UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0929

September Term, 2015

VON HAMMOND

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Berger, J.

Filed: July 12, 2016

Following a jury trial in the Circuit Court for Baltimore City, Von Hammond, appellant, was convicted of first-degree rape, kidnapping, and related offenses. The court imposed a sentence of life imprisonment for first-degree rape and a consecutive sentence of ten years for kidnapping. Appellant noted this appeal and raises four issues, the first two of which we have re-ordered for clarity:

> 1. Did the trial court abuse its discretion by reopening Mr. Hammond's case from the stet docket without good cause?
>
> 2. Did the trial court err by permitting the SAFE nurse to recount the complaining witness's extensive prior consistent statement?
>
> 3. Was the evidence insufficient to convict Mr. Hammond of first-degree rape?
>
> 4. Should the trial court have merged Mr. Hammond's kidnapping conviction into his rape conviction for sentencing purposes?

For the reasons that follow, we answer appellant's first and fourth questions in the negative. We do not reach appellant's second and third questions, as appellant has waived both of those issues. We, accordingly, affirm the judgments of the circuit court.

BACKGROUND

On February 13, 2009, a woman whom we shall refer to as "D.J." was driving home alone, when, around 10:00 p.m., she exited the Baltimore beltway and pulled over to retrieve some cigarettes from the trunk of her vehicle. When she re-entered her car, appellant -- a stranger to her -- was in the passenger seat. Appellant held a knife at D.J.'s side and told her to start driving. Fearing for her safety, D.J. complied and followed appellant's directions. Eventually, appellant had D.J. park the car in an alley behind a block of rowhouses.

Appellant took the keys from the ignition and got out of the vehicle. Coming around to the driver side, appellant reached through the window, grabbed D.J. by the hair, and dragged her out of her seat. D.J. struggled with appellant as he dragged her to a window of one of the rowhouses, opened it, and threw her inside. Appellant followed D.J. into a sparsely-furnished room. D.J. pleaded with appellant to stop and let her go, but appellant punched D.J. between the eyes, stunning her. D.J. fell onto a mattress. Appellant leapt onto D.J.'s back and put an arm around her neck, choking her. Appellant momentarily released his hold, but then started choking D.J., again, to the point that D.J. was losing consciousness. Appellant screamed, "Die, bitch, die," while he choked her.

Appellant also beat D.J. with objects at hand, including a two-by-four, a stereo speaker, and a hammer. D.J. testified that appellant hit her ankles and the inside of her knees with the hammer, beat her about the torso and face with the two-by-four, and hit her across the face with the stereo speaker. D.J. also recalled being hit across the face with a glass object. At one point, D.J. was bleeding so badly that appellant threw her a towel and said that she was "bleeding all over the place, bitch." Once D.J. was on the ground, appellant stomped on her elbows and wrists. He also ripped D.J.'s necklace and rings off and put the rings in his pocket.

After the beating stopped, D.J. was lying on her stomach on the mattress. Holding her arms and legs behind her, appellant hogtied her using shoelaces and a stereo cable. Then, appellant pulled down D.J.'s pants and vaginally raped her. Once appellant finished, he left the room momentarily. When he returned, he took D.J.'s keys and threw her out of the same window he used to enter the building. D.J. attempted to scream for

help, but she could not yell loudly due to the beating. D.J. heard appellant leave in her car. Shortly thereafter, she heard a neighbor say that she had called police.

Officer Monica Nashan responded to the neighbor's 911 call.[1] When Officer Nashan arrived near the scene, she could hear someone faintly screaming. Eventually, Officer Nashan found D.J. in an alley; she was bleeding from her head and face, and Officer Nashan stated that she was hysterical. Officer Nashan cut the ties binding D.J.'s limbs and transported her to the hospital, where she was admitted at approximately 2:00 a.m. on February 14th. On the way there, D.J. told Officer Nashan that she had been beaten and raped. While Officer Nashan transported D.J. to the hospital, Officer Valencia Gavin secured the crime scene at 1940 Hollins Street and its abutting alley.

