UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2757

September Term, 2014

BENNY DAVIS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 15, 2015

*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 Baltimore City found appellant Benny Davis guilty of two counts of first-degree rape and one count of first-degree sexual offense. The court sentenced Davis to a term of 20 years of imprisonment for one count of first-degree rape, to a consecutive 10 years for the other count of first-degree rape, and to a concurrent term of 12 years for the first-degree sexual offense.

QUESTION PRESENTED

On appeal, Davis poses one question, which we have rephrased: Did the trial court abuse its discretion in admitting evidence under the hearsay exception for prompt complaints of sexually assaultive behavior, Md. Rule 5-802.1(d)?[1]

Finding no abuse of discretion, we affirm.

FACTUAL BACKGROUND

The victim met her friend Ms. L. at a bar in Baltimore City in June 2011.[2] At around midnight, after the victim had become visibly intoxicated, Ms. L. hailed and paid for a taxi to take the victim home. When the victim exited the taxi, she became disoriented and began to wander in search of her home.

After a man approached the victim and began to guide her, she noticed that another man was following them. Shortly thereafter, one of the men pushed the victim to the ground, bent her over, and penetrated her vagina from behind with his penis. The other

[1] Davis phrased the question as follows: "Did the court err in permitting the State to elicit inadmissible hearsay under the guise of the prompt report exception?"

[2] For privacy reasons, we refer to the victim as "the victim" and to her friend to as "Ms. L."

man took her purse, rummaged through it, and asked her if she had a condom. She responded, "No." The man who had taken the purse then grabbed the victim's head and placed his penis in her mouth. The two men later switched positions. Afterwards, they walked away in opposite directions. The victim remained paralyzed with fear throughout the encounter.

After gathering up her belongings, the victim "was in such a state of shock" that she did not know what to do. She felt as though she "needed someone to tell [her] what to do." Although she could barely even hold her phone or dial numbers, she accessed the phone's recent call list and called her former boyfriend. The call was unanswered, but she left a voicemail stating "something really horrible just happened to me. I don't know where I am. I'm really scared. I don't know what to do." She considered calling the police at that time, but did not because she was uncertain of her exact location.

Soon thereafter, the victim regained her bearings and walked home. Upon entering her apartment, she told her roommate, "I just got raped," and her roommate called the police.

The victim went to the hospital and met with a sexual-assault forensic nurse examiner (a "SAFE nurse") and told her about the circumstances of the rape. The SAFE nurse observed the victim's injuries, which included abrasions on her elbows, knees, and inside her genitalia. She collected the victim's underwear as evidence and swabbed her mouth and genitals for forensic testing.

The victim's ex-boyfriend came to the hospital to comfort her. At the hospital, she told him that two unknown men had thrown her to the ground and raped her.

The victim left the hospital at about 5:00 a.m. and went home to sleep for a few hours.

At some time between 10:00 and 11:00 a.m. that morning, Ms. L., who was unaware of the attack, sent a text-message to the victim asking how she was feeling. The victim responded, "Not great, I was raped last night." The victim sent that response about eight to nine hours after the assault.

The victim spoke with the police about what had occurred, but could not identify either of her attackers. Several years later, however, DNA testing identified Davis as a major contributor of the sperm fraction genetic material[3] collected from the victim's underwear and genitalia. He could not be excluded as a minor contributor of the sperm fraction genetic material collected from the victim's mouth.[4]

At trial, Davis encouraged the jury to infer that, because the victim did not immediately call the police, the sexual encounter was consensual and not forcible. The jury found him guilty of first-degree rape as both a principal and an accomplice and guilty of a first-degree sexual offense as an accomplice.

[3] A "sperm fraction" is the portion of sperm cells and surrounding liquid that is separated from the non-sperm cells of a "non-sperm fraction" through a process called "differential extraction." Once the sperm fraction has been isolated, its DNA may be extracted through normal procedures. "The result of a differential extraction is two tubes, one containing DNA all or mostly from sperm and the other containing DNA all or mostly from non-sperm cells." *See* Norah Rudin & Keith Inman, *An Introduction to Forensic DNA Analysis* 68-69 (2d. ed 2001).

