Circuit Court for Baltimore County
Case No.: 03-K-16-001894

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 932

September Term, 2023

JAMES DARNELL JOHNSON

v.

STATE OF MARYLAND

Nazarian,
Kehoe, S.,
Zarnoch, Robert, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 8, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury sitting in the Circuit Court for Baltimore County convicted appellant, James Johnson, of a first-degree sexual offense, first-degree assault, robbery with a dangerous weapon, use of a handgun in the commission of a crime of violence, false imprisonment, and possession of a stun gun. He was sentenced to an aggregate term of 70 years. Johnson appeals,[1] arguing that the trial court erred by admitting a police officer's testimony recounting a statement made by the victim under the prompt complaint of sexual assault exception to the rule against hearsay. For the following reasons, we shall affirm the judgment of the circuit court.

BACKGROUND

The following evidence was adduced at the three-day jury trial. A little before midnight on March 5, 2016, D[2] hailed a "hack"[3] outside of the hair salon in Baltimore City where he worked. Two men were in the front seat of the SUV that picked him up. D later identified the driver as Shakir Mitchell and the passenger as Johnson.

They arrived outside of D's apartment complex in Dundalk just after midnight on March 6. Mitchell "pulled a gun out" and threatened to kill D if he did not comply. The

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[1] Johnson noted his appeal 31 days after the entry of the judgments of conviction. This Court dismissed his appeal as untimely. Seven years later, Johnson filed a petition for post-conviction relief arguing that trial counsel was ineffective for failing to note a timely appeal. On July 6, 2023, the court entered a consent order permitting Johnson to file a belated appeal within 30 days of the order, which he did.

[2] Consistent with Md. Rule 8-125, we identify the victim only by his last initial.

[3] A hack is an unlicensed taxicab.

gun was "black like a police gun" and did not have a barrel. Mitchell directed D to walk to his apartment and to act normal.

Once inside, Mitchell forced D into his bedroom and ordered him to change his clothes. Meanwhile, Johnson rummaged through D's belongings. Mitchell handcuffed D's hands behind his back and told him to lay face down on his bed. Johnson went through the closets and unplugged electronics. Mitchell and Johnson demanded the passcode for D's cell phone. D was so "nervous" that he could not remember the correct passcode. Mitchell used a stun gun on him when D provided an incorrect passcode, which happened "a lot."

Johnson held a knife to D's throat and Mitchell threatened to kill him again. Mitchell then removed the handcuffs and used D's phone charging cord to tie him up with his hands attached to his ankles behind his back.

Johnson continued "ransacking" D's apartment and packing up items. He found anal beads and a dildo in their original packaging in D's closet. Mitchell attached the anal beads to a phone cord and inserted the dildo and the anal beads into D's anus. Mitchell used his cell phone to take photographs of D and threatened to post the photographs online if D contacted the police. Mitchell directed D to act like he was enjoying it.

Mitchell and Johnson left carrying belongings they stole, including a television, a check made out to D from the hair salon, bath towels, shoes and clothing, and cash. Mitchell instructed D to repeat the alphabet backwards while they were leaving. About 10 minutes after D heard the men leave, he was able to free himself from the restraints. He removed the anal beads. Fearing that the men were outside, D climbed out his bedroom window and ran to a Royal Farms store where he called 911.

The 911 call, which was played for the jury, was received at 2 a.m. In the call, D, who was crying, recounted that he had been robbed and sexually assaulted at gunpoint at his nearby apartment by two men who had driven him home from work. He said Mitchell displayed a "black gun," that they "stun gunned" him on his neck and his hands, and that one of them put a "knife on [his] neck[.]"

Officer Joseph Conway with the Baltimore County Police Department responded to the Royal Farms and spoke with D, who "was extremely upset and emotionally drained at the time." Over objection, Officer Conway testified that D told him that the perpetrators pointed a "semi-automatic handgun" at him and used a "taser" and a knife.

Officer Conway returned to D's apartment with him. The apartment "had clearly been ransacked[.]" On the bed was a cord with anal beads attached to it. The police searched the apartment for the dildo that D told them was used on him but did not find it. No fingerprints or other forensic evidence of value was recovered from the apartment.

Still images from a surveillance video recorded on March 6, 2016 at the apartment complex were introduced into evidence. They depicted D, Mitchell, and Johnson entering D's apartment together at 12:06 a.m. and Mitchell and Johnson carrying items out of the apartment an hour later, including a large television and a bag.[4]

D was transported to the Greater Baltimore Medical Center where he underwent a SAFE exam. A forensic nurse examiner testified as an expert that D had burn injuries on his neck and left shoulder, linear abrasions on both wrists, and injuries to his anus

[4] Johnson identified himself and Mitchell as the men in the video stills during his recorded statement to police, which was introduced into evidence at trial.

consistent with his narrative account of the assault. She explained that internal examinations were not performed on men as part of a SAFE exam.