At the hospital, doctors treated D.J.'s injuries, which were "life-threatening," according to Nurse Barbara Boal.[2] Following medical treatment, Nurse Boal conducted a SAFE exam in order to treat D.J. and collect evidence. Initially, D.J. was "hysterical," screaming, crying, and pulling the blankets over her head. She screamed, "Can't you see? Can't you see? He raped me. Can't you see?" Eventually, D.J. calmed down to a "constant cry," and told Nurse Boal about the attack.

Nurse Boal identified D.J.'s injuries as extensive. Nurse Boal testified that D.J. had suffered an avulsion -- meaning that part of her lip was missing-- and she had swollen areas on her face, lumps on her head, swollen lips, scratch marks and abrasions all over

[1] All law enforcement officers in this case are members of the Baltimore City Police Department.

[2] The court accepted Nurse Boal as an expert in forensic nursing.

her body, as well as red marks on her knees, which would later bruise. D.J.'s right eye was black and swollen shut. Additionally, Nurse Boal pointed out that D.J. had ligature marks on her hands and feet; Nurse Boal explained that a ligature mark is a type of bruise that indicates something had been tied tightly on D.J.'s body. Nurse Boal also diagrammed a "patterned injury" on D.J.'s face, meaning that an implement was used to create the injury. Nurse Boal also noted that D.J.'s neck was swollen with areas of redness. In addition to a vaginal swab, Nurse Boal collected scrapings from D.J.'s fingernails, as well as D.J.'s bloodstained clothing.

Detective Robert Faison recovered the shoelace and stereo cable that Officer Nashan had cut off of D.J. from the crime scene. Police also recovered a two-by-four, stereo speaker, and hammer. Police found D.J.'s vehicle in an alley in the 1900 block of Hollins Street, and her cell phone was inside the car. Later, Detective Faison spoke with D.J. at the hospital, and she recounted the attack.

A couple of days after the incident, D.J. spoke with police and identified appellant in a photo array as her assailant. In investigating appellant, police learned that he resided at 1915 Hollins Street with his grandmother, and the grandmother also owned 1940 Hollins Street, where the attack occurred. Jennifer Bresett identified sperm on the vaginal swab taken from D.J.[3] Jennifer Ingbretson analyzed the DNA evidence recovered from the crime scene, the SAFE kit, and D.J.'s vehicle.[4] She testified that the sperm sample

[3] The court accepted Ms. Bresett as an expert in serology and DNA evidence.

[4] The court accepted Ms. Ingbretson as an expert in DNA analysis.

from the vaginal swab matched D.J. and appellant. DNA from a portion of the shoelace matched D.J. and an unknown individual and excluded appellant. DNA from another segment of the shoelace, however, matched D.J. and appellant at 11 of 13 loci. Ms. Ingbretson stated that DNA evidence recovered from other items -- such as D.J.'s vehicle, the hammer, and the speaker -- was inconclusive. She indicated that there was DNA evidence on these items, but not enough to compare to anything.

D.J. testified that all of her top teeth had been removed due to the beating, as well as most of her bottom teeth: she stated that she had only six original teeth in her mouth. In the days after the attack, D.J. stated that her left eye bruised, she suffered hearing loss, and her knees bruised to the point where she could not walk.

The State charged appellant and initially brought him to trial on June 18, 2009. At that time, however, D.J. was unavailable, and the State had not completed DNA analysis of the recovered evidence. Accordingly, the court granted State's request -- which appellant acceded to -- to place appellant's case on the stet docket. Approximately four years later, on July 30, 2013, the State requested to re-open appellant's case. Over appellant's objection, the court granted the State's request, and trial was conducted from August 22-28, 2014. A jury acquitted appellant of robbery, theft, and carrying a deadly weapon, but convicted him of first-degree rape, second-degree rape, third-degree sexual offense, fourth-degree sexual offense, second-degree assault, and kidnapping. The sentencing court merged all of appellant's convictions, with the exception of the conviction for kidnapping, into first-degree rape for sentencing purposes and sentenced

appellant to a life sentence for first-degree rape, followed by a consecutive ten year sentence for kidnapping.

