Circuit Court for Carroll County
Case No. C-06-JV-18-000040

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 437

September Term, 2019

IN RE: M. M.

Kehoe,
Leahy,
Wells,

JJ.

Opinion by Kehoe, J.

Filed: June 11, 2020

M. M., appellant, was found involved by the Circuit Court for Carroll County, sitting as a juvenile court, in an act that, if committed by an adult, would be third-degree sexual offense. He was subsequently placed on probation with various conditions, including registering for outpatient sex offender treatment. M. presents two questions for our review, which we have slightly rephrased for clarity:

I. Did the juvenile court err at adjudication by admitting testimony of the victim's post-incident behavioral changes?

II. Did the juvenile court impose an illegal sentence by requiring M. to register for outpatient sex offender treatment because he denied involvement in the sexual offense?

For the reasons that follow, we shall affirm.

Facts

T. was born in 2009, and her brother, O., was born a year earlier. Since 2011 the children have lived with their paternal grandparents, J. and her husband.[1] To provide some respite, J.'s niece, Tracey, cared for the children at her own home about once a month, often over the weekend.

Tracey and her husband lived on a large piece of property with several of his family members. On the property was a large garage, above which were two, side-by-side apartments. Jerry and her husband lived in one of the apartments, and her husband's brother lived in the other apartment with two of his children, including M. M., who is several years older than T.

[1] The children's father is deceased and their mother is not available to care for the children.

T., who was nine years old at the time of trial and in the fourth grade, testified that one day while visiting Tracey the year before, she and her brother went to M.'s home to play video games with him. After playing video games in M.'s bedroom, M. suggested they play a "massage game." M. said he would use a timer, and that he and she would alternate rubbing her brother's back for five minutes, and then M. would rub her back for 10 minutes.

T. testified that she rubbed her brother's back in M.'s bedroom while M. waited in the living room, then M. rubbed her brother's back, and then while her brother was in the living room, M. locked the door to his bedroom and rubbed her back. After doing so, M. pulled down her pants and underwear, and engaged in sexual contact with her. She testified that "after he did that he said to never, ever – to not – he said don't ever tell anyone I did this." The timer went off, M. opened the door to his bedroom, and she and her brother left and went back to Tracey's home. Several months later, T.'s teacher gave a lesson about the differences between appropriate and inappropriate touching and the need to report the latter. She then told her grandparents what had happened.

J. testified that T. has gone to the same elementary school and had "always been a straight A student" but that changed in the fall of her third-grade school year. She explained that T. "would keep to herself. She wouldn't eat. She was extremely quiet. And she was angry. Traits we had never see[n] in her before." J. added that T.'s "grades fell. She read all the time and she didn't want to read anymore. . . . And she would cry a lot." When she and her husband asked T. what was wrong, she would not answer.

On April 1, 2018, the children, J. and her husband went to M.'s home for Easter dinner. J. described how T. sat in a chair away from the rest of the family and she cried at one point. Later that evening, T. told her about the sexual assault by M. A few days after that conversation, the authorities were contacted. J. testified that T. also told her about an incident while she and M. were on a 4-wheeler during which M. had "gotten up and kissed her," and that it had upset her.

O., who was ten years old at the time of trial, testified similarly to his sister about the massage game. He testified that he and his sister went to M.'s home to play video games, and at some point M. told them they were going to play a massage game. M. set a timer for five minutes for the massage his sister and M. gave him, but set the timer for ten minutes for the massage M. gave his sister. M. locked the door while giving his sister a massage, during which time O. watched television in the living room.

M. testified in his defense. He denied ever being alone with T. or O., denied ever giving them a massage, and denied ever touching T. inappropriately. Several witnesses for the defense testified that M.'s bedroom door does not lock and, in fact, it does not shut properly but bounces back about two inches when someone tries to close it shut.

One of the theories of defense was to suggest that O. was a "troubled child" who might have instigated his sister to falsely accuse M.[2] The defense elicited testimony about

[2] The defense elicited that evidence that O. has been diagnosed with ADHD, anxiety, and depression for which he takes medication, and that he has been under the care of a psychiatrist since he was eight years old. **(12.11-49)**

a "trampoline incident" that occurred when the children were visiting Tracey several months before the sexual assault. During the incident, M. fractured O.'s leg when he came down on it while doing a flip. The defense elicited that although witnesses to the incident believed it was an accident, O. believed that M. had done it purposefully. Tracey's husband testified that after the incident O. told Tracey that M. had "to pay for what he [had] done [to] his leg." Tracey testified that when O. left the courtroom after testifying, he ran up to his sister, saying, "[W]hoo, whoo, . . . we did it[,]" and touched her on the back and then inappropriately on her buttocks.

