UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2406

September Term, 2014

ISRAEL SORTO REQUENO

v.

STATE OF MARYLAND

Woodward,
Wright,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: October 15, 2015

On October 21, 2014, appellant, Israel Sorto Requeno, was found guilty of a sex offense in the second degree by the Circuit Court for Montgomery County. He was sentenced to 18 years' incarceration, with all but 10 years suspended, followed by a period of five years' supervised probation. During trial, the State introduced, and the court admitted over Requeno's objection, several statements made by Karla Sorto, the victim, and Detective Michael Fergus Sugrue, the lead investigator in Requeno's case.

Requeno presents the following questions:

1. Did the lower court err in admitting the videotaped statement of Karla Sorto?

2. Did the lower court err in admitting the hearsay statements of Detective Sugrue?

3. Did the lower court err in admitting prior bad acts evidence?

Facts

Requeno was accused of digitally penetrating his niece, Ms. Sorto, while she was asleep in her bed on or about November 18, 2013. Requeno and Ms. Sorto lived together in a home that was also shared with several other family members, including Ms. Sorto's mother, two brothers, and her stepfather. Requeno slept in the attic with his girlfriend, Maria, while Ms. Sorto slept in the basement on a mattress with her young daughter. On the night of November 17, 2013, Ms. Sorto went to bed around 11:00 p.m., and approximately around 1:30 a.m., she awoke to the feeling of someone's finger in her vagina. Ms. Sorto screamed when she saw a man next to her bed, and the man subsequently fled upstairs.

After the incident, Ms. Sorto told her brothers that the man who touched her was Requeno. The family searched for Requeno but he could not be found in the house at the time. Ms. Sorto then called 911 and said that she needed the police, explaining, "I was sleeping and my uncle lives, he lives over here. He was touching me, my area. And I don't think that's good. He has done it for two times already." Police arrived at the scene and asked Ms. Sorto several questions. She was then taken to the police station for further investigation, where her interview with Detective Sugrue was videotaped. During this interview, Ms. Sorto recounted that the event that took place that night, as well as previous incidents in which Requeno had touched her or behaved in ways that made her uncomfortable.

At trial, Ms. Sorto was somewhat vague in her testimony, which contrasted with what she said on the night of the incident, during the 911 call, and in her interview with Detective Sugrue. She testified that when speaking with the 911 operator, she was "certain it was Israel [Requeno]," but at trial she was no longer certain of who was in her room. Ms. Sorto testified that maybe she "assumed" it was Requeno because he was not in the house after the incident. She maintained that she no longer knew or remembered what happened that night. Ms. Sorto testified that "[a]t that moment [when speaking with 911] I was so nervous and [ ] I don't know if I say something that I wasn't supposed to say." Ms. Sorto testified that she may have "exaggerated" the previous incidents she disclosed to police, and that she did not now remember those prior incidents.

Additional facts will be included in the discussion as they become relevant.

Discussion

I. The circuit court properly admitted hearsay evidence against Requeno.

When reviewing a trial court's decisions on whether evidence falls under an exception to the rule against hearsay, the appellate court reviews "for clear error the trial court's findings of fact, and reviews without deference the trial court's application of the law to its findings of fact." *Hailes v. State*, 442 Md. 488, 499 (2015) (citing *Gordon v. State*, 431 Md. 527, 538 (2013)).

A. The videotaped interview with Ms. Sorto was properly admitted as prior inconsistent statement.

The circuit court permitted into evidence the videotaped statements made by Ms. Sorto to Detective Sugrue the night of the incident. Prior inconsistent statements made by a testifying witness at trial that would otherwise be inadmissible as hearsay are permitted under Md. Rule 5-802.1,[1] which provides, in pertinent part, that the inconsistent statement is permitted "if the statement was . . . recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the

[1] Md. Rule 5-802.1(d) states:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> d) A statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is *consistent* with the declarant's testimony[ ].

