Circuit Court for Charles County
Case No. 08-K-15-001213

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1317

September Term, 2016

TRAVONNE JOHNSON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Arthur, J.

Filed: November 3, 2017

The State charged appellant Travonne Johnson with one count of attempted first-degree sexual offense, one count of second-degree rape, and one count of second-degree assault. The Circuit Court for Charles County granted Johnson's motion for judgment of acquittal on the charge of attempted first-degree sexual offense, and the jury convicted him only of second-degree assault.

The court sentenced Johnson to ten years in prison, but suspended all but eight. In addition, the court placed Johnson on five years' probation under the Collaborative Offender Management Enforcement Treatment or "COMET" program, which was designed "for the supervision of sexual offenders." *Russell v. State*, 221 Md. App. 518, 522-23, *cert. granted*, 443 Md. 234, *appeal dismissed*, 443 Md. 734 (2015).

In this timely appeal, Johnson presents the following questions:

1. Did the trial court err by refusing to instruct jurors not to consider a dead charge?

2. Did the trial court err [in] allowing a lay witness to give expert testimony about cell phone data extraction?

3. Did the trial court illegally sentence Johnson to supervision under the COMET program as a condition of probation after he was only convicted of second-degree assault?

For the reasons that follow, we shall affirm the conviction for second-degree assault. But because we conclude that the trial court erred in imposing supervision under the COMET program as a condition of Johnson's probation, we vacate that portion of his

sentence and direct the amendment of his commitment record and probation order in accordance with this opinion.

FACTS AND LEGAL PROCEEDINGS

N.C.[1] met Travonne Johnson about a month before Thanksgiving of 2015, when he walked past her house and engaged her in flirtatious conversation. At the time, she was 19; he was 17.

N.C. testified that she and Johnson exchanged phone numbers and communicated "pretty frequent[ly]" thereafter. They met on occasion to talk, and she said that they smoked marijuana together on one occasion. Occasionally they had conversations about sex: N.C. told Johnson that she was sexually involved with another young man, and Johnson asked why she could not have sex with him as well. She told him that she did not want to have sex with him.

Several days before the assault, N.C. discovered that Johnson had been flirting with one of her friends on Twitter. N.C. testified that Johnson had shown her a lack of respect: she believed that if Johnson liked her, he should not be flirting with her friends. N.C. told Johnson that she did not want to talk to him anymore, but later he texted her to say he was not interested in her friend. N.C. responded that she would still be his friend, "but other than that, no."

This aspect of N.C.'s testimony was corroborated by a number of text-messages that she exchanged with Johnson during the dispute about the friend. In one message,

[1] To protect the victim's privacy, we shall use initials to identify her, her family, and her friends.

N.C. wrote, "Look we can be friends just friends that's it." Johnson responded ambiguously, writing, "Dat dont mean we cant finish wat we was talkin about." A minute later, he wrote, "We friends I get it but reme[m]ber yu said I gotta wait for that." When N.C. asked, "Wait for what [?]," Johnson answered, "To fuck you." Within 20 seconds, N.C. replied, "That's not happening either." A few minutes later, Johnson asked, "Ok then so why we cant fuck once or twice." Within a minute, N.C. responded, "Because I said so."

Two days before the assault, on December 1, 2015, N.C. and Johnson exchanged another flurry of text-messages. After they had gotten together to smoke marijuana that evening, Johnson wrote, "Kill[2] but ima cool it and stopp being press to fuck you." After N.C. responded, "Yep," Johnson pressed on, asking, "But how im going kno you trying [to] fuck." N.C. replied, "You'll just kno."

In the late morning and early afternoon of December 3, 2015, N.C. and Johnson exchanged several dozen text-messages, some of which referred obliquely to the topic of sex. Johnson wanted to know why N.C. was about to spend money on cigarettes when she owed him $20, apparently for some marijuana that she had smoked. In one message he wrote, "Smh [shaking my head] you cant give me nothing else but money." She responded, "What else is there to give you[?]" He replied, "Anything frfr [for real, for real]." She offered him some food, making it clear that she was joking by adding the

[2] It is not entirely clear what Johnson meant by "kill." The prosecutor admitted that he did not know what it meant. The Online Slang Dictionary says that it means "high-grade marijuana" (http://onlineslangdictionary.com/meaning-definition-of/kill) (last viewed October 27, 2017), which is consistent with the context of the message.

abbreviation "lol." When he responded, "Nope," she wrote, "Ok well I don't know what to tell you."

