UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1279

September Term, 2014

JOSE D. SALVADOR

v.

STATE OF MARYLAND

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: June 25, 2015

The appellant, Jose D. Salvador, was charged with three counts each of (1) sexual abuse of a minor, (2) third degree sexual offense, (3) fourth degree sexual offense, and (4) second degree assault.[1] On May 20, 2014, the appellant was convicted by a jury on all counts in the Circuit Court for Prince George's County. On July 3, 2014, the court imposed an aggregate sentence of nine years incarceration. The appellant presents a single issue on appeal, which we have rephrased slightly as follows:

> Did the trial court err in allowing the victim's older sister to give hearsay testimony regarding the content of text messages she had seen on the victim's phone?

We shall affirm for the reasons set forth below.

Facts and Proceedings

The appellant's convictions relate to sexual interactions which took place in May 2013 between him, then age forty-four, and his cousin's minor daughter, "G.B.," then age thirteen. At the outset of trial, defense counsel orally moved in limine with respect to the anticipated testimony of G.B.'s older sister, M.B., whom the State intended to call as a witness. M.B., as well as a second older sister, E.B., had seen certain text messages on G.B.'s cell phone. The content of those messages prompted them to confront G.B. with questions regarding what the appellant had done to her. The defense's motion sought to preclude the State from eliciting testimony of the content of those text messages on the theory that such testimony was inadmissible hearsay.

[1]The trial court granted appellant's motion for judgment of acquittal as to a single count of second degree rape.

> "[DEFENSE COUNSEL]: ... I have a motion in limine, Your Honor. *I anticipate there being testimony from one State witness named [E.B.], regarding some alleged text messages that she saw on the complaining witness's cell phone*, regarding the texts allegedly between the victim and the victim's boyfriend *regarding what the [appellant], had allegedly done to her*.

(Emphasis added).

In reply, the State proffered that it would limit its direct examination to what M.B. did in response to seeing the text messages, and would not inquire into the content of the text messages themselves.

> "[THE STATE]: Your Honor, [E.B.] is not here and will not be testifying. But [M.B.] is present and also saw the text messages. *The State plans to ask her about the text messages, for the limited purpose of her saying, that based on seeing text messages that she then talked to her sister*."

(Emphasis added).

The court and the appellant indicated that they were satisfied with this resolution.

> "THE COURT: We are not going to know what they said, just as a result of the text messages.
>
> "[THE STATE]: We will not, if that's the Court's ruling.
>
> "THE COURT: All right. I'm agreeable to that.
>
> "[DEFENSE COUNSEL]: *As long as that's where we are, great*."

(Emphasis added).

G.B. was the State's first witness. She testified that in May 2013, when the appellant was picking her up from school, he observed her interacting with a boy. She claimed that the appellant, apparently aware of the fact that her parents had prohibited her from dating,

told her that unless she sexually interacted with him he would tell her parents that she was involved with a boy from school.

G.B. testified that when she and the appellant got home, the two of them went into her mother's bedroom and the appellant locked the door. He took off his pants and told her to take off her clothes.

> "[G.B.]: And he told me to get on top of him. And I got on top of him. And he told me to start kissing him. And I started kissing him. And he started kissing my breasts. And then he told me to get off of him and to lay on the bed. And he started getting on top of me and kissing me. And then he tried putting his penis inside of me.
>
> "[THE STATE]: Inside of you where?
>
> "[G.B.]: Inside of – inside of my – inside of my butt. And then I kept backing away, so he wouldn't put his penis inside of me. And then – and then he told me to get off of him. And then he laid back down on the bed and told me to get on top of him.
>
> "And then, after I had gotten on top of him, sperm started coming out of his penis. And it got on the towel. And it got on my foot. And then, that's when I got off of him. And I went to the bathroom to clean myself up and by that time he was gone."

Later that month, the appellant dropped G.B. off at school. Believing that he had driven away, she and a friend departed from school with the intention of walking to an abandoned house "where everyone usually hangs out." While in route, she noticed that the appellant had been following her in his car. She eventually got into the car with him and left. She testified that he again threatened to tell her parents about what he had seen unless

G.B. sexually interacted with him. G.B. testified that upon arriving at home, she and the appellant entered her mother's bedroom where he again sexually interacted with her.

Toward the end of its direct examination, the State asked G.B. about being confronted by her older sisters regarding text messages that they had seen on her phone.

> "Q. Did there come a time when [M.B.] and [E.B.] came to you about text messages?
>
> "A. Yes.
>
> "Q. After they came to you, did they ask you questions?
>
> "A. Yes.
>
> "Q. After they asked you questions, what did you tell them?
>
> "A. *I told them, yes, it was true*."

(Emphasis added).

She elaborated that she had told her older sister E.B. "everything that happened" and there came a point when she talked to both of her older sisters and her mother and told them that "it was true that [the appellant] had sexually harassed [her]."

