Circuit Court for Baltimore City
Case No. 116225010

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 730

September Term, 2017

MATTHEW BOOK

v.

STATE OF MARYLAND

Berger,
Shaw Geter,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 30, 2018

Matthew Book was convicted, following a bench trial in the Circuit Court for Baltimore City, of sexual abuse of a minor, third degree sexual offense, fourth degree sexual offense, sexual contact by a person in authority, and second degree assault.[1]

On appeal, Book presents four questions for our consideration, which we have recast.[2]

1. Was appellant deprived of his right to a closing argument?

2. Was appellant denied his right of cross-examination?

3. Was the evidence sufficient to prove appellant's age as to the charges which are age-specific?

[1] Book was sentenced to 20 years' incarceration with all but 12 years suspended for sexual abuse of a minor, concurrent sentences of ten-year terms for third degree sexual offense and fourth degree sexual offense, and a concurrent three-year term for second degree assault, which was followed by five years of supervised probation. The charge for sexual contact by a person in a position of authority merged with the fourth degree sexual offense charge.

[2] Book's questions, as presented in his brief are:

1. Did the trial court violate Appellant's basic Constitutional rights in denying Appellant an opportunity to be heard through a closing argument, resulting in reversible err [sic]?

2. Did the trial court improperly preclude Appellant Book from questioning the alleged victim about her recantation during cross examination?

3. Should Appellant Book's Motion for Judgment of Acquittal, asserted at the close of the State's case, have been granted with respect to all charges requiring proof of his age?

4. Did trial court impermissibly intervene on behalf of the State when it *sua sponte* qualified Iona Rudisill as an expert witness during the course or [sic] her cross examination?

(continued)

4. Did the trial court abuse its discretion in permitting opinion testimony?

Finding neither error nor abuse of discretion, we shall affirm.

BACKGROUND

Book, a teacher in the Baltimore City public school system at the time of the offenses charged, was indicted on counts of sexual abuse of a minor, third and fourth degree sexual offense, sexual contact by a person in authority, and second degree assault. The charges arose out of an incident that occurred in October 2011, at Lockerman Bundy Elementary School in Baltimore City, where Book was then a computer teacher. The victim of the offenses was X., a student, then eight years old.[3]

Book waived his right to a jury trial and proceeded to a bench trial, in March 2017. The State called three witnesses: X., her stepmother, and her homeroom teacher.

X., age 14 at the time of trial, testified that, on the day in question, she had been in the computer lab when Book put her on his lap, flipped her over, and pulled down her pants. She testified that Book told her that she needed lotion for her buttocks. While he was getting the lotion, X. pulled up her pants and went under the computer table.

X. described how Book then pulled her from beneath the table by grasping her with one hand in her underwear, with the back of his hand touching her vagina, and the other hand on her foot. She explained that he then rubbed lotion on her buttocks with his hand.

[3] Following the policy of this Court, we do not provide personal identifying information as to minors. We shall refer to the victim as "X."

X. did not report the incident to her stepmother or homeroom teacher for a few weeks because she was afraid and thought she would get in trouble.

The State also called both X.'s stepmother and homeroom teacher, who described when and how the incident had been reported to them, and what actions they took in response to X.'s report.

Book moved for judgment of acquittal at the close of the State's case in chief, asserting a number of errors relating to the sufficiency of the evidence as to each of the charges. The court denied the motion.

The first of two defense witnesses was Iona Rudisill, a social worker with the Baltimore Child Abuse Center, who had conducted a forensic interview of X. in 2011. In response to counsel's questions on direct examination, Rudisill recited her education, qualifications, training, and experience as a social worker and a forensic interviewer. She detailed the process and procedure for conducting forensic interviews and discussed in detail what X. had told her during her interview about Book's actions.