The following day, D experienced stomach pain and when he defecated, he expelled the dildo. The forensic nurse examiner opined that this was consistent with the dildo having been pushed into D's colon, where he would not have been able to feel it. D contacted the police, and the dildo was collected as evidence.

The police developed Mitchell as a suspect and executed a search warrant for his home in Pennsylvania in cooperation with local authorities and for an SUV titled in his girlfriend's name. Inside the SUV, police recovered clothing identical to that worn by Mitchell in the surveillance video, a stun gun, a check made out to D from the hair salon, and a universal handcuff key.

From inside the home, police seized Mitchell's cell phone. Data extracted from the cell phone showed that Mitchell changed his phone number the same day as the assault. Four photographs found on the cell phone depicted D lying face down on a bed, bound with his hands to his ankles, with anal beads inserted in his anus.

Johnson was developed as a suspect based on information provided to police by Mitchell's girlfriend. On March 8, 2016, Johnson was arrested, and a search warrant was executed at the home where he stayed with the mother of his newborn baby. The police recovered a stun gun and handcuffs in the bedroom.

Johnson was advised of his *Miranda*[5] rights and agreed to give a taped statement. He admitted to being present at D's apartment with Mitchell but denied having physically assaulted or sexually assaulted him. According to Johnson, Mitchell misled him about why they were going to D's apartment, representing that he worked as a fugitive recovery agent and that they were going to D's apartment to serve a warrant. According to Johnson, when Mitchell tied D up and pulled his pants down, Johnson left the room and did not return. Johnson confirmed that Mitchell was armed with a gun and that he routinely carried a holstered, concealed weapon.

We shall include additional facts in our discussion of the issue on appeal.

DISCUSSION

a.

As set out above, Officer Conway was the first responding officer who met with D at the Royal Farms store. As pertinent, the prosecutor questioned Officer Conway about D's account of the crime:

> [PROSECUTOR]: Did you ask for a physical description of the individuals responsible?
>
> [OFFICER CONWAY]: I did.
>
> [PROSECUTOR]: Describe any weapons used against him?
>
> [OFFICER CONWAY]: Yes, he did.
>
> [PROSECUTOR]: What weapons did he describe was [sic] used against him - -
>
> [DEFENSE COUNSEL]: Objection.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

THE COURT: Sustained.

[PROSECUTOR]: Your Honor, this is prompt reporting.

The court called counsel to the bench, where the following discussion ensued:

[DEFENSE COUNSEL]: Your Honor, I'm objecting based on hearsay.

[PROSECUTOR]: Your Honor, this is very clearly prompt reporting of a sexual offense. The victim will be subject to cross-examination. You've heard the 911 call.

On that 911 call, he said the officer is here. He's now telling the officer the information. I believe I can get the physical description of all three of the weapons used. I don't need him to recount the story, and I'm not going to have him recount the story, but I do believe he can advise what weapons were used.

THE COURT: What weapons or what they look like?

[PROSECUTOR]: Yes.

THE COURT: Because he says he doesn't know weapons.

[PROSECUTOR]: Right.

[DEFENSE COUNSEL]: Your Honor, I made my objection.

THE COURT: All right. So, basically what you're saying is it's more in the form of an excited utterance.

[PROSECUTOR]: Excited utterance and prompt . . . reporting of a sexual offense, both of which are exceptions to the Hearsay Rule.

* * *

THE COURT: I found the 802.1, Hearsay Exception. "Prior statement by a witness. The following statements previously made by witness [sic] who testifies at trial or hearing is subject to cross-examine [sic] are not excluded by the Hearsay Rule; a statement that's one of prompt complaint of sexually assaulted behavior to which the declarant is subjected, if the statement is consistent with the declarant's testimony." Now, clearly it's subject to being

> stricken if it's not consistent. Do you wish to comment before I make a ruling?
>
> [DEFENSE COUNSEL]: Putting the cart before the horse.
>
> THE COURT: It is putting the cart before the horse, but I'm gonna allow it.

On resumed direct examination, the prosecutor asked Officer Conway to recount what D reported about "what weapons . . . were used and what, if any, physical description he gave you of those weapons?" He responded: "Yes, it was a semi-automatic handgun was pointed at him. There was a taser used, and also a knife."

D confirmed during his testimony that Mitchell pulled out a gun that did not have a barrel and looked like a "police gun." He testified that Mitchell used a stun gun on him while Johnson demanded his cell phone password. Johnson then held a knife to his throat.

Defense counsel did not move to strike any of Officer Conway's testimony after D testified.

b.

Johnson contends that the trial court erred by permitting Officer Conway to testify to D's description of the three weapons used against him. He asserts that this testimony was hearsay and was not admissible under the exception for a prompt complaint of sexual assault or as an excited utterance. He asserts that reversal of his convictions is warranted because the error was not harmless beyond a reasonable doubt.

