Circuit Court for Montgomery County
Case No. 127399

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2173

September Term, 2016

KESTER GABRIEL CUTHBERT

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 8, 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 jury in the Circuit Court for Montgomery County convicted Kester Gabriel Cuthbert, appellant, of two counts of child sexual abuse, three counts of second-degree rape, and four counts of second-degree sex offense. The court sentenced appellant to two consecutive twenty-five year prison terms, with all but ten years suspended, for each of the child abuse convictions and concurrent ten year sentences for the remaining convictions. Additionally, appellant is required to register as a Tier III sex offender. On appeal, appellant contends that the court erred and/or abused its discretion in excluding him from the courtroom during the rendition of the verdict. Assuming that the court erred, we conclude that any error was harmless, and we affirm.

BACKGROUND

In the spring of 2015, Rosa R. confronted her fourteen-year-old daughter – whom we shall refer to as "the child" – because she was "acting weird" and her grades were slipping. The child said that she had been raped by a stranger. Ms. R. immediately called police. Later, the child said that she had been raped by appellant.

At trial, the child testified to events as follows. When the child was ten-years-old, she and her mother moved in with appellant at an apartment in Silver Spring. At the time, Ms. R. and appellant were dating, and they had a daughter – the child's younger half-sister – in common. Their relationship ended, but Ms. R. remained in the apartment with appellant and her two daughters. After the relationship ended, and the child turned eleven, appellant began to enter her room when she was sleeping and reach down her pants. The child testified that on several occasions, appellant would come into her room at night, take

her pants down, and put his fingers into her vagina. The child also stated that at least once, appellant put his penis into her vagina.

In January 2013, the child, her half-sister, and appellant moved into a different apartment in Silver Spring to live with appellant's mother. Ms. R., who refused to live with appellant, was homeless for a period of time. The child testified that the abuse continued at the new apartment. The child stated that the pattern was the same: appellant would come into her room at night, take her pants down, put his fingers into her vagina, and then place his penis into her vagina. The child could not recall how many times appellant abused her, but she testified that it was "more than five." In January 2015, following an argument with appellant, the child went to live with Ms. R. A few months later, the child reported the rape to Ms. R. and police.

DISCUSSION

At trial, the jury announced unanimous convictions for Counts 1-4. Then, the following occurred:

> THE CLERK: Count 5, do you find the defendant, Kester Cuthbert, not guilty or guilty of sex abuse of a minor, [the child], at 1131 University Boulevard West?
>
> THE FOREPERSON: Guilty.
>
> [PROSECUTOR]: Your Honor, may we approach? I'm sorry to interrupt.
>
> THE COURT: All right. Come forward. Sir, if you'd be seated for a moment. This is very irregular. All right, ma'am, you're going to need to leave.
>
> [PROSECUTOR]: (Unintelligible).
>
> THE COURT: Okay. Take him out. All right. Step back. Out of the courtroom. Sheriff, these people are removed from the courtroom. Leave the

> courtroom. Leave the courtroom. Leave the courtroom or you'll be found in contempt. All right, ladies and gentlemen. On behalf of the court system, I apologize for that. We're going to proceed with the rendition of the verdict. The defendant has absented himself by his behavior upon partial rendition of the verdict in making statements towards one of the persons who was present in the courtroom. Okay? We're at Count 5. You have, as far as I recall – I'm going to have Count 5 called again. I think you said it, but I just want to make sure. So, Madam Clerk, if you would take Count 5.

With appellant absent from the courtroom, the jury announced convictions on Counts 5-9, the court polled the jurors, and the verdict was hearkened. In dismissing the jurors, the court remarked: "This has been a case that has obviously much at stake, much emotion in it. You, unfortunately, were subject to the worst of the emotional part a few moments ago. Hopefully, things will quiet down."

Once the jurors had exited the courthouse, the court asked the sheriff to check on appellant to see if he could be brought into the courtroom. The court then stated why it had removed appellant from the courtroom:

> All right. We're back on the record. Present in the courtroom is the Assistant State's Attorney and Defense counsel. The defendant is not present in the courtroom. He has been removed by the sheriffs because of some activities that occurred halfway through the rendition of the verdict. The jury has been discharged. They have left the premises. One of the witnesses, [Ms. R.], and people who accompanied her, have left the premises and we're ready to proceed with the remaining issues.
>
> Now, while we were on the record – I think it was while we were on the record, but I'll say it now while we're on the record again if I didn't say it before. The defendant was taken out because of his behavior. If the defendant has calmed down to the point where he can be returned to the courtroom and proceed without any further displays, then I'll bring him back to the courtroom. I've asked the sheriff as to whether he has calmed down or not. The sheriff indicates to me that he has. He's going to be brought back into the courtroom. He'll be in handcuffs or any other devices that the sheriffs believe are advisable, including leg irons, if need be. And we'll proceed with

> the rest of needs to happen. But if he becomes unruly, then he'll just be removed again.