Book next called Detective Edward Jones of the Baltimore City Police Department, who had been assigned to the Child Abuse Unit at the time the incident had been reported. Jones testified as to what had been reported to him, and the actions he took in response to the allegations, all of which he memorialized in an incident report prepared on November 17, 2011, the day the incident was reported to the police.

Book did not testify, and renewed his motion for judgment of acquittal, reiterating many of the arguments he had made at the close of the State's case. Without articulating its ruling on the renewed motion, the court rendered a verdict of guilty as to each count.

I. The Right to Make Closing Argument

The first of Book's asserted errors is that "the trial court erroneously found [him] guilt [sic] without first affording his counsel an opportunity to make closing argument." He reaches that conclusion because the court, after hearing his renewed argument on his motion for judgment, moved promptly to rendering the verdict.

It is well established that:

> The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny accused such right.

Washington v. State, 180 Md. App. 458, 471 (2008) (quoting *Yopps v. State*, 228 Md. 204, 207 (1962)).

Book asserts that "the record plainly demonstrates that [he] anticipated addressing evidentiary inconsistencies during closing arguments and that the trial court anticipated receiving such arguments."

Book also refers to a colloquy during his direct examination of the forensic interviewer, Rudisill, when the court stated:

> So that's argument. But the witness has testified and the trier of fact determines that. You know, I'm not bound by your interpretation. You can certainly make that argument in closing. But --

* * *

> -- asking her, even if she had a different understanding than I had, this is a court trial, mine matters. Mine's the only one that matters.

He places significance on the court's statement that he could "make that argument in closing," as well as to his own statement, made during argument on the renewed motion for judgment, "But there is, as I see it and I will argue to you, no evidence that is indicative of sexual contact."

Book also places emphasis on counsel's statement in support of his motion for judgment of acquittal on all counts, that: "And I will exclude one from that argument, which is the second degree assault…. And I think that the second degree assault survives because that is an offense [sic] of touching…."

The State responds that "[t]here was an opportunity for counsel to object to the court's actions prior to the delivery of the verdict, and the failure to do so waives the issue." Alternatively, the State, relying on *Cherry* v. *State*, 305 Md. 631 (1986) and *Covington v. State*, 282 Md. 540 (1978), argues that any question of waiver is best resolved in a post-conviction procedure rather than on direct appeal.

The State points to a window of opportunity for counsel to have interjected his intent to present closing argument, stating that "[w]hen the court asked Book to stand (and he, presumably, complied) and then read the case number, it was clear that the court was about to render a verdict." Based on that, the State posits that "[d]efense counsel had sufficient time during this lead-up to the announcement of the verdict to interject and request an

opportunity to argue[,] … [e]ven if the 'lead up' … was no more than 10 or 15 seconds, it is not unreasonable to expect counsel to lodge a contemporaneous objection during that time."

Responding to Book's claim that he had requested an opportunity to present closing argument, the State argues that Book's "rebuttal argument in support of his motion for judgment of acquittal morphed into an argument on the credibility of the witnesses and [his] guilty [sic] or innocence." This, the State asserts, "[t]he court could have interpreted the latter part of this argument as counsel's closing." But, the State concludes, "[r]egardless of whether this Court finds the closing argument issue waived, direct appeal is not the appropriate venue for Book's claim[,]" and that he "must file a post conviction petition and have a fact-finding hearing in order to be eligible for relief."

In essence, the State's position is that if there was error, it was harmless because Book's counsel thoroughly argued both motions for judgment and, in closing, would have little more to add.

Waiver

The threshold question is whether there is sufficient support from the record to allow resolution of the consequences of the waiver question on direct appeal. Case law suggests that, for resolution on direct appeal to be appropriate, there must be either (1) a conspicuous assertion or desire to offer closing argument and denial of the opportunity despite the expressed desire; or, (2) there was no opportunity for counsel to have objected before the verdict, but counsel did so immediately thereafter.

