Circuit Court for Charles County
Case No. 08-K-15-000652

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1435

September Term, 2016

BRYAN SANTOS

v.

STATE OF MARYLAND

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Raker, J.

Filed: August 21, 2018

Appellant Bryan Santos was convicted in the Circuit Court for Charles County with two counts of conducting a continuing course of sex abuse of a minor and three counts of third degree sex offense. In this appeal, he presents the following questions for our review:

> "1. Did the court err in allowing Mrs. Santos to testify to privileged marital communications?
>
> 2. Did the court err in admitting hearsay?
>
> 3. Did the trial court err by excluding a key defense witness based on a rules violation without exercising any discretion?"

For the following reasons, we shall reverse.

I.

Appellant proceeded to trial before a jury in the Circuit Court for Charles County. The jury convicted him of sexual abuse of a minor and third-degree sex offense. The court sentenced him to a term of incarceration of thirty years on each count of the continuing course of conduct offenses, all but thirteen years suspended, to be served concurrently, and a term of incarceration of ten years, concurrent, for the third-degree sex offense. Consecutive to these sentences, the court imposed two concurrent sentences of ten years, all suspended, for the two remaining third-degree sex offenses, followed by five years' supervised probation.

The charges in this case stem from allegations that appellant forced the minor-aged cousins of his wife, Rebecca Santos, to perform fellatio upon him. A.L., seventeen years old at the time of trial, testified that, approximately two years before trial, between January

and June of 2014, appellant asked her to perform oral sex on him. A.L. testified that, on one occasion in her brother's bedroom, appellant pushed her head down such that her mouth touched his exposed penis. In addition, on July 4, 2014, while they were in the woods near her house, appellant had her perform fellatio until he ejaculated. When asked how many times this type of incident occurred, A.L. replied, "I can't even . . . I can't give you a number, sorry." A.L. testified that appellant told her "Nobody can know about this," and asked her to promise not to tell anyone.

V.L., sixteen years old at the time of trial, testified that approximately three years before trial, appellant forced her to perform oral sex on him, confirming that her mouth and her hand touched appellant's penis. This occurred as frequently as two to three times a month. V.L. testified that there were approximately five times "where [appellant] would . . . um . . . finger me in the vagina." On one occasion, around Thanksgiving or Christmas 2014, appellant had her put her mouth on his penis until he ejaculated.

The victims' testimony was corroborated by events that occurred around June 13, 2015, after appellant and his wife returned home from attending a "Marriage Encounter" program at their church. On June 13, 2015, appellant told his wife, Mrs. Santos, that he had kissed her cousins, A.L. and V.L., and did "some inappropriate things" with them that "passed the line with them." Mrs. Santos testified that, after this, "I kinda really didn't want to hear anything else after that."

Immediately after these revelations, Mrs. Santos drove from her home in Virginia to her aunt and uncle's home in Maryland. After conveying appellant's admission to her

aunt and uncle, they woke up A.L. and V.L. and confirmed appellant's "inappropriate" conduct with them.

Aracelis L., A.L.'s and V.L's mother, confirmed that her niece, Mrs. Santos, texted her at 11:00 p.m. on June 13, 2015, asking if they were home. Shortly thereafter, at approximately 2:00 a.m., Mrs. Santos arrived at Aracelis L.'s home in Maryland and spoke to her. Asked her reaction following that conversation, Aracelis L. replied, "I freak out." She then went and woke her daughters "to confirm the horror." Aracelis L. asked A.L. "is it true that [appellant] made you give him head?" to which A.L. replied, "Yes." Aracelis L. contacted the police a few days later.

On cross-examination, Aracelis L. testified that appellant texted an apology to her. According to Aracelis L., the text came while appellant's wife was en route to their house in Maryland. Appellant told her "You guys don't deserve this."

