Circuit Court for Montgomery County
Case No. 130432C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 608

September Term, 2017

ALEJANDRO MEMBRANO-VASQUEZ

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 1, 2018

On February 28, 2017, Alejandro Membrano-Vasquez was convicted of sexual abuse of a minor and five counts of third-degree sexual offense after a jury trial in the Circuit Court for Montgomery County. He claims on appeal that the State improperly bolstered witnesses and that the evidence was insufficient as to two of the five counts of third-degree sexual offense. We disagree with his first argument, find his second not preserved for review, and affirm.

I. BACKGROUND

Mr. Membrano-Vasquez was convicted of sexually abusing S.H., the young daughter of some friends with whom he'd lived on-and-off. He eventually was asked to leave the apartment for not paying rent, but he continued to come around and visit S's mother. Around the time Mr. Membrano-Vasquez moved out, he began to touch S over her clothes. S was ten years old at the time of the trial, but the abuse she complained of began around 2014 and had occurred approximately thirty times.

The final incident that led to Mr. Membrano-Vasquez's arrest occurred on July 30, 2016. He came to the apartment that day to visit S's mother while her stepfather was away at work. At some point during the visit, Mr. Membrano-Vasquez told S's mother that he was going to the bathroom, but instead went to S's bedroom and touched her breasts and vaginal area over her clothes. After about five seconds, S pushed Mr. Membrano-Vasquez away from her with her foot and kicked him out of the room. S then texted a friend, Maryoris Del Cid De Guevara, and complained that "they" were touching her and asked to go over to Ms. Guevara's house. S's mother, Rosa H., corroborated S's story. According

to Ms. H, Mr. Membrano-Vasquez went to the bathroom and was gone for about two minutes. Shortly after he returned, S came out and asked to go to her friend's house.

When S arrived at Ms. Guevara's house, she described the incident to Ms. Guevara. Ms. Guevara urged S to call the police and report Mr. Membrano-Vasquez's behavior. In her trial testimony, Ms. Guevara stated that, on previous occasions when S came to her house and complained of Mr. Membrano-Vasquez touching her, she had advised S to tell her mother. In response to the State's question about "what was different about [the July 30th incident] that made you tell her to call the police," Ms. Guevara testified "I asked her if she was telling me the truth and she said, yes, I am saying the truth, and I believed her."

The recording of S's call to the police was played at trial, and S's initial text to Ms. Guevara complaining about Mr. Membrano-Vasquez touching her was admitted into evidence. S told police that Mr. Membrano-Vasquez had touched her "private part" and "boobs." Police arrived shortly after S's call. In her statement, S told the police that Mr. Membrano-Vasquez had also exposed himself to her on one occasion, complaining that his penis hurt. S took a picture with her cellphone to show her mother, and afterwards deleted the photo, but Ms. H confirmed that S had shown her the picture. After seeing the photo, however, Ms. H told Mr. Membrano-Vasquez "not to do that," and took no further action. From that time forward, S either did not tell her mother about the continued abuse or was disbelieved when she did mention it.

After giving her statement, the police accompanied S back to her apartment. When they arrived, they found Ms. H and Mr. Membrano-Vasquez, both of whom had been

drinking. Police asked Ms. H to come with them to the station and give a statement. When police returned Ms. H and S to the apartment after the interview, Mr. Membrano-Vasquez was still there, and they asked him to leave the apartment, which he did.

Mr. Membrano-Vasquez was charged by criminal indictment with one count of sexual abuse of a minor (Count 1), five counts of third-degree sexual offense (Counts 2-6), and one count of indecent exposure (Count 7). Count 2 pertained to the July 30th incident. Counts 3-6 charged the thirty other alleged instances of abuse between January 1, 2015 and July 29, 2016: Counts 3 and 4, respectively, for the first and last times Mr. Membrano-Vasquez touched S's vaginal area and Counts 5 and 6 for the first and last times Mr. Membrano-Vasquez touched S's breasts. The indecent exposure charge was eventually dropped.