We shall provide further facts below to address the arguments raised.

Analysis

1.

Appellant argues on appeal that the juvenile court erred in allowing J. to testify about T.'s behavioral changes following the sexual assault. Appellant argues that the evidence was irrelevant because only an expert could testify that a change in behavior related to a traumatic event, and the evidence was unduly prejudicial. We are not persuaded that the juvenile court erred.

When the State asked J. how T. did in school, she testified that T. "has always been a straight A student. Third grade things changed." Defense counsel objected, arguing: "I am not sure what the basis is for how we are getting to the changing, how we are moving forward with this. I am just not sure of the relevance of all this. And a – you are talking

about her school. I am not sure how we moved into that." The State responded that the testimony was "highly relevant" and the following colloquy occurred:

> [DEFENSE COUNSEL]: Well, I guess, Your Honor, are we going to bring in an expert witness to make some conclusions or are we going to make sure that it is just observations and not something that is going to now be lead into [a] conclusive area [of] evidence without an expert being qualified to say that some of these things may or may not be indicative. They could just be regular behaviors of children.
>
> And so I am just not sure exactly where this is going. But again, I['m] just kind of trying to figure out what the relevance is. My client is charged with sex offenses in – at – her – at a residence. And I am not sure how her schooling – and I have not – and I do not know if I have even heard where the school is. I am not sure if – Madam State even said that, so.
>
> With that, Your Honor, I would ask the [c]ourt to sort of not allow the State much leeway in sort of moving forward with this. I think it is probably more prejudicial than probative.
>
> THE COURT: I will overrule the objection. Changes in a child's conduct can be caused by myriads of reasons. But the [c]ourt has to look at everything in its totality before making a decision. That this is a small piece, but a piece nonetheless. So, I will overrule.

The State then asked J. about changes she noticed in T.'s behavior, and she testified that in the second quarter of third grade, T. "became extremely depressed." Defense counsel objected, and the court asked the witness, "just tell us what you observed. Try not to make – conclusions." The State again asked her what she observed, and she testified that T. "was depressed." Defense counsel objected, and the State said it could rephrase the question, emphasizing to J. that the question was what she observed about T.'s demeanor. J. testified that T. kept "to herself. She wouldn't eat. She was extremely quiet. And she was angry.

Traits we had never seen in her before." She added: "Her grades fell. She read all the time and she didn't want to read anymore."

Appellant argues on appeal that the testimony about T.'s behavioral changes following the sexual assault was admitted in error because "there was absolutely no foundational showing that behavioral changes are in any way related to a traumatic event, such that such changes increase the likelihood of sexual victimization." Appellant cites to a case from Ohio that he argues holds that in a trial alleging sexual assault, testimony about a victim's changed behavior may be admitted only through an expert. *See In Re T.W.*, 112 N.E.3d 527, 535 (Ohio App. 2018).

Two Maryland Rules govern opinion testimony. Md. Rule 5-701, titled "**Opinion Testimony by Lay Witnesses**," provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Md. Rule 5-702, titled, "**Testimony by Experts**," provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The Court of Appeals in *Ragland v. State*, 385 Md. 706, 717-18 (2005), clarified the distinction between lay and expert testimony. The Court explained that lay opinion

testimony was "testimony that is rationally based on the perception of the witness" and set forth examples of proper lay opinion testimony, including:

> the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences. . . . Other examples . . . include identification of an individual, the speed of a vehicle, *the mental state* or responsibility of another, whether another was healthy, [and] the value of one's property.

Id. at 717-18 (quotation marks and citation omitted) (emphasis added). In contrast, the Court defined expert opinion testimony as "testimony that is based on specialized knowledge, skill, experience, training, or education. Expert opinions need not be confined to matters actually perceived by the witness." *Id.* at 717. To keep clear the distinction between the two types of opinion testimony (and to prevent a party from avoiding the notice and discovery requirements regarding expert opinion testimony), and to prevent the admission of expert opinion testimony "under the guise of lay opinion" testimony, the Court held that Rules "prohibit the admission as 'lay opinion' [] testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 724-25 (footnote omitted). The admissibility of lay opinion testimony lies largely within the discretion of the trial court, and the court's action will seldom constitute grounds for reversal. *See Warren v. State*, 164 Md. App. 153, 166 (2005).