Joel L., A.L.'s and V.L.'s father, testified that, on June 13–14, 2015, Mrs. Santos told him that appellant "confessed to her some of the things he did with my daughters." Joel L. further testified that, later on June 14, apparently after Mrs. Santos had been to their house and gone back home, appellant left a voice mail message for Joel L., saying "that he's sorry . . . uh . . . for what he did, for me to forgive him, and you know, (inaudible) crying." Appellant sent a text message, which stated as follows:

> "All I can say, I'm sorry, guys. I never meant to hurt you or anyone in your family. My family and everything I've worked for has been stripped from me and my soul is crushed knowing the pain I've caused. There might not be anyway to restore our relationship but I pray you can forgive me. In my heart, you're all still family. I don't know what to say or what to do. You don't deserve this. I'm sorry, please forgive me."

Prior to trial, the State's Attorney requested a subpoena for Mrs. Santos. Because she lived out-of-state, the State also petitioned the circuit court to compel her attendance at trial. *See* Md. Code, Courts and Judicial Proceedings Article, § 9-303 (permitting a court to issue a certificate requiring an out-of-state material witness to appear in a pending prosecution).[1] In support thereof, the State averred that Mrs. Santos was "a witness to whom [appellant] confessed his involvement" in the underlying offenses. The circuit court issued the subpoena.

Appellant moved *in limine* to preclude any testimony from his wife on the grounds that it involved the disclosure of confidential marital communications in violation of § 9-105. The State maintained that the proffered testimony was admissible under § 9-106(a)(1), on the grounds that the statute provided a testimonial exception to the rule against disclosure of marital confidential communications in cases of child abuse.

The trial court heard argument on this motion prior to jury selection. Defense counsel proffered that, following their attendance at a church-related marriage program called "Marriage Encounter," appellant confided to his wife that he "had some sort of inappropriate relations with these two young ladies," A.L and V.L.[2] Defense counsel proffered that Mrs. Santos "does not wish to testify about this" and "that she would actually

[1] All subsequent statutory references herein shall refer to Md. Code, Courts and Judicial Proceedings.

[2] Defense counsel stated that "Marriage Encounter" "is apparently designed to help couples work on their problem and develop a closer marriage. And part of the theme of these Marriage Encounters is . . . uh . . . confession and honesty, and telling the truth."

prefer not to[.]" Counsel further proffered that the couple was married at the time of the communication and were married at the time of trial.

The trial court denied appellant's motion in limine, ruling as follows:

> "Mrs. Rebecca Santos, whether she would testify or not, I have reviewed a number of the cases and the treatises on it. And to paraphrase the Court of Special Appeals, confidential communications between spouses *should be recognized only within the narrowest limits required by principle, here being to preserve the harmony and tranquility of the marriage.*
>
> What [appellant] is asking the Court to do is to expand the privilege beyond its intended scope. The Court's view that the admission of [appellant] would not . . . *the Court's view is that the admission of [appellant] would not preserve the harmony and tranquility of the marriage*, and therefore I am going to deny that motion, and she will be allowed to testify."

At trial, Mrs. Santos confirmed that she was married to appellant and that, on June 13, 2015, they attended a "Marriage Encounter" program at their church. When the State asked Mrs. Santos whether appellant told her something when they returned home after that event, defense counsel objected based on the marital privilege ground. Over objection, Mrs. Santos testified as follows:

> "Um . . . he mentioned to me that he . . . um . . . felt convicted and wanted to tell me something that he had been holding . . . um . . . in. Um . . . and he told me that some inappropriate things, or things have gone too far, he did some inappropriate things with . . . um . . . my cousins. Um . . . and I asked . . . um . . . like, who? And he said, you know [V.L. and A.L.]. And I didn't ask for details . . . um . . . but he did mention that he passed the line with them.
>
> And . . . um . . . I was not happy, so . . . but in the beginning it was very vague. Um . . . after I, like, asked some general questions, then he told me, like, that he had kissed them. Um . . . and I kinda really didn't want to hear anything else after that."