M.B. was the State's next witness.[2] The State endeavored to proceed along the narrow line of questioning to which the parties had earlier agreed when resolving the motion in limine, and avoided introducing the content of the text messages. However, when M.B. was asked what G.B. said after being confronted, M.B.'s answer prompted the objection on which Salvador seeks to preserve his claim of error:

> "[THE STATE]: [M.B.], did there come a time you and your sister, [E.B.], looked at [G.B.]'s cell phone?
>
> "A: Yes.
>
> "Q. Did you see some text messages when you looked at the phone?
>
> "A. Yes.
>
> "Q. After you and [E.B.] saw those text messages, did you ask [G.B.] some questions?
>
> "A. Yes, we did.
>
> "Q. *When you asked [G.B.] some questions, what did she say?*
>
> "A. *She told us what we read in the text messages.*
>
> "[DEFENSE COUNSEL]: *Objection.*"

(Emphasis added).

[2] Prior to M.B.'s testimony, the appellant objected to her testifying at all because the balance of her testimony regarding what G.B. said to her after being confronted would be hearsay. The State successfully argued that such testimony, while hearsay, was nonetheless admissible as a "prompt complaint of sexually assaultive behavior" under the hearsay exception provided for by Md. Rule 5-802.1(d). The appellant contested the ruling on the basis that the statement was not sufficiently "prompt" and noted a continuing objection to the line of questioning. The appellant does not, however, challenge the trial court's determination as to the Rule 5-802.1(d) hearsay exception on this appeal.

Without expressly ruling on the objection, the trial court intervened and redirected the questioning away from the text messages and back to what G.B. said. The State adapted its questioning to focus on what G.B. told her sisters had happened.

> "THE COURT: Tell me how we are going to do this. There were text messages and she took some action after that.
>
> "[THE STATE]: After you saw the text messages and you asked [G.B.] some questions, *did* [*G.B.*] *tell you what happened*?
>
> "A. Yes.
>
> "Q. *What did she tell you happened*?
>
> "A. She told us [the appellant] had been doing that for a long time, that he would insert his penis in her vagina, not all the way."

(Emphasis added).

The appellant did not object to this latter line of questioning or the answers. The appellant never requested an explicit ruling on his earlier objection nor did he move to strike the answer which was objected to.

Eventually, M.B. was excused as a witness. The State called two law enforcement witnesses. The appellant testified in his own defense. The case was then submitted to the jury.

Discussion

The appellant contends that the trial court erred by allowing double-hearsay to be admitted, presented through M.B., of the content of the text messages M.B. had seen on G.B.'s phone. The appellant moreover complains that the trial court "did nothing to address

appellant's objection to the inadmissible evidence," and "failed to exercise any discretion by ignoring and thus implicitly denying the motion." Ultimately, the appellant asserts that the erroneous admission of M.B.'s testimony regarding the content of the text messages resulted in "substantial" prejudice, "deprived [him] of a fair trial," and requires reversal.

The State argues (1) that the issue has not been preserved because the appellant neither requested an explicit ruling on his objection nor did he move to strike the challenged testimony that now forms the basis for his appeal; (2) that even if preserved, the challenged testimony was not hearsay and was admissible; and (3), that any conceivable error was harmless. We agree with the State that the issue has not been preserved. Even if the issue is preserved, there is no error.

I

Generally, "[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 the objection become apparent." Md. Rule 4-323(a). In practice, if the impetus for the objection arises from the question itself, such as where the question is improperly phrased or calls for inadmissible evidence, the objection must be made before the answer is given and the failure to do so waives the objection. *Bruce v. State*, 328 Md. 594, 627, 616 A.2d 392, 409 (1992).

Some leniency to this otherwise stringent timing requirement is afforded in circumstances where "'the question is unobjectionable, but the answer includes inadmissible testimony which was unforeseeable from the question.'" *Id.* (citations omitted). In such a

scenario, it is the objecting party's prerogative to request that the court strike the challenged testimony. *Id*. at 628, 616 A.2d at 409. *See also Holmes v. State*, 119 Md. App. 518, 523, 705 A.2d 118, 121 (1998) ("An objection must be made when the question is asked or, if objectionable material comes in unexpectedly in the answer, then at that time by motion to strike."); *Williams v. State*, 99 Md. App. 711, 717, 639 A.2d 180, 183 (1994) ("Even in such a circumstance, however, it is required that the offended party move immediately to strike the objectionable answer.").

Here, an objectionable response could not have been foreseen from the State's question, "When you asked [G.B.] some questions, what did she say?" The question was properly phrased and did not call for inadmissible testimony. The appellant therefore, was not required to lodge an objection before the answer. However, if the answer, once it was given, was objectionable as appellant contends, the appropriate course of action would have been for the appellant to immediately move to strike the offending answer. This he did not do. Instead, only a standard objection was made. The trial court responded by intervening and directing the questioning away from the text messages. If the appellant was in any way dissatisfied with the trial court's method of addressing his objection, he gave no indication of it.

