Circuit Court for Baltimore City
Case No. 816146001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1281

September Term, 2016

MILTON CARRINGTON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: July 12, 2017

*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.

A Baltimore City jury convicted appellant Milton Carrington of second-degree assault and malicious destruction of property, but acquitted him of theft of property with a value of less than $1,000. The court sentenced Carrington to 10 years' imprisonment for second-degree assault and time-served for malicious destruction of property.

In a timely appeal, Carrington raises two issues:

1. Did the circuit court abuse its discretion in denying defense counsel's motion for a mistrial?

2. Did the circuit court err at sentencing by considering prior charges filed against [appellant] that were either nol prossed or stetted by the State?

For the reasons discussed below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Carrington and Aseelah Swilling were involved in an intimate relationship from 2011 to 2016. In 2015 Carrington was convicted and incarcerated for committing a second-degree assault on Swilling (when she was pregnant). He was out on probation for that conviction by March 30, 2016.

Swilling testified that, at about 3:00 a.m. that morning, Carrington approached her car when she was stopped at a red light at the intersection of Orleans Street and Aisquith Street in East Baltimore. Carrington attempted to open the passenger-side door, but it was locked. He demanded that she open the door, but she refused. According to Swilling, Carrington "started getting aggressive, screaming and hollering" as he continued to pull on the door handle.

When the light changed, Swilling stepped on the gas. Carrington responded by jumping on top of her car and clinging to the roof while banging on the driver's side window and windshield.

Swilling drove several blocks east, to the intersection of Orleans Street and Wolfe Street, where she knew that there was a security booth for the Johns Hopkins Medical Center. At the intersection of Orleans Street and Wolfe Street, a video camera captured images of Carrington breaking the driver's side window, reaching inside, unlocking the door, and punching Swilling while she was buckled in her seat. Carrington ran to the passenger side, opened the door, took something from the passenger compartment (Swilling said that it was her purse), and fled.[1] A Johns Hopkins security officer left the security booth and chased Carrington, but did not catch him.

A police officer responded to the scene. He testified that the driver's side window of Swilling's car was broken, that the front seat and floor were covered with glass, and that the contents of the glove compartment were "strewn about" as though someone had gone through them.

Carrington testified on his own behalf. He said that he had been with Swilling, in her car, on the morning of the incident. He claimed to have decided to break off his relationship with her earlier that evening, and he complained that Swilling had not

[1] The record on appeal does not contain the video-recording. All we have is testimony in which Swilling narrates what she says the video depicts.

permitted him to see a child that she said was his.[2] He claimed to have gotten out of her car at Orleans Street and Central Avenue, but to have forgotten a bag that he had left in the car. In his account, Swilling would not open the door for him. At that point, he said, he walked in front of the car, she hit the gas, and he reacted by jumping onto the car. When the car finally came to a stop, he said that he accidentally broke the window with his elbow as he rolled off. He testified that he unlocked the door, grabbed his bag, and left. He denied punching Swilling, but admitted to "cussing her out."

The jury convicted Carrington of second-degree assault and malicious destruction of property, but acquitted him of theft.

DISCUSSION

I. Denial of Carrington's Motion for Mistrial

Carrington has a number of prior convictions, including a conviction for committing a second-degree assault on Swilling on December 30, 2014, when she was 15 weeks' pregnant. He was detained or incarcerated on that charge from December 2014 until January 2016, when he was released on probation. The child had been born on March 30, 2015.

[2] Swilling was pregnant with this child when Carrington committed the assault for which he was convicted in 2015. In his testimony, Carrington appeared ambivalent or noncommittal about whether the child was his. On one hand, he denied that he had any children with Swilling. On the other, it seems that he may have wanted to see the child, or to see a photograph of the child, in order to confirm whether it was his.

Before trial, Carrington made several motions *in limine*, including a motion to prevent the State and its witnesses from mentioning that he had been incarcerated. The court did not rule on that motion.

During Swilling's cross-examination, defense counsel asked whether she had told Carrington that she was pregnant with his child. The State objected, and the court sustained the objection.

During the ensuing bench conference, defense counsel explained that his line of questioning was relevant to show that on the night of the incident Carrington was angry with Swilling for not allowing him to see the child after he had been released from jail. The State responded that it had had no intention of mentioning the assault conviction for which Carrington had been detained or incarcerated when the child was born, but warned that Carrington might open the door to that subject. The court responded that it did not know whether the defense would open that door.

When defense counsel resumed the examination, he asked: "Now [Carrington] has never seen his child, has he?" Swilling responded: "No, because he was in jail."

