UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0613

September Term, 2014

ADRIAN KMAR WATERS

v.

STATE OF MARYLAND

Wright,
Reed,
Sharer, J., Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: September 4, 2015

On May 6, 2014, following a one-day bench trial in the Circuit Court for Talbot County, the court found Adrian Kmar Waters, appellant, guilty on three counts of second degree assault related to incidents on April 22, 2013, and May 29, 2013, both involving the same victim, appellant's former girlfriend, Terry Lynn Pierce ("Ms. Pierce").[1] The court sentenced appellant to serve a five-year sentence for the first count of second degree assault, suspended the sentence for the second count, and, on the third count, sentenced appellant to ten years, all suspended in lieu of five years of supervised probation.

In his timely filed appeal, appellant raises three questions for our consideration, which we have simplified as follows:

> 1. Did the trial court err by denying defense counsel the opportunity to question the victim regarding any previous attempts to hurt herself?
>
> 2. Did the trial court err by ruling that the victim could not be impeached with a prior adjudication of probation before judgment for the offense of theft?
>
> 3. Did the trial court err by allowing the State to elicit testimony regarding hearsay statements made by the victim to a responding police officer?

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

[1]The trial court granted appellant's motion for judgment of acquittal regarding an associated charge for possession of drug paraphernalia.

FACTUAL AND PROCEDURAL HISTORY

At the time of the reported incidents, appellant and Ms. Pierce were living together. They are the natural parents of a son, who was three-years-old at the time of trial.[2]

On the evening of April 22, 2013, appellant confronted Ms. Pierce about talking to another man that afternoon, while waiting for her daughter's school bus. The couple argued and the disagreement became physical. A neighbor attempted to intervene and then called the police.

One of the responding officers, Deputy Gannon Lyons of the Caroline County Sheriff's Office,[3] interviewed Ms. Pierce. Deputy Lyons and another officer interviewed appellant. Domestic violence forms were completed for both Ms. Pierce and appellant, but appellant did not indicate any injuries or sign the form. Deputy Lyons observed Ms. Pierce's injuries and another officer took photographs to document the various bruises and abrasions on Ms. Pierce's face, neck, and arms. Deputy Lyons later arrested appellant for assault.

The second incident occurred on the afternoon of May 29, 2013. Appellant and Ms. Pierce were arguing, again. When Ms. Pierce left the apartment to take her son to a doctor's appointment, appellant came "out of nowhere" and started hitting her. Ms. Pierce ran to a

[2]Ms. Pierce's daughter, age six-years-old at the time of trial, also resided with her and appellant.

[3]At the time of the incident on April 22, 2013, Deputy Lyons was an officer with the Easton Police Department.

friend's house and the friend, Ms. Ashley Williams, drove Ms. Pierce and her son to the doctor's office.

While Ms. Pierce and her son were at the doctor's office, appellant again arrived and began physically and verbally assaulting Ms. Pierce. Dr. Brian Corden ("Dr. Corden") confirmed that appellant came in to the doctor's office during his son's appointment, made inappropriate comments, and repeatedly attempted to touch or fondle Ms. Pierce despite her attempts to resist and her repeated requests that he stop. Appellant's actions and the arguing between appellant and Ms. Pierce interfered with Dr. Corden's examination of their son. When the doctor completed his examination and left the examination room, appellant and Ms. Pierce began to argue loudly and Dr. Corden asked them to leave the office. Ms. Pierce requested assistance from the doctor and his staff, who called the police.

The officer who responded to Dr. Corden's office, Officer Michelle Schuerholz ("Officer Schuerholz") of the Easton Police Department, testified that she met with Ms. Pierce at the doctor's office. Officer Schuerholz observed marks on Ms. Pierce's neck, arms, and chest, which the officer documented and photographed. Ms. Pierce reported that she was scared that appellant was going to beat her up, so Officer Schuerholz radioed a description of appellant to other officers waiting outside, and she accompanied Ms. Pierce out of the office where she was met by a friend who would take her to obtain a protective order against appellant.

Appellant was initially charged in two cases in the district court; the first case alleging that appellant assaulted Ms. Pierce twice on May 29, 2013, and the second case alleging that appellant assaulted Ms. Pierce on April 22, 2013. Following appellant's

request for a jury trial, the cases were transferred to the Circuit Court for Talbot County. Appellant later waived his right to a jury trial and his case was heard in a bench trial on May 6, 2014. The court found appellant guilty on three counts of second degree assault. The court sentenced appellant to five years of incarceration, to be followed by five years of supervised probation. Appellant filed the instant appeal on May 29, 2014.

