UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0963

September Term, 2014

CESAR OMAR SANCHEZ

v.

STATE OF MARYLAND

Meredith,
Berger,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 14, 2015

On April 29, 2014, following a trial in the Circuit Court for Prince George's County, a jury convicted Cesar Omar Sanchez, appellant, of second degree rape and third degree sexual offense. The court merged appellant's conviction for third degree sexual offense with the conviction for second degree rape and sentenced appellant to a term of imprisonment of ten years, with all but five years suspended. Appellant noted this timely appeal and presents one question for our review:

> Was the evidence legally insufficient to support his conviction for third degree sexual offense?

As this issue is not preserved, however, we will affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

Early on the morning of June 10, 2013, appellant sent a text message to a thirteen-year-old girl we shall identify as S.M. S.M. testified that she and appellant had been dating since February 2013, and she knew appellant because her mother was friends with his mother. S.M. stated that appellant had told her that he was seventeen-years-old. In this text message, appellant asked S.M. if she wanted to go out, which S.M. interpreted to mean see him. S.M. left her house through a second-floor window and saw appellant in a nearby parked vehicle. S.M. testified that she and appellant talked in the vehicle for a while and then drove to appellant's house in New Carrollton.

S.M. stated that she and appellant sneaked into the house through the back door and went to appellant's bedroom. S.M. testified that she and appellant talked some more, and

then they started kissing. S.M. stated that they then had sex, and she saw appellant ejaculate onto the bed. S.M. asked appellant if she should go home, and appellant responded that she should go to sleep and stay with him. S.M. acquiesced and went to sleep sometime on the morning of June 10.

Around 7:00 a.m. on June 10, appellant and S.M. awoke to appellant's mother knocking on the bedroom door. Appellant hid S.M. in the closet while appellant opened the door to speak with his mother. After a short time, appellant's mother left, and appellant let S.M. out of the closet. Appellant hid S.M. in the closet again a few minutes later so that appellant could go eat breakfast. When appellant returned, he let S.M. out of the closet and offered her some food and water, which S.M. refused.

S.M. testified that later that night, appellant asked her if she wanted to have sex again. S.M. initially refused because she said it was going to hurt, but appellant insisted, and S.M. acceded to appellant's request. After they had sex, S.M. and appellant went to sleep. They awoke on the morning of June 11 to appellant's mother knocking on the bedroom door. Appellant told S.M. that she needed to leave, so S.M. sneaked out of the house the same way she and appellant had gotten into the house the previous day. S.M. stated that she went to a nearby motel and was able to borrow a phone from someone to call her mother. She asked her mother to come pick her up.

Meanwhile, S.M.'s mother, who we shall refer to as Ms. M., had woken up on the morning of June 10 to find her daughter was not in her bedroom. She contacted the

Bladensburg Police Department to file a missing persons report. When S.M. called Ms. M. on the morning of June 11, Ms. M. rushed to pick her up at the motel. Ms. M. notified the Bladensburg Police that she had found her daughter. Ms. M. testified that they did not say much on the drive home, but when she asked S.M. where she had been, S.M. responded that she had been out with some friends. When they got home, Ms. M. told S.M. to go take a shower, which she did. After S.M. showered, she spoke with Bladensburg Police about what had happened.

At first, S.M. told police that she had been alone and that she left the house because Ms. M. had mistreated her. Shortly afterwards, S.M. told police that she had been walking alone and that appellant had dragged her into the woods and raped her. At trial, S.M. admitted that she lied. S.M. testified that she lied to police because she was scared that something would happen to appellant, and she did not know what else to say. After telling police that she had been raped, S.M. went to a Bladensburg police station and spoke with Detective Joshua Malinowski of the Prince George's County Police Department.

S.M. told Detective Malinowski that she left her house on June 10, went to appellant's house, and had sex with appellant before leaving on June 11. With this information, Detective Malinowski went to see appellant and asked him to come to the police station for an interview concerning S.M. Appellant initially agreed, but, at the police station, appellant declined to answer any questions.

On June 17, 2013, Detective Malinowski arrested appellant and brought him to the police station. During the ensuing interrogation, appellant agreed to give a statement, video portions of which were played at trial. In this videotaped statement, appellant admitted to having sex with S.M. Detective Malinowski testified that appellant told him he was nineteen-years-old, and his birthday was March 4, 1994.

Appellant was charged with second degree rape, third degree sexual offense, fourth degree sexual offense, and second degree assault. The court conducted a jury trial on April 29, 2014. At the conclusion of the State's presentation of evidence, appellant moved for a judgment of acquittal as to all counts, which was denied. Shortly afterwards, appellant renewed his motion, and the court granted the motion as to count 3 – fourth degree sexual offense – but denied it as to the remaining charges. The jury convicted appellant of second degree rape and third degree sexual offense and acquitted him of second degree assault.