Appellant's argument is without merit. Most of J.'s testimony was observation based in fact, not opinion testimony, *i.e.*, T.'s grades fell, she stopped reading, she kept to herself, she was quiet, she would not eat. To the extent that J. expressed an opinion of T.'s emotional state, that T. was depressed and angry, appellant has failed to preserve his

argument as to the testimony that T. was depressed, but even if preserved, it is without merit, as is appellant's argument as to the testimony that T. was depressed.

Appellant failed to preserve for our review his depression argument. First, although he objected to this testimony, he never asked for a ruling from the trial court, nor did he ask the court to strike the allegedly offensive testimony. *Wallace v. State*, 63 Md. App. 399, 409 (1985) (where the lower court did not rule on the objection and appellant did not press for a ruling, and where appellant did not move to strike, "we are doubtful that there is anything for us to review."). Second, appellant did not object when similar testimony was admitted through Tracey, J's niece.[3] *See id.* (holding that where appellant allowed similar evidence to come in through another witness without objection, "he cannot contend

[3] During the State's cross-examination of J.'s niece, the following was elicited:

> [THE STATE]: And you also talked to [J.] about the fact that both of you noticed that T. was depressed, right?
>
> [WITNESS]: Yeah, but that could have been a lot –
>
> [THE STATE]: We don't know why, right?
>
> [WITNESS]: Right.
>
> [THE STATE]: But you both talked about the fact that T. had changed, something was different about her, right?
>
> [WITNESS]: Yeah, a little bit, yeah, I guess.

(12.13-19-20) It is of no importance that Tracey changed her testimony when the court later asked her: "[D]id you ever have a conversation with anyone before you became aware of the specific allegations in this case about whether T[.G.] had changed and had appeared depressed?" and she answered, "No." **(12.13-21)**

that admission of the challenged evidence during his own testimony, even if erroneous, was so prejudicial as to require a new trial.") (citations omitted).

Even if preserved, testimony that T. was depressed and angry was admissible lay opinion testimony because it was rationally based on J.'s perception and helpful to understand and determine a fact at issue. *See Bruce v. State*, 328 Md. 594, 630 (1992) (holding that testimony that appellant was "unconcerned" is proper lay opinion testimony when derived from first-hand knowledge);*Galusca v. Dodd*, 189 Md. 666, 669 (1948) (trial court properly admitted testimony that plaintiff was "very nervous"); *Lawson v. Ward*, 153 Md. 93, 98 (1927) (trial court properly admitted testimony that the testator became "angry" when kidded about certain matters); *Warren v. State*, 164 Md. App. 153, 166 (2005) (holding that testimony that appellant was "drunk" was proper lay opinion testimony). *Cf. State v. Pace*, 770 S.E.2d 677, 680-81 (N.C. Ct. App. 2015) (mother's testimony about changes she observed in child's behavior following an alleged sexual assault, that she became "mean" and "violent" was not improper lay opinion testimony); *Kurczy v. St. Joseph Veterans Ass'n Inc*., 820 A.2d 929, 941 (R.I. 2003) (finding no error by trial court in admitting lay opinion testimony by a teacher of her first-hand observations concerning child victim's physical, behavioral, and educational performance in her classroom after the accident); *State v. Sibert*, 648 N.E.2d 861, 869 (Ohio Ct. App. 1994) (mother, whose sons lived with her, could give lay opinion testimony that their behaviors radically changed after being sexually abused and that they became "violent," "very critical and bossy," and had "'major nightmares'").

We are aware that describing a witness as "depressed" can veer from proper lay opinion testimony about an emotional state to testimony about a specific psychiatric diagnosis about which only an expert can testify to. This did not occur here. J.'s testimony was based on her personal knowledge of her granddaughter and was not akin to a psychiatric evaluation. *Cf. State v. Storm*, 743 S.E.2d 713, 717-18 (N.C. Ct. App.), *denying review*, 748 S.E.2d 544 (N.C. 2013) (holding that the trial court did not err in prohibiting a licensed clinical social worker from testifying that the defendant "appeared noticeably depressed with flat effect" where the statement was more akin to a specific psychiatric diagnosis and based only upon a brief observation). Moreover, and contrary to appellant's argument, J. never opined that her granddaughter's behavioral changes *were the result* of sexual abuse. Rather, she merely stated her observations based on her first-hand, direct knowledge of facts.