Defense counsel immediately moved for a mistrial. The court denied the motion, proposed a curative instruction, and asked defense counsel whether he would prefer that the court not highlight the stricken testimony by giving the instruction. Counsel asked the court to give the curative instruction, and it did.

In explaining the basis for its decision to deny the motion for a mistrial, the court acknowledged that it had not acted on Carrington's motion requesting that the State and its witnesses be instructed not to mention his incarceration. On the other hand, the court

correctly observed that Swilling's answer came in response to defense counsel's "accusatory" questions.[3] "[S]ometimes you get more than what you asked for," the court observed. The court also observed that Swilling did not say that Carrington had been in jail on the charges on which he was currently facing trial.

Carrington contends that the "reference to [his] incarceration was so prejudicial that the court's curative instruction was insufficient." The State responds that "a single reference to [Carrington's] having been in jail at an indeterminate point in time and for an unspecified reason did not warrant the extraordinary remedy of a mistrial." We hold that the court did not abuse its discretion in denying Carrington's motion for mistrial.

"A mistrial is no ordinary remedy[.]" *Cooley v. State*, 385 Md. 165, 173 (2005). Rather, it is "'an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Id.* (quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)); *accord Rutherford v. State*, 160 Md. App. 311, 323 (2004) (stating that mistrial is "an extreme sanction that courts generally resort to only when no other remedy will suffice to cure the prejudice" to the defendant) (internal quotation marks and citations omitted). Put another way, "[t]he determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)).

[3] The questions suggested that Swilling was an alcoholic, that she became angry when she drank, that she was a jealous person, and that she had accused Carrington of cheating on her.

"'[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court[.]'" *Cooley*, 385 Md. at 173 (quoting *Wilhelm v. State*, 272 Md. 404, 429 (1974)). "[T]he trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks." *Wilhelm*, 272 Md. at 429.

> "The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able ... to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has his finger on the pulse of the trial."

Simmons v. State, 436 Md. 202, 212 (2013) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

An appellate court will not reverse a denial of a mistrial motion absent an abuse of discretion, *see Simmons v. State*, 436 Md. 202, 212 (2013); *Browne v. State*, 215 Md. App. 51, 57 (2013); and certainly will not reverse simply because it might have ruled differently. *Nash v. State*, 439 Md. 53, 67 (2014) (citations omitted). A trial court abuses its discretion when its ruling:

> is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice." . . . The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

King v. State, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994) (internal citations omitted)).

To determine whether a defendant was denied a fair trial, the Court of Appeals identified the following factors to be considered:

> [W]hether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists. . . .

Rainville v. State, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

"[T]hese factors are not exclusive and do not themselves comprise the test." *Kosmas v. State*, 316 Md. at 594. Rather "[t]he question is whether the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial, and the enumerated factors are simply helpful in the resolution of that question." *Id.* at 594-95.

In this case, we have a single reference to Carrington's incarceration for some unspecified offense and for some indeterminate amount of time. The State did not elicit that reference. To the contrary, the State not only avoided the subject of Carrington's incarceration, but warned defense counsel that he might open the door to that subject if he persisted in the line of questioning that he was pursuing. Despite the warning, defense counsel pressed on with a hostile, "accusatory" assertion that Carrington had not seen the child. The question prompted a predictable response that Carrington had not seen the child because he had been "in jail." Swilling may well have served up this response more as a defense against the veiled assertion that she was wrongfully preventing Carrington from seeing the child than as a means of impugning his character. In any event, with defense counsel's consent, the court promptly instructed the jury to disregard the

comment. In these circumstances, it is difficult to regard the court's response as anything other than a sound exercise of discretion.

Citing the factors enumerated in *Rainville*, Carrington complains that credibility was a "crucial issue" and that Swilling, the source of the improper reference, was "the principal witness upon whom the prosecution depended." He simultaneously overstates the importance of Swilling's testimony and understates the "'great deal of other evidence'" against him. *Rainville v. State*, 328 Md. at 408 (quoting *Guesfeird v. State*, 300 Md. at 659).

The jury saw the surveillance video that depicted Carrington on top of Swilling's car, breaking the driver's side window, punching her in the face, and forcing his way into the car. In addition, the jury heard the police officer's testimony that there was broken glass all over the front seat and floor of the car and that someone had ransacked the glove compartment. Furthermore, because Carrington later took the stand and testified on his own behalf, the jury heard of his prior conviction for an offense relevant to his credibility, which may have impaired the jury's evaluation of his veracity at least as much as Swilling's brief reference to his having been in jail. The circuit court, in short, did not abuse its discretion in denying the motion for a mistrial.[4]

[4] In his brief, Carrington complains that after the motion for a mistrial Swilling volunteered another reference to his incarceration. Carrington did not, however, move for a mistrial because of the second reference. Hence, that issue is not before us. In any case, the court properly dealt with the issue by sustaining an objection even before one was made and taking the initiative to admonish the witness to listen to the question and to answer that question that she was asked.