Mrs. Santos then "wanted to see if it was true," and drove from Virginia to her aunt and uncle's house in Maryland, where her cousins lived. When she arrived, Mrs. Santos first spoke to her aunt and uncle and "let them know what [appellant] had confessed to me." Mrs. Santos continued that, "at first they were taken aback, but then they just wanted to confirm as well to see if it all was true." Thereafter, the young girls' parents and Mrs. Santos took the girls out of their room to speak with them. Mrs. Santos testified that, after they were asked if "everything that I had said was true," the girls "said yes, right away, that it was true."

On cross-examination, Mrs. Santos conceded that appellant did not identify "any specific sexual activity," other than "he kissed them, and he said he passed the line, and he was vague." She acknowledged that this confession of infidelity angered her, and that the couple had marital problems before this, including a period of separation. She further answered in the affirmative when counsel asked her whether "you have since decided to go your separate ways[.]"

On redirect examination, Mrs. Santos provided additional detail about appellant's admission to her:

> "He said that he kissed them, and he felt really bad about it. He felt really, really guilty. And he didn't want to hold anything from me because he wanted to save our marriage, so he wanted to tell me the truth about everything that he had done behind my back, to make our marriage stronger, so that he knows that he's . . . well, so that I know that he's being honest with me."

During the trial, at the end of the State's case-in-chief, the court inquired of defense counsel whether she intended to call any witnesses. Defense counsel informed the court

that she intended to call two witnesses. The first was Carlos Santos. The second was Piro Santos, appellant's mother, who had been sitting in the courtroom the entire trial. Counsel proffered the substance of appellant's mother's testimony, stating as follows:

> "Um . . . that during the testimony of . . . uh . . . V.L., in which she mentioned that there was an incident on the Fourth of July . . . uh . . . she said, I know that didn't happen, the Fourth of July incident, because I was there with [appellant], and with the girls, the whole time when he was on the basketball court, the mother was then.
>
> When she went inside, [appellant] immediately followed her because she was leaving the next day. They sat on the couch, he had the baby with him, and they were talking. And essentially refute. . ."

The court precluded defense counsel from calling Piro Santos on the grounds that the court had imposed the Rule on Witnesses (the sequestration rule) and that because Piro Santos had been sitting in the courtroom the entire trial, she would not be permitted to testify.

Following the jury's verdict of guilty and sentencing, appellant noted this timely appeal.

II.

Before this Court, appellant contends that the court erred in admitting confidential communications between himself and his wife, Mrs. Santos, in violation of the spousal privilege set forth in § 9-105. He argues that the trial court was wrong in permitting appellant's spouse to testify after appellant asserted the marital privilege on the grounds that admitting the communication in question ran counter to the promotion of marital

harmony and tranquility. He points out that the communication was undoubtedly confidential; it was made to his wife, in private, immediately following a "marriage encounter," a church-based marriage consulting session. In fact, Mrs. Santos explained that "he didn't want to hold anything from me because he wanted to save our marriage, so he wanted to tell me the truth about everything that he had done behind my back, to make our marriage stronger." Additionally, appellant points out that the communication's content, an admission to a crime, itself indicates it was intended to remain confidential. As to the State's argument that § 9-106 creates a statutory exception to the marital privilege contained in § 9-105 for the crime of child abuse, he maintains that the privilege contained in § 9-105 is absolute, with no exception. This error, he concludes, is not harmless.

Appellant argues that the court erred in permitting Joel L. to testify that appellant's wife told him what happened with her and appellant and that appellant confessed to her. According to appellant, this testimony was inadmissible hearsay and highly prejudicial.