The single case cited by appellant does not stand for the proposition he claims - that a witness's observations related to behavior in a sexual assault case are inadmissible. Rather, the Ohio appellate court cited by appellant held that a witness's "behavioral observations standing alone cannot be considered independent proof" of a sexual act where Ohio hearsay law requires independent proof of a sexual act before admission of an out-of-court statement by a child under 12 years of age. *In Re T.W.*, 112 N.E.3d at 535. This is not the law in Maryland, nor the factual situation before us.

We are also persuaded that J.'s testimony was relevant and its probative value outweighs its prejudice. *See Moreland v. State*, 207 Md. App. 563, 568-574 (2012) (where

we engaged in a relevance and prejudicial determination within the context of finding testimony proper lay opinion testimony) and *Warren v. State*, 164 Md. App. 153, 168-69 (2005) (same).

"Relevant evidence" is defined as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. The relevance threshold "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Md. Rule 5-403. Whether evidence is "unfairly" prejudicial is not judged by whether the evidence hurts one's case, but by whether it "might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Burris v. State*, 435 Md. 370, 392 (2013) (quotation marks and citation omitted) (brackets in *Burris*)).

We review de novo a trial judge's legal conclusion that evidence is relevant or not. *State v. Simms*, 420 Md. 705, 724-25 (2011). "Trial judges[, however,] generally have wide discretion when weighing the relevancy of evidence" against the dangers of unfair prejudice. *Id*. at 724 (quotation marks and citation omitted). An abuse of discretion occurs when the "ruling is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes

an untenable judicial act that defies reason and works an injustice." *Alexis v. State*, 437 Md. 457, 478 (2014) (quotation marks and citation omitted).

We are persuaded that J.'s observations about T.'s behavior after the sexual assault were relevant to whether T. was sexually assaulted. We agree with the juvenile court's assessment that "[c]hanges in a child's conduct can be caused by myriads of reasons. But the [c]ourt has to look at everything in its totality before making a decision. That this is a small piece, but a piece nonetheless." We do not find that the evidence was unduly prejudicial, nor does appellant put forth any argument on this point other than to point out that the State mentioned J.'s testimony in closing.[4] Because the testimony was relevant and not unduly prejudicial, the State could properly argue those facts during closing. Accordingly, we find no abuse of discretion by the juvenile court in admitting this testimony.

[4] During closing, the State prosecutor argued:

> [T]here was evidence of behavior changes. Her grandmother testified specifically that it was her demeanor, her behavior, she went to – everyday, she stopped reading every day, her grades failed.
>
> I believe she said in November 2017, she started to notice her grades. She didn't know why, what was the cause of it, she noticed that she wanted to be by herself a lot. Kind of stuck to herself, and again, we can see the emotional struggle and the behavior changes from time that this – the incident happened, and she is struggling with it.

In rebuttal closing, the State argued: "The behavior change was noted in October/November of last year. She was in third grade, and it was that corner of third grade and when she started noticing the changes."

2.

Appellant argues that the juvenile court erred at disposition when the court ordered him to participate in sex offender treatment as a condition of his probation allegedly because he repeatedly and consistently denied his involvement in the sexual offense. The State disagrees, as do we.

"[A] trial judge has very broad discretion in sentencing." *Jones v. State*, 414 Md. 686, 693 (2010) (quotation marks and citation omitted). Accordingly, we review a sentence only on three grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits." *Jackson v. State*, 364 Md. 192, 200 (2001) (quotation marks and citations omitted). Appellant's argument falls under the second ground for review.

Maryland Code Ann., Courts and Judicial Proceedings Article ("CJP") § 3-8A-01(p), requires a juvenile court at a disposition hearing to determine "[w]hether a child needs or requires guidance, treatment, or rehabilitation" and if so "[t]he nature of the guidance, treatment, or rehabilitation." The objective of the statute is to balance three objectives: 1) "[p]ublic safety and the protection of the community"; 2) "[a]ccountability of the child to the victim and the community for offenses committed"; and 3) "[c]ompetency and character development to assist children in becoming responsible and productive members of society[.]" CJP § 3-8A-02. "'[T]he foremost consideration in the

disposition of a juvenile proceeding should be a course of treatment and rehabilitation best suited to promote the full growth and development of the child.'" *In re Cristian A.*, 219 Md. App. 56, 66 (2014) (quoting *In re Keith W.*, 310 Md. 99, 109 (1987)). The statute provides for a range of considerations a juvenile court may consider at disposition, including a "treatment service plan[.]" CJP § 3–8A–19(d)(1)(i-iii), (d)(2) and § 3–8A–20.1(a)(1).

