Circuit Court for Montgomery County
Case No. 134194C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 154

September Term, 2019

ELIZARDO ROSARIO-OVALLES

v.

STATE OF MARYLAND

Berger,
Beachley,
Harrell, Jr., Glenn T.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: June 17, 2020

Appellant, Elizardo Rosario-Ovalles ("Rosario-Ovalles"), seeks reversal of his convictions by a jury in the Circuit Court of Montgomery County for sexual abuse of a minor, second-degree sex offense, and two counts of third-degree sex offense. At trial, the judge permitted, over objection, the testimony of a State's witness (not the victim regarding the charges for which Rosario-Ovalles was being tried), who testified to uncharged allegations of sexually abusive behavior by Rosario-Ovalles toward her. This testimony was received under Md. Code, Cts. & Jud. Proc. § 10-923 ("Evidence of other sexually assaultive behavior."). During jury instructions, the judge instructed the jury that the "evidence" it had heard from that witness regarding uncharged allegations was to be considered only as it may bear on Rosario-Ovalles's implied defense of fabrication by the victim of her testimony as to the charged crimes.

FACTUAL BACKGROUND

Appellant met Ibelka M. when the latter was visiting the Dominican Republic in 2002. They commenced a romantic relationship and were married in December 2003. In January 2008, Ibelka assisted Appellant in obtaining a green card and moving to the United States to live with her in Montgomery County.

From 2008 until 2010, Appellant lived next door to Ibelka's niece, Y.U. (the victim in this case). At the time, Y.U. was six-to-eight years old. Y.U. testified that, when she was released from school around 3:00 p.m., she would often go to Aunt Ibelka's apartment until her mother, who worked as a maid, returned home. When at Ibelka's dwelling after

school, Y.U. would be often with her older cousin, W.S., and Appellant for two to three hours before her mother came home. Although W.S. was tasked with watching over Y.U., W.S. would sometimes be elsewhere with friends or still at school herself. Consequently, Y.U. would be alone with Appellant during those occasions.

It was during this period that Y.U. claimed later that Appellant began assaulting her sexually. The first incident occurred when Y.U. was six years old. While she was using a computer in Aunt Ibelka's apartment, Appellant stood close to her, rubbed her shoulders, and leaned in to kiss Y.U. on the mouth, attempting to insert his tongue. Y.U. resisted, clenching her teeth. Appellant stopped and left. Y.U. asserted at trial that she did not appreciate then that Appellant's conduct was inappropriate and, thus, thought nothing of the incident at the time. Consequently, she did not report contemporaneously the episode to any family member or governmental authority.

In the second incident, Appellant approached Y.U. while she was cooking and again forced her to kiss him. He led her to Ibelka's bedroom where he removed some of his clothes, rubbed his penis against her vagina, put his penis in her mouth, touched her breasts, and ejaculated. This incident concluded with Appellant telling her not to tell anyone what occurred.

Y.U. testified, with specificity, to a third incident when W.S. walked in on Appellant and Y.U. in his bedroom. Appellant told W.S. to leave and then began rubbing his penis against Y.U.'s thigh. In sum, Y.U. estimated that "less than five" incidents occurred outside her aunt's bedroom and "less than five" occurred inside it.

Because Y.U. did not comprehend fully and immediately the nature of the incidents

(due to her youth) and did not think her mother would believe her in any event, the incidents went unreported for years. Eventually, Y.U., once she became more aware of the nature of Appellant's actions, began to engage in acts of self-harm at the age of fourteen. Ultimately, she told her mother in 2017 of the 2008-10 incidents. Y.U. reported the incidents to the Montgomery County police shortly thereafter.

Detective James Kafchinski was assigned the case in February 2018. As part of his investigation, he spoke with Y.U., W.S., Ibelka, and Y.U.'s mother (Yanilka) before arresting Appellant. Appellant was charged with sexual abuse of a minor, second-degree rape, second-degree sex offense, and three counts of third-degree sex offense regarding Y.U. A jury trial was scheduled for 10-13 December 2018 in the Circuit Court for Montgomery County.

Prior to trial, a hearing was held, at the State's request, to determine whether the proffered testimony of W.S. (a proposed State's witness), who alleged three separate and uncharged incidents of sexual assault by Appellant against her, would be permitted at trial. The State justified W.S.'s testimony under Md. Code, Cts. & Jud. Proc. § 10-923, titled "Evidence of other sexually assaultive behavior," which allows evidence of other sexually assaultive behavior to be received so long as: (1) the State files a proper and timely motion, (2) a hearing is held outside the presence of the jury to determine the admissibility of the evidence, (3) the evidence is being offered only to prove lack of consent or rebut an express or implied allegation that a minor victim fabricated the charged incident(s), (4) the defendant may confront and cross-examine the testifying witness, (5) the sexually assaultive behavior was proven by clear and convincing evidence, and (6) the probative

value of the evidence is not outweighed substantially by the danger of unfair prejudice.