Finally, appellant argues that the trial court erred in excluding appellant's mother as a witness because even though her presence in the courtroom during the trial was in violation of the Rule on Witnesses, the trial court imposed the sanction of exclusion without exercising any discretion as to the gravity of the violation or whether it called for any sanction.[3]

Apparently recognizing that the trial court's stated reason for denying the motion *in limine* and permitting the spouse to testify was error, the State presents a different basis to

[3] Because we shall reverse on the marital privilege and hearsay issues, we need not address this issue.

support the admissibility of the wife's testimony: that the communication, amounting to appellant's admission of guilt of child abuse, was admissible under § 9-106. The State's argument has three prongs: first, that privileges are disfavored; second, that the specific controls the general and that § 9-106 permits a spouse to testify against a person who is on trial for a crime and that § 9-105 makes no reference to "testimony or to trial;" and third, that the later enacted statute, § 9-106, controls the earlier § 9-105. In sum, the State argues that in light of the disfavor of testimonial privileges, the more specific, more recent statutory language in § 9-106, which explicitly and without qualification permits a spouse to testify at a criminal trial in two narrow categories of cases (child abuse and spousal abuse), the testimony was admissible under § 9-106. Moreover, the State asserts, that assuming error *arguendo*, the error was harmless beyond a reasonable doubt.

The State argues that Joel L. testified to a statement made by appellant, a party-opponent of the State, and thus it fits within the party-opponent exception to hearsay. The State also asserts that any error was harmless error.

Finally, the State argues that appellant did not preserve his argument for our review that Piro Santos should have been allowed to testify because he did not raise the argument he now raises before the trial court. The State points out that appellant never suggested a lesser remedy based on the sequestration violation. As to the merits, the State maintains that the trial judge considered the purpose for which the testimony was offered, and that, considering that appellant's mother was present throughout the entire trial, the trial court did not abuse its discretion in excluding her as a witness.

III.

We review the trial court's interpretation and application of Maryland constitutional, statutory, or case law under a *de novo* standard of review. *Harrison-Solomon v. State*, 442 Md. 254, 265 (2015) ("The interpretation of a statute is a question of law, which we consider *de novo*."); *Schisler v. State*, 394 Md. 519, 535 (2006).

The rules of statutory construction are well-known. Our paramount goal is to ascertain and effectuate the intent of the Legislature. If the language of the statute (or rule) is clear and unambiguous, our inquiry ordinarily ends and we look no further. *Brown v. State*, 359 Md. 180, 188 (2000). Statutes which deal with the same subject matter should be read *in pari materia* in order to give full effect to each enactment. *See Chen v. State*, 370 Md. 99, 106 (2002) ("Two statutory provisions concerning the same subject matter are considered to be *in pari materia* and must be interpreted accordingly.").

Section 9-105 provides that "[o]ne spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage." It contains no exceptions. Section 9-106(a) provides that "[t]he spouse of a person on trial for a crime may not be compelled to testify as an adverse witness unless the charge involves: (1) [t]he abuse of a child under 18 . . ." This Court has recognized that these are separate privileges, not a general and specific application of the same rule. *See, e.g.*, *Ashford v. State*, 147 Md. App. 1, 60 (2002) ("Sections 9-105 and 9-106 of the Courts and Judicial Proceedings Article contain the spousal privileges. There are two."); *Hagez v. State*, 110 Md. App. 194, 207 n.2 (1996) ("We focus here on the privilege against adverse spousal testimony, and not the privilege that applies to confidential spousal

communications that is embodied in C.J. § 9-105."). Section 9-105 grants a privilege to any spouse to bar the other from disclosing confidential communications, and § 9-106 grants the spouse of a criminal defendant the privilege not to testify, limited by explicit exceptions for child and spousal abuse.