In *Cherry v. State*, *supra*, the Court of Appeals explained that *Yopps v. State*, 228 Md. 204 (1962) had established that the denial of the right to closing argument "1) offends the constitutional guarantees of assistance of counsel; and 2) is reviewable on direct appeal *upon timely protest or objection* at trial; and 3) entitles the defendant to a new trial." *Cherry*, 305 Md. at 639-40 (emphasis added). *See also Yopps*, 228 Md. at 207-09.

The *Cherry* Court also addressed *Covington*, wherein it had concluded that denial of such a right "1) is not reviewable on direct appeal in the absence of timely protest or objection *when the record is not sufficient* to show that the failure to protest or object was not knowing and purposeful; but 2) is reviewable under post conviction procedures in which the reasons for the absence of protest or objection at trial may be established through a plenary hearing." *Cherry*, 305 Md. at 640 (emphasis added). *See also Covington*, 282 Md. at 544-46.

In its application to *Cherry*, the Court clarified its holding in *Covington*, explaining that the issue "was not that the right to closing argument was waived that precluded a review of the issue on direct appeal[;] … [r]ather, … in the circumstances, review was not feasible because the facts before the Court were insufficient to enable a determination whether the right was constitutionally waived or not[.]" *Cherry*, 305 Md. at 644.

Finally, in its summary of the holding in *Spence v. State*, 296 Md. 416 (1983), the *Cherry* Court recognized that the denial of the right "1) is not cured by the striking of the verdict by the trial judge and the receiving of belated argument over protest or objection; and 2) is reviewable on direct appeal." *Cherry*, 305 Md. at 640. *See also Spence*, 296 Md.

at 422-24. Spence, as did Book, opted for a bench trial, moved for judgment of acquittal after the State's case, and renewed the motion following the close of his case. 296 Md. at 418. The court held the motion *sub curia* until the following day, when it denied the motion and immediately rendered guilty verdicts. *Id.* at 418-19. In contrast to the record before us, Spence's counsel objected to the court's procedure, which prompted the court to strike the verdicts. *Id*. at 419. At that point, Spence moved for a mistrial, which the court denied, leaving defense counsel to offer its closing arguments. *Id.* The court then adopted its previous remarks and findings. *Id.* In finding that "the error was clear and the prejudice was manifest[,]" *id*. at 424, the Court of Appeals reversed, and concluded that the court had violated Spence's constitutional right to counsel and that "striking the verdict and permitting argument thereafter did not cure the defect." *Id.* at 423.

It is clear, the denial of a right to offer closing argument is a violation of a defendant's Sixth Amendment rights and may be reviewable on direct appeal. However, the failure of a court to extend the opportunity for a defendant to present closing argument presents a factual question that is appropriate for review on post-conviction. The question then becomes whether there was a knowing waiver of the right or if defense counsel's silence in failing to object was a strategic trial tactic.

We do not find in this record support for Book's argument that he had expressed a clear desire to offer closing argument. Counsel had a window of opportunity to interject and object to the court announcing a verdict before he was afforded the opportunity to

present closing argument. He then had an opportunity to object during, or after, the court rendered its verdicts, which would have allowed him to have moved for a mistrial.

II. Cross Examination of the Victim

Book next contends that the trial court erred by sustaining the State's objection to the following question to X. on cross-examination:

> [DEFENSE]: Did you ever tell any members of the Baltimore City Police Department that this did not happen?
>
> [STATE]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE]: I have no further questions, Your Honor.

Book asserts that he was denied his constitutional right to confront the victim through cross-examination, which resulted in an unfair trial. He contends that "[h]ad the trial court permitted [him] to question [X.] about her own voluntary recantation, it would not have been in the position to ignore the happening as a simple statement a [sic] police officer." He argues, further, that the court's ruling precluded him from questioning the victim about her inconsistent statements, and "hampered [his] ability to the [sic] fully cross examine the State's other witnesses[,]" like the victim's stepmother, but "this line of questioning was effectively blocked." His arguments are without merit.