II. Sentencing

During sentencing, the State detailed Carrington's extensive criminal record, which included a previous conviction for second-degree assault on Swilling in 2015 (while she was pregnant); a conviction for a second-degree assault on another woman in 2012; and five more domestic violence cases that were either nol prossed or stetted between 2001 and 2014. When he committed the assault for which he was convicted in this case, Carrington was on probation for the conviction for assaulting Swilling when she was 15 weeks' pregnant.[5]

At sentencing, defense counsel did not object to the State's recitation of the stets and nol prosses on Carrington's record. Instead, in mitigation, defense counsel said that if the court was "going to give any weight to the various stets and nolle prosses," it should "give equal weight to Ms. Swilling's record."

Before handing down its sentence, the court stated:

> And do I consider all of the stets and nolle prosses? It tells me a lot when there are a number of stets and nolle prosses as it relates to assaults and the like against different female victims, and the same female victim in this case. What it tells me is that you have an issue with the women to whom you are in a relationship.

[5] At the sentencing proceeding, the prosecutor detailed the circumstances of the assault that occurred when Swilling was pregnant. According to the prosecutor, Carrington gained access to a house through a second-floor window. He found Swilling in the kitchen, where he beat her face and head with a child's metal scooter, beat and kicked her in the stomach, and told her, "bitch, you can't get rid of me." Swilling briefly lost consciousness, but awoke to find Carrington on top of her, wielding a knife. Swilling's teenaged son heard the assault and went to investigate. He saw Carrington, with a knife, on top of his mother. He tried to intervene, but Carrington cut his hands with the knife. The young man ran outside and alerted a police officer, who made the arrest. Carrington received a sentence of five years' incarceration, with all but time-served suspended, because Swilling refused to cooperate.

> Not one of these assaults is on any man, not one. That means this is a power and control issue. Not one of them. It is only the women with whom you are in either a sexual or a romantic relationship, and these women, I can say particularly two of these women, have ended up with you laying on hands and that was without healing. You were laying on hands.
>
> This Court has no choice. At some point somebody has to put their foot down that his doesn't make sense at all, because eventually this woman or some other woman is going to be seriously hurt and this is where it stops. The Court is sentencing you, sir, [to] the maximum penalty to this matter is ten years [sic].

Carrington did not object. Nonetheless, he argues on appeal that the circuit court relied on impermissible considerations – specifically, the five domestic violence cases that ended in stets or nol prosses and, hence, did not result in convictions.

In an effort to evade the consequences of his failure to object, Carrington argues that the court imposed an illegal sentence, which he can challenge at any time under Md. Rule 4-345(a). His premise, that the court imposed an illegal sentence, is incorrect.

Rule 4-345(a) allows a court to "correct an illegal sentence at any time," even if the criminal defendant failed to object at the time of the proceedings. *See Bryant v. State*, 436 Md. 653, 662 (2014). The rule applies, however, only "to sentences that are 'inherently' illegal." *Id.* (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). An "inherently illegal" sentence is one in which "'there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed[.]'" *Bryant*, 436 Md. at 663 (quoting *Chaney*, 397 Md. at 466). By contrast, if the defendant complains only of a procedural

error in sentencing, the complaint does not concern an "illegal" sentence within the meaning of Rule 4-345(a). *See Tshiwala v. State*, 424 Md. 612, 619 (2012).

The circuit court did not impose an illegal sentence. Carrington had been convicted of the offenses for which he was sentenced – second-degree assault and malicious destruction of property. Moreover, the court imposed a permitted sentence (albeit the maximum sentence) of incarceration for 10 years for assault (Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 3-203(b) of the Criminal Law Article) and time-served for malicious destruction. Carrington's real complaint is of a procedural error – the court's alleged reliance on allegedly impermissible considerations. He cannot raise that complaint in a motion under Rule 4-345(a). *See Reiger v. State*, 170 Md. App. 693, 700 (2006).

Ordinarily, an appellate court will not consider allegations of impermissible considerations in sentencing unless they were raised in or decided by the trial court. *See*, *e.g.*, *Abdul-Maleek v. State*, 426 Md. 59, 69 (2012); *Chaney v. State*, 397 Md. at 466-67. Carrington did not raise any such issue at his sentencing, and the circuit court did not decide it. Hence, Carrington has not preserved that issue for appellate review. Md. Rule 8-131(a); *see* Md. Rule 4-323(c). Accordingly, we decline to consider it.

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