As the conversation continued, Johnson asked N.C. to help him roll some joints and to smoke some marijuana with him at his house. She testified that she said no, but he reminded her that she owed him money for the marijuana that she had smoked before and cajoled her until she relented. On at least three occasions before she relented, she told him, in text-messages, that she did not want to go into his house.

N.C. testified that she went into Johnson's house and sat on a couch or bed in a back bedroom while he went upstairs to get the marijuana. When he returned five or ten minutes later, she said, he was shirtless, and his erect penis was exposed through his jeans and boxer shorts.

N.C. said that she told Johnson "it was not going to happen" and tried to leave the house, but he pulled her from behind and threw her on a bed. While she fought and cried, she said, he ripped her belt from the back and held her hands. The State introduced a thin piece of leather, with broken metal clasps, which N.C. said she was wearing at the time of the assault.[3]

According to N.C., she was able to get up, but when she started to run, Johnson grabbed her leg. They both landed on the floor. He pulled her pants down, grabbed her neck, and tried to insert his penis into her vagina. He was able to do so on the third attempt. She did not know whether he ejaculated. She tried to get away, crying and

[3] The item resembles a purse strap, which is what the defense called it.

yelling, "No, I don't want to, no, no, no. Stop." Eventually, he got up, and N.C. pulled up her pants, left the house, and went home.

When N.C. got home, her older sister, A.P., said that she could tell that something was wrong. A.P. said that she saw the broken belt and asked N.C. what had happened. Although N.C. initially tried to deny that anything was wrong, she eventually told her sister that Johnson had raped her.

A.P. went over to Johnson's house because, she said, she had to "make sure" that "this is what really happened." She knocked loudly on the door, but no one answered.

Approximately 30 minutes after N.C.'s sister returned home from her unsuccessful attempt to talk to Johnson, her best friend, J.C., arrived at N.C.'s residence. N.C. said that she told J.C. what had happened and asked if she had a Plan B or morning-after pill to prevent a pregnancy.

Although she did not want to tell anyone else what had happened, N.C.'s sister and her friend convinced N.C. to tell her father. Mr. C. called the police, who interviewed his daughter and counseled her to go to the hospital for a sexual-assault nurse ("SANE") examination.

The SANE nurse observed a small, crescent-shaped laceration on the left side of N.C.'s neck, a contusion with swelling on the left side of her neck, and redness along her hairline, as well as scratches on her abdomen. The nurse did not observe any injuries to N.C.'s genitals, but she explained that it would not be unusual for a sexual-assault victim to exhibit no such injuries.

The State's forensic scientist testified that vaginal, vaginal-cervical, anal-perianal, and external genitalia swabs, taken during the SANE, showed the presence of semen. Johnson's DNA matched the DNA in the semen samples that were taken from N.C.

When the police officers first met with N.C., a detective noticed that one of her earrings was missing. After obtaining a search and seizure warrant for Johnson's house, the detective found the backing of an earring on the floor of a back bedroom.

Johnson was arrested at his residence on the evening of December 3, 2015. The next day, the detective obtained Johnson's cellphone from Johnson's mother.

Johnson called no witnesses. His defense consisted of his attorney's argument that N.C. consented to have sex with him – or at least that the State had failed to prove beyond a reasonable doubt that she did not consent. Counsel argued that N.C. was attracted to Johnson, but had fabricated the allegation of rape because she was worried about how the other young man with whom she was sexually involved would react if he learned that she had had sex with Johnson. In addition, the argument focused on N.C.'s injuries, which, counsel claimed, were inconsistent in nature and extent with the forcible rape that she described. The argument also focused on N.C.'s account of the rape, which counsel described as improbable.