(Emphasis added).

making of the statement [ ].” Md. Rule 5-802.1(a). A witness’s prior statement “is admissible at trial as substantive evidence when inconsistent with the witness’s in-court testimony, so long as the witness is subject to cross-examination concerning the statement.” *Marlin v. State*, 192 Md. App. 134, 145 (2010) (citations omitted). Requeno contends that Ms. Sorto was not inconsistent in her testimony, and, therefore, her videotaped statements were inadmissible under Md. Rule 5-802.

In her statements to Detective Sugrue, Ms. Sorto recounted with clarity the events from the night of the incident. She stated on the video recording that, while she was sleeping, she “felt someone touching [her] down there [ ] so [she woke] up [a]nd saw [her] uncle. And he was kneeling, touching and [she] felt his finger inside [her] vagina.” Detective Sugrue asked Ms. Sorto, “Now, you’re absolutely sure that it was your uncle inside you?” to which she responded, “Yes, because it’s not the first time he’s doing it.” She also acknowledged that “it was definitely not any other male in the house.”

However, in her testimony at trial, Ms. Sorto lacked the certainty that she had in her recorded statements with Detective Sugrue. She stated that “a man” came into her room that she “assumed” was Requeno because he was not in the house after the incident. Ms. Sorto also claimed that she was “so nervous” the night she made the phone call to 911, and that she did not remember telling them what had happened. She testified, “I remember that I called the police,” but claimed she was unsure of the details. Ms. Sorto also testified that she could not remember whether the man who was next to her bed that night touched her. She further claimed that she may have “exaggerate[d]” what she

reported to the 911 operator the night of the incident regarding Requeno having touched her inappropriately in the past, and that she did not remember having told the police the same thing that night.

The circuit court did not err in admitting Ms. Sorto's videotaped statements as substantive evidence. Her testimony in the courtroom was indeed inconsistent with statements she had made to the detective in the recording. Requeno contends that Ms. Sorto's testimony was not inconsistent because she maintained that she "told the truth about what happened that night." Requeno argues further that although Ms. Sorto maintains that she does not remember details, her testimony is consistent because she testified that she "'saw Israel [Requeno]' in her basement that night."

We disagree with Requeno. Although parts of Ms. Sorto's testimony were consistent with the videotaped record, "[i]nconsistency includes both positive contradictions and claimed lapses of memory." *Nance v. State*, 331 Md. 549, n.5 (citing *State v. Devlin,* 825 P.2d 185, 187 (Mont. 1991)). Inconsistency is also implied when a witness's "claim of lack of memory amounts to deliberate evasion." *Id.* (citing *People v. Johnson,* 842 P.2d 1, 18 (Cal. 1992)); *see also Corbet v. State*, 30 Md. App. 408, 425-26 (2000) (explaining that the decision whether a witness's lack of memory is feigned or actual is a demeanor – based credibility finding that is within the sound discretion of the trial court to make). Ms. Sorto testified at trial that she did not remember many of the details of the incident, and that she may have been "exaggerating" when she said that Requeno "has done it for two times already." This is discrepant with her videotaped

statements, where she described the incident and past events with certainty, and the trial court found it as such. Because the matter was tried as a court trial, it was no necessary for the trial court to make the finding on the record.[2] Thus, Ms. Sorto's testimony was inconsistent, and her videotaped statements to Detective Sugrue were appropriately admitted by the circuit court under Md. Rule 5-802.1 as an exception to the hearsay rule.

B. Any error in admitting Detective Sugrue's testimony regarding the statements made to him by Ms. Sorto was harmless.

During the trial, Detective Sugrue testified that he spoke with Ms. Sorto at the scene, before he interviewed her on videotape at the station, and discussed what she told him "had occurred." Detective Sugrue stated:

> I had her point out the bed that we had previously shown, indicating this is where the incident occurred. Asked her about the clothing she still had on. And then what happened is she indicated to me that she had been asleep in the bed with her daughter . . . And that she awoke to having her uncle, Israel, he had, she awoke when she said she felt hand [sic] inside of her pants and a finger inside of her vagina.

Requeno objected to Detective Sugrue's testimony, claiming it was "hearsay at this point." The circuit court ruled that Detective Sugrue's testimony was admissible as a prompt report of sexual offense pursuant to Md. Rule 5-802.1(d).