We have said, in order "[t]o preserve an assignment of error based on an evidentiary question, a party is required to bring its position to the attention of the trial court so that the court may pass upon any objection, and possibly correct any errors." *Jones v. State*, 213 Md. App. 483, 493 (2013) (citing *Robinson v. State*, 404 Md. 208, 216–17 (2008)).

The "failure to raise a particular argument … acts as a waiver of the argument for the purposes of appellate review." *Id.* *See also* Rule 8-131(a).

As the record clearly reflects, defense counsel did not challenge the court's ruling, advocate his position, or proffer how the question would elicit an admissible response. Book has not preserved this asserted error for our review.[4]

Moreover, as the State points out, "Book got the answer to his question … from his examination of Detective Jones." Jones, a defense witness, was asked by counsel, "On November 11, 2007, the beginning of this investigation, did [X.] recant her story?" Over objection, Jones answered, "Yes."

III. Sufficiency of the Evidence of Book's Age

Book was charged with, and convicted of, a third degree sexual offense, the elements of which include a victim under the age of 14 and a perpetrator at least four years older than the victim.[5] As X. was eight years old at the time of the offense in October, 2011, the State would have had to prove that Book was over the age of 13.

Book was also charged with sexual contact by a person in authority.[6] Among the elements of the offense is that the perpetrator be at least 21 years of age.

[4] Thus, we need not indulge the State's hearsay argument.

[5] Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.) § 3-307(a)(3) of the Criminal Law Article ("Crim. Law").

[6] Crim. Law § 3-308(c)(1).

Book now asserts that the State failed to prove the age elements of each of those offenses and that the trial court erred in not granting his motion for judgment of acquittal as to each. We make short work of his argument for two reasons: (1) the argument is not preserved, and (2) evidence of Book's age at the time of the offenses was admitted through the testimony of Detective Jones.

In renewing his motion for judgment of acquittal at the end of his case, Book failed to argue the sufficiency of the evidence as to his age. Thus, this argument is not preserved for this Court's consideration. *See Williams v. State*, 173 Md. App. 161, 167 (2007) ("A review of a claim of legal insufficiency of the evidence is available only for the reasons given in support of the motion." (citing *Whiting v. State*, 160 Md. App. 285, 308 (2004))).

Maryland Rule 4-324 requires that "[t]he defendant shall state with particularity all reasons why the motion should be granted." Md. Rule 4-324(a). Further, when a defendant moves for judgment of acquittal at the close of the State's case in chief, he "may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made." Md. Rule 4-324(c). And, "[i]n so doing, the defendant withdraws the motion." *Id*. When Book put on a defense, his motion for judgment of acquittal at the close of the State's case was effectively withdrawn, along with all arguments he made in support thereof.

Book argues that "[t]here was no evidence in the record at the close of the State's case to support the factual finding that [he] was four years older than the alleged victim and/or that [he] was at least twenty-one years old at the time of the alleged occurrence"

and that, "[a]s there was no testimony and/or evidence in the record concerning [his] age during the State's case in chief, the lower court's necessary factual finding regarding [his] age to sustain a denial of [his] Motion for Judgment of Acquittal and [his] convictions were clearly erroneous."

Book, however, fails to take into account that, by offering Jones as a defense witness, he opened the door, which the State utilized, to his age and date of birth being introduced. On cross-examination, the State elicited the following testimony from Jones about the contents of his police report:

> [STATE]: Do you see a date of birth listed for the Defendant Matthew Book?
>
> [WITNESS]: Yes.
>
> [STATE]: Could you please advise the Court of what his date of birth was?
>
> [DEFENSE]: Objection.
>
> THE COURT: Overruled.
>
> [WITNESS]: 7/16/76.
>
> [STATE]: Okay. And what was his approximate age at the time of the incident?
>
> [WITNESS]: At that time 35 years old.