At trial, the State offered S, Ms. H, Ms. Guevara, and the investigating police officers as witnesses. Due to S's age and the extended time frame of the abuse, she was not able to provide specific dates for the other instances of abuse, although she was able to describe that they had occurred. On direct examination, S's story varied slightly from what she'd earlier told police—she testified that Mr. Membrano-Vasquez had only touched her vaginal area and not touched her breasts when he had abused her previously:

> STATE: I see. When he touched you those other 30 times where did he touch you.
>
> S.H.: In my vagina.
>
> STATE: Okay. Anywhere else?
>
> S.H.: No.
>
> STATE: Did he, so he only touched your vagina those times?

> S.H.: Yes.
>
> STATE: And was it the same or was it different than the time he touched you?
>
> S.H.: It was, it was almost the same.

At the close of the State's case, Mr. Membrano-Vasquez moved for acquittal on Counts 1, 3, and 5. He argued that the State had not sustained its burden in proving that the first acts of abuse occurred between January 1, 2015 and July 21, 2016, as alleged in the indictment. In addition, Mr. Membrano-Vasquez argued that he did not qualify as a caretaker, family member, or resident of the household during the alleged period of abuse. The court denied the motion, found the State had met its burden for the three counts he challenged, and noted that "the other counts weren't really disputed." The defense then rested and the jury found him guilty on all charges. This timely appeal followed.

II. DISCUSSION

Mr. Membrano-Vasquez presents two issues on appeal. *First*, he contends that Ms. Guevara's statement at trial that she believed S improperly bolstered S's credibility. *Second*, he argues that the evidence was insufficient to support his convictions on Counts 5 and 6—touching S's breasts before July 30, 2016.[1] He argues that because the State's case relied solely on S's allegations of abuse, Ms. Guevara's statement that she believed S

[1] In his brief, Mr. Membrano-Vasquez phrased his Questions Presented as follows:

> 1. Did the trial court err in allowing a State witness to improperly vouch for the credibility of complaining witness?
>
> 2. Was the evidence legally insufficient to support Appellant's convictions for third degree sexual offense under Counts 5 and 6?

acted to improperly bolster S's credibility and "encroached on the jury's function to judge the credibility of the witnesses and weigh their testimony[.]" *Bohnert v. State*, 312 Md. 266, 279 (1988). The State responds that Ms. Guevara was not expressing an opinion about S's credibility, only explaining "why she finally convinced [S] to call the police[.]"

Mr. Membrano-Vasquez also contends that evidence was insufficient to convict him of the charges flowing from allegations that he touched S's breasts prior to July 30th because, in her trial testimony, S stated that he previously had only touched her vagina. The State responds that these arguments were not preserved in his motion for judgment at the close of the State's case and, therefore, are waived. In the alternative, Mr. Membrano-Vasquez claims that trial counsel's failure to preserve this argument amounted to ineffective assistance of counsel. The State replies that ineffective assistance of counsel claims normally must be brought in post-conviction proceedings, not on direct appeal.

Trial courts have "wide latitude" when determining the admissibility of evidence. *Taneja v. State*, 231 Md. App. 1, 11 (2016). We review those decisions for abuse of discretion, and reverse only when the trial court acted "in an arbitrary or capricious manner" or "beyond the letter or reason of the law." *Jenkins v. State*, 375 Md. 284, 295–96 (2003). "[A]ppellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the refusal of the trial court to grant a motion for judgment of acquittal." *Lotharp v. State*, 231 Md. 239, 240 (1963). The motion for judgment of acquittal must have stated "with particularity all reasons why the motion should be granted," Md.

Rule 4-324(a), and a new reason cannot be raised for the first time on appeal. *Starr v. State*, 405 Md. 293, 302 (2008).

A. Ms. Guevara's Testimony Did Not Improperly Bolster S's Credibility.

First, Mr. Membrano-Vasquez alleges that Ms. Guevara's testimony that she told S to call the police because she "believed [S]" was "saying the truth," "was tantamount to an impermissible assessment of S's credibility." He cites *Bohnert v. State*, a case in which a social worker, as an expert witness for the State, offered the professional opinion that she believed the victim's story that she had been abused, despite evidence that contradicted her testimony. 312 Md. 266, 272–73 (1988). The Court held that "it is [] error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying," *Bohnert*, 312 Md. at 277, and reversed and remanded the case for a new trial.

