

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 919

September Term, 2016

MELVIN CALDWELL A/K/A
KAMAL MUHAMMAD

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: April 24, 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.

This appeal is before us for the second time. In 2014, after a jury trial in the Circuit Court for Baltimore City, Kamal Muhammad, a/k/a Melvin Caldwell, appellant, was convicted of various crimes arising out of the stabbing of L.M.¹ and sentenced to imprisonment for 34 years. On appeal, we reversed. *See Muhammad v. State*, 223 Md. App. 255, 273 (2015). After a retrial before a jury in May 2016, Muhammad was convicted of attempted second-degree murder. He was sentenced to imprisonment for a term of 30 years. This timely appeal followed.

QUESTIONS PRESENTED

Muhammad presents the following questions for our consideration:

I. Did the circuit court err by excluding a key defense witness without exercising any discretion?

II. Did the trial court err by permitting the prosecutor to argue that Mr. Muhammad's DNA was found on the knife when there was no evidence that it was?

III. Did the trial court err by permitting the complaining witness to give irrelevant and highly prejudicial victim impact testimony?

For the reasons set forth more fully below, we shall affirm.

FACTUAL BACKGROUND

On the night of July 21, 2012, Baltimore City Police Detective Willie Craft was on patrol when he received a call to respond to 637 West Lafayette Street. When he arrived at that location, he observed a vacant dwelling with the windows and front door boarded up. There were two women on the opposite side of the street yelling out to him. As the

¹ To protect the victim's identity, we shall refer to her as "L.M."

detective approached the vacant building he heard the “faint loud cry” of a woman calling for help. He attempted to pull the wood from the front door, but was unable to remove it. When other police units arrived, Detective Craft went to the rear of the building, where he saw a “slight step-up wall” and a fence that was overgrown with shrubbery. Detective Craft also observed a naked black man, later identified as Muhammad, crouched down and walking away from the dwelling holding in his hands something that looked like clothing.

Detective Craft identified himself as a police officer and told Muhammad to stop, but Muhammad dropped the items he had been carrying and ran. Detective Craft chased Muhammad and eventually caught up to him. When Muhammad had his hands up, the detective walked up behind him. As he did so, Muhammad turned around and his arm came back toward the detective. Detective Craft struck Muhammad’s neck with his arm and Muhammad fell to the ground, at which point he was arrested. Detective Craft noticed that Muhammad had scratches on his face.

While another officer watched over Muhammad, Detective Craft and other officers entered the boarded up dwelling at 637 West Lafayette Street. There was no power in the house and the interior was dark. Using flashlights, Detective Craft and the other officers made their way into a room at the front of the house. Detective Craft saw “blood all over the floor and the walls” and a mattress that had a blood-soaked sheet and a blood-soaked knife lying on it. As he continued to scan the room, Detective Craft saw a naked woman, later identified as L.M., covered in blood and lying on her back on the floor. Detective Craft observed “penetrated wounds” on L.M.’s neck, the side and back of her head, and her arms. L.M., who was not responsive, was transported to Shock Trauma.

Detective Craft returned to the area behind the house where he had first observed Muhammad. Police eventually recovered a black wallet containing Muhammad's Maryland identification card, Social Security card, and medical card. They also found a purse containing L.M.'s Maryland identification card, a syringe, a vial and a bottle cap both containing residue, a shoe with blood on it, two socks, a ten dollar bill, and a ruby earring.

