UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0143

September Term, 2013

WALTER JEROME FORD

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 17, 2014

On December 14, 2012, following a three-day jury trial in the Circuit Court for Calvert County, Walter Jerome Ford, appellant, was convicted of two counts each of second degree rape and second degree assault.[1]

In his timely appeal, Ford raises a single issue for our consideration: "Whether the trial court erred in admitting hearsay testimony." Discerning neither error nor abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL and PROCEDURAL HISTORY

Because Ford raises only issues of procedural error, we need not set forth all of the facts adduced at his trial. *See Washington v. State,* 190 Md. App. 168, 171 (2010). We note briefly that the convictions arose from the events of June 20 and June 21, 2011, when appellant admittedly engaged in sexual relations with two women, Lakisha Mason ("Mason") and Indya McDonald ("McDonald"), following a house party at the home where the two women resided. Both women were unconscious or incapacitated when the sexual assaults occurred. The evidence reveals that the women had been drugged, and that Ford's DNA was present on evidence collected from the victims. Mason and McDonald testified at appellant's trial. Additional facts will be provided as necessary to support the analysis of the issues.

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[1]The circuit court sentenced Ford to serve a 15 year sentence, and a consecutive eight year sentence for the two rape convictions. The other convictions were merged for the purposes of sentencing.

ANALYSIS

The Hearsay Testimony

The court allowed Gregory Waul, Mason's step-father, and Gloria Waul, Mason's mother, to testify that Mason told them she had been raped. The court also allowed the forensic nurse examiner, who was admitted as an expert witness, to testify regarding statements that McDonald made in the course of a SAFE examination, describing her physical symptoms after having a drink offered by Ford, and then her discovery upon awaking some time later, still disoriented, of Ford engaged in sexual intercourse with her.

Ford contends that the trial court erred by admitting the hearsay statements made by Mason and McDonald over the objections of defense counsel. He asserts that the statements made by Mason to the Wauls were not admissible because at the time the hearsay statements were admitted, the court did not know "whether the 'prompt complaint' would be consistent with Mason's trial testimony, as is a necessary predicate to its admission." Ford further asserts that Mason's statements to the Wauls were not admissible because they were not prompt, because the victims "could have lodged some kind of complaint far earlier in time, yet none of them did."

As to the statements made by McDonald to the forensic nurse examiner, Ford contends that the court erred by admitting them pursuant to the exception for hearsay statements made for the purpose of medical diagnosis or treatment. Ford suggests that

because the purpose of the SAFE examination was primarily investigative, it is "unlikely that [McDonald] believed there was a medical purpose for the examination."

The State responds that the trial court properly admitted the statements the victims made to others in the hours after they were raped. The statements were admissible, the State contends, pursuant to the hearsay exceptions for prompt complaints of sexual assault, and statements made for the purpose of obtaining medical treatment.

Hearsay

Maryland Rule 5-801 defines hearsay 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." In the instant case, over defense counsel's objections, the court admitted statements made by Mason to her mother and step-father indicating that she had been raped. The court also admitted statements made by McDonald, describing the circumstances surrounding her rape, to the nurse who examined her at the hospital. The victims' statements, as recounted by the persons to whom they were made, were out-of-court statements offered as substantive evidence that the rapes had, in fact, occurred; therefore, the challenged statements were hearsay statements. Md. Rule 5-801.

Generally, hearsay evidence is not admissible. Md. Rule 5-802. There are, however, many exceptions to the general rule excluding hearsay evidence. Unlike the admission of other evidence, which is reviewed under an abuse of discretion standard, a trial court's determination that a challenged statement falls within a hearsay exception is reviewed *de*

novo. *See Bernadyn v. State*, 390 Md. 1, 7-8 (2005) ("Hearsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence. . . Thus, a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility.").

The Prompt Complaint Requirement

Maryland Rule 5-802.1(d) allows the admission of statements made to others that constitute a "prompt complaint of sexual assault." The Rule provides in pertinent part:

> 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[.]