ANALYSIS

I. Limited Cross-Examination of Victim

During defense counsel's cross-examination of the victim regarding the May 29, 2013 assault,[4] the following exchange occurred:

> [DEFENSE COUNSEL]: All right. Ms. Pierce, have you ever attempted to hurt yourself?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: What's the purpose of the question?
>
> * * *
>
> THE COURT: . . . [A]ll right now the question is whether or not she has ever tried to physically hurt herself, was that the question?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: What's the relevance of that?
>
> [DEFENSE COUNSEL]: Your Honor, my client alleges that what Ms. Pierce is saying here is not true and that she has attempted to hurt herself before and that this is a continuation

[4]The trial court first heard all of the testimony about the assault that occurred on May 29, 2013, and then about the assault that occurred on April 22, 2013. Consequently, Ms. Pierce testified twice.

> of that. And that because she was angry at him she is blaming these injuries on him.
>
> THE COURT: Objection sustained. I can't even follow it. I mean I understand that he says it didn't happen that way and she's lying and her memory is bad or whatever and we'll find out. Hopefully before the end of the case from other witnesses whose sanity isn't in question.[5]
>
> [DEFENSE COUNSEL]: Okay, thank you, Your Honor. I have nothing further at this time.

Appellant asserts that the trial court abused its discretion by limiting his ability to cross-examine Ms. Pierce regarding her past attempts to harm herself. He concludes that the trial court's ruling "deprived him of a fair trial." The State responds, contending that the trial court correctly determined that the evidence was irrelevant, or alternately, that any error in the exclusion of the evidence was harmless.

"Managing the scope of cross-examination is a matter that falls within the sound discretion of the trial court." *Simmons v. State*, 392 Md. 279, 296 (2006) (citation omitted). *See also Oken v. State*, 327 Md. 628, 669 (1992), *cert. denied*, 507 U.S. 931 (1993) ("Generally speaking, the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is clear abuse of such discretion." (citation omitted)). "[T]rial courts retain wide latitude in determining

[5]Appellant contends that the trial court erred because it based its decision on the inaccurate premise that the defense's position was solely that the victim's "memory was faulty." Quite to the contrary, in its ruling, the court articulated appellant's defense as "he says it didn't happen that way and [the victim's] lying and her memory is bad or whatever [.]" As such, we are not persuaded that the court failed to consider all the arguments put forth by appellant before concluding that the evidence was irrelevant.

what evidence is material and relevant, and to that end, may limit, in their discretion, the extent to which a witness may be cross-examined for the purpose of showing bias." *Merzbacher v. State*, 346 Md. 391, 413 (1997). Trial judges are empowered "'to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). *See also* Md. Rule 5–402 ("Evidence that is not relevant is not admissible."); Md. Rule 5–403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of . . . waste of time . . . ."); Md. Rule 5–611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . .").

Consistent with the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, a trial court must allow the defendant a sufficient opportunity to cross-examine witnesses about relevant matters which affect any "bias, interest or motive to testify falsely" the witnesses may harbor. *Parker v. State*, 185 Md. App. 399, 425 (2009); Md. Rule 5–616.[6] In general, a

[6]Md. Rule 5-616(a) provides in pertinent part:

> (a) **Impeachment by Inquiry of the Witness.** The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> * * *

(continued…)

witness may be cross-examined on matters and facts that affect his or her credibility, "so long as such facts are not immaterial or irrelevant to the issue being tried." *State v. Cox*, 298 Md. 173, 181 (1983).

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Evidence that is not relevant is inadmissible." Md. Rule 5-402. *See also Donati v. State*, 215 Md. App. 686, 736 (2014) ("[T]he trial court does not have discretion to admit irrelevant evidence . . . ." (quoting *Simms v. State*, 420 Md. 705, 724-25 (2011))).

The question asked by defense counsel of the victim sought specific information about whether she had "ever attempted to hurt [her]self." Appellant contends that Ms. Pierce's response to this question was relevant to demonstrate that she was not credible and to prove his defense that she had "caused these injuries herself in an attempt to

(…continued)

(2) Proving that the facts are not as testified to by the witness;

* * *

(4) Proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely;

* * *

(6) Proving the character of the witness for untruthfulness by (i) establishing prior bad acts as permitted under Rule 5-608(b) or (ii) establishing prior convictions as permitted under Rule 5-609.

incriminate [appellant]." The trial court rejected appellant's argument, and summarily foreclosed that line of questioning. We discern no error or abuse of discretion in the trial court's determination.