On the morning following the incident, Baltimore City Police Detective Robert Bell, Jr.², transported a sexual assault forensic examination ("SAFE") nurse, Ben Lebovitz, to Shock Trauma to perform a SAFE examination on L.M., who was intubated and sedated.³ Nurse Lebovitz observed a hematoma on the right side of L.M.'s forehead, some ecchymosis under her right eye, and abrasions on her upper lip, left inner thigh, right inner knee, and left elbow. One of L.M.'s teeth was missing, another was loose, and there was blood in her mouth. Nurse Lebovitz opined that the injuries to L.M.'s face, particularly the hematoma on her forehead and the ecchymosis under her eye, were consistent with blunt force trauma. During a genital examination, Nurse Lebovitz observed multiple small abrasions throughout L.M.'s vagina, some small abrasions on the hymen, and some small abrasions on the labia minora. Nurse Lebovitz collected swabs from L.M.'s oral cavity,

² At some time after testifying in Muhammad's first trial, Detective Bell died. During the May 2016 trial, a redacted video recording of his prior testimony was played for the jury.

³ The SAFE program is run exclusively out of Mercy Medical Center in Baltimore City. Detective Bell went to Mercy, picked up a SAFE kit, and transported the kit and nurse Lebovitz from Mercy to Shock Trauma.

external genitalia, vagina, anus, and fingernails. L.M.'s toxicology report was positive for the presence of cocaine and opiates. Four days after she was stabbed, L.M.'s breathing tube was removed and she was brought out of sedation, which enabled her to speak. Detective Bell, who was assigned to investigate L.M.'s case, interviewed her in Shock Trauma.

As part of his investigation, Detective Bell obtained a search and seizure warrant and collected forensic evidence from Muhammad through the use of a suspect's SAFE examination. During the SAFE examination, the nurse collected a sample of Muhammad's blood, oral and facial swabs, fingernail scrapings, hair from his head, pubic hair combings, and pubic hair. Muhammad's blue and white boxer shorts were seized and photographs were taken of scratch marks on his face.

L.M. testified that for many years she had been addicted to heroin and, at the time of the trial, she was in a methadone program. On July 21, 2012, she planned to go to her sister's house for a crab feast. Before going there, L.M. went to an area near Argyle Street to purchase "a pill of dope" to take with her so she would not become sick or uncomfortable from heroin withdrawal. L.M. acknowledged that she carried a syringe with her because she was part of a needle exchange program. No one was outside dealing drugs, so she began to walk back toward her home. At some point, L.M. noticed Muhammad walking behind her. He put his arm around her in "a sleep hold," became "very aggressive," and said, "I'm going to kick out some pussy." As Muhammad took her through a small "gully" or walkway, L.M. became unable to breathe and eventually, "everything started getting dark."

The next thing L.M. remembered was waking up naked and seeing Muhammad, who was also naked, standing over her.

Muhammad told L.M. to “suck my dick.” At first, L.M. complied with his request, but then she decided to bite his penis. As she decided to do so, Muhammad started backing away from her. L.M. bit down and Muhammad started pushing her forehead and hitting her. Some of L.M.’s teeth were knocked out and, when Muhammad’s penis fell out of her mouth, L.M. jumped up and ran toward a boarded up window or door and yelled for help. Muhammad grabbed her by the hair and told her she was going to die. L.M. scratched Muhammad, but he got her on the floor and started choking her. L.M. felt something like a jar or glass on the floor, picked it up, and hit Muhammad with it. Thereafter, she lost consciousness. The next thing L.M. recalled was waking up in Shock Trauma.

A DNA analyst testified that a fingernail swabbing from L.M. yielded a DNA profile that was a mixture of L.M. and Muhammad’s DNA. Swabs from the knife blade and handle yielded DNA from L.M. and at least one indeterminate minor contributor. A blood stain from a sock also yielded DNA from L.M. and at least one indeterminate minor male contributor.

Glenn Ehasz, a private detective, testified on behalf of the defense. He first visited the scene of the crime on November 23, 2013. On that date, he photographed and measured the “gully” or walkway and photographed the building located at 637 W. Lafayette Street. Mr. Ehasz stated that the walkway was about 26 ½ inches wide. About six weeks later, Mr. Ehasz returned to 637 W. Lafayette Street and entered the vacant house, which he described as boarded up and dark.