[2] *See infra* Part II (discussing that a trial judge need not make certain findings on the record). A trial judge is presumed to know the law, "even in the absence of a verbal indication of having considered it." *Wagner v. Wagner* 109 Md. App. 1, 50, (1996); *see e.g. Reuter v. Reuter,* 102 Md .App. 212, 244 (1994) ("We presume that the trial judge knows the law, and there is no indication in the record that the court was not aware of the statutory factors.").

Requeno argues that the circuit court improperly admitted Detective Sugrue's testimony as a Md. Rule 5-802.1 hearsay exception because that rule requires that the statements be consistent with the declarant's testimony. Requeno contends that if the court found Ms. Sorto's testimony *inconsistent,* as to admit her videotaped statements under Md. Rule 5-802.1(a)(3),[3] it cannot find the same testimony *consistent* for the purpose of admitting Detective Sugrue's statement under Md. Rule 5-802.1(d). The State defends the court's decision by asserting that Ms. Sorto's "testimony was both consistent and inconsistent with her pretrial statements," and so admission of both hearsay statements was appropriate under the two rules.

We disagree with the circuit court on its admission of Detective Sugrue's statements as "consistent with the declarant's testimony" for the reasons described in Part I.A. However, while the court did err in admitting the testimony, the error was harmless. Circuit court error is harmless when that "error did not contribute to the verdict." *Dorsey v. State*, 276 Md. 638, 658 (1976). Admission of erroneously admitted evidence has been held "harmless error" where that evidence was cumulative. *See id*. at 652; *Dove v. State*, 415 Md. 727, 743-44 (2010). Evidence is cumulative when "there was sufficient evidence, independent of the [evidence] complained of, to support the appellant['s] conviction [ ]." *Dove*, 415 Md. at 743-44 (citing *Richardson v. State,* 7 Md. App. 334, 343 (1969)). Further, "witness testimony is cumulative when it repeats the testimony of other witnesses introduced during the State's case-in-chief." *Id.* at 744 (citation omitted).

[3] *See* discussion in Part I.A., *supra*.

In this case, although the circuit court erred in admitting the hearsay portion of Detective Sugrue's testimony, the error was harmless because that portion of his testimony was cumulative evidence. Before Detective Sugrue testified, the court played the taped recording of Ms. Sorto's 911 call which included statements made by Ms. Sorto to the dispatcher similar to Detective Sugrue's testimony.[4] Then the State was permitted to play the videotaped interview of Ms. Sorto by Detective Sugrue, which included similar statements.[5]

The State also called as a witness Detective Daniel Campbell, the patrol officer who responded to Ms. Sorto's 911 call, to testify about his communication with Ms. Sorto. When asked what Ms. Sorto told him had happened, he testified, "She stated that she was sleeping in her basement apartment downstairs on her mattress. And her uncle came down and digitally penetrated her." Detective Campbell referred to his notes from that night, and he said that Ms. Sorto had identified her uncle, by name, as Israel Sorto Requeno. Requeno did not object to this testimony.

All of the testimony recounted above is virtually identical in content to the objected testimony of Detective Sugrue. His testimony "repeats the testimony of other witnesses" and is, thus, cumulative evidence. *Dove*, 415 Md. at 744. Requeno was not prejudiced by Detective Sugrue's testimony because similar statements were already

[4] Ms. Sorto told the dispatcher: "I was sleeping and my uncle lives, he lives over here. He was touching me, my area. And I don't think that's good. He has done it for two times already."

[5] *See* Part I.A., *supra*.

made and admitted without objection. The admission of his testimony, therefore, is harmless error.