While a witness's credibility and any bias, motive, or hostility of a witness are relevant and proper subjects for impeachment, the question asked by defense counsel was not likely to evoke testimony reflecting any untruthfulness, bias, motive, or hostility held by Ms. Pierce. *See e.g. Pantazes v. State*, 376 Md. 661, 692-93 (2003) (discussing how evidence of a specific prior bad act by a witness, unrelated to the case at issue, was inadequate to establish that the witness's testimony was untrustworthy or that the witness was biased or had a motive to lie). Defense counsel proffered only that Ms. Pierce had previously attempted to hurt herself. By impeaching Ms. Pierce with specific instances of conduct – injuring herself– appellant sought to establish that her trial testimony was unreliable. Appellant failed to proffer, however, how the alleged misconduct established the victim's propensity to lie.[7] Nor does the evidence that Ms. Pierce had previously inflicted injuries on herself establish that she had any bias or a motive to lie in this particular case.[8] What appellant was trying to present with his question was propensity evidence, or

[7]The act of inflicting injury on oneself is not an impeachable offense. Nor does the mere fact that an individual has previously harmed him- or herself have any bearing on that individual's credibility.

[8]At no time has appellant asserted that the type of injuries that Ms. Pierce had self-inflicted on previous occasions were similar to the injuries that she was observed to have in this case. Nor does he contend that Ms. Pierce has previously blamed her self-inflicted injuries on another individual. There was nothing other than appellant's bald speculation linking any injuries Ms. Pierce had previously inflicted on herself to the facts and circumstances of the instant case. Although a witness's prior bad acts may (continued…)

behavior in conformity with past behavior, not evidence of untruthfulness or motive to lie. Based on the parties' arguments and the defense proffer, we are not persuaded that the circumstances surrounding any previous instances when Ms. Pierce had harmed herself were relevant to prove a material fact at issue before the circuit court. We conclude, therefore, that the trial court did not err in excluding this irrelevant evidence.[9]

II. Impeachment of Victim with Probation Before Judgment

During Ms. Pierce's testimony, defense counsel sought the court's leave to impeach her with a probation before judgment ("PBJ") entered against her for a theft offense. The following colloquy occurred:

> [DEFENSE COUNSEL]: Your Honor, I'm asking for a ruling on impeachment if the victim has been tried for a theft case but granted a PBJ?
>
> THE COURT: I think the flip side of that is that you can't use that you know if it was the Defendant because it's not a conviction, isn't it?
>
> [DEFENSE COUNSEL]: Right, right, that's true.
>
> THE COURT: So to the extent of the question, you want a ruling. It's not an impeachable offense. A PBJ isn't an impeachable offense even though the crime of theft is. So if that's the basis of the question and objection that would be sustained.
>
> [DEFENSE COUNSEL]: Thank you.

(…continued) be relevant to a witness's credibility, mere accusations of misconduct have little probative value and may not be used to impeach a witness. *Cox*, 298 Md. at 181.

[9]Because the evidence was irrelevant, the court was also not obliged to weigh the probative value of the evidence against any potential prejudice as required by Md. Rule 5-403 before relevant evidence can be excluded. Md. Rule 5-403.

Appellant now contends that the trial court abused its discretion by prohibiting his attorney from impeaching the victim with her PBJ. Appellant concedes that Md. Rule 5-609 does not allow impeachment with a PBJ,[10] but asserts that the court should have considered whether the PBJ for theft might be admissible under Md. Rule 5-608.[11]

[10]Maryland Rule 5-609 governs impeachment by evidence of conviction of crime and provides in pertinent part:

> (a) Generally. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) Time limit. Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.
>
> (c) Other limitations. Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:
>
> (1) the conviction has been reversed or vacated;
>
> (2) the conviction has been the subject of a pardon; or
>
> (3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.

