

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 16th day of December, 2021.

Present: All the Justices

Harold S. Jones,

Appellant,

against

Record No. 201254
Court of Appeals No. 0656-20-2

Commonwealth of Virginia,

Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

At the conclusion of a jury trial, Harold S. Jones was convicted of rape, abduction with the intent to defile, forcible sodomy, and strangulation. Jones' convictions arose from the sexual assault of D.R. In this appeal, Jones challenges the admissibility of the testimony of K.P., a witness who alleged that Jones sexually assaulted her approximately one year before he allegedly assaulted D.R. Jones contends that K.P.'s testimony was inadmissible during the sentencing phase of his trial.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that Jones' argument is procedurally defaulted under Rule 5:25. Accordingly, the Court affirms Jones' convictions without considering the merits of his appellate argument.

I. BACKGROUND

During the guilt phase of Jones' jury trial, D.R. testified that Jones sexually assaulted her on April 29, 2018. D.R. described the sexual assault in detail, and evidence collected by a sexual assault nurse examiner corroborated D.R.'s testimony. Jones testified in his own behalf. After considering the evidence, the jury convicted Jones of the charged offenses.

The Commonwealth indicated that it intended to present the testimony of K.P. during the sentencing phase of Jones' trial. The Commonwealth explained that K.P. would testify about a prior sexual assault that Jones allegedly committed. The Commonwealth maintained that K.P.'s testimony would provide relevant evidence of Jones' "prior bad conduct."

Jones objected to K.P.'s testimony, arguing that K.P. was "basically a prior bad act witness." Jones noted that K.P. would testify about unadjudicated criminal conduct. While Jones acknowledged that K.P.'s testimony may have been admissible for certain purposes during the guilt phase of his trial, he maintained that K.P.'s testimony was "irrelevant" at sentencing. Jones also claimed that K.P.'s testimony lacked "value" when viewed with the mandatory minimum sentences for Jones' convictions.

The circuit court overruled Jones' objection and permitted K.P. to testify. K.P. testified that Jones raped her in March of 2017, and she described the sexual assault in detail. The sexual assault described by K.P. was factually similar to the sexual assault described by D.R. Jones did not present any evidence during the sentencing phase of his trial.

After considering Jones' prior felony convictions, K.P.'s testimony, and written victim impact statements from D.R. and her mother, the jury recommended life sentences for each of Jones' rape and forcible sodomy convictions. The jury also recommended a 20-year sentence for Jones' abduction conviction and a 5-year sentence for Jones' strangulation conviction. The circuit court imposed the jury's recommended sentences on February 12, 2020.

Jones appealed the circuit court's sentencing decision to the Court of Appeals of Virginia. The Court of Appeals denied Jones' petition for appeal on September 15, 2020. This appeal followed.

II. ANALYSIS

On appeal, Jones contends that K.P.'s testimony was inadmissible under Code § 19.2-295.1. Citing the specific provisions of Code § 19.2-295.1,¹ Jones argues that K.P.'s testimony could only be admitted as rebuttal evidence during the sentencing phase of his trial.

¹ In pertinent part, the version of Code § 19.2-295.1 that was in effect at the time of Jones' trial states:

In cases of trial by jury, upon a finding that the defendant is guilty of a felony . . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury. At such proceeding, the Commonwealth may present any victim impact testimony pursuant to [Code] § 19.2-295.3 and shall present the defendant's prior criminal history, including prior convictions and the punishments imposed, by certified, attested or exemplified copies of the final order, including adult convictions and juvenile convictions and adjudications of delinquency. Prior

At oral argument, Jones conceded that he did not present this statutory argument to the circuit court. Jones' concession is well taken. A review of the record confirms that, at trial, Jones did not reference Code § 19.2-295.1 or argue that K.P.'s testimony was inadmissible pursuant to terms of that statute.

Pursuant to Rule 5:25, “[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.” Rule 5:25. The purpose of Rule 5:25 is to “afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals.” *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010) (quoting *Weidman v. Babcock*, 241 Va. 40, 44 (1991)).

As Jones failed to argue that K.P.'s testimony was inadmissible under the provisions of Code § 19.2-295.1 at any point during the circuit court proceedings, his argument is not properly before the Court for appellate review.

While Rule 5:25 permits the Court to consider matters that are not preserved for appeal in order to attain the “ends of justice,” we decline Jones' invitation to apply the “ends of justice” exception of Rule 5:25 in this case. “This Court considers two questions when deciding whether

convictions shall include convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories. The Commonwealth shall provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's prior criminal history, including prior convictions and punishments imposed. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had, (iii) each offense of which he was convicted, and (iv) the punishment imposed. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce at sentencing. After the Commonwealth has introduced in its case-in-chief of the sentencing phase such evidence of prior convictions or victim impact testimony, or both, or if no such evidence is introduced, the defendant may introduce relevant, admissible evidence related to punishment. Nothing in this section shall prevent the Commonwealth or the defendant from introducing relevant, admissible evidence in rebuttal.

Code § 19.2-295.1 (2019).

to apply the ends of justice exception: ‘(1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice.’” *Commonwealth v. Bass*, 292 Va. 19, 27 (2016) (quoting *Gheorghiu v. Commonwealth*, 280 Va. 678, 689 (2010)). The Court has previously explained that the ends of justice exception is applied in “very limited circumstances.” *See Williams v. Commonwealth*, 294 Va. 25, 28 (2017) (quoting *Gheorghiu*, 280 Va. at 689).

In the present case, the Court’s refusal to apply the ends of justice exception to address the merits of Jones’ argument will not lead to a grave injustice. Jones’ convictions all arise from the violent rape and sexual assault of D.R. Significantly, Jones has not challenged the sufficiency of the evidence supporting his convictions at any point during the appellate proceedings. While Jones argues that the jury should not have been allowed to consider K.P.’s testimony, it is unclear whether, or to what extent, K.P.’s testimony may have influenced the jury’s sentencing recommendation. Given the violent nature of Jones’ offenses, the imposition of the jury’s recommended sentences simply cannot be considered a grave injustice.

III. CONCLUSION

For the reasons stated, the Court affirms the judgment of the circuit court.²

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Petersburg.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "M. H. S. P. J. J.", is written over a horizontal line.

Clerk

² As Jones’ appellate argument is procedurally defaulted, the Court does not express any opinion regarding the merits of Jones’ argument.