DISCUSSION

Appellant contends that there was insufficient evidence upon which to convict him of third degree sexual offense.[1] Specifically, appellant argues that third degree sexual offense requires sexual contact, which appellant avers is defined as an act "'in which a part of an individual's body, except the penis, mouth, or tongue, penetrates, however slightly into

[1] The State charged appellant with violation of Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C. L."), § 3-307(a)(3), which prohibits "sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least four years older than the victim."

another individual's genital opening or anus'" that can be construed to be for sexual gratification or abuse. (emphasis omitted) (quoting Md. Code (2002), Criminal Law Article ("C. L.") § 3-301(f)(2)). Appellant concedes that this argument was not made to the trial court.

Rule 4-324(a) mandates that in making a motion for judgment of acquittal, "[t]he defendant shall state with particularity all reasons why the motion should be granted." Additionally, the Court of Appeals has held: "'The issue of sufficiency of the evidence is not preserved when [the defendant]'s motion for judgment of acquittal is on a ground different than that set forth on appeal.'" *Hobby v. State*, 436 Md. 526, 540 (2014) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)). Stated another way, "'[a] defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal.'" *Id.* (quoting *Tetso v. State*, 205 Md. App. 334, 384 (2012)).

In making the motion for a judgment of acquittal in this case, appellant argued as follows:

> Specifically move for judgment of acquittal as to Count 4, second degree assault. There is no showing of any nonconsen[s]ual touching of [S.M.] by my client.
>
> * * *
>
> And as [to] the others [charges], I move for judgment of acquittal based on the fact that the only evidence of violation constituting a second degree rape, third degree sex offense, were - fourth degree sex offense, is the

> testimony of the victim, which she's contradicted herself three times. It's inherently unreliable.

In renewing the motion, appellant stated:

> [APPELLANT'S COUNSEL]: I'd like to renew my motion on one other grounds [sic].
>
> [The Court granted appellant's motion as to fourth degree sexual offense]
>
> THE COURT: Okay. You're renewing again on all other counts, in particular Count 4, second degree assault?
>
> [APPELLANT'S COUNSEL]: Which I've said there is no evidence of an unconsented to touching in this case.
>
> * * *
>
> [APPELLANT'S COUNSEL]: And I have one other grounds [sic] for the motion as to Counts 1 and 2, that the age of the defendant was never established sufficiently. She said she thought he was seventeen. The officer said he thought that his birthday was whatever it was.
>
> THE COURT: Denied.

Plainly, appellant never argued to the trial court what he now argues on appeal. Accordingly, this issue is not preserved for our review. Appellant, however, contends that we may still review this issue based on this Court's ruling in *Testerman v. State*, 170 Md. App. 324 (2006). In that case, we determined that Mr. Testerman's counsel had failed to argue that the evidence was insufficient to support a conviction for eluding a police officer on the grounds that switching seats with a passenger upon being pulled over does not constitute eluding a police officer. *Id.* at 337-41. Nevertheless, this Court proceeded to rule on the merits of Mr. Testerman's conviction because his counsel provided ineffective

assistance. *Id.* at 341-44. Importantly, however, Mr. Testerman raised ineffective assistance of counsel as an issue on appeal, which appellant has not done here. *Id.* at 335. *See also Heffernan v. State*, 209 Md. App. 231, 240 (2012) (addressing unpreserved argument not raised in motion for judgment of acquittal with ineffective assistance of counsel claim "because it appears there is confusion in the bench and bar with respect to the application of the statutes in question regarding the payment of rent, and it is important to clarify the application of the statutes[,]" and defendant had no other procedural avenue to address claims).

Moreover, we differentiate *Testerman* from this case because appellant has cited to the wrong statute. In his brief, appellant cites to C. L. § 3-301 as it appeared prior to an amendment effective on October 1, 2011. The version of C. L. § 3-301(f) which was in effect in June 2013 and governs this case defines sexual contact as an "intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." Accordingly, sexual contact may include penile penetration, contrary to appellant's argument. We will, therefore, decline to review this unpreserved issue, as appellant's contention is entirely without merit and does not constitute ineffective assistance of counsel. *See also Schmitt v. State*, 140 Md. App. 1, 16 (2001) ("If counsel would not have prevailed on the legal issue in any event, no matter how timely it was raised or how effectively it was argued, then the less than sterling effort would

not under *Strickland v. Washington*[, 466 U.S. 668 (1984)] have constituted a deficient performance.").

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.