Maryland courts have historically refused to add exceptions to privilege statutes, including § 9-105, leaving it to the Legislature to make those policy decisions. In *Coleman v. State*, 281 Md. 538 (1977), the Court of Appeals explained as follows:

> "It is elementary that a statute should be construed according to the ordinary and natural import of the language used unless a different meaning is clearly indicated by its context, without resorting to subtle or forced interpretations for the purpose of extending or limiting its operation. In other words, a court may not as a general rule surmise a legislative intention contrary to the plain language of a statute or insert exceptions not made by the legislature. Indeed, in *Birmingham v. Board*, 249 Md. 443, 239 A.2d 923 (1968), it was evident that twelve words were inadvertently omitted from a statute authorizing the State to incur a certain debt; the effect of the omission was to render the statute unconstitutional on its face. The Court there held that the question was not one concerning construction of the statute, or whether true legislative intent should prevail over precise grammatical construction or literal intent, but whether the Court was empowered to enlarge upon the statute by including language presumably omitted by inadvertence. In refusing to supply the missing language by judicial construction, the Court held that since it could not invade the function of the legislature, it had no power to correct an omission in the language of a statute even though it appeared to be the obvious result of inadvertence.
>
> In the oft-cited case of *Schmeizl v. Schmeizl*, 186 Md. 371, 46 A.2d 619 (1946), our predecessors were urged, on grounds of public policy, to import an exception into a statute not evident by its plain language. The Court referred with emphatic disapproval to the practice of the early English judges in disregarding the letter of a statute and extending its provisions to cases which in their judgment, on grounds of

> reason and justice, were within the mischief which the law was designed to remedy, but for which express provision had not been made by the legislative body. The Court said that 'the doctrine giving the judge power to mould the statute in accordance with his notions of justice has no place in our law.' We thus decline the State's invitation to engraft the two exceptions upon which it relies into § 9-105."

Id. at 546–47 (internal citations omitted).

Fifteen years later, the Court of Appeals again considered exceptions to § 9-105 in *State v. Enriquez*, 327 Md. 365 (1992), holding as follows:

> "In applying § 9-105 in *Coleman*, we said that the statute contains no exceptions. In this regard, we held that the legislature recognized the need for an express exception for a statutory privilege protecting certain communications between accountants and their clients, and between psychiatrists or psychologists and their patients [in §§ 9-110 and 9-109]. Because § 9-105 contains no exceptions, we declined to add words to the statute to judicially create exceptions for which the legislature had not made express provision.
>
> As already observed, the substance of the marital communication in this case was that Enriquez was sorry for his actions; that he wanted a reconciliation with Levina; and that he was undergoing treatment. The presumption that this communication was intended to be confidential, and not disclosed to the police, was simply not rebutted at trial. This is especially so since, as in *Coleman*, the marital communication amounted, implicitly, to an admission of a crime. Thus, as in *Coleman*, the wife was incompetent under the statute to divulge the marital communication over her husband's objection because it was made during marriage and was confidential in nature.
>
> In the fifteen years since we decided *Coleman*, the legislature has taken no action to add any express exceptions to the statute. Since the legislature is presumed to know the law and it did not amend the statute, we conclude that it intended that our interpretation of the statute in *Coleman* should obtain."

Id. at 372–73 (internal citations omitted).

Although the language of § 9-105 is clear, we can consider the context of the statute in confirming its interpretation. Sections 9-105 and 9-106 are not isolated in a group of rules on spousal testimony, but are sections of Subtitle 1 (Competence, Compellability, and Privilege) of Title 9 (Witnesses). The Subtitle also includes, *inter alia*, § 9-107: Privilege Against Self-Incrimination, § 9-108: Attorney-Client Privilege, and § 9-109: Patient-Therapist Privilege. Sections 9-107 and 9-108, like § 9-105, contain no exceptions, while § 9-109 contains exceptions akin to those found in § 9-106. We have not applied exceptions in individual sections of this Subtitle to other sections, and we decline to do so now. Otherwise § 9-106's exceptions would require a compelled spouse in a child abuse case to give testimony that incriminates her or violates the attorney-client/patient-therapist privilege held by her clients.[4]