The defense also called Baltimore City Police Detective Helen Mateo as a witness. She assisted Detective Bell in investigating the case. Detective Mateo did not recall if there were police cameras in the vicinity of 637 W. Lafayette Street. She stated that she did not review any police camera footage as part of her investigation.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Muhammad contends that the trial court abused its discretion in excluding the testimony of defense witness Stephan Waters because he violated a sequestration order. Muhammad argues that the court failed to engage in any inquiry as to whether the sequestration violation could have affected Waters’ testimony and, instead, excluded his testimony based “solely” on the fact that it had earlier granted a defense objection to the testimony of a State’s witness who also violated the sequestration order. According to Muhammad, because the court failed to exercise any discretion in determining an appropriate sanction for Waters’ violation, reversal is required. We disagree and explain.

In order to place this issue in its appropriate context, it is necessary to examine the defense’s efforts to bring in evidence pertaining to police cameras in the vicinity of 637 W. Lafayette Street. On Monday, May 2, 2016, just prior to jury selection, the State advised the court that, on the preceding Friday, defense counsel had advised that a private investigator retained by the defense had “located a camera operated by City Watch a block and-a-half north of where this incident occurred, started to occur.” In addition, defense

counsel advised that he had obtained a certified letter “from the City of Baltimore indicating when the camera was installed and when – and where the camera was located.” On the morning of May 2, 2016, defense counsel showed the prosecutor photographs of the camera that had been taken by the private investigator. The State sought to preclude any mention of a camera, the letter from Baltimore City, and the photographs. In support of its argument to exclude the letter, the State asserted that it was hearsay, it was not properly authenticated, and it was irrelevant and misleading. In addition, in order to establish any probative value, a mini-trial would be required.

Defense counsel countered that the letter constituted a business record and a public record and that there would be no prejudice to the State in admitting it. Defense counsel stated that he would call as a witness at trial the City employee who authored the letter. Defense counsel acknowledged that the letter stated only that a camera was in place at the time of the incident and that the defense could not establish that that camera “would have definitely caught the incident[.]”

The court ruled that the defense could not confront a witness with the letter from Baltimore City because it was “not properly certified under [Md. Rule] 5-902” and constituted hearsay, but he could impeach a State’s witness with testimony that there was a camera in the vicinity on the day of the incident.

After jury selection, the court clarified its ruling, as follows:

Now there was a new motion by the State today concerning the CCTV cameras, motion in limine. I don’t remember the name of the person, but someone that [defense counsel] had to author a letter stating that in July of 2011 there were CCTV cameras in that area.

The Court discussion this morning, Mr. Muhammad, was rather or not – first of all, there’s a discovery violation because that was just given to the State Friday, I believe. The second thing was whether it would be misleading, or whether it’s – or relevant, or cause confusion. The third – well, that’s really kind of two things, two of those, but. And the fourth thing was whether it was properly certified.

Now, the Court has found that it is not properly certified, and I told [defense counsel] if he intended to elicit that testimony he would have to elicit through a witness. The second part of it is the Court is concerned with what I read, as far as the letter was concerned, there’s nothing in there whether or not the camera was working in 2012, or how it was working. Was it manned by a police officer, or is it just oscillating back and forth?

So what my ruling was on that was whatever witness [defense counsel] intends to impeach, we’ll see. He’s allowed to ask whoever – whatever police officer or whoever he chooses, or he can ask several, I mean it’s up to him, anything about any CCTV cameras in that area. That is a proper question, and then I don’t know what they’re going to say.

Now, what I did say, for instance, if they say no, I would not allow [defense counsel] to use the letter that he got from the City to show them to say, well, this letter clearly states, and that’s because it’s not properly certified. Okay? Because, you know, the hearsay is both oral and written. Okay? It’s not just what somebody says.

So this letter that he has, because it’s not properly certified according to [Md. Rule] 5-902, is still hearsay, and, therefore, I cannot allow him to do that. What I did tell him was that if he had his witness, whichever, you know, when the witness testified, he doesn’t have to say, well, I’m impeaching, and tell me but he doesn’t have to tell the jury, I’m impeaching witness number whoever it might be. But that witness would be the impeachable person to say – and the only thing they could say was that their cameras were installed there in 2011, but they won’t know whether it was working or not.