Md. Rule 5-802.1(d). "It has been the settled law of Maryland for over one hundred years that 'a victim's timely complaint of a sexual attack is admissible as part of the State's case-in-chief.'" *Cole v. State*, 83 Md. App. 279, 287, *cert. denied*, 321 Md. 68 (1990).

There are, however, limitations on the type of statements that may be admitted as a prompt complaint under this exception. *Parker v. State*, 156 Md. App. 252, 261-62 (2004). As this Court has previously explained:

> In prosecutions for sex offenses, evidence of the victim's complaint, coupled with the circumstances of the complaint, is admissible as part of the prosecution's case if the complaint was made in a recent period of time after the offense.

Nelson v. State, 137 Md. App. 402, 409 (2001)(quoting *State v. Werner*, 302 Md. 550, 563 (1985)). Whether a complaint was timely depends on the circumstances. *See Werner*, 302 Md. at 564 ("what is a 'recent' complaint for purposes of this evidentiary principle is not rigid"). To determine the promptness of the complaint, the court may consider the reasonableness of the victim's actions considering his or her age, family involvement and other facts affecting the victim's report. *Gaerian v. State*, 159 Md. App. 527, 545 (2004); *Nelson*, 137 Md. App. at 418. More than one prompt complaint made by a victim may be admitted so long as the requirements of the Rule are met. *See Parker*, 156 Md. App. at 267 (explaining that the purpose of the Rule is to corroborate the victim's testimony).

Disclosure of the victim's complaint is properly limited to recounting "the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail." *Nelson*, 137 Md. App. at 411. (quoting *Cole*, 83 Md. App. at 289); *see also Guardino v. State*, 50 Md. App. 695, 706 (1982) (stating that a rape victim's complaint is admissible "as to the time, place, crime, and name of wrongdoer," but that additional details will be excluded). The Rule also requires that both the victim of the sexual assault, and the person to whom the assault was reported, provide testimony and be available for cross-examination at the defendant's trial. *Nelson*, 137 Md. App. at 411; Md. Rule 5-801(d).

The court allowed Mason's mother and step-father to testify, over defense counsel's objections, that Mason told them she had been raped. On this record, we are persuaded that

the trial court properly admitted the testimony of Mason's mother and step-father regarding Mason's statements to them on the morning after the incident, pursuant to Md. Rule 5-802.1(d), which allows the admission of prompt complaints of sexual assault.

At Ford's trial, Waul, Mason's step-father, testified before Mason. Ford contends that Waul should not have been permitted to testify regarding Mason's hearsay statements because there was no basis on which the court could determine that his testimony was consistent with Mason's testimony.

The plain language of Md. Rule 5-802.1(d) does not dictate the order in which the State's witnesses must testify, only that the declarant testify during the trial. Md. Rule 5-801.2(d). Evidence admitted pursuant to this exception is admitted as substantive evidence, not rebuttal evidence, and as such, it may be offered at any time during the State's case. *Cole*, 83 Md. App. at 289. When the person to whom the statements are made testifies before the declarant, the court may admit the evidence with the understanding that if the declarant later fails to testify consistently, the court may reconsider its ruling.

Ford makes no argument that Mason's testimony was inconsistent with that of Waul. Our review of the transcripts indicates that Mason did, in fact, testify that she had been raped. Thus, we find no error in the admission of Waul's to testimony regarding Mason's hearsay statements.

Ford next suggests that Mason's statements to her mother and step-father do not fall under the prompt complaint exception because they were not prompt. He asserts that Mason

could have reported the rape closer in time to when it occurred instead of waiting until her step-father "solicited" the information from her the next day.

Sometime in the early morning hours, Mason was drugged and raped by a person she knew and had invited into her home. The next morning, she reported the rape to her step-father, in response to his questions after he noticed that she was acting strangely. She subsequently disclosed the rape to her mother, as well. The Court of Appeals has long recognized:

> There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt; but there is, and can be no particular time specified. The rule is founded upon the laws of human nature, which induces a female thus outraged to complain at the first opportunity.

