Circuit Court for Montgomery County
Criminal Case No. 134083C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0501

September Term, 2019

MARIA HENRIQUEZ-CARBAJAL

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Wells,

JJ.

Opinion by Graeff, J.

Filed: May 14, 2020

In January 2017, Maria Henriquez-Carbajal, appellant, was visiting her daughter and her daughter's children at their home in Gaithersburg, Maryland. Appellant was angry to learn that her 13-year-old granddaughter, E.H., was dating a boy, so she took a piece of jalapeno and "rubbed" it on E.H.'s vagina, which caused E.H. pain.[1]

Appellant was convicted of sexual abuse of a minor, two counts of second-degree sexual offenses, and conspiracy to commit second-degree sexual offense. The court sentenced appellant to 25 years, all but nine suspended, on the conviction for sexual abuse of a minor, 20 years concurrent, all but nine suspended, on one conviction for second degree sexual offense, and 20 years consecutive, all suspended on the conviction for conspiracy. The court merged, for sentencing purposes, the other conviction for second degree sexual assault, and it ordered appellant to register as a Tier 3 sex offender.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in refusing a request for mental health records and a competency hearing for E.H. after she was admitted to a mental health treatment facility?

2. Did the State's closing argument improperly attribute testimony not in evidence to the appellant?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

[1] To protect the victim's privacy, we will refer to her by her initials.

FACTUAL AND PROCEDURAL BACKGROUND

E.H. lived in Gaithersburg, Maryland with her mother, stepfather, and siblings. Appellant would come from New York to visit the family in Maryland.

In January 2017, when E.H. was 13 years old and in the seventh grade, she started dating Y.Z.[2] E.H. did not tell her mother about Y.Z., and they never "hung out" at her house. E.H.'s mother found out about the relationship through E.H.'s sister, and she told appellant about it. Appellant was angry that E.H. had a boyfriend and told her daughter to put hot sauce on E.H.'s vagina.

One day, appellant cut a piece of jalapeno, forced E.H. onto the couch, pulled E.H.'s pants down, and "rubbed" the jalapeno on the inner and outer lips of E.H.'s vagina, telling her "this is for your own good." This caused E.H. pain and burning, and it made it difficult for her to sit, go to the bathroom, or walk correctly for at least an hour. E.H. testified that appellant did this three times.

E.H. told Y.Z. what her grandmother had done. Y.Z. told his mother, who told the school authorities.

As indicated, appellant was charged with multiple counts. Trial begin on January 7, 2019.

E.H., who at the time of trial was 15 years old, testified that her grandmother, appellant, was abusive. She "would just hit me and had no love for her grandchild." E.H. testified that, in January 2017, she had "someone special" in her life. She dated Y.Z. for

[2] To protect his privacy, we will refer to E.H.'s minor boyfriend by his initials.

"a year and 12 months," but she never told her mother about him, only her sister. She explained their relationship as follows: "I would just hang out with him. Talk about my life and all that. . . ." He was a close friend, and they only "hung out" at school.

Her sister told her mother about Y.Z., who told appellant. Appellant told E.H. that she was too young to have a boyfriend. Appellant, E.H.'s mother, and E.H.'s stepfather all started saying that E.H. had sex with Y.Z., even though that had not happened. E.H. testified that "my grandma got this idea where she said her friend – her friend had a daughter. And that the mother would do to the daughter to put hot sauce on her private parts. And that my grandma said to my mom that she should do the same thing to me."

One day, appellant "cut a piece of jalapeno. She laid [E.H.] on the sofa, opened up [her] legs, and rubbed it on [her] private parts." E.H. clarified that "private parts" meant the outer and inner lips of her vagina, but not inside her vagina. E.H. testified that appellant said: "[T]his is for your own good." E.H.'s mother also was present and "approved" of appellant's actions, but only appellant put her hands on E.H., and appellant was the one to pull E.H.'s pants down and touch her with the jalapeno. E.H. testified that the pain and burning lasted for about an hour; she could not sit or go to the bathroom, and she could barely walk. E.H. testified that appellant put a jalapeno on her vagina approximately three times.[3] She eventually told Y.Z. about these incidents.

[3] E.H. testified that appellant did it once because E.H. was not eating fast enough, but that it started because E.H. had a boyfriend.