W.S.'s proffered testimony embraced uncharged incidents of sexual assault by Appellant against her when she was ten-to-twelve years old. The first claimed incident occurred at a family party when Appellant followed W.S. to Ibelka's bedroom, motioned her down to the bed, and breathed down her neck. Appellant left after approximately three minutes. W.S. testified that she did not want to tell her mother about this episode because she did not want to upset her. The second incident occurred when W.S. entered her mother's bedroom and found Appellant fondling his genitalia. He told W.S. to come closer and asked her to touch him there. She refused and ran from the room. In the final incident, W.S. would testify that, while watching television in her mother's room with Appellant, Appellant took her right hand and placed it against his penis. W.S. left the room when her baby brother, whom she was bottle-feeding at the time, needed to be burped.

At the conclusion of the pretrial hearing, the court determined that W.S.'s proffered testimony was clear and convincing, that Appellant's counsel had been given ample opportunity to cross-examine her (and could do so again at trial), and that the final decision as to whether the probative value of the testimony was outweighed substantially by the danger of unfair prejudice to Appellant would be made at trial. At trial, Y.U. testified as recited above. After the State called W.S. to testify, the judge stated that he did "not find that the probative value is substantially outweighed by the danger of unfair prejudice," and allowed W.S. to testify. The court explained that:

> We had ruled on this yesterday at the end of business. I've considered it more, and I'll stay with the same ruling that all the criteria of 10-923 have been met. And I make a finding that there's been implied allegations that the

> minor has fabricated the sexual offense charges and I also find that the probative value of this offense is not substantially outweighed by the danger of unfair prejudice.

The judge and counsel discussed what, if any, jury instruction should be given regarding W.S.'s testimony. After the court articulated the language it intended to use, defense counsel expressed disagreement with the judge's word choice in the following exchange:

> **[The Court]**: Can you read that back and see how it sounds?
> **[The Clerk]**: Yes. We have heard evidence from [sic] the defendant committed other sexual offenses which are not charges in this case. You may consider this evidence only for the purpose of refuting the defense's fabrication regarding the alleged sexual offenses which are charged in the case before you.
> **[The Court]**: Is that satisfactory to the defense and State?
> **[Defense Counsel]**: No, Your Honor.
> **[The Court]**: Okay.
> **[Defense Counsel]**: I believe that we should say you have heard allegations or that the defendant may have committed other acts but not that he committed. The way we've got it now . . . it was that the defendant committed other acts and those were all unproven allegations.

The court disagreed with defense counsel and propounded the following instruction to the jury:

> You have heard evidence that the defendant committed other sexual offenses with respect to [W.S], which are not charges in this case. You may consider this evidence only for the purpose of refuting the defense of fabrication regarding the alleged sexual offenses which are charged in this case before you.

Ultimately, as to the charges with respect to Y.U., the jury acquitted Appellant of second-degree rape and one count of third-degree sex offense, but convicted him of sexual abuse of a minor, second-degree sex offense, and two counts of third-degree sex offense. Appellant was sentenced to incarceration of forty-five years, with all but twenty-five years

suspended, and five years of supervised probation. Appellant appealed timely.

QUESTIONS PRESENTED

Appellant presents two questions for our consideration, which we have rephrased:

I. Did the Circuit Court err in permitting W.S. to testify about uncharged allegations of "sexually assaultive behavior" under Md. Code, Cts. & Jud. Proc. § 10-923?
II. Did the Circuit Court err in giving a jury instruction that deemed W.S.'s testimony regarding the uncharged allegations as "evidence" because it risked biasing the jury?

STANDARD OF REVIEW

When reviewing a trial court's decision to admit evidence under Md. Code, Cts. & Jud. Proc. § 10-923, and determining whether the defendant was unfairly prejudiced thereby, we use the abuse of discretion standard. *Cagle v. State*, 462 Md. 67, 78 (2018). We will overturn the trial court's decision only when "no reasonable person would take the view adopted by the court" or its ruling is "clearly against the logic and effect of facts and inferences before the court." *Id.*

We review given jury instructions "in their entirety to determine if reversal is required. The jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State*, 373 Md. 426, 433 (2003). "[W]hile the trial court has discretion, we will reverse the decision if we find that the defendant's rights were not adequately protected." *Cost v. State*, 417 Md. 360, 369 (2010).