Moreover, while Book objected to the State reading directly from Jones' police report, he had also previously stated that "[i]f she wants to put it into evidence I have no objection." Book acquiesced to the State introducing additional evidence in support of its case-in-chief during the defense's case.

The State argues, as a bonus offering, that the court could draw a reasonable inference that, as "Book had been a teacher for at least two years at the time of this incident in 2011[,]" and that, "even if he had just graduated from college at the time of his hiring, after two years he would still be over 21 years old."

The evidence, both direct and circumstantial, was sufficient to satisfy the "age of the defendant" elements of the offenses.

IV. Admission of "Opinion" Testimony

Book's final argument challenges the court's admission of what he characterizes as the "opinion testimony" of Iona Rudisill, the social worker who conducted the forensic interview of X. on November 17, 2011. He contends that, during the State's cross-examination of Rudisill, "the court permitted [her] to offer testimony based on her experience, knowledge and training as a social worker over … objection," which he asserts, "was improper as Ms. Rudisill was not initially called or admitted as an expert witness, nor was she qualified as an expert witness."

"The admissibility of evidence is left to the sound discretion of the trial court." *Mines v. State*, 208 Md. App. 280, 291 (2012) (citing Md. Rule 5-104(a)). "Generally, a trial court has 'wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony.'" *Shemondy v. State*, 147 Md. App. 602, 611 (2002) (quoting *Massie v. State*, 349 Md. 834, 850-51 (1998)).

At the outset, we point out that the court was not asked to, nor did it, confer expert witness status on Rudisill. We find no prohibition to a witness being qualified as an expert

by an adverse party on cross-examination. *See* Md. Rules 5-701 through 5-706. Because Rudisill was called by Book, and he does not suggest that the State violated discovery rules, he cannot be heard to complain of prejudice.

Book relies on *Ragland v. State*, 385 Md. 706 (2005), where the State offered the testimony of two police officers who, based on their training and experience, concluded that Ragland's observed conduct was a drug transaction. 385 Md. at 725-26. In its analysis, the Court held that "Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id*. at 725 (footnote omitted). Applying that determination to the facts before it, the *Ragland* Court determined that the State had relied on the officers' opinion testimony to prove an element of the drug distribution charge. *Id*. at 726-27. The Court then concluded that "[i]n admitting the testimony under Md. Rule 5-701, the trial court abused its discretion." *Id*. at 726.

Ragland is readily distinguishable. First, Rudisill was offered by Book as a defense witness, not by the State. Second, defense counsel inquired extensively into Rudisill's education, background, and experience as a social worker and a forensic interviewer. He also had Rudisill explain in detail the standard procedures and policies of the Baltimore Child Abuse Center in conducting juvenile forensic interviews. Finally, as we observed, Rudisill was not recognized by the court as an expert. Book's extensive inquiry, on direct examination, about her education and qualifications, and her answers, which occasionally

went well beyond the question asked, provided the State with fertile ground for cross-examination.

The State's line of questioning on cross-examination, objected to at trial, and reiterated on appeal, appears from the record to have further elucidated the responses that he himself had elicited from Rudisill on direct examination. For example, on direct examination, Book engaged in the following colloquy with Rudisill:

> [DEFENSE]: And do you know, and would you have included this in your report, if she told the dates or times when those incidents had occurred?
>
> [RUDISILL]: In looking at the video and, well, actually, let me back up with that. That would have been a question that, yes, we would have asked, because that's one of the questions that we just normally ask during our forensic interviews. However, there's a lot of research that also basically shares that for youth, because of their child -- because of their development stages it's challenging for youth to actually identify locations and times of when things actually happened. However, they can actually clearly identify sequencing, which is basically what actually happened to them.
>
> [DEFENSE]: Okay. So when you say sequencing, they would be able to readily identify sort of the beginning to the end of an occurrence?
>
> [RUDISILL]: They can identify that much better than they can do [sic] with time and location.