DISCUSSION

I. The Stet Docket

Rule 4-248(a) provides that on motion by the State and with no objection from the accused, "the court may indefinitely **postpone** trial of a charge by marking the charge 'stet' on the docket." (Emphasis added). "A stetted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown." *Id.* This Court has noted that a stet "is simply an indication by the prosecutor, acquiesced in by the court, that he does not choose at that time on that indictment to proceed further with prosecution." *State v. Jones*, 18 Md. App. 11, 34 (1973) (emphasis omitted) (citing cases). *See also LaFaivre v. State*, 338 Md. 151, 158 (1995).

Appellant contends that the court abused its discretion in granting State's motion to re-open his case from the stet docket. Appellant argues that the court did not have good cause to grant the State's request. He pointed out that the State had received the DNA testing results in October 2010, and he had done nothing to violate what he perceived to be the conditions of his stet in that he had had no contact with D.J. since June 2009. Appellant contends that the State's stated rationale for re-opening the case -- that he was charged for a new, albeit similar, offense with a different victim -- does not constitute good cause.

The State argues that appellant's new offense was good cause to re-open this case because it shows a pattern of conduct, demonstrating that appellant posed a public danger.

The State surmises that appellant, although protesting the lack of a speedy trial in this case, actually wanted no trial at all, which is not the purpose of the stet docket.

We note that Rule 4-248 does not define "good cause," but the Court of Appeals has previously defined good cause as "'[s]ubstantial reason, one that affords a legal excuse. Legally sufficient ground or reason. Phrase good cause depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed[.]'" *In re Robert G.*, 296 Md. 175, 179 (1983) (quoting BLACK'S LAW DICTIONARY 623 (5th ed. 1979)). *See also State v. Toney*, 315 Md. 122, 132-33 & n.3 (1989) (noting that an exact definition of good cause is "somewhat vague and amorphous").

As such, because trial courts have discretion in the determination of what constitutes good cause in a given case, we review a trial court's determination of good cause for abuse of that discretion. *See Housing Auth. of Balt. City v. Woodland*, 438 Md. 415, 434-35 (2014) (finding no abuse of discretion in court's determination that claimant had good cause for noncompliance with a notice statute); *Robert G.*, 296 Md. at 188 (finding no abuse of discretion in court's finding that prosecutor had demonstrated good cause for obtaining juvenile court records); *Reed v. State*, 78 Md. App. 522, 537 (1989) (finding no abuse of discretion in court's determination of good cause for postponement of trial).

A court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] [c]ourt[] . . . or when the court acts 'without reference to any guiding principles.'" *Rios v. Montgomery Cnty.*, 386 Md. 104, 121 (2005) (quoting *Wilson v. John*

Crane, Inc., 385 Md. 185, 198 (2005)). "'An abuse of discretion may also be found where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court[] or when the ruling is violative of fact and logic.'" *Id.* (quoting *Wilson*, 385 Md. at 198).

In this case, the circuit court concluded that the State had presented good cause to re-open appellant's stetted case in that appellant had been charged for another crime with a similar fact pattern. We fail to perceive how the court abused its discretion in this determination. Appellant contends that the cases could not be tried together, nor would evidence of one be admissible in the other. Indeed, this may be true, but it is of no moment to a consideration of whether good cause exists to re-open a case that has been stetted. In our view, the trial court did not abuse its discretion in finding good cause to re-open this case.

II. The SAFE Nurse's Testimony

Next, appellant argues that Nurse Boal should not have been permitted to testify in court as to D.J.'s narrative of the attack. Appellant contends that Nurse Boal's statement is hearsay and does not fall into either of the exceptions for a prompt complaint of a sexual assault or an excited utterance. Additionally, appellant argues that Nurse Boal's testimony is not rehabilitative of D.J.'s credibility as a prior consistent statement.

The State contends, primarily, that appellant has waived this issue because similar testimony was admitted without objection. Moreover, the State argues that Nurse Boal's testimony was admissible, either as an excited utterance, a statement made for purposes of medical diagnosis or treatment, or as a prompt complaint of sexual assault.