During trial, both Detective Craft, who testified in the State’s case, and Detective Mateo, who was called as a witness by the defense, testified that they did not know if there were police cameras in the area of Argyle Avenue and Mosher Street. Detective Mateo acknowledged that no cameras were reviewed as part of the police investigation.

On the second day of trial, L.M.’s sister, Sharon C., was in the courtroom in violation of the court’s sequestration order. The court determined that Sharon C. had violated the order and ruled that she could not testify.

The following day, defense counsel advised the court that he intended to call Stephan Waters, a Baltimore City employee, to testify that there was a camera installed on Argyle Avenue in 2011 and that the camera was not portable. The court pointed out that Detective Craft had testified that he did not know if there were any police cameras in the area. Over objection, the court ruled that Detective Craft could not be impeached with Waters’ testimony. Subsequently, after Ehasz testified for the defense, the prosecutor pointed out that Waters was sitting in the courtroom and had heard some of the testimony. The court excluded Waters as a witness for violating the sequestration order. The issue of Waters’ testimony was revisited again, just after the close of the evidence, when the court stated:

Now, one other thing the Court wants to do before we begin. I just want to make it clear on the record in case it was not clear why Defense witness Stephan Waters was not permitted to testify.

Mr. Waters, as we discussed earlier in motions, was made known to the State on Friday and – along with the photographs and some documents that he had prepared, a letter, I believe. The Court’s ruling was that that was a violation of [Md. Rule] 4-263, that there was not proper notice given to the State for that witness to testify. However, I ruled that if he was an impeachment witness, he could testify if there was a witness to impeach. The Court ruled today that there was no witness to impeach. That was the first reason why he couldn’t testify. And then it became known that he had violated the sequestration rule because he was sitting in the courtroom during the testimony of the Defense’s first witness.

Now, when the State’s witness, Ms. [C.], was sitting in the courtroom, the Defense asked that the Court not allow her to testify. The Defense has

been very concerned and talking a lot about what's just and with balancing the scales in this case and, therefore, [the Prosecutor] said to the Court the same as you had said about Ms. [C.] so, therefore, I did not allow him to testify because he violated the sequestration rule.

Had you not objected to Ms. [C.] testifying, I would have allowed him to testify. So I just wanted to make sure the record is clear as to why that witness was not allowed to testify.

Muhammad's argument that the trial court abused its discretion in excluding the testimony of defense witness Stephan Waters "solely" because he violated a sequestration order ignores the context in which the issue of the police cameras and Waters' potential testimony occurred. The record clearly reveals that the defense violated the discovery rules by identifying the letter, Waters, and the substance of Waters' testimony on the work day preceding the start of the trial. The court determined that the letter was not properly certified or authenticated and ruled, preliminarily, that under the proper circumstances, Waters could be called to impeach the testimony of any witness who testified that there were no cameras in the vicinity of the incident. The opportunity to use Waters to impeach another witness never materialized. Detective Craft testified that he did not know if there were any cameras in the area. Thus, we need not resolve the issue of whether the court erred in excluding Waters' testimony for violation of the sequestration order because, even if Waters had not violated the sequestration order, his testimony would not have been relevant and could not have been used for impeachment purposes. It is undisputed that Waters could not attest to the operation of the cameras when the incident in question occurred.

Moreover, any error in precluding Waters’ testimony was harmless. Detective Mateo, a defense witness, testified that there may have been a camera in the vicinity of the incident, but no footage was reviewed as part of the police investigation. As the State points out, defense counsel emphasized this fact when he argued in closing that the police “did not check for camera footage of something that happened on a City street. And we don’t know about the availability of it.” As a result, even if the trial court erred in excluding Waters’ testimony for violating the sequestration order, such error was harmless. *Dorsey v. State*, 276 Md. 638, 659 (1976).