If §§ 9-105 and 9-106 conflict, we must reconcile them to give full effect to each enactment, s*ee Chen*, 370 Md. at 106, but they do not conflict. Section 9-106 undisputedly allows the State to call Mrs. Santos as a witness because the charges involve child abuse. Section 9-105 gives appellant, as Mrs. Santos's spouse, the privilege to preclude Mrs. Santos from disclosing confidential marital communications from her spouse, as it would preclude a non-compelled spouse. Just as Maryland Rules 5-802(c) and 5-404 generally

[4] The State also contends that § 9-106 should override § 9-105 as a more recent statute. The Legislature created Article 35, § 4, which included § 9-105's marital communications privilege, in 1957. *Brown v. State*, 359 Md. 180, 197. In 1965, the Legislature added the non-compellability rule to § 4. Acts 1965, c. 835, § 1, eff. June 1, 1965. In 1967, it added the child abuse exception, also to § 4. Acts 1967, c. 176, § 1, eff. June 1, 1967. A 1973 recodification replaced Article 35, § 4, with a number of statutory sections, including §§ 9-105 and 9-106. Acts 1973, 1st Sp. Sess., c. 2, § 1, eff. Jan. 1, 1974. The Legislature wrote § 9-105 after it wrote the child abuse exception and at the same time as § 9-106.

bar Mrs. Santos from offering hearsay without an exception or general character evidence during her compelled testimony, § 9-105 limits the scope of her testimony but does not limit either her ability to offer admissible testimony nor the State's power to compel such testimony. There is no ground to go beyond the text of § 9-105 to apply the exceptions of § 9-106 to it.

IV.

Appellant next asserts that the trial court erred by admitting hearsay testimony from Joel L. that Mrs. Santos told him that appellant had confessed. The State responds that the evidence was admissible as a statement of a party-opponent and that extrinsic evidence of such statements was relevant to a material issue in this case. The State also contends that because the evidence was cumulative to all the other evidence admitted at trial, any error was harmless. Joel L. testified as follows:

> "[THE STATE]: Thank you, Your Honor. Um . . . Mr. L., directing your attention to 6/13/15, that's June 13th, 2015, into the early morning hours of June 14th, 2015, did anything unusual happen?
>
> [JOEL L.]: Uh . . . within that, yes, that early morning around 12:00 I would say, Rebecca Santos came into our facility and basically, you know, told us what had happened, as far as with her and Bryan, that Bryan confessed to her—
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> [DEFENSE COUNSEL]: Objection.
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> THE COURT: Overruled.
>
> [JOEL L.]: Uh . . . confessed to her some of the things he did with my daughters."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 5-801(c). Further, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Rule 5-802. When hearsay statements themselves contain other hearsay statements, the "hearsay within hearsay" must also fall within an exception to the prohibition; otherwise, it will be excluded as hearsay. Rule 5-805.

Without a doubt, Joel L.'s testimony as to what Mrs. Santos told him was hearsay. Assuming *arguendo* that appellant's statement was a statement of a party-opponent when appellant made the statement to his wife and thus not hearsay when Mrs. Santos testified to it, Mrs. Santos's repetition of the appellant's statement to Joel L. was a hearsay statement in Joel L.'s testimony. No exception to the hearsay rule has been offered to support the admissibility of Joel L.'s testimony because Mrs. Santos, whose statement he testified to, is not a party-opponent; thus his testimony as to Mrs. Santos's statement is still hearsay. The admission of Joel L.'s testimony was error.

V.

The question now becomes whether the trial court's errors were harmless. Error cannot be harmless "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *State v. Mazzone*, 336 Md. 379, 400 (1994).

Reversing the admission of both Mrs. Santos's testimony about appellant's confession and Joel L.'s testimony about Mrs. Santos's description of that confession would remove all testimony of appellant's admission to the crime. The victims' statements and the implications of appellant's text messages to the victims' parents may suffice to sustain his conviction, but we cannot find, beyond a reasonable doubt, that appellant's statements did not influence the verdict. The errors were not harmless.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY CHARLES COUNTY.