Alternatively, the State contends that any error in the admission of Nurse Boal's testimony was harmless due to the overwhelming evidence of appellant's guilt.

We agree with the State that appellant has waived this issue for review. Generally, an issue is waived when identical evidence or similar evidence is received without objection, even if a party later objects to that evidence. *See Ware v. State*, 170 Md. App. 1, 20 (2006) (citing *Williams v. State*, 131 Md. App. 1, 26 (2000)); *Standifur v. State*, 64 Md. App. 570, 579 (1985) (citing *Spriggs v. Levitt & Sons, Inc.*, 267 Md. 679, 682-83 (1973)), *aff'd* 310 Md. 3 (1987).

Appellant objected to Nurse Boal's testimony concerning D.J.'s narrative of the attack. Appellant failed to object, however, when D.J. offered similar testimony in her direct examination. Moreover, appellant failed to object when Nurse Boal's report, which contained D.J.'s statement, was admitted into evidence or when Detective Faison testified as to D.J.'s account of the attack. Accordingly, appellant has waived any claim of error as to this testimony because similar testimony was admitted without objection.

III. Sufficiency of the Evidence

Appellant argues that the State presented insufficient evidence of conduct supporting a conviction for first-degree rape. Specifically, he contends that the State did not present evidence of any of the aggravating factors that elevate second-degree rape to first-degree rape, as delineated in Maryland Code (2002) Criminal Law Article ("C.L."), § 3-303(a)(2).[5] The State argues that this issue is not preserved for our review. We agree

[5] All citations to the Criminal Law Article will be to the statutes as they appeared in 2009, at the time of the incident in this case.

with the State, but we note that appellant has waived this issue, rather than it simply being unpreserved.

Rule 4-324(a) permits a defendant to move for a judgment of acquittal at the close of the State's case-in-chief and again at the conclusion of the presentation of all evidence. The rule requires the defendant to "state with particularity all reasons why the motion should be granted." Rule 4-324(a). This Court has noted that "'[t]he language of the rule is mandatory, and review of a claim of insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal.'" *Peters v. State*, 224 Md. App. 306, 353 (2015) (quoting *Whiting v. State*, 160 Md. App. 285, 308 (2004), *aff'd* 389 Md. 334 (2005)), *cert. denied* 445 Md. 127 (2015). Moreover, "[c]hoosing to 'submit' without articulating reasons to support acquittal is a waiver of any appellate challenge to the sufficiency of the evidence." *Id.* (citing *Garrison v. State*, 88 Md. App. 475, 478 (1991)).

In this case, appellant moved for judgment of acquittal at the proper times, but failed to argue with particularity the reasons supporting the motion. Indeed, appellant chose to "submit," thereby waiving any appellate challenge to the sufficiency of the evidence. Notably, were we to address appellant's arguments, we would find them to be entirely without merit, as the State presented ample evidence of the aggravating factors elevating a second-degree rape into rape in the first degree.[6]

[6] C.L. § 3-303(a)(2) provides the so-called aggravating factors, which include: "employ[ing] or display[ing] a dangerous weapon;" "suffocat[ing], strangl[ing], disfigur[ing], or inflict[ing] serious physical injury on the victim;" or "threaten[ing], or plac[ing] the victim in fear, that the victim . . . imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping." (cont.)

IV. Sentencing Issues

Finally, appellant contends that the sentencing court should have merged his conviction for kidnapping into first-degree rape for sentencing purposes. Appellant argues that the conduct supporting the conviction for kidnapping was part of the conduct supporting the rape conviction, and, as such, he should not be punished twice for the same conduct.

The State argues that this issue is not preserved for our review. Should we address the merits, the State contends that the sentencing court properly imposed separate sentences for kidnapping and first-degree rape because the kidnapping was based on separate conduct.

