

Circuit Court for Baltimore City
Case No. 117152013

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2040

September Term, 2018

TYRONE FENNER

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 9, 2019

*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.

Appellant Tyrone Fenner was convicted in the Circuit Court for Baltimore City of second degree assault. The case arose from allegations that appellant and co-defendant Shamira Harris abused Harris's son, T.R. The cases were consolidated for trial, and both defendants were convicted of second degree assault. Appellant timely appealed, presenting for our review the following rephrased question:

Did the trial court abuse its discretion in allowing the State to introduce prior bad acts of appellant's use of a hanger to strike the victim?

Finding that appellant did not preserve the issue for our review, we shall affirm.

I.

Appellant was indicted by the Grand Jury for the Circuit Court for Baltimore City with second degree assault and child abuse against T.R.¹ and S.F., carrying a dangerous weapon (a clothes hanger) openly with the intent to injure, conspiracy to commit child abuse, and conspiracy to commit second degree assault. During trial, the State entered a *nolle prosequi* to the charges related to S.F. Appellant was convicted by a jury of second degree assault and acquitted of the child abuse, weapon, and conspiracy charges. The court sentenced him to a term of incarceration of ten years, all but five suspended, with three years' supervised probation.

The State filed a pre-trial motion, putting appellant on notice that the State intended

¹ As is our custom, we refer to the minor children by their initials.

to introduce at trial evidence of appellant's alleged prior abuse of T.R. and S.F. The prosecutor proffered that before the incident in question, appellant hit T.R. and S.F. with a coat hanger, and the children's mother, Ms. Harris, used a broomstick to hit T.R. The court ruled that the evidence of appellant's use of the coat hanger would be admitted at trial if offered by the State.

We state the following facts as set forth at trial. On March 19, 2007, appellant and Harris returned to their home in Baltimore City to find that T.R. and his six-year-old sister S.F. were outside the home. T.R. testified that appellant "told [Harris] to get the belt. That's when I got a beating first." Appellant hit him with a closed fist, Harris hit him with a belt, and appellant hit him again with a clothes hanger, leaving bruises and red patches.

The following day, T.R. and S.F. approached Officer James Kostoplis at a bus stop near T.R.'s home. T.R. told the police officer that they did not want to return home "because my mom, she beat us. That's why we don't want to go home." T.R. stated also that appellant beats S.F. with a coat hanger and with pencils, but he did not state that appellant beat *him* with a hanger. Officer Kostoplis recorded T.R.'s statements on his body camera. He noticed bruising on T.R.'s left arm, and he took the children to a hospital. The doctor in the pediatric emergency room observed that T.R. still had bruises and "red patches" on his face, shoulder, chest, and arms. The doctor testified that T.R. had a fresh, "U"-shaped bruise on his chest at the time of his examination.

Dana Lewis, a state social worker, interviewed T.R. and S.F. at the hospital. He noticed marks and bruises on T.R.'s face, neck, and arms. Appellant and Harris arrived at

the hospital sometime after Mr. Lewis. They told Mr. Lewis that they did not abuse T.R. and that he had been in an altercation with other boys at school. A friend of Harris testified that she supervised T.R. in the afternoon and evening on March 19 and saw no signs of physical abuse.

At trial, the State offered Officer Kostoplis's body camera video into evidence. Appellant did not object to the admission of the video, and the court admitted it. In the video, T.R. said that appellant hit S.F. "with hangers and pencils and stuff and leaves bruises on her." Officer Kostoplis then told other individuals that T.R. and S.F. were "getting . . . hit" with a coat hanger. Neither defendant testified at trial. As stated above, the jury convicted appellant of second degree assault, and the court imposed sentence. This appeal followed.

II.

Before this Court, appellant argues that the recorded statements that appellant hit T.R. and S.F. with a coat hanger were inadmissible evidence of a prior bad act. He emphasizes that evidence of prior bad acts cannot be used to prove criminal propensity and that it must be "subjected to rigid scrutiny because of the possibility of prejudice."

First, appellant argues that the evidence was inadmissible because the prosecutor did not establish that the evidence satisfied an exception to the rule against admission of prior bad acts. The prosecutor asserted that the evidence was admissible to show "malicious intent," an element of the crime, and admissible to show absence of mistake.

Appellant contends that because his defense was not mistake, it was “inappropriate” to admit evidence of intent or malice. He contends that the statements referred to his hitting S.F., not the victim for whom he was charged, making inapposite the exception relied upon by the motions court to admit the evidence.

Second, appellant argues that the bad act was not proven by clear and convincing evidence as required by *State v. Faulkner*, 314 Md. 630, 634 (1989). He notes that the motions court found a lack of clear and convincing evidence for another bad act to which T.R. testified and asserts that the court should have been equally skeptical of T.R.’s testimony about the clothes hanger. He argues that because there was no additional evidence of prior abuse with a clothes hanger, and T.R. did not testify at trial to the prior incident, there was a lack of evidence supporting the prior bad act.

Third, appellant argues that the evidence was more prejudicial than probative because there was no need for the State to prove that his hitting T.R. was malicious—he did not argue at trial that he hit T.R. for less culpable reasons. He argues that the evidence was highly prejudicial, leading the jury to believe that he was “a bad person who abuses children with a hanger.” He concludes that the evidence was inadmissible based on any of the three elements of *Faulkner*.

The State argues that appellant failed to preserve his issue for our review. The State maintains that, notwithstanding any pre-trial ruling on a motion *in limine*, to preserve an issue for appellate review, a party must make a contemporaneous objection when the evidence is offered at trial. Appellant did not object to the admissibility of the evidence

when the State offered the video, the source of the evidence. Because appellant did not object when the State offered Officer Kostoplis’s body camera video, the State contends that appellant waived any claim of error.²

III.

We hold that appellant failed to preserve the issue for our review. Maryland Rule 4-323(a) provides as follows:

“An 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.”

In Maryland, when a party moves *in limine* to exclude evidence, and it is admitted into evidence at trial, the complaining party ordinarily must object contemporaneously to the admission of the evidence to preserve the issue for appellate review. *Reed v. State*, 353 Md. 628, 637 (1999).

Before trial, the court ruled that the proposed evidence of appellant hitting T.R. and S.F. with a clothes hanger before the incident at issue would be admissible. To preserve his objection for appellate review, appellant needed to object to that evidence when the prosecutor offered it at trial. T.R. did not testify at trial to any prior incidents of abuse. Instead, the court admitted Officer Kostoplis’s body camera video, in which T.R. told the

² The State argues in the alternative that the evidence was admissible. Because we find that the issue was not preserved for our review, we shall not set forth the State’s arguments on the merits.

police officer that appellant hit S.F. with a clothes hanger and Officer Kostoplis told other individuals that T.R. and S.F. were “getting . . . hit” with a coat hanger. Appellant did not object contemporaneously to the admission of the body camera video on any grounds. He has waived appellate review of the issue.

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