The jury found Johnson not guilty of second-degree rape, but guilty of second-degree assault.

DISCUSSION

I.

At the end of the State's case, Johnson moved for a judgment of acquittal on all charges. The court denied the motion on the charges of second-degree rape and second-degree assault, but granted the motion on the charge of attempted first-degree sexual offense. In reaching its decision, the court agreed with Johnson's argument that the indictment had alleged attempted anal penetration, which the State had not proved.

When the time came to instruct the jury, Johnson requested that the court give Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 3:05, which reads:

> At the beginning of the trial, I described the charges against the defendant. Some of those charges are no longer part of the case. You should not consider those charges or the reasons those charges are no longer before you. The only charge[s] left for you to consider is [are] (charge[s] being submitted to the jury).

The court declined to give the instruction, reasoning that it was unnecessary to do so. The court correctly observed that it had mentioned the charge of attempted first-degree sexual offense "very briefly in passing" during voir dire.[4] The court added that it recalled no mention of the substance of the charge (attempted anal penetration) in the State's opening statement, and the State confirmed that it had said nothing on that

[4] During introductory remarks at the beginning of voir dire, the court told the jurors: "It is alleged that . . . [Johnson] committed a second degree rape, attempted first degree sex offense and a second degree assault on [N.C.]."

subject.[5]

The court then proceeded to instruct the jury. Among other things, the court told the jurors: "If you are not satisfied of the Defendant's guilt [beyond a reasonable doubt] for each and every element of a crime charged, then reasonable doubt exists and the Defendant must be found not guilty of that crime." It instructed the jurors that they were required to "decide th[e] case based only on the evidence that [they] and [their] fellow jurors heard together in the courtroom." It stated that the evidence that the jury should consider was "(1) testimony from the witness stand; and (2) physical evidence or exhibits admitted into evidence." It specifically stated that "the charging document" was "not evidence of guilt and must not create any inference of guilt." It reminded the jurors that "[o]pening statements and closing arguments of lawyers are not evidence[,]" and that they should not draw any inference from comments on the evidence made by the court.

The court further instructed the jury that Johnson was "charged with Rape – Second Degree and Second Degree Assault." It said that the jury was required to "consider each charge separately and return a separate verdict for each charge." Later, it separately addressed the elements of those two charges. It repeated that the defendant was "charged with the crime of Second-Degree Rape" and told the jury what the State was required to prove "[i]n order to convict the defendant of Second-Degree Rape[.]" It

[5] In its opening statement, the State did mention the charge of attempted first-degree sexual offense, but it said nothing about the substance of the charge. In particular, it said nothing about any allegation of attempted anal penetration. Immediately before opening statements, the court had instructed the jury that "opening statements are not evidence[,]" but "only statements of what the lawyers expect the evidence will be."

then repeated that the defendant was "charged with the crime of Assault" and told the jury what the State was required to prove "[i]n order to convict the Defendant of Assault[.]" After those instructions, the court took note of Johnson's exception to its refusal to deliver MPJI-Cr 3:05.

Johnson contends that the court abused its discretion in declining to give the instruction.

Maryland Rule 4-325 states, in pertinent part:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Rule 4-325(c) requires the court to give a requested instruction when a three-part test is met: (1) the requested instruction is a correct statement of the law; (2) the instruction is applicable under the facts of the case (*i.e.*, is generated by some evidence); and (3) the content of the instruction was not fairly covered elsewhere in the jury instructions actually given. *See Atkins v. State*, 421 Md. 434, 444 (2011); *Thompson v. State*, 393 Md. 291, 302-03 (2006). On appeal, we review the instructions "'in their entirety' and '[r]eversal is not required where the jury instructions, taken as a whole, sufficiently protect[ed] the defendant's rights and adequately covered the theory of the defense.'" *Carroll v. State*, 428 Md. 679, 689 (2012) (quoting *Fleming v. State*, 373 Md. 426, 433 (2003)) (first alteration in original); *see also General v. State*, 367 Md. 475, 487 (2002) ("[i]f the instructions given as a whole adequately cover the theory of the defense, the trial court does not need to give the specific requested instruction").