We agree with Hammond that the issue is preserved for our review. The sentencing court specifically addressed merger concerns as to kidnapping and first-degree rape. Accordingly, appellant was not required to object. *See* Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue [besides jurisdiction] unless it plainly appears by the record to have been raised in **or decided by** the trial court[.]" (Emphasis added)). Moreover, this Court has held that an objection at sentencing is not necessary to preserve the issue when there is an allegation of an illegal sentence. *See Latray v. State*, 221 Md. App. 544, 555 (2015). As such, we shall address the merits of appellant's merger argument.

A review of the record reveals that D.J. was choked and suffered serious physical injury from which the jury could have found that appellant committed first-degree rape.

Essentially, appellant presents a fundamental fairness argument; that is, he contends that the conduct supporting the conviction for kidnapping was incidental to – *i.e.*, was part and parcel of – the rape. "Merger by virtue of the fundamental fairness test . . . is heavily and intensely fact-driven." *Pair v. State*, 202 Md. App. 617, 645 (2011). Pursuant to principles of fundamental fairness, a defendant should not be punished twice for the same conduct. *See Carroll v. State*, 428 Md. 679, 695 (2012) ("In deciding whether fundamental fairness requires merger, we have looked to whether the two crimes are 'part and parcel' of one another, such that one crime is 'an integral component' of the other." (Quoting *Monoker v. State*, 321 Md. 214, 223-24 (1990))). This Court has noted that "[t]he principal justification for rejecting a claim that fundamental fairness begs merger in a given case is that the offenses punish separate wrongdoing." *Latray*, 221 Md. App. at 558.

C.L. § 3-502(a) provides that a "person may not, by force or fraud, carry or cause a person to be carried in or outside the State with the intent to have the person carried or concealed in or outside the State." Recognizing that kidnapping may be incidental to a variety of other offenses, the Court of Appeals, in *State v. Stouffer*, 352 Md. 97, 113 (1998), held that the primary consideration in determining whether kidnapping merges into another offense is whether the carrying – the asportation aspect of kidnapping – is "merely incidental to the commission of another offense." Although the Court declined to adopt specific standards for this analysis, the Court did present five factors for consideration:

1. How far, and where, was the victim taken?

2. How long was the victim detained in relation to what was necessary to the commission of the other crime?

3. Was the movement either inherent as an element, or as a practical matter, necessary to the commission of the other crime?

4. Did it have some independent purpose?

5. Did the asportation subject the victim to any additional significant danger?

McGrier v. State, 125 Md. App. 759, 770 (1999).

We are not persuaded that the court erred in refusing to merge kidnapping into first-degree rape. As to the first factor, D.J. testified that appellant forced her at knifepoint to drive until the vehicle was hidden behind a block of rowhouses. In our view, this was a significant asportation that was not "merely incidental" to the rape. *See also Lester v. State*, 9 Md. App. 542, 545-46 (1970) (finding separate sentences for kidnapping and rape appropriate where Lester forced victim into his car, drove to a secluded area, and raped her).

Moreover, D.J. was detained in the house for a significant period of time -- several hours -- which is longer than necessary to complete the other crimes of which appellant was convicted. Similarly, we are not persuaded that the movement was inherent or necessary to the commission of the rape.

Appellant contends that there was no evidence of an independent purpose in the asportation. Appellant argues that he was acquitted of the robbery and theft crimes, meaning that the asportation was solely for purposes of the rape. Appellant is correct that the jury acquitted him of the theft offenses, but he overlooks the severe beating that D.J.

sustained in the house. We are not persuaded that the asportation was solely for means of committing the rape.

Lastly, we conclude that the asportation exposed D.J. to additional dangers. She could have been injured by the knife appellant was holding against her during the drive. Moreover, appellant's attempt to conceal D.J. and her vehicle lessened the likelihood that he would be discovered in his criminal enterprise. Additionally, leaving D.J. hogtied and bleeding in an alley meant that she was unable to run, seek medical aid for her "life-threatening" injuries, or defend herself if another individual attempted to harm her.

For these reasons, we conclude that the court committed no error in refusing to merge kidnapping into first-degree rape. As such, the trial court did not err in imposing separate sentences for separate conduct.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.