II. The circuit court properly admitted Requeno's prior "bad acts" for the purposes of identity and absence of mistake.

During the trial, the circuit court permitted the introduction of evidence that Requeno had assaulted Ms. Sorto previously on two separate occasions. On the 911 recording, Ms. Sorto tells the dispatcher that "this happened before," and that Requeno "has done it for two times already." During her videotaped interview with Detective Sugrue, Ms. Sorto specifically recounts the two incidents. She described an incident that happened about five years ago when she was in high school where Requeno was "on top of" her, put his hands on top of her mouth, and "told [her] the bad things he would do to" her. She then stated that three months before the incident at issue, she awoke to find Requeno lying on the floor next to her bed. Requeno made a timely objection to the admission of the previous incidents as prior bad acts. In his appeal, Requeno maintains that the court erred in admitting these statements "because the court failed to state which exception applied and because there was no balancing of the probative value against the prejudicial impact."[6]

[6] Requeno asserts that the "court not only admitted the evidence but, in announcing its verdict, the court made it clear that this evidence is what tipped the balance in favor of a guilty finding." He quotes the court's verdict:

> And I'll just take a little side here, more as a Judge than more as a trier of fact. But she's talking about a prior incident when he gets on top of her,

(continued…)

An appellate court will review under the abuse of discretion standard the trial court's determination of the necessity for and the probative value of evidence of other crimes. *State v. Faulkner,* 314 Md. 630, 641 (1989). The "ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Wagner v. State*, 213 Md. App. 419, 454 (2013) (citation omitted). Further, "[t]here is no requirement that the trial court's exercise of discretion be detailed for the record, so long as the record reflects that discretion was in fact exercised." *Walker v. State*, 373 Md. 360, 391 (2003) (citation and footnote omitted).

A trial court may not admit evidence of "other crimes, wrongs, or acts" that is offered "to prove the character of a person in order to show action in conformity therewith." Md. Rule 5-404(b). Such evidence is known as evidence of "prior bad acts." *Gutierrez v. State*, 423 Md. 476, 487 (2011). Prior bad acts evidence is defined as "an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Id*. at 489 (citation omitted). Md. Rule 5-404(b) provides that while prior bad acts are not admissible to show conformity therewith, they may "be admissible for other purposes such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity or absence of mistake or accident."

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covers her mouth, and I fought with him. My brother came in my room to see what was happening . . . . But in any event, she goes on and tells Detective Sugrue, he always does this stuff at nighttime.

The evidence of prior bad acts, specifically the previous incidents detailed by Ms. Sorto, was properly admitted. There is no requirement that the trial court's exercise of discretion be detailed for the record, so long as the record reflects that discretion was in fact exercised. *Walker*, 373 Md. at 391; *see also Jackson v. State*, 340 Md. 705, 717 (1995) (reasoning that courts are no obliged to place their considerations on the record).

Although not explicitly stated, the evidence was appropriately admitted to show identity. Evidence that Ms. Sorto found Requeno sleeping on the floor next to her bed three months before the incident would tend to show proof of identity, especially considering Ms. Sorto's testimony during the trial, that she only saw "a man" and that she may have incorrectly assumed that it was Requeno.

The evidence of Requeno's previous incidents with Ms. Sorto is also admissible to show "absence of mistake or accident." Md. Rule 5-404(b). This Court has explained the "common factual scenarios within the absence of mistake" exception:

> If the defendant admits that he or she took an action, but claims to have done so unintentionally or by mistake, so that allegations [ ] are unfounded, the prosecution may offer evidence of his or her similar prior wrongs, acts, or crimes. This use of the evidence as proof of absence of mistake is merely the obverse of proof of intent.

Cousar v. State, 198 Md. App. 486, 499 (2011) (internal citations omitted). Evidence of other crimes or prior bad acts, "under the Maryland Rule 5-404(b) absence of mistake exception, is admissible in the prosecution of an unnatural or perverted sexual practices offense, where the defendant alleges having committed the act or offense by mistake or accident." *Id.* at 508.

The circuit court admitted into evidence, without objection, Requeno's recorded statement to police where he claimed that "this is not the first time that it's happened. We've had an accident like this." Requeno recounted different "incidents" as where he and Ms. Sorto were "joking around" and he touched her vagina. Regarding that evening, Requeno stated that "it could have been on accident," that "he maybe accidentally put his hand like inside[.]" Ms. Sorto's testimony that Requeno had touched her or behaved inappropriately on previous occasions was a counterpoint to Requeno's contention that his actions the night of November 18, 2014, were an accident, as he claimed. The court, therefore, did not abuse its discretion in admitting evidence of Requeno's prior bad acts.

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