II.

Muhammad contends that the trial court erred in permitting the prosecutor to argue to the jury that Muhammad’s blood was on the knife because the DNA expert testified only that there was DNA from an indeterminate minor contributor. Specifically, he directs our attention to the following portion of the State’s closing argument:

[PROSECUTOR]: Likewise, Defendant holding a knife leaving his skin cells on that knife goes and then cuts [L.M.] up with it, gets her blood all over it, that blood from [L.M.] is going to overpower any touch what [the DNA analyst] called it “touched sample” on that knife.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: And that’s exactly what [the DNA analyst] told you and that’s probably – that’s exactly what happened in this case.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

It is well established that attorneys are afforded great leeway and liberal freedom of speech in presenting closing arguments to the jury. *Lee v. State*, 405 Md. 148, 163 (2008) (citing *Degren v. State*, 352 Md. 400, 429-30 (1999)). This wide latitude is permitted because “[s]ummation provides counsel with an opportunity to creatively mesh the diverse facts of trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent’s argument.” *Id.* at 162 (quoting *Henry v. State*, 324 Md. 204, 230 (1991)). As the Court of Appeals recognized in *Wilhelm v. State*, counsel “may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.” *Wilhelm*, 272 Md. 404, 413 (1974). Notwithstanding this wide latitude, there are limits on what a prosecutor may say in closing argument so that a defendant’s right to a fair trial is protected. *Degren*, 352 Md. at 430. What exceeds the limits of permissible commentary during closing argument depends on the facts of each case. *Id.* at 430-31 (citing *Wilhelm*, 272 Md. at 415). Even if an improper remark is made during closing argument, reversal is only required when “the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.” *Id.* at 431 (quoting *Jones v. State*, 310 Md. 569, 580 (1987)).

In the case at hand, we reject Muhammad’s contention that the prosecutor’s closing argument mischaracterized the evidence so as to require reversal. The prosecutor’s statement was made as he recounted the testimony of the DNA analyst. Just prior to the statement complained of by Muhammad, the prosecutor argued:

Now, if you remember the testimony of Kimberly Morrow correctly, Kimberly Morrow said that blood is a very probative source of DNA. So much so that when it gets on an object, it overpowers, for example, if I touch this pen and I just touch it, it doesn't matter how hot it is or how much I'm sweating, and then I go and I drop it in blood it's more likely she's going to get a DNA profile from that blood because that's how powerful blood is as a source of DNA.

Evidence was presented that Muhammad attacked L.M., that a bloody knife was found in the room where the attack occurred, and that Muhammad was found naked and walking away from the house where the attack occurred carrying clothing and items that belonged to L.M. From this evidence and the testimony of the DNA analyst, the prosecutor was free to draw the inference that, in the instant case, L.M.'s blood overpowered any DNA that Muhammad might have left on the knife. There was no dispute that Muhammad's DNA was not identified on the knife, but neither was there any dispute that, as the DNA analyst explained, the blood on the knife could have overpowered DNA from other sources. The prosecutor fairly summarized the evidence and drew rational inferences from it.

III.

Muhammad's final contention is that the trial court erred in permitting L.M. to give "irrelevant and highly prejudicial" testimony about how she had been impacted by the incident. According to Muhammad, even if L.M.'s testimony had some relevance, it should have been excluded because its probative value was substantially outweighed by unfair prejudice resulting from sympathy jurors might have felt for L.M. We disagree.

On direct examination, the following occurred:

[PROSECUTOR]: Since this incident, how have you been impacted by it?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: You may answer.