Legore v. State, 87 Md. 735, 737 (1898).

There may be many explanations why Mason might have hesitated for several hours before reporting that she had been raped. Under all the circumstances, we are persuaded that the delay of several hours between the assault and Mason's initial report is not "unexplained or inconsistent with the occurrence of the offense." *Gaerian*, 159 Md. App. at 541. We conclude, therefore, that the trial court did not err in finding that Mason's statements to the Wauls satisfied the promptness requirement of Md. Rule 5-802.1(d).

Having determined that Mason's statements to her mother and step-father were consistent with her trial testimony, and were made promptly after the rape, we conclude that

the trial court did not err by allowing the Wauls to testify about Mason's hearsay statements pursuant to the exception for prompt reports of sexual assault set forth in Md. Rule 5-802.1(d).

Medical Diagnosis and Treatment Exception

Maryland Rule 5-803(b)(4), allowing the admission of statements made for the purposes of medical diagnosis or treatment provides:

> Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

The reasoning underlying this exception presumes that a patient's statements to treating medical personnel are "apt to be sincere and reliable because the patient knows that the quality and success of treatment depends upon the accuracy of the information provided to the physician." *State v. Coates*, 405 Md. 131, 142 (2008). If the patient believes that the primary purpose of the examination is forensic or investigative, rather than medical diagnosis and treatment, the same guarantees of reliability cannot be assumed. *See id*. at 147 (holding that the medical treatment exception did not apply where the young patient expressed her understanding that the purpose of the examination was so that the police could go find the man who had raped and abused her). The focus of our inquiry, therefore, must be on the patient's state of mind at the time of the examination. *Id*. at 145. This Court has previously opined, however, that "the existence of dual medical and forensic purposes for an

examination [does] not disqualify an otherwise admissible statement under Rule 5-803(b)(4)." *Id*. at 143 (adopting this Court's holding in *Webster v. State*, 151 Md. App. 527, 546 (2003)).

McDonald's statements to the registered nurse examiner were made during an examination in the hospital emergency room that occurred less than 24 hours after McDonald had been raped. In addition to a head-to-toe assessment for signs of trauma and physical evidence of the rape, McDonald was also counseled and given medication at the conclusion of the examination. McDonald reported to the nurse examiner that:

> We woke up after playing a bit – partying a bit. Didn't even take a full shot, and my head was spinning. I woke up this morning – I have no idea what time – with him in me. Then I don't know anything more than that. I thought it was a dream. I guess I was still out of it and that's all.

At trial, the court allowed the nurse examiner to testify, over defense counsel's objections, regarding the statements McDonald made to her during the SAFE examination.[2]

Given McDonald's age, twenty-one, at the time of the examination, as well as the treatment and counseling that she received as part of the SAFE examination, it is reasonable to infer that McDonald knew that her statements to the nurse examiner were relevant for the identification of any intoxicating substance she had ingested, diagnosis and treatment of sexual-transmitted diseases, and medical intervention to prevent an unwanted pregnancy. At no time did McDonald indicate that she thought that the primary purpose of the examination

[2]SAFE is an acronym for "sexual assault forensic examination."

was investigative. *Compare Coates*, 405 Md. at 145 (noting victim's question "Are you going to go out and find him now?" suggested that she thought the primary purpose of the examination was investigative).

We are persuaded that the trial court did not err in finding that McDonald's statements to the nurse examiner during the SAFE examination fell within the hearsay exception for statements made in the course of medical diagnosis or treatment. Md. Rule 8-503(b)(4). We conclude, therefore, that the trial court's admission of the nurse examiner's testimony relating McDonald's hearsay statements was not erroneous.

Discerning no error or abuse of discretion, we affirm the judgments of the circuit court.

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