After appellant returned to the courtroom, the State asked the court to revoke appellant's bond and explained:

> Your Honor, the State would ask that the Court revoke the defendant's bond pending sentencing, based on the threat that was made directly to the victim's mother, [Ms. R.], while we were on the record. I said it earlier; I'll repeat it again for Your Honor because I heard it myself. He was staring very intently at Ms. R[.] throughout the rendering of the verdict and then whispered in a loud voice, "I'm going to fucking kill you." Ms. R[.] has expressed concerns to me all day today about what is going to happen if he's found guilty. And I had, prior to what just happened in the courtroom, you know, patiently assured her that I didn't think – we hadn't seen any signs of anything that might happen. And, I mean, sure enough she's right. I have serious, serious concerns for the safety of [the child] and the safety of [Ms. R.] as a result of this verdict.

Defense counsel did not dispute what appellant had said, but he remarked that "the outburst was done at a time where, as a result of the verdict, emotions flew through him. And I don't believe it was a deliberate attempt or an intentional attempt or any attempt that he will be doing any damage to anybody." Nevertheless, the court revoked appellant's bond, remarking that appellant's outburst, as well as the comments of appellant's family members, caused concern.

Undisputedly, a defendant has a right to be present at all critical stages of his or her trial. *See State v. Hart*, 449 Md. 246, 265 (2016) (explaining that this right "'vindicates two primary interests: enabling the defendant to assist in the presentation of a defense, and ensuring the appearance of fairness in the execution of justice'" (quoting *Pinkney v. State*, 350 Md. 201, 209 (1998))). Rule 4-231(c), however, states that a defendant may waive this right by: 1) being voluntarily absent; 2) "engag[ing] in conduct that justifies exclusion

from the courtroom; or" 3) agreeing to being absent. This Court has observed that "the trial judge has broad discretion to control the conduct in his or her courtroom[.]" *Biglari v. State*, 156 Md. App. 657, 674 (2004). Indeed, the "'appropriateness and lawfulness of any action taken in a given case will depend naturally on the facts of each case.'" *Shiflett v. State*, 229 Md. App. 645, 670 (2016) (quoting *Smith v. State*, 382 Md. 329, 344 (2004)), *cert. denied*, 452 Md. 545 (2017).

We have also noted that a trial judge facing a disruptive defendant has, generally, three options: "'(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; [or] (3) take him out of the courtroom until he promises to conduct himself properly.'" *Cousins v. State*, 231 Md. App. 417, 448 (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)), *cert. denied*, 453 Md. 13 (2017). "'When the trial court selects the third option, however, the defendant who is removed from the courtroom must be advised of the opportunity to return upon a promise to behave.'" *Id.* (quoting *Biglari*, 156 Md. App. at 671).

In this case, appellant contends that the court violated his constitutional right to be present for the rendition of the verdict by excluding him from the courtroom following one "emotional" outburst. Appellant argues that the court should have warned him prior to excluding him from the courtroom, failed to advise him that he could return upon promising to behave properly, and also failed to provide him an opportunity to return. The State maintains that the court acted within its discretion in excluding appellant from the courtroom for the remainder of the rendition of the verdict given the nature of his outburst, and, moreover, if the court erred, it amounted to harmless error.

Assuming *arguendo* that the court erred in excluding appellant from the courtroom during the remainder of the rendition of the verdict, we conclude that any error was harmless. *See Hart*, 449 Md. at 262-63 (applying harmless error analysis to defendant's right to be present during proceedings). An error is harmless when "'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]'" *Id.* at 262 (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

We find this case analogous to *Reeves v. State*, 192 Md. App. 277, 300-01 (2010), in which we affirmed Reeves's convictions after he was voluntarily absent during the rendition of the verdict. We reasoned that Reeves's absence during the rendition of the verdict did not affect the jury's verdict because the court did not advise the jury that Reeves would be absent, and Reeves's attorney was present and requested that the jury be polled. *Id.* We concluded: "Even if [Reeves] were present, it is difficult to imagine what more he could have done." *Id.* at 301.

In this case, the jury was halfway through its rendition of the verdict against appellant. We fail to perceive how appellant's absence for the latter half of the rendition affected the verdict. As in *Reeves*, there was nothing appellant could have done at that point to influence the verdict.[1] Once the jury had been discharged, and the court moved to the next stage of the proceedings, appellant was given an opportunity to return to the

[1] Indeed, the State argues that appellant's continued presence after threatening Ms. R. may have hurt his case with the jury. *See United States v. Shepherd*, 284 F.3d 965, 967-68 (8th Cir. 2002).

courtroom. *See Biglari*, 156 Md. App. at 674 n.7 (stating that an absent defendant should be given an opportunity to return to the courtroom "whenever a particular phase of the proceedings has concluded . . . and a new phase is about to begin"). Accordingly, appellant's absence from the courtroom for the latter half of the rendition of the verdict, if it was error, amounted to harmless error.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.