Rudisill's responses occasionally exceeded the scope of counsel's question and, without objection or a motion to strike, she offered testimony as to accepted research in the field about what youths can identify with sequencing. Counsel's follow-up question about sequencing invited Rudisill to continue a recital of her specialized knowledge as to the meaning of sequencing. That testimony is what then prompted the State to engage in the following colloquy, on cross-examination:

[STATE]: You indicated that it can be difficult for a child to identify the date on which an abuse allegation occurred, correct?

[DEFENSE]: Objection.

THE COURT: Overruled. That was her testimony. Overruled.

* * *

[STATE]: And you also indicated that it can be difficult for children to identify the time, presumably based on your direct, meaning the time of day that an incident occurred; isn't that true?

[RUDISILL]: Yes.

* * *

[STATE]: …. So based on your training in child development, your training as a social worker, and your training in forensic interviewing, would you agree that children can sometimes conflate incidents, meaning mix them together, or say they were one incident or two incidents?

[DEFENSE]: Objection.

THE COURT: Overruled.

* * *

[DEFENSE]: Can I be heard on the record very briefly, Your Honor?

THE COURT: Sure. Sure.

[DEFENSE]: Has Ms. Rudisill been identified or is she being introduced as an expert at this point in time?

THE COURT: Well, you called her, so --

[DEFENSE]: I did. I didn't introduce her as an expert. She was doing a forensic interview. I think she's asking a -- she's being asked to offer an opinion at this point in time.

> [STATE]: Based on her training and experience that the defense attorney elicited in a very lengthy manner.
>
> * * *
>
> [STATE]: And he specifically elicited questions regarding timing and number incidents and dates.
>
> THE COURT: Overruled.

Defense counsel renewed his objection, at which point the court asked Rudisill if she had ever testified as an expert in court, to which she responded, "Yes." The court then asked where she had previously testified as an expert, to which she responded, "The District of Columbia, Howard County, and Baltimore City." She also testified that she had previously testified "at least a hundred [times]." The court permitted her to answer the State's question, which prompted defense counsel to, again, object.

> [DEFENSE]: And just for the record, again, I'm objecting. Are you introducing her as an expert at this point?
>
> [STATE]: I'm on cross, so I'm not sure that I'm permitted to. But I think that her -- I mean he called her.
>
> [DEFENSE]: I did.
>
> [STATE]: And he elicited her background. And based on the testimony --
>
> THE COURT: And I'm satisfied, so we can move on that based on her training, expertise, educational background she is qualified to render the -- to respond to the questions that are being propounded to her, as well as the ones that were propounded by the Defense.

Earlier, in Book's direct examination, he allowed Rudisill to offer testimony that exceeded the scope of the question that was based on her specialized training and knowledge, as follows:

> [DEFENSE]: Did you speak with [the victim's stepmother] about [X.'s] history of making false statements?
>
> [RUDISILL]: I probably did. And in this time what I do is I explain to them, what we explain to non-offending caregivers is that children in their developmental stage they are not going to be truthful at all times. But it's what they're truthful about. So for instances [sic] when there is a trauma event or situations of a serious nature, then those instances are usually not those that a child would make up.
>
> [DEFENSE]: Uh-huh.
>
> [RUDISILL]: And that's been in our experience and the research has said that in the past as well.

Book's failure to limit Rudisill to his questions or the scope of her answers, allowed her to qualify them with her experience and specialized knowledge of research on the topics. The door was opened to the State's extensive cross-examination. Clearly, based upon her training and experience, the witness would have been, had she been so proffered, qualified to give expert opinions. Book cannot challenge the State's questions on cross-examination that followed directly from her testimony that he himself had elicited during his direct examination of her.

JUDGMENTS OF THE CIRCUIT COURT FOR BALIMORE CITY AFFIRMED;
COSTS ASSESSED TO APPELLANT.