The State points instead to *Conyers v. State*, 354 Md. 132, 153 (1999), and *Tyner v. State* as more apt comparators. 417 Md. 611, 617 (2011). In *Conyers*, a detective testified that he knew "upon hearing" certain statements from a witness that they were "truthful" and that he was able to verify those statements. 354 Md. 132, 153 (1999). The Court held that this testimony did not "invade the province of the jury" because the statements were intended to demonstrate why he believed the witness' statements were true, not whether he viewed the witness as credible. *Conyers*, 354 Md. at 153. In *Tyner*, a detective testified that he had told a witness to tell the truth and that she'd agreed to do so as part of a cooperation agreement. 417 Md. 611, 619 (2011). The witness previously had told a different story, and the State was attempting to address the motives behind the witness's change in testimony.

Tyner, 417 Md. at 621. The defense objected, contending that the jury would believe the witness's testimony because the detective said it was true. *Id.* at 619. The Court held that the context of the witness's statement determined whether the commentary infringed on the jury's determination of the witness's credibility, and it's only when the vouching witness's statements address the substance of another's testimony that *Bohnert* prohibits them. *Id.* at 620–21 ("In sum, the State's direct examination of Detective Bradley involved not the substance of McCullough's taped statement, but the context in which it was given (*i.e.*, McCullough's motives). The prosecutor elicited only from Detective Bradley 'why' McCullough gave the taped statement and whether 'tell[ing] the truth' was part of that agreement.").

We don't read any vouching in Ms. Guevara's statement. The one line of Ms. Guevara's testimony that Mr. Membrano-Vasquez challenges simply recounts why *she* acted as she did, not whether she found S to be an inherently credible witness. And in closing argument, the State didn't say Ms. Guevara believed S, only that she'd "decided that it was time to call the police and that telling [S] to tell her mom wasn't working and so she called the police." Nor did the State ask the jury to believe S because Ms. Guevara said so or because she had a specialized background that made her testimony inherently more persuasive to the jury. Because Ms. Guevara's testimony did not impermissibly "infringe upon the jury's fact-finding obligation," *Tyner* 417 Md. at 621, the trial court did not abuse its discretion by permitting it.

B. Mr. Membrano-Vasquez Did Not Preserve His Sufficiency Objections Regarding Counts 5 And 6 For Appellate Review.

Second, Mr. Membrano-Vasquez challenges the sufficiency of the evidence to support his convictions under Counts 5 and 6, the first and last act of touching S's breasts between January 1, 2015 and January 29, 2016. But in order to preserve this claim, he needed to move for judgment at the close of the State's case and state "with particularity all reasons why [a] motion [for acquittal] should be granted." Md. Rule 4-324(a). "The language of [this] rule is mandatory." *Whiting v. State*, 160 Md. App. 285, 308 (2004) (cleaned up). When a criminal case is heard by a jury, this Court can review only the sufficiency of the evidence claims specified in the motion for acquittal, *Lotharp v. State*, 231 Md. 239, 240 (1963), not new reasons raised for the first time on appeal. *Starr v. State*, 405 Md. 293, 302 (2008). If the motion for acquittal did not argue "precisely the ways in which the evidence is lacking" that are brought on appeal, the challenge is not preserved. *Hobby v. State*, 436 Md. 526, 540 (2014).

We agree with the State that the sufficiency challenges Mr. Membrano-Vasquez argues in his brief were not preserved. Although he did move for acquittal on Count 5 at the close of the State's case, he offered a different reason: he questioned whether the timing of the first act fell within the timeline described in the indictment and whether he could be considered a "caretaker" within the meaning of the statute. At no point in his motion did he argue that there was no evidence or testimony that he touched S's breasts before July 30, 2016. And, as the trial court pointed out, "the other counts weren't really disputed."

Mr. Membrano-Vasquez anticipates this issue, however, and asks us to find that, if the issues were not preserved, the failure to make this motion constituted ineffective assistance of counsel. He relies on *Testerman v. State*, a case in which we did consider a claim of ineffective assistance of counsel on direct appeal. 170 Md. App. 324 (2006). But post-conviction proceedings generally are the appropriate time to address ineffective assistance claims since "the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). Mr. Membrano-Vasquez argues that there is no conceivable trial strategy that could explain a decision not to move for judgment on sufficiency grounds, but we have no record before us on which to test that hypothesis, and we decline to consider the issue without one.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.