The State responds that Johnson's challenge to the admission of this evidence is unpreserved, that the evidence was properly admitted, and that, even if the court erred, the error was harmless beyond a reasonable doubt both because it was cumulative of other

evidence admitted without objection and because the evidence of Johnson's guilt was overwhelming.

c.

Though the admission or exclusion of evidence "is generally committed to the sound discretion of the trial court[,]" *CR–RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 406 (2012), a court has "no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Bernadyn v. State*, 390 Md. 1, 8 (2005). Accordingly, we review *de novo* whether the circuit court properly admitted hearsay pursuant to an exception to the rule against hearsay. *Id*. Any factual findings made by the trial court when evaluating whether a hearsay exception applies are reviewed for clear error. *Gordon v. State*, 431 Md. 527, 538 (2013).

Officer Conway's testimony recounting D's statements about the weapons used against him during the robbery and sexual assault was hearsay. *See* Md. Rule 5-801(c) ("'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."). The circuit court ruled that it was admissible under the "prompt complaint of sexually assaultive behavior" exception set out in Rule 5-802.1(d). Under that exception, a prior statement of a witness who will testify at trial subject to cross-examination that "is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected" is admissible "if the statement is consistent with the declarant's testimony[.]" Md. Rule 5-802.1(d).

Johnson's argument on appeal is that the testimony exceeded the scope of the prompt complaint exception, which he asserts is limited to a statement that the assault

occurred and the identity of the perpetrators. We are persuaded that this argument is adequately preserved but conclude that it is without merit.

We have observed that the "'legally sanctioned function'" of the prompt complaint exception is to "'give added weight to the credibility of the victim'" by corroborating the victim's account of the alleged assault. *Choate v. State*, 214 Md. App. 118, 146 (2013) (quoting *Nelson v. State*, 137 Md. App. 402, 411 (2001)). "Admission of the fact that a prompt complaint was made will forestall the creation of reasonable doubt in the jurors' minds, simply because they have not heard when the first report of rape was made." 6A Lynn McLain, MARYLAND EVIDENCE STATE AND FEDERAL § 801(2):2 at 305 (3d ed. 2013). "'[A]lthough the earlier case law admitted only the bare fact that the complaint had been made, the restraints have been loosened at least to the point of admitting as well the *essential nature of the crime complained of* and the identity of the assailant.'" *Vigna v. State*, 241 Md. App. 704, 731 (2019) (emphasis added) (quoting *Cole v. State*, 83 Md. App. 279, 293 (1990)), *aff'd on other grounds*, 470 Md. 418 (2020), *cert. denied*, -- U.S. --, 141 S. Ct. 1690 (2021).

Officer Conway's testimony that D told him that his assailants used a semiautomatic weapon, a knife, and a "taser,"[6] was not a narrative account of the crime and was part of the essential nature of the crime. The crime includes essential elements of the sexual offenses with which Johnson was charged. Significantly, he was charged with a sexual

[6] Other testimony established that Mitchell used a stun gun, not a taser, but this discrepancy is minor and does not detract from the corroborative effect of Officer Conway's testimony.

offense in the first degree, then codified at Md. Code, Crim. Law § 3-305,[7] which made it a crime for a person to "engage in a sexual act with another by force, or the threat of force, without the consent of the other" and "employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon[.]" The description of the weapons used related to the dangerous weapon element of this crime. Officer Conway did not delve into the narrative details of the sexual assault by detailing how the weapons were used. His testimony was consistent with D's subsequent testimony describing the weapons used against him during the sexual assault and, consequently, it was admissible under the prompt complaint exception.

Even if we were to agree with Johnson that the testimony exceeded the scope of the prompt complaint exception, which we do not, we would hold that its admission was harmless beyond a reasonable doubt in the face of the overwhelming evidence that Johnson and Mitchell were armed during the assault. *See Dionas v. State*, 436 Md. 97, 108 (2013) (stating that an error is harmless when a reviewing court is "'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'" (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))). Consideration of "the cumulative nature of an erroneously admitted piece of evidence" is a well-established component of harmless error analysis. *Gross v. State*, 481 Md. 233, 237 (2022).

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[7] This statute was repealed effective October 1, 2017. *See* Acts 2017, c. 161, § 1.

The evidence at trial bearing on the presence of the weapons included 1) that D told the 911 operator that the perpetrators used a black gun, a stun gun, and a knife during the assault; 2) that D testified to the same at trial; 3) that the SAFE exam revealed burn marks on D's neck and shoulder consistent with a stun gun having been used against him; 4) that Johnson told police during his recorded statement that Mitchell carried a concealed weapon and pulled it out during the assault; 5) that a universal holster was recovered from Mitchell's house; and 6) that stun guns were recovered from Mitchell's house and the bedroom that Johnson shared with his girlfriend. Perceiving no error, much less reversible error, we affirm the judgments of the circuit court.

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