This Court's holdings in *Schmitt v. State*, 140 Md. App. 1, 41 (2001), *cert. denied*, 367 Md. 88 (2001), and *Molter v. State*, 201 Md. App. 155, 171-73 (2011), are clear that a probation before judgment is not a conviction as contemplated by Md. Rule 5-609. *See also* Joseph F. Murphy, Jr., Maryland Evidence Handbook §1302[B] at 592 (4th ed. 2010) (In discussing impeachment under Rule 509, Judge Murphy explains: "Please (continued…)

It is clear from the record that, although the trial court clearly offered defense counsel the opportunity to present any additional arguments or theories regarding why the victim's PBJ should be admitted, defense counsel did not suggest that the evidence was admissible under Md. Rule 5-608. We conclude, therefore, that this issue was not properly preserved for appellate review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *White v. State*, 324 Md. 626, 640 (1991) (argument not made at trial in support of admission of evidence cannot be asserted for first time on appeal). We decline to consider appellant's argument on this issue any further.

(…continued) remember that impeachment by 'conviction' requires a final judgment of conviction. The witness who has been found guilty but who has received 'probation before judgment' . . . has not been 'convicted' for purposes of impeachment by conviction.").

[11]Md. Rule 5-608 provides, in pertinent part:

> (b) Impeachment by examination regarding witness's own prior conduct not resulting in convictions. The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

We note that defense counsel made no proffer regarding his "reasonable factual basis" for asserting that the victim had a PBJ for theft.

III. Admission of Hearsay Evidence

During the State's direct examination of the officer who responded to the victim's apartment on April 22, 2013, after receiving a call that two individuals were fighting, the following exchange took place:

> [PROSECUTOR]: Okay. So you responded based on the dispatch what did you find when you got there?
>
> [DEPUTY LYONS]: Upon my arrival I wound up meeting with the victim in the case, Ms. Pierce.
>
> [PROSECUTOR]: Okay. Please tell us what happened when you met with her.
>
> [DEPUTY LYONS]: She told me that …
>
> [DEFENSE COUNSEL]: Objection.
>
> [PROSECUTOR]: Okay, you.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Go ahead.
>
> [DEPUTY LYONS]: That Adrian Pierce.
>
> [PROSECUTOR]: Adrian?
>
> [DEPUTY LYONS]: I'm sorry. Adrian Waters.
>
> [PROSECUTOR]: Um-hm.
>
> [DEPUTY LYONS]: Her, the father of at least one of her children, had choked her. Hit her in the face with his fist and tugged her by the arm. And I observed on her person, there were marks on the left side of her neck. On the back of her neck. She had bruising on her left upper arm. Bruising and scratches on her right upper arm and a cut on the inside of her upper lip.

Appellant contends that the trial court erred by admitting the officer's account of the victim's statements, which constituted improper hearsay evidence.[12]

As detailed above, Deputy Lyons testified that the victim reported that appellant had choked her, hit her in the face with his fist and tugged her by the arm. Ms. Pierce gave this exact testimony on direct examination, cross-examination, and when questioned by the court. Moreover, on cross-examination, defense counsel asked the victim if she "shared with police officers" the fact that her hair was pulled, she was naked, "and all of that," and Ms. Pierce responded that she had. The injuries Ms. Pierce's suffered as a result of the assault on April 22, 2013, were described by Detective Lyons and the photographs taken to document her injuries were entered into evidence. Thus, Detective Lyons' testimony regarding what Ms. Pierce told him about the assault was merely cumulative of other evidence already before the trial court.

Under all the circumstances, we are persuaded that there is no reasonable possibility that Deputy Lyons' testimony about the victim's statements may have contributed to the trial court's determination of appellant's guilt.[13] *See e.g. Fields v. State*, 395 Md. 758, 763-

[12]"'Hearsay' is 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(c).

[13]As the Court of Appeals has explained:

> [W]hen an appellant in a criminal case establishes error, unless 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, such error cannot be deemed "harmless" and a reversal is mandated. Such
>
> (continued…)

64 (2006) (concluding that admission of hearsay evidence was harmless because the purpose for which the evidence was admitted was proven by "[t]he collective effect of the other evidence in this case"); *Dionas v. State*, 436 Md. 97, 108 (2013) (reaffirming that an error will be deemed harmless if "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" (quoting *Dorsey*, 276 Md. at 659)). Because we conclude that any error in the admission of the testimony was harmless, beyond a reasonable doubt, we decline to reverse appellant's convictions on this basis.[14]

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

(continued…)
reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976).

[14]Nor is this Court obliged to consider whether Officer Lyons' testimony was admissible pursuant to an exception to the general rule excluding hearsay evidence.