DISCUSSION

I. Testimony of W.S. Regarding Uncharged Allegations.

Appellant argues that the admission of W.S.'s testimony was in error and asks us to reverse his convictions as a result. This outcome is justified because, in Appellant's view, the probative value of the testimony was outweighed substantially by the danger of unfair prejudice against him. It is Appellant's belief also that the uncharged allegations addressed in W.S.'s testimony were "substantially different" from the charged allegations regarding Y.U. for which Appellant was on trial. He imagines further that the jury was enflamed unfairly by a particular aspect of W.S.'s testimony, e.g., when it was mentioned that Appellant was "playing . . . with his penis" while an infant (W.S.'s brother) was in the same room. The State responds by asserting that the trial court's application of the statute was proper and that the allegations by W.S. and Y.U. were similar substantially. Even if the testimonies were not similar sufficiently, the State quarrels with Appellant's reliance on certain reported appellate opinions marshalled to support Appellant's desired outcome. We shall affirm the judgment of the trial court.

Md. Code, Cts. & Jud. Proc. § 10-923 permits that "[i]n a criminal trial for a sexual offense . . . evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible, in accordance with this section." Md. Code § 10-923(b). The Code states further, in relevant part, that "[t]he court may admit evidence of sexually assaultive behavior if the court finds and states on the record that: (1) The evidence is being offered to: . . . (ii) rebut an express

or implied allegation that a minor victim fabricated the sexual offense." Md. Code § 10-923(e). The term "Sexually assaultive behavior" is defined as: "(1) A sexual crime under Title 3, Subtitle 3 of the Criminal Law Article; (2) Sexual abuse of a minor under § 3-602 of the Criminal Law Article; (3) Sexual abuse of a vulnerable adult under § 3-604 of the Criminal Law Article; (4) A violation of 18 U.S.C. Chapter 109A; or (5) A violation of a law of another state, the United States, or a foreign country that is equivalent to an offense under item (1), (2), (3), or (4) of this subsection." Md. Code § 10-923(a). Such evidence may not be admitted, however, if its probative value is outweighed substantially by the danger of unfair prejudice. Md. Code § 10-923 (e)(4).

In claiming that the testimony offered by W.S. does not have probative value sufficient to outweigh substantially the risk of unfair prejudice occasioned by its admission, Appellant draws a comparison between § 10-923 and "bad-acts evidence."

> "Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of the person in order to show action in the conformity therewith. Such evidence, however, may be admissible for other purposes . . . such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, absence of mistake or accident, or in conformity with Rule 5-413."

Md. Rule 5-404. In offering this comparison, Appellant notes that, to overcome the general prohibition on the receipt of other crimes evidence, the uncharged allegation must be "nearly identical in method as to earmark them as the handiwork of the accused." *Lebedun v. State*, 283 Md. 257, 279 (1978).

Appellant misses his mark in several aspects. First, the comparison between Rule 5-404 and § 10-923 is inapt. Were the relevant allegations here not sexual in nature,

perhaps Appellant's line of reasoning might carry more force and his argument regarding the asserted lack of similarities between the witnesses' testimony might be more worthy. As both witnesses' testimony fit the definition of "sexually assaultive behavior," however, Md. Code § 10-923 is the preeminent benchmark here. Rather than being comparable to the exceptions listed in Rule 5-404, § 10-923 exists on its own plane, with specific conditions regarding when the offered evidence may be admitted. As appears in the record of the adoption process of the legislation, "[b]y limiting the circumstances under which the evidence of other sexual assaults are admissible and allowing the trial court to perform its gatekeeper function and assess the potential for unfair prejudice, [the statute] strikes the appropriate balance between public safety and ensuring the defendant a fair trial." Letter from Office of the Attorney General of Maryland to Honorable Joseph F. Vallario, Chair, House Judiciary Committee, Senate Bill 270 (27 March 2018). The State's purpose in offering the testimony of W.S. was not to impugn generally Appellant's character, nor was it offered to prove he had committed the uncharged crimes, but to rebut the implied defense of fabrication of the events attested by Y.U.[1]

[1] The State filed a motion to introduce the evidence of sexually assaultive behavior committed against W.S. pursuant to Md. Code § 10-923 (c)(1). At the motion hearing, held 7 December 2018, counsel for the State expressed the following view:

> I think that [fabrication] covers every case that involves sex abuse of a minor, because there's always an expressed or implied allegation that the victim is fabricating the abuse when the defense says he didn't do it, which I think is going to be the defense here . . . .