Y.Z., who was 14 years old at the time of trial, testified that he started dating E.H. in January 2017, and they dated for a year and ten months. He described their relationship as "we would just hang out, you know, hold hands, kiss sometimes. But we could just make each other laugh a lot." Y.Z. testified that he noticed bruises on E.H.'s arm one day, and when he asked about them, she told him that her parents abused her. One day, he noticed her walking "weirdly and like painfully" and holding her vagina. When he asked what was wrong, she initially told him she was on her period, but he persisted, and she finally told him that appellant put "jalapeno in her private part." Y.Z. told his mother about this, and his mother told the school authorities.

The State's last witness was Detective Barros with the Montgomery County Police Department. He testified that he interviewed appellant on March 23, 2018.[4] During the interview, appellant stated that she lived in New York and came to Maryland to visit. Appellant initially stated that anything to do with putting jalapenos on E.H.'s vagina was a lie, asserting that "the little girl lies." Detective Barros told E.H. that a doctor had found burns on E.H.'s vagina, and appellant needed to tell him the truth about how the burns got there. Eventually, the following exchange occurred:

> [BARROS]: And, how much, how much of this, because this, this doctor is gonna ask me this question, that's the only thing he needs, when you al [*sic*] put that, when [you] put that, that was just a little bit, right?
>
> [APPELLANT]: A little bit. Look that was just done on the top, no.
>
> [BARROS]: O.k. that . . .

[4] The interview was conducted in Spanish and later translated into English.

> [APPELLANT]: And I'm sorry a thousand times because I'm not the mom, she's the one who brought her into this world, and she has to get ahead with her, I have no reason to get into that. But I worry because of that, for me, I don't think I'll ever, unless they want. Say something to me[.]
>
> [BARROS]: Mrs. . . . Maria that's why . . . we talk here O.K., we talk here and relax O.K.? And I'm telling you honesty, honesty because I needed to, explain it to this doctor so, and the nee . . . , [*sic*] because the lady had, had told me like about two (2) times, how many times that you remember?
>
> [APPELLANT]: One (1) time.

The court admitted State's Exhibit 1, the video of the interview, and State's Exhibit 2, the transcript of the interview, into evidence. The State played the relevant parts of the video for the jury, as discussed above.

Further facts will be set forth, as necessary, in the discussion that follows.

DISCUSSION

I.

Mental Health Records

Appellant contends that the circuit court "erred in its refusal to allow a request for mental health records and possibly a competency hearing for the[S]tate's main witness." She asserts, with no citation of authority, that she should have been able to inquire into E.H.'s admission to a treatment facility to determine if there were psychological issues that would affect her ability to recollect or recount facts and to allow counsel to determine whether E.H. was competent to testify. Appellant contends that the court's refusal to allow counsel access to the mental health records "was unreasonable and prejudicial."

The State contends that this Court should decline to consider this contention because "[t]here was *no request* made to the trial court" for the records and "*no challenge* to the competency of the State's witness to testify." (Emphasis in original.) We agree that the contention is not properly before this Court.

"Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). If a defendant is not satisfied with the circuit court's resolution of an issue, he or she is responsible to make that objection known to the circuit court, so it can resolve the issue at that time. *See Gilliam v. State*, 331 Md. 651, 691 (1993), *cert. denied*, 510 U.S. 1077 (1994).

Prior to the start of trial, counsel for appellant stated that there were two preliminary motion issues that needed to be addressed:

> [APPELLANT'S COUNSEL]: The first is, is that on Friday it came to my attention that [E.H.] was at a residential treatment facility and I am using that term because that's what I thought it was and which it triggered a discussion between the prosecutor and myself as to whether there were any relevant psychiatric or psychological issues which would affect her ability to recollect or her ability to perceive.
>
> This was the first I heard of her being in such a facility and the first, frankly, any indication that there was any mental health issues besides for what Dr. Shukat had indicated in her report of depression and PTSD. I had observed her, watched the interview several times and her affect and her ability to recollect, I mean, there's issues within the actual version of the events, but there was no indication whatsoever of any mental health issues.
>
> Therefore, I, but then after seeing, hearing that she was coming from a facility, I spoke to the State and the State will tell you what she discovered and, therefore, I just wanted to tell the Court and actually just put it on the record that based on my analysis of what the State said and my observations

> of [E.H.], is that **I don't even meet the threshold to purse any records, any mental health records.**
>
> As, Your Honor, knows in both *Goldsmith* and *Za*[*a*]*l*, **I have to actually be able to proffer to the Court that there is a good faith basis for me to even pursue any of those records and I just don't see it being there** and if it would be all right with the State, I mean, with the Judge, I just ask for the prosecutor to put the, what's in discovery –[5]

(Emphasis added.)