[L.M.]: Every – I don't mean to be (indiscernible) but I just – (indiscernible) you know, a lot of people say black people look alike, but every man that's – that is black like him and has that bald head is him, and I can't do anything. I have – every [sic] since he did what he did to me. I can't go anywhere without – I have to go from my apartment to the car and from the car to the apartment. I haven't taken a cab (indiscernible), but one time since I left (indiscernible) and I have a godfather that comes from Pikesville every day – I'm on a drug program three blocks away from my house and drives me. He comes from Pikesville, Owings Mills, to bring me to the drug program and take me back to the apartment. I haven't been anywhere in four years since he did this to me and he (indiscernible) he broke my sternum. I didn't know none of this. I never saw the knife. I never knew I was raped. Excuse me – (indiscernible) – I didn't know he raped me. I didn't know he cut me. I never saw a knife. I thought he choked me to death and that's it. My health is a mess.

THE COURT: Next question?

[PROSECUTOR]: Thank you, Your Honor.

It is well established that trial judges are afforded broad discretion in the conduct of trials. *Hopkins v. State*, 352 Md. 146, 158 (1998)(and cases cited therein). We ““extend the trial court great deference in determining the admissibility of evidence and will reverse only if the court abused its discretion.”” *Kelley v. State*, 392 Md. 511, 530 (2006)(quoting *Hopkins*, 352 Md. at 158). We find no abuse of discretion in the instant case.

Preliminarily, we note that Muhammad objected only to the question asked by the prosecutor. The question posed to L.M. was probative with respect to the charge of first-degree assault. With regard to one modality of that crime, the State was required to establish “serious physical injury,” which is defined as injury that is “permanent or

protracted.” Md. Code (2012 Repl. Vol.), §§ 3-201(d) and 3-202(a) (1) of the Criminal Law Article (“CL”). Thus, evidence of the harm suffered by L.M. was relevant to that issue. It was also relevant to the issue of lack of consent. *See Parker v. State*, 156 Md. App. 252, 274 (2004).

Maryland Rule 4-323(a) requires that “[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.” Muhammad did not lodge any objection to the response given by L.M. He did not request that the court strike her testimony, instruct the jury, or grant a mistrial. At no time did Muhammad argue, as he does on appeal, that L.M.’s testimony was irrelevant or that it unfairly generated sympathy for her. As a result, any complaint he has with regard to L.M.’s answer was waived. Md. Rules 4-323(a); 8-131(a).

Even if this issue had not been waived, and assuming, *arguendo*, that the court erred in admitting L.M.’s testimony, Muhammad would fare no better. Much of the challenged testimony was cumulative of other evidence presented at trial and its admission would have constituted harmless error. L.M.’s statements about being frightened of Muhammad and people who look like him was consistent with her testimony on re-direct examination, when she testified, without objection, that Muhammad was “so scary,” that he was “still scary,” and that “[h]e’s not a nice person.” With regard to L.M.’s testimony about her godfather driving her to a drug program, L.M. admitted that she was a drug addict and testified that she was participating in a methadone program. L.M.’s statements that she did not know that her sternum had been broken, did not know she had been raped, never saw a knife, and

did not know she had been stabbed were consistent with her testimony on both direct and cross-examination that after being grabbed by Muhammad, she lost consciousness. When she awoke, she saw Muhammad naked and standing over her. After a subsequent struggle, L.M. again lost consciousness and later awoke in Shock Trauma. With respect to L.M.’s testimony that her “health is a mess,” there was evidence presented that L.M. had a long time drug addiction and that she was in a methadone program. Moreover, her medical records established the serious nature of the injuries she suffered. Finally, with regard to L.M.’s testimony that she was cautious about going outside and taking cab rides, in light of all the evidence presented at trial, we are able to conclude, beyond a reasonable doubt, that that testimony in no way influenced the verdict and was harmless. *Dorsey v. State*, 276 Md. 638, 659 (1976). Thus, even if this issue had not been waived and the trial court had erred in admitting L.M.’s response, such error would have been harmless.

**JUDGMENT OF THE CIRCUIT COURT FOR
BALTIMORE CITY AFFIRMED; COSTS TO BE
PAID BY APPELLANT.**