Johnson agrees that "[t]his Court reviews a trial court's refusal to give a proposed jury instruction under an abuse of discretion standard." Brief at 8 (citing *Thompson v. State*, 393 Md. at 311); *accord Arthur v. State*, 420 Md. 512, 525 (2011); *Albertson v. State*, 212 Md. App. 531, 551-52 (2013). We see no abuse of discretion in the circumstances of this case.

During voir dire, the circuit court briefly mentioned the charge of attempted first-degree assault, along with the other charges against Johnson. The court did not, however, "describe" the charges in any level of detail. The court did not, for example, describe the allegations on which the charge was based or the anticipated proof. Accordingly, it is difficult to see why the proposed instruction would apply in this case.

This case differs markedly from *Sherman v. State*, 288 Md. 636 (1980), the only decision on which Johnson relies. In that case the trial court erred because it allowed the jurors to consider an indictment that contained "dead counts" that the court had dismissed. *Id.* at 642. In this case, by contrast, Johnson admits (Brief at 10) that the count on which he had been acquitted to the jury was not submitted to the jury.

Furthermore, the court's instructions made it clear that Johnson was charged only with second-degree rape and second-degree assault, and they advised the jury not to consider or give any weight to the charging document. Taken as a whole, the instructions adequately protected Johnson's rights and fairly covered the concept that the jury was permitted to consider only the offenses of second-degree rape and second-degree assault. *See Carroll v. State*, 428 Md. at 69. The court, therefore, did not abuse its discretion in declining to give Johnson's requested instruction.

Finally, even if the court had abused its discretion (which it did not), we would find any error to be harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976). Despite substantial evidence of a forcible rape, the jury acquitted Johnson of rape and convicted him only of second-degree assault. In these circumstances, we are certain that the jurors' decision was in no way affected by the court's failure to instruct them not to consider the charge that it had dismissed. *See Sutton v. State*, 139 Md. App. 412, 456-57 (2001).

II.

At trial, the State called Detective Chris Shankster to testify about text-messages that N.C. and Johnson exchanged. The detective had extracted those messages from their cellphones, using a software program called Oxygen Forensics. After connecting the phones to hardware supplied by the vendor, the detective activated the program by hitting the command "send." The program then presented the data in the form of a report. Detective Shankster created custom reports isolating N.C.'s and Johnson's phone numbers, so as to exclude thousands of pages of irrelevant data, such as text messages or phone calls to or from other people. Over a defense objection, the court allowed the State to publish the reports to the jury.

Johnson argues that the trial court erred in permitting Detective Shankster, who was not named or accepted as an expert, to give what he says amounted to expert testimony about cellphone data extraction. He contends that the trial court should have

sustained his counsel's objections to the detective's testimony and to the admission of the reports showing telephone calls and text-messages between him and N.C.[6]

In support of his contentions, Johnson observes that Detective Shankster began his testimony with a reference to his 123 hours of specialized training in cellular telephone technology. In view of the detective's specialized training, Johnson likens this case to *Ragland v. State*, 385 Md. 706, 725-26 (2005), in which police officers were held to have given expert testimony when they opined, based on their training and experience in law enforcement, that the defendant's conduct was that of a person who was engaging in a drug transaction. In addition, Johnson invokes *State v. Payne*, 440 Md. 680, 701-02 (2014), in which a detective was held to have given expert testimony when he used his training and experience to cull data from the records of a company that operated a cellular telephone network, interpret data that would not be "decipherable" to a layperson, and distinguish "pertinent" from "extraneous" data in opining about the location of the cellphone towers that transmitted specific communications. In our view, *Payne* and *Ragland* are inapposite.