The State explained that E.H. was in a "residential care facility for children who have been abused, neglected or have other homecare issues and . . . are in need or supervision." It stated:

> I spoke with the social worker this morning to confirm that my understanding was correct. The social worker who is in charge of her case has no information about any sort of diagnosis. I can represent to the Court with respect to my interactions with her, I have no concerns about her ability to recollect or to perceive and there is no information that she is, in any way, has any sort of diagnosis that would qualify for either *Goldsmith* or *Za*[*a*]*l* for something that would be discoverable.
>
> And to be clear, the reason that I didn't say anything about where she is, is because I have no reason to believe . . .
>
> * * *
>
> . . . I just have no reason to believe that it's relevant to the case in any way.

[5] In *Goldsmith v. State*, 337 Md. 112, 127–28 (1995), the Court of Appeals held that before a court will order pre-trial disclosure of mental health records "the moving party must show, usually at a hearing, some connection between the records sought, the issue before the court, and the *likelihood* that information relevant to the trial would be discovered." *Accord Zaal v. State*, 326 Md. 54, 81–82 (1992).

The court stated that, "given the proffer and given information placed on the record," there has "not be[en] any request for any mental health records." It concluded: "I don't think I have to rule on anything, it's just what the parties have just wanted to place on the record . . . in the case, so." Appellant's counsel did not pursue the issue further.[6]

Under these circumstances, where counsel never requested to review treatment records and counsel specifically stated that she did not have a good faith basis to make such a request, it is with some ill grace that appellant now contends that the court refused to allow a request for mental health records. This contention is not preserved for review, and we will not address it.

II.

Closing Argument

Appellant contends that the circuit court erred in allowing the prosecutor to make improper statements during closing argument. Specifically, she asserts that the prosecutor "improperly attributed testimony not in evidence to the appellant and unduly prejudiced the jury" by "vouching against" her credibility.

The State contends that appellant's claim is not preserved for this Court's review because defense counsel did not object to any of the State's closing argument. In any event, the State contends that parties are granted "great latitude" in closing argument, and the State's "remarks were proper comment on the evidence and inferences reasonably drawn from the evidence."

[6] When E.H. testified, appellant did not challenge her competency.

The comment to which appellant objects on appeal was as follows:

> The defendant admits to what she did and the defendant's statement helps you also in making decisions about what happened here even though, again, it is extremely clear because her statement can inform some of your decision-making.

Appellant contends that she did not admit to what she did.

As indicated, this Court, ordinarily, will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). The purpose of requiring counsel to raise an objection below is "to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings[.]" *Univ. Sys. of Md. v. Mooney*, 407 Md. 390, 401 (2009) (quoting *Robinson v. State*, 404 Md. 208, 216–17 (2008)). *See Small v. State*, 235 Md. App. 648, 697 (2018) ("[T]o preserve an objection to an allegedly improper closing argument, defense counsel must object either immediately after the argument was made or immediately after the prosecutor's initial closing argument is completed."), *aff'd. on other grounds*, 464 Md. 68 (2019).

Here, defense counsel did not object to any of the State's comments during closing argument. Accordingly, appellant's argument is not preserved for this Court's review.

Even if the issue were preserved, we would conclude that the court did not abuse its discretion in allowing the comments. An attorney has "great leeway in presenting closing arguments to the jury." *Sivells v. State*, 196 Md. App. 254, 270 (2010) (quoting *Degren v. State*, 352 Md. 400, 429 (1999)), *cert. dismissed*, 421 Md. 659 (2011).

> [I]t is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. . . . Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the prosecution produces.

Id. (quoting *Mitchell v. State*, 408 Md. 368, 380 (2009)).

Here, a fair reading of appellant's statements to Detective Barros supports the prosecutor's argument. Although appellant initially denied putting jalapeno on her granddaughter's vagina, she eventually admitted she put a "little bit. . . . on the top." She later stated that it was "[o]ne (1) time." Thus, even if the issue were preserved, we would conclude that it would not have been an abuse of discretion for the court to permit the prosecutor's statements during closing argument.

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