At disposition, each of the parties presented a report from their expert on the best course of treatment for appellant. The State's expert recommended an outpatient sex specific therapy program, and appellant's expert recommended "individual therapy focused on sexual education" and "pro social behaviors in the community, at school, and [in] interpersonal relationships." Appellant's expert explained that she did not believe that a sex offender treatment program was appropriate for appellant because some juvenile sex offender treatment programs have "an overemphasis on accepting responsibility" for the crime committed and used polygraphs as part of treatment, which she believed was unhelpful. On cross-examination, appellant's expert acknowledged that the State's recommendation did not include the use of polygraphs.

In rendering its disposition, the court stated that it had read both reports and noted that it was "invited to cho[o]se between two schools of thought and approaches to rehabilitation that have as their central difference the significance of the [appellant]'s continued denial of conduct" and the use of polygraphs. The court declined to "get

involved" in ordering any specific program requirements, instead referring to the DJS's expertise in tailoring a sex offender program to a juvenile's needs. The court stated:

> For me to get involved in picking and choosing particular aspects of treatment I think would be a disservice to [appellant]'s overall treatment because I know, for instance, in adult court, that the use of a polygraph is pretty standard in sex offense cases. And it is a tool that is used and has gained a – I know on at least several occasion[s] in cases that have appeared before me, it missions when denials had proceeded the use of a polygraph.
>
> So I am not in a position to say one or the other which of these should be used, and what the component parts of this treatment should be. I will tell you that it has been in my experience in 42 years of both practicing law and sitting on a bench that the admission of conduct is the first step to rehabilitation. I am not a fan of coddling or excusing a person's denial in the face of a factual finding to the contrary.

The court concluded:

> I don't want to force any particular type of treatment in this case but – nor do I want to take any particular type of treatment off the table. That is for the experts in this field to determine. So what I am going to do is I am going to release [appellant], on probation, to his father, subject to standard conditions of probation, an[d] with the following special conditions[:] he is to attend school with no excused absences or suspensions, he is to participate in outpatient, individual, and or group sexual offender therapy, he is to have no contact with the victim, he is to have no unsupervised contact with children under the age of 11, and he is to have no access to pornography.

When defense counsel asked whether the court was ordering appellant to participate in sex offender treatment, the court stated: "[T]he facts of the case itself tell the [c]ourt that generalized treatment not relating to sexual offenses will not be sufficient, particularly in light of the Defendant's denial."

The record reflects no error by the juvenile court in ordering appellant to "participate in outpatient, individual, and or group sexual offender therapy[.]" The court found

appellant involved in a serious sexual offense beyond a reasonable doubt. *See In re Caitlin N.*, 192 Md. App. 251, 275 (2010) (to sustain a finding that a juvenile was "involved" in an act that if committed by an adult would constitute a criminal offense, the State must demonstrate that the juvenile has committed a delinquent act beyond a reasonable doubt) (citations omitted). Even though the court stated that appellant's failure to take responsibility for his conduct could be an impediment to his rehabilitation, the court did not dictate what kind of therapy should be used to treat appellant but left that to his treating therapist. The facts before us are unlike those cases cited by appellant where a court punishes a defendant at sentencing for invoking his right to trial or asserting his innocence.[5] Under the circumstances, the court had the authority to require appellant to participate in the rehabilitative option of sex offender therapy, and we are not persuaded that the court's sentence was based on an impermissible consideration so that the court abused its discretion in fashioning its sentence. *Cf. State v. Bullman*, 203 P.3d 768, 775-76 (Mont. 2009) (rejecting petitioner's argument following conviction for incest and sexual assault of his step-daughter that the sentencing court erred in imposing a sentence of incarceration

[5] *See Johnson v. State*, 274 Md. 536, 543 (1975) (where the Court of Appeals held that the sentencing court inappropriately "punished Johnson more severely because he failed to plead guilty and, instead, stood trial" when the sentencing court told Johnson after he decided to not enter a plea of not guilty that "if you had come in here with a plea of guilty . . . you would probably have gotten a modest sentence.") and *Abdul-Maleek v. State*, 426 Md. 59, 71-74 (2012) (where the Court of Appeals held that although the sentencing court did *not actually* impose a more severe sentence when Abdul-Maleek exercised his right to appeal, the Court nonetheless remanded for resentencing because a reasonable person could infer that the sentencing court *might* have been motivated by an impermissible consideration when the sentencing court told Abdul-Maleek that while he had "every right" to exercise his right to trial twice, in doing so, he had re-victimized the victim each time).

instead of community based out-patient treatment because he did not admit that he committed the offense).

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.