed L.B. to move to the lower bunk bed. Once on the bunk bed, appellant re-assaulted L.B. and sodomized him on the bunk bed while he lay in his side. Because of the disengagement, the different location, and the different position of sexual assault, we

are persuaded there was no continuing course of conduct between the third and fourth sexual offenses.

B. First- and second-degree assault

Appellant also argues that we must reverse his convictions for first- and second-degree assault regarding the fourth incident. He argues that there was insufficient evidence that he threatened L.B. with serious physical injury – he neither threatened L.B. or displayed the shank immediately prior to or during the fourth assault. The State initially asserts that appellant has not preserved his argument for our review, but in any event, it has no merit. Regardless of whether the argument is preserved, we agree it is without merit.

First-degree assault prohibits a person from "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another." CL § 3-202(a). "[S]erious physical injury" is defined as an injury that "creates a substantial risk of death" or "causes permanent or protracted serious" disfigurement or loss or impairment of the function of any bodily member or organ. *See* C.L. § 3–201(d).

We are persuaded that a reasonable juror could find that appellant attempted to cause serious physical injury to L.B. during the fourth incident. To reiterate, prior to and during the first and second incident of forced anal penetration, appellant pulled out a shank, pushed it against the victim's thigh, held it to the victim's neck, and threatened to kill the victim if he did not comply with appellant's demand for anal sex. When the victim refused to take off his pants again an hour or so later and just prior to assaulting him again, appellant "made a move to go get the shank from behind the mirror." The victim stated that he complied with the sexual assault because he was "still afraid of what [appellant] would do

if I didn't comply." We believe that a rational trier of fact could find that appellant attempted to cause serious physical injury to appellant where he had earlier threatened to kill L.B. with a knife that he had pressed against both his thigh and neck. *Cf. Blotkamp v. State*, 45 Md. App. 64, 70-71, *cert. denied*, 288 Md. 732 (1980)(actual display of knife not necessary to establish credibility or reality of threat of serious and imminent bodily injury because appellant's repeated reference to a knife was reasonably calculated to create a real fear of imminent bodily harm, serious enough to overcome the victim's will to resist).

II.

Appellant argues that the trial court improperly limited his cross-examination of L.B. for bias or motive when the court would not allow him to inquire into the inconsistencies between L.B.'s 2013 guilty plea for rape and L.B.'s reference to the rape in a letter he wrote two years later. The State responds that the trial court properly exercised its discretion to exclude irrelevant testimony that would have distracted the jury from the issues present. We agree with the State.

A criminal defendant is guaranteed the right to confront witnesses against him under both the Confrontation Clause of the Sixth Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights. *Peterson v. State*, 444 Md. 105, 122 & n.4 (2015). A witness's credibility may be attacked through questions directed at the witness's biases, prejudices, interests in the proceeding's outcome, and motive to testify falsely. *Id*. at 122 (citation omitted). "To comply with the Confrontation Clause, a trial court must allow a defendant a threshold level of inquiry" – one that exposes facts to the jurors from which they could

draw appropriate inferences relating to the credibility of the witness. *Id*. (quotation marks and citation omitted). The scope of cross-examination, however, has limits. *Martinez v. State*, 416 Md. 418, 428 (2010). A trial court may limit cross-examination for "witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Peterson*, 444 Md. at 122-23 (quotation marks and citation omitted). "Therefore, although the defendant has 'wide latitude . . . the questioning must not be allowed to stray into collateral matters which would obscure the trial issues and lead to the factfinder's confusion.'" *Id*. at 123 (citation omitted)(ellipses in *Peterson*).

On cross-examination, L.B. admitted that in October 2013, he plead guilty to rape in an unrelated case. The following colloquy then occurred:

> [DEFENSE COUNSEL]: Okay. So let me ask the question. On March the 3rd, 2015, did you write a letter to Judge El-Amin in your own handwriting, in which you asked him for a new trial?
>
> [WITNESS]: Yes.
>
> [DEFENSE COUNSEL]: In that letter, did you deny committing any crime?
>
> [WITNESS]: Yes.
>
> [DEFENSE COUNSEL]: In that letter, notwithstanding the fact that you had gone to court on October the 30th, 2013, and admitted to raping a woman who was so incapacitated that she –
>
> [THE STATE]: Your Honor –
>
> [DEFENSE COUNSEL]: -- could not consent –
>
> [THE STATE]: -- I'm objecting.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: All right.

[DEFENSE COUNSEL]: Did you write a letter on March the 3rd, 2015, where you no longer described the acts that had occurred in your case as rape, but rather wonderful, mutually consensual sex?

[THE STATE]: Objection, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Can we approach?

THE COURT: Sure.

(Counsel approached the bench, and the following ensued:)

[DEFENSE COUNSEL]: Judge, he goes to court and says I committed a crime. Now he writes a letter saying I didn't do anything of the sort. I think this is fair game for cross-examination.

THE COURT: Request denied.

[DEFENSE COUNSEL]: Thank you.

(Counsel returned to the trial tables, and the following ensued in open court:)

[DEFENSE COUNSEL]: All right. But sir, without getting into the particulars of the letter that you wrote to Judge Al-Amin, we can agree, can we not, that you wrote him a letter, in your own handwriting on March the 3rd, 2015, saying I don't want the sentence. I didn't commit a crime. I want a new trial? Is that right?

[WITNESS]: Yes.

[DEFENSE COUNSEL]: Okay. So, what's the truth? Is the truth what you told the Judge on October the 30th, 2013, or is the truth what you wrote in your letter on March the 3rd, 2015.

[THE STATE]: I object, Your Honor.

THE COURT: Sustained.

Here, the trial court allowed defense counsel to elicit on cross-examination that: (1) in October 2013, L.B. plead guilty to rape; and (2) on March 3, 2015, L.B. wrote a letter to the judge asking for a new trial and denying he had committed the rape. We agree with the State that defense counsel's attempt to elicit *details* regarding the facts of an unrelated second-degree rape conviction (whether the victim was "so incapacitated" that she could not consent and whether appellant described the rape later as "wonderful" and "mutual") did not go to the victim's bias or motive to testify but were rather collateral matters that obscured the issues at trial. Additionally, we are persuaded that the trial court did not err in sustaining the State's objection to defense counsel's question, "what's the truth?" That was an improper question because it was argumentative. *Cf. Hunter v. State,* 397 Md. 580, 595-96 (2007)(holding that were-they-lying questions are an improper form of cross-examination because they are argumentative). Accordingly, the trial court acted within its discretion when it limited cross-examination to not include details of an unrelated crime.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.