Counsel for the defendant did not contradict whether a defense of fabrication by Y.U. was intended. The Court responded that: "I think that's very broad, implied allegation. I think

Even if he were able to stitch together a whole garment from the bare threads Appellant lays-out (and we agreed that the Rule 5-404 standards apply to determinations made under § 10-923), we would still affirm the trial court on this record. Appellant relies on *Lebedun v. State* to support his claim that the similarities between W.S.'s testimony and Y.U.'s testimony are not sufficient. 283 Md. 257, 279 (1978). In that case, the Court of Appeals held that, despite cross-similarities of the witnesses' testimony about the alleged perpetrator's race, build, equipment, and language used, the incidents did not contain enough unique characteristics from which to infer the disparate incidents were perpetrated by the same person. *Id.* at 280-82.

Appellant's claims highlight a distinction without a difference between the witnesses' testimony in this case. Although all of the alleged incidents contained different forms of childhood sexual assault, there were sufficient similarities between the two testimonies that a reasonable judge could be persuaded to allow W.S.'s testimony. The location of the incidents was specific and similar as to the venue, in which room of the

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once the implied allegation manifests itself in this case, the State is at liberty to bring these incidents in front of the jury . . . ."

At trial, prior to deciding whether to permit the testimony of W.S., the Court stated that, based on defense counsel calling Y.U.'s credibility into question on cross-examination regarding inconsistent statements as to the dates and events surrounding the incidents and questioning her on why her mother would not believe her while bringing up the fact that children are known to lie, it had found an implied defense of fabrication. The Court said:

> I believe that this case has many implied allegations that have been put into the case through the Defense. He's got a job to do, represent a client. He didn't do anything wrong and the areas that he asked are certainly permissible. . . . [What] I'm saying is I believe, for the record, that there's been [an] implied allegation that the victim fabricated her offense . . . .

dwelling and even the pieces of furniture on which the misconduct occurred. The incidents were committed against pre-teen girls. The girls testified consistently that Appellant forced them to touch and stimulate his genitalia. This is far different than the circumstances in *Lebedun*. In *Lebedun*, the similarities were common to the alleged crimes and could be connected likely to any number of additional unrelated incidents. Here the similarities between the two are sufficiently indicative as to connect the two sets of allegations and assist the fact-finder in deciding whether Y.U.'s testimony was credible or a fabrication.

Finally, although there was some risk of prejudice, the probative value in allowing the testimony to come into evidence was sufficient to adopt the course selected by the judge. The testimony was not likely to prejudice unfairly Appellant as the jury was instructed to consider W.S.'s testimony only insofar as it might be found to refute a defense that Y.U.'s testimony was fabricated. We hold that, on this record, Appellant was not unfairly prejudiced by the admission into evidence of the testimony of W.S.

II. Bolstering Effect of Jury Instruction.

The second contention Appellant advances is an alleged error the trial court made in explaining to the jury that it "heard evidence that the defendant committed other sexual offenses with respect to [W.S.] . . . ." Appellant's dispute with this jury instruction is not that it was inaccurate, but that it risked prejudicing unfairly the defendant by characterizing W.S.'s testimony as "evidence" and thereby bolstering its impact indirectly. Believing that jurors do not attach a neutral value to the word "evidence," Appellant claims the jury instruction was erroneous. The State counters that the jury instruction, read in totality,

prevents any unduly prejudicial impact by the word choice of "evidence" (over "allegations") by providing the jury with only a constrained avenue in which to consider W.S.'s testimony.

Our review of a trial court's jury instruction requires that we "read [the instructions] together, and if, taken as a whole they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State*, 373 Md. 426, 433 (2003). The whole of the jury instruction in question reads:

> You have heard evidence that the defendant committed other sexual offenses with respect to [W.S.], which are not charges in this case. You may consider this evidence only for the purpose of refuting the defense of fabrication regarding the alleged sexual offenses which are charged in this case before.

Appellant's primary contention regarding this jury instruction is that, rather than use Appellant's suggested alternate jury instruction, replacing "evidence" with "allegations," the court assumed the risk of "suggesting to the jury that [W.S.'s] testimony about Appellant's alleged conduct was credible."

We disagree. The word "evidence" does not lend credibility, but merely describes the permitted testimony for what it is, i.e., testimony is a form of evidence allowed by the judge. The weight or credibility to be given that evidence remains for the jury to decide and for opposing counsel to argue about in closing argument. As the court instructed the jury overarchingly: "In making your decision, you must consider the evidence in this case, that is one, the testimony from the witness stand and any physical evidence or exhibits admitted into evidence."

Appellant is correct in stating that the trial court may not make a statement "that may influence improperly the jury." *Stabb v. State*, 423 Md. 454, 463 (2011). This "limits the trial court from giving jury instructions that comment on evidence properly before the jury." *Id.* Calling evidence by its appropriate name, however, does not have such an impact on the jury. At one point, in his brief, Appellant even admits that the trial court's instruction "may have been correct that its instruction on the use of W.S.'s testimony was accurate because W.S.'s testimony constituted "evidence" the State presented . . . ."

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JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.