Although he now argues that the trial court ignored his objection or "implicitly" denied it, the appellant never requested an express ruling from the court. *See Abell v. Albert F. Goetze, Inc.*, 245 Md. 433, 440, 226 A.2d 253, 257 (1967) (Evidence admissibility issue

not reviewable where "there was no objection offered to the rephrased question, nor was any request for a ruling made by appellant's counsel on the objection to the original question."); 1 Wigmore § 19, at 854 (rev. 1983) ("[A] party who mistakenly and unreasonably believes that his objection has been overruled when no ruling has in fact been made cannot complain on appeal if by reason of his mistake he allows his opponent's evidence to be given at trial without any ruling by the trial court as to its admissibility.").

Similarly, Salvador complains that the jury was erroneously exposed to inadmissible hearsay evidence as a result of the objected to testimony, yet he did not move to strike it or object to the testimony responding to the State's rephrased questions. *See Clermont v. State*, 348 Md. 419, 429, 704 A.2d 880, 885 (1998) ("The object of the motion to strike, which is usually accompanied by a request for an instruction to the jury to disregard certain evidence, is to remove matters which have not been properly admitted as evidence from the jury's consideration." (Citation omitted)).

Lastly, the appellant contends that the admission of the challenged testimony resulted in "substantial" prejudice and "deprived [him] of a fair trial." However, if the appellant felt that the jury was so irreparably tainted after hearing M.B.'s response that striking the testimony would have been insufficient to cure the error, the appropriate course of action would have been to move for a mistrial. This too the appellant chose not to do.

By not requesting an explicit ruling on his objection or otherwise requesting any additional relief or curative measures following the trial court's chosen method of

intervention, the appellant gave the impression that he was satisfied with the court's approach, and the trial proceeded without a hint of protest. He cannot now, having obtained an unfavorable result, argue to the contrary. Trial courts are seldom at fault for failing to grant relief which an appellant did not request. *See, e.g., Klauenberg v. State*, 355 Md. 528, 735 A.2d 1061 (1999) (No grounds for appeal with respect to sustained objections where appellant requested no further relief.)*; Ball v. State*, 57 Md. App. 338, 359, 470 A.2d 361, 372 (1984) (No error where appellant's objection was sustained and appellant did not request curative instruction or make a motion for mistrial, reasoning, "[i]n a nutshell, the appellant ... got everything he asked for. This is not error."), *aff'd in part, rev'd in part on other grounds by Wright v. State*, 307 Md. 552, 515 A.2d 1157 (1986). The appellant received all of the relief that he requested, and has therefore failed to preserve anything for our review.

II

The appellant argues that, as a result of M.B.'s testimony, jurors were exposed to inadmissible hearsay evidence, namely the content of the text messages on G.B.'s phone. The State, on the other hand, points out that M.B. never disclosed to the jury what the contents of the messages were.

In support of his position, the appellant relies heavily, if not entirely, on his interpretation of two separate answers, to two different questions, as really being a two-part answer to the same underlying question. He suggests:

> "Once [*M.B.*] *was allowed to testify that what G.B. told them was what they had just read on the messages and then proceeded to tell the jury what that was*, jurors were privy to inadmissible evidence about the content of the messages[.]"

Appellant's Brief at 7 (emphasis added).

In the appellant's view, the first pertinent piece of M.B.'s testimony follows the State's initial question, "When you asked [G.B.] some questions, what did she say?" to which M.B. replied, "She told us what we read in the text messages." This is the response which provoked defense counsel's objection and, in turn, the trial court's intervention. The State then asked M.B. a series of revised questions with a more precise focus: "After you saw the text messages and you asked [G.B.] some questions, *did* [*she*] *tell you what happened*?" M.B. answered affirmatively. The State then inquired further, "*What did she tell you happened*?" At this point, M.B. testified, "She told us he had been doing that for a long time, that he would insert his penis in her vagina, not all the way."[3]

The appellant contends that this last response by M.B. referred back to the contents of the text messages. By taking this position, the appellant seems to acknowledge that the initial response, to which his objection was made, did not disclose the contents of the messages.

[3] In his brief, the appellant observes that this response contained incriminating details that were beyond the scope of G.B.'s own testimony. However, this response was not met with a contemporaneous objection and the appellant does not argue on this appeal that this response went beyond the hearsay exception provided for by Md. Rule 5-802.1.

The two pieces of testimony now identified by the appellant were provided as answers to two materially different questions. The State's revised question specifically did not call for the content of the text messages, and M.B.'s answer did not provide such information. Rather, the revised question, by design and in effect, elicited M.B.'s account of "what happened" as it had been related to her by her younger sister. What G.B. told her sisters about "what happened" was admissible as a "prompt complaint of sexually assaultive behavior" to prove the truth of "what happened." Salvador does not brief any argument to the contrary. Thus, it is immaterial that the content of the text messages from G.B. to her boyfriend would not be admissible to prove the truth of what happened.[4]

For the foregoing reasons, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.

[4]In view of the foregoing, we need not address the State's harmless error argument.