[4] The testing identified one Jermaine Wyatt as the major contributor to the sperm fraction genetic material recovered from the victim's mouth.

DISCUSSION

At trial, the victim's friend, Ms. L., was the State's first witness. During her direct examination, the State asked Ms. L. about the text-message that she received from the victim on the morning after the attack. The court permitted the testimony under Md. Rule 5-802.1(d), the hearsay exception for a "prompt complaint of sexually assaultive behavior." As previously stated, Ms. L. testified that the victim reported that she had been "raped last night."

Davis contends the trial court erred when it permitted Ms. L.'s testimony that the victim had sent her that text-message. Davis argues that because the victim did not report the rape to Ms. L. until the day after the attack, her complaint did not meet the "promptness" requirement of the hearsay exception for a "prompt complaint of sexually assaultive behavior." The State responds that (1) Davis did not preserve the issue for appeal, (2) that, if preserved, the court committed no error, and (3) that if the court erred, the error was harmless.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801. Hearsay is generally inadmissible. Md. Rule 5-802. "A hearsay statement may be admissible, however, under certain recognized exceptions to the rule if circumstances provide the requisite indicia of trustworthiness concerning the truthfulness of the statement." *Parker v. State*, 156 Md. App. 252, 259 (2004) (quoting *State v. Harrell*, 348 Md. 69, 76 (1997), *which quoted Ali v. State*, 314 Md. 295, 304-05 (1988)) (quotation marks omitted); *accord Gaerian v. State*, 159 Md. App. 527, 536 (2004).

Maryland law recognizes numerous exceptions to the hearsay rule, one of which is set forth in Md. Rule 5-802.1(d):

> 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[.]

Rule 5-802.1(d) codifies Maryland's longstanding common-law rule that "'a victim's timely complaint of a sexual attack is admissible as part of the State's case-in-chief.'" *Nelson v. State*, 137 Md. App. 402, 409 (2001) (quoting *Cole v. State*, 83 Md. App. 279, 287 (1990)); *see Gaerian*, 159 Md. App. at 536-37; *see also Muhammad v. State*, 223 Md. App. 255, 266-69 (2015) (discussing the history of the exception).

The purpose of the contemporary hearsay exception for prompt complaints of sexual assault is not simply to combat the retrograde stereotype that the absence of a prompt complaint implies that the victim consented (*Gaerian*, 159 Md. App. at 537; *Parker*, 156 Md. App. at 267); it is also to "'corroborate the victim's testimony.'" *Id.* (quoting *Parker*, 156 Md. App. at 267). A timely complaint frequently forestalls or counteracts a defense based upon consent. *Id*. at 538 (citing *Cole*, 83 Md. App. at 290).

"The victim's complaint to another is admissible as substantive evidence to contradict the inference that the failure to complain was inconsistent with the victim's trial testimony concerning the attack." *Id.* at 537 (citing *Nelson*, 137 Md. App. at 411). In

effect, the victim's complaint is a prior consistent statement that is admissible because of this exception to the hearsay rule. *See Muhammad*, 223 Md. App. at 269.

The hearsay exception for a prompt complaint of a sexual assault has three requirements: "The victim must testify, the complaint must be timely, and references to the complaint '"may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit."'" *Gaerian*, 159 Md. App. at 538 (quoting *Nelson*, 137 Md. App. at 411, *which quoted Cole*, 83 Md. App. at 289). "The narrative details of the complaint are not admissible, as they exceed the limited corroborative scope of the exception." *Muhammad*, 223 Md. App. at 268. Davis's appeal focuses solely on the requirement that the complaint be "prompt."

With regard to that requirement, "Maryland has not established an immutable time frame within which a complaint of sexual assault must be made in order for it to be admissible." *Gaerian*, 159 Md. App. at 541. "[P]romptness is a flexible concept, tied to the circumstances of the particular case." *Id.* at 540. "What is a 'recent' complaint for purposes of this evidentiary principle is not rigid." *State v. Werner*, 302 Md. 550, 564 (1985).