In this case, the detective did not rely, and did not need to rely, on his specialized training to generate the reports that the State entered into evidence. Not only did the

[6] The State raises a preservation issue. It argues that during the detective's testimony defense counsel offered only one general objection, which the court "plainly construed" as an objection to the form of the question, because it instructed the State to rephrase the question. Defense counsel did not object again until the State moved to admit the detective's reports into evidence. But because a general objection ordinarily preserves all grounds of objection, *Boyd v. State*, 399 Md. 457, 476 (2007), we conclude that defense counsel's general objections adequately preserved the issue for our review.

offer no opinion, but it appears that he could have created the reports by hand if he took time to scroll through all of the information stored on the phones and to identify message that Johnson and N.C. exchanged. By automating the clerical steps of identifying the digital messages that Johnson and N.C. exchanged and compiling them in a log, the software simply expedited a process that the detective could have performed on his own. It required no more specialized training or experience for the detective to generate the reports than it requires to generate a word-count for an appellate brief.

The detective's reference to his 123 hours of training may have been rhetorically useful in enhancing his prestige in the jury's eyes, but it did not transform him into an expert witness. Therefore the court did not err in permitting him to testify about the messages that Johnson and N.C. exchanged.

III.

Under the COMET program, a "sexual offender management team" is required to "conduct lifetime sexual offender supervision and the supervision of probation, parole, or mandatory release of a person subject to lifetime sexual offender supervision." Md. Code (2001, 2008 Repl. Vol., 2016 Supp.) § 11-725(a) of the Criminal Procedure Article ("CP"). Johnson argues that the court imposed an illegal sentence when it subjected him to supervision under the COMET program as a condition of his probation.[7]

[7] Although Johnson did not object to the condition of probation at his sentencing proceeding, Rule 4-345(a) provides that the court "may correct an illegal sentence at any time." A condition of probation is part of the punishment for the crime. *Walczak v. State*, 302 Md. 422, 426 n.1 (1985), *abrogation on other grounds recognized by Savoy v. State*, 336 Md. 355 (1994). Therefore, "an illegal condition of probation can be

"The COMET supervision program was created in response to legislation passed by the General Assembly in 2006[,] which mandated the establishment of sexual offender management teams for the supervision of sexual offenders." *Russell v. State*, 221 Md. App. at 522-23. The pertinent legislation is contained in Subtitle 7 of Title 11 of the Criminal Procedure Article, which concerns sex-offender registration.

At the time of Johnson's conviction, subsections (a) and (b) of CP § 11-723 stated that if a defendant is convicted of any one of several sex offenses, including second-degree rape and first-degree sexual offense, the sentence must "include a term of lifetime sexual offender supervision," unless the court imposes a sentence of life without parole.[8] The "lifetime sexual offender supervision" is conducted by the members of the COMET "team," which must include a "specially trained parole and probation agent," as well as "a representative of a sexual offender treatment program or provider" (*id.* § 11-725(a)); and may include victim-advocates, "faith counselors," a polygraph examiner with expertise in examinations specific to sexual offenders, a law enforcement officer, an assistant State's Attorney, and others. *Id.* § 11-725(b). Once every six months, the team must submit a progress report to the sentencing court. *Id.* § 11-725(c)(1).

challenged as an illegal sentence[,]" even if the defendant fails to object at the sentencing proceeding. *Walczak v. State*, 302 Md. at 426 n.1; *Chaney v. State*, 397 Md. 460, 466 (2007).

[8] "[S]exual offense in the first degree" no longer exists as a separate and distinct offense. Effective Oct. 1, 2017, the conduct that formerly would have amounted to a first-degree sexual offense was reclassified as a species of first-degree rape. 2017 Md. Laws ch. 161.

"A probationer on COMET supervision is required to comply with a sexual offender management program, which may include intensive reporting requirements, specialized sex offender treatment, electronic GPS monitoring, polygraph testing, computer monitoring, and being compelled to take medication." *Russell v. State*, 221 Md. App. at 523. "COMET supervision also may include a 7:00 p.m. to 7:00 a.m. curfew." *Id.*

By its terms, the COMET program establishes "sexual offender management teams for the supervision of sexual offenders." *Id.* at 522-23 (citing CP § 11-725(a)). CP § 11-723(a) defines the class of offenders who are subject to lifetime sexual supervision:

> (a) Except where a term of natural life without the possibility of parole is imposed, a sentence for the following persons shall include a term of lifetime sexual offender supervision:
>
> (1) a person who is a sexually violent predator;
>
> (2) a person who has been convicted of a violation of § 3-303 [first-degree rape], § 3-304 [second-degree rape], § 3-305 [first-degree sexual offense], or § 3-306(a)(1) or (2) [second-degree sexual offense] of the Criminal Law Article;
>
> (3) a person who has been convicted of a violation of § 3–309 [attempted first-degree rape], § 3–310 [attempted second-degree rape], or § 3–311 of the Criminal Law Article [attempted first-degree sexual offense] or an attempt to commit a violation of § 3–306(a)(1) or (2) of the Criminal Law Article [second-degree sexual offense];
>
> (4) a person who has been convicted of a violation of § 3-602 of the Criminal Law Article [sexual abuse by a person with care, custody, or responsibility for the supervision of a minor] involving a child under the age of 12 years;
>
> (5) a person who is required to register under § 11-704(c) of this subtitle [persons who have been adjudicated delinquent for acts that, if committed as an adult, would constitute certain sexual offenses]; and

> (6) a person who has been convicted more than once arising out of separate incidents of a crime that requires registration under this subtitle.

Johnson meets none of these criteria. Although he was charged with second-degree rape and first-degree sexual offense, he was convicted only of second-degree assault, which does not put him within the class of offenders who are subject to lifetime sexual supervision. Furthermore, the record reveals no other conviction for any type of sexual offense that would have required him to register as a sex offender and subjected him to supervision through the COMET program.[9]

Johnson correctly observes that this case resembles *Cain v. State*, 386 Md. 320 (2005). There, the State had charged the defendant with child abuse, a third-degree sexual offense, and second-degree assault. *Id.* at 322-23. After the State allowed the defendant to enter an *Alford* plea[10] to the charge of second-degree assault and dismissed the child abuse and sexual offense charges, the circuit court imposed a sentence that required him to register as a sex offender. *Id.* at 323-26. Notwithstanding that the assault was sexual in nature, the Court of Appeals held that the court imposed an illegal sentence when it required the defendant to register as a sex offender. *Id.* at 340. The Court

[9] At sentencing, the prosecutor referred to some type of psychosexual treatment that Johnson had voluntarily undergone, but there is no evidence of any conviction for a sexual offense in the record.

[10] "An *Alford* plea arises when a defendant maintains his or her innocence, but concedes that the State could adduce enough evidence to prove him or her guilty of the crime charged, as derived from the Supreme Court Case of *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)." *Cain v. State*, 386 Md. at 326 n.7.

reasoned that the registration requirement applied only to persons who were "'convicted of a *crime* that involves conduct that by its nature is a sexual offense' against a minor" (*id.* at 336 (quoting Md. Code (2001), § 11-701(d) of the Criminal Procedure Article), but that the elements of second-degree assault "do not contain reference to a sexual offense against a minor." *Id.* at 338.

Similarly, in this case, Johnson would qualify for sexual offender supervision only if he met the criteria listed in CP § 11-723(a)(1)-(6). That list does not include person who has been convicted of second-degree assault. "The statutory crime of assault in the second degree consists of the common law offenses of assault, assault and battery, and battery, unless aggravated to the greater offense of first degree assault by the use of a firearm or intent to cause serious physical injury." *Cain v. State*, 386 Md. at 338 (footnote omitted). "These elements alone do not, necessarily and solely, contemplate conduct that by its nature involves a sexual offense." *Id.* Therefore, the circuit court imposed an illegal sentence when it subjected Johnson to supervision under the COMET program as a condition of his probation.

CASE REMANDED TO THE CIRCUIT COURT FOR CHARLES COUNTY FOR THE PURPOSE OF AMENDING APPELLANT'S COMMITMENT RECORD AND PROBATION ORDER IN ACCORDANCE WITH THIS OPINION; JUDGMENT OTHERWISE AFFIRMED; COSTS ASSESSED TWO-THIRDS TO APPELLANT AND ONE-THIRD TO CHARLES COUNTY.