"The court should consider whether the complaint is prompt as 'measured by the expectation of what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so.'" *Gaerian*, 159 Md. App. at 545 (quoting *Nelson*, 137 Md. App. at 418). For the complaint to qualify as "prompt," "it is necessary only that 'declarant must have made the complaint "without a delay which is unexplained or is inconsistent with the occurrence of

the offense."'" *Id.* at 541 (quoting *Robinson v. State*, 151 Md. App. 384, 391 (2003), *which quoted Harmony v. State*, 88 Md. App. 306, 321 (1991)); *accord id.* at 542 ("the requirement of promptness is not defeated by some delay in the reporting, so long as the delay is adequately explained").

Thus, for example, in *Robinson v. State*, 151 Md. App. 384, 393 (2003), this Court affirmed the use of the exception for prompt complaints of sexual assault to admit complaints that the victim made within 15 hours of the first of two assaults and within five hours of the second. In *Gaerian*, 159 Md. App. at 545-46, this Court affirmed the use of the exception to admit a complaint that the 13-year-old victim made sometime during the same month as the assault (*i.e.*, as many as 30 days after the assault).

"The question whether a complaint is sufficiently prompt to be presented to the jury is one that is best committed to the sound discretion of the [trial] court." *Id.* at 545. Here, assuming that the issue was preserved,[5] the circuit court did not abuse its discretion in concluding that, under the circumstances, the victim's report of the rape to Ms. L. was sufficiently "prompt."

[5] At trial, Davis asserted only that the complaint to Ms. L. was not sufficiently prompt to qualify under the exception. On appeal, he makes the strange and different argument, that because the court admitted the victim's (more prompt) reports of rape to her roommate, the SAFE nurse, and her ex-boyfriend, it should not have admitted Ms. L.'s testimony about the victim's later complaint to her. The new argument has no merit, because when the court made the decision to admit Ms. L.'s testimony, the roommate, the SAFE nurse, and the ex-boyfriend had not yet testified: Ms. L. was the State's first witness. Moreover, under *Parker*, 156 Md. App. at 265, the law imposes no limitation on the number of complaints of sexual assault that a court may admit at trial. Notably, Davis did not object later, when the roommate, the SAFE nurse, and the ex-boyfriend testified that the victim had told them that she had been raped. *See infra* at 8 (concerning harmless error).

At 10:00 or 11:00 a.m., no more than eight or nine hours after the assault, the victim responded to Ms. L.'s text-message by telling her that she "had been raped." The victim had been at the hospital until about 5:00 a.m. that morning and had returned home and gone to bed. She responded to her friend's message even though she had little time to sleep after the traumatic events of the previous night. In these circumstances, the trial court was well within its discretion in concluding that the victim made the complaint without any unexplained delay – *i.e.*, that she complained promptly. *Gaerian*, 159 Md. App. at 541. The trial court did not abuse its discretion in admitting Ms. L.'s account of the victim's statement that she had been raped.

In any event, assuming purely for the sake of argument that Ms. L.'s statement did not meet the requirements of the hearsay exception for prompt complaints of sexually assaultive behavior, any error in admitting the statement was harmless beyond a reasonable doubt under *Dorsey v. State*, 276 Md. 638 (1976), and the cases decided thereunder. The evidence admitted later at trial demonstrated that, by the time the victim sent the text message to Ms. L., she had already told her roommate, the SAFE nurse, and her ex-boyfriend that she had been raped. As a result, Ms. L.'s testimony became thrice-over cumulative. "'The cumulative effect of the properly admitted evidence so outweighs the prejudicial nature'" of Ms. L.'s testimony that there would be "'no reasonable possibility that the decision of the finder of fact would have been different" if the testimony had been

excluded. *Dove v. State*, 415 Md. 727, 744 (2010) (quoting *Ross v. State*, 276 Md. 664, 674 (1976)); *accord In re Matthew S.*, 199 Md. App. 436, 468 (2011).

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