Circuit Court for Harford County
Case No. K-15-1222

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1524

September Term, 2017

FRANCOIS NGUESSI DAME

v.

STATE OF MARYLAND

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

JJ.

Opinion by Leahy, J.

Filed: February 5, 2019

A jury in the Circuit Court for Harford County found Francois Nguessi Dame, appellant, guilty of three counts of sexual abuse against his step-daughter, V.M., on May 12, 2017. At trial, V.M. and her siblings testified that Dame would often text V.M., and V.M. testified that he would do so to solicit her for sex. Dame testified in his own defense, denying the charges against him. On cross-examination, the State sought to impeach him by asking if he had "ever text[ed] [V.M.] for a quickie." Although Dame admitted that he had, his counsel objected, arguing that text messages from Dame's phone were inadmissible because the expert who downloaded them was unavailable for trial, and therefore, the prosecutor's question contained a factual predicate that could not be supported by admissible evidence. The circuit court overruled Dame's objection.

Dame filed a timely appeal, and presents this Court with one question: "Did the trial court err and/or abuse its discretion in allowing the prosecutor to cross-examine Mr. Dame about a highly prejudicial text message that the prosecutor acknowledged was 'not admissible as evidence?'" We hold that the trial court was within its discretion to allow the question because Dame's affirmative response obviated the need for extrinsic proof, and in any case, the State could have proved that Dame solicited V.M. for sex via text messaging through V.M.'s testimony.

BACKGROUND

On August 26, 2015, a grand jury indicted Dame on one count sexual abuse of a minor by a household member; one count of sexual abuse of a minor by a person having temporary care, custody, or responsibility for the supervision of that minor; and one count of sexual abuse of a child under the age of 14 in a continuing course of conduct over a

period of 90 days or more. The following facts were adduced from the testimony and evidence presented at Dame's jury trial in the Circuit Court of Harford County on May 10 and May 11, 2017.

The Family

V.M. was five years old when she and her older brother, F.J., came from Cameroon to join their mother in the United States in 2003. They lived with their mother and Dame, mother's boyfriend, who V.M. referred to as "Dad." Mother and Dame then had three children together: two daughters, I.D. and R.D., and a son, S.D. Mother worked two jobs while Dame worked sporadically in building maintenance and property management. While mother worked, V.M., the oldest daughter, and Dame, were largely responsible for raising the children.

V.M., mother, R.D., and I.D. described the family dynamic similarly. They related that Dame favored V.M., buying her clothes, accessories, jewelry, and food. According to mother, Dame would gladly take V.M. to her after school activities, but would not take F.M. to his, forcing mother to leave work to drive F.M. to his activities. And V.M. related that Dame would not pay attention to her siblings, but made sure that her "needs were met, very, very fast." Dame gave V.M. a key to the home mailbox so that she could pick up the items he purchased for her when she got home from high school, preventing her mother from finding out about those purchases.

Sexual Abuse

V.M. testified that Dame began molesting her when she was 10 years old. She had a detailed recollection of the first time: she wore a pink skirt and a blue shirt and was

sleeping in the same bedroom as her sisters. Dame entered her bedroom, sat on the side of her bed, and felt inside her underwear, in her crotch area, and on her butt. From the time she was 10 years old until she was 16 years old, whenever Dame hugged V.M., he would "grind his penis against [her] vagina." Dame also carried V.M., put her on his lap in front of a computer, and felt her "vagina and chest area." The touching took place in the parents' bedroom, either in the closet or behind the bed. In the beginning, V.M. disliked the touching but did not understand that it was wrong. As V.M. grew older, Dame told her that he was her best friend and that the touching was normal.

Dame called V.M. to his bedroom verbally or by text, and told her to distract her siblings by turning on the TV, raising its volume, and putting food out for them. Dame's texts would instruct her to go to his room, saying "I'm feeling horny," or "I need help with this, can you come and see me." Dame told V.M. to lock the door and would then check the door himself to ensure that it was locked properly.

When V.M. was 14 years old, Dame began to perform oral sex on her. V.M. estimated that Dame performed oral sex on her at least 200 times. Dame eventually forced V.M. to perform oral sex on him. The next year, Dame began to vaginally rape her, three to four times per week, while mother was at work. V.M. testified that the rapes began when Dame discovered that she was gay, so that he could "turn [her] straight." He told her this was "the process." The first few months of "the process" entailed reading Bible verses and reading about why being gay was wrong; the latter months entailed Dame raping V.M. so that she would experience "sexual intercourse with a man." V.M. volunteered to have intercourse with a classmate, but Dame refused, insisting that she "had to do it with him

because he was the most fit, he was the most experienced and he would know how to handle a woman."

V.M. described enduring these encounters by "laying [sic] in bed pretty much like dead," and said that Dame would scold her for not "participating." He yelled at V.M. and asked, "[d]o you not want to turn straight?" V.M. testified that the reason the family moved from Riverside to Havre de Grace was so that she could attend school in a different district away from her lesbian friends. The rapes continued for about one year. V.M. estimated that Dame raped her "[a]t least" 200 times.

Dame communicated with V.M. primarily through texts. V.M. explained that Dame texted her "24/7, every day," and that "it was always him just screaming at [her] through the phone or planning to do something after school." Dame would text V.M. even if she were at school, and sometimes the texts would make her cry and she would have to leave class. Dame also texted her at odd hours of the night to come to his bedroom. He preferred text to other forms of communication because "he was afraid that someone could hear him say something." When V.M. was questioned by the State as to whether she and Dame used "any terminology or code words," V.M. replied "[w]ell, the two main [] ones were if he said come, then I know what that meant and then if he says the process, then I know that that meant him having sex with me to make me straight." The text messages were not saved because as soon as V.M. went to Dame, he would delete the messages first from her phone and then from his own.

Dame threatened to kill V.M. and hide her body if she ever told anyone about the sex. He also threatened to hurt her mother and siblings. These threats of violence occurred

"at least every other week." Additionally, Dame told V.M. that if she told her mother about the sexual abuse, he would tell mother that V.M. was gay. V.M. testified that Dame made her "believe that [her] Mom would be more angry at the fact that [she] liked girls [than] that he was touching me." V.M was very fearful that mother would not love her, kick her out of the house, and disown her for being gay.

R.D., I.D, and V.M. testified that Dame would take V.M. into the master bedroom or basement and lock the door for at least an hour, three to four times per week, while mother was at work. R.D. testified that she confronted Dame about the time spent locked in a room with V.M., and Dame shared that he was trying to convert V.M. from gay to straight.

V.M. exhibited personality and mood changes. Mother reported that when V.M. first arrived in the United States, she was a happy, playful child. Both I.D. and mother testified that V.M. became sad and withdrawn in her early teenage years, sleeping during the day, spending much time alone in her room, and speaking in a monotone. V.M. told mother that she had heart palpitations and was cutting herself. Mother sought medical treatment for V.M.'s anxiety. Mother thought that perhaps V.M.'s fatigue was attributable to staying up all night and talking on the phone. Mother knew something was "really, really wrong with her but [she] couldn't put [her] hands on it."

In 2015, when Dame was away in Cameroon for several months, V.M. finally confided in her mother that Dame had molested her for many years and had raped her as well. V.M. explained that she had documented the abuse in two journals. The first, Dame found and burned when V.M. was 12 years old. The second, V.M. wrote on her phone,

recording from memory all the abuse that she had suffered from age 10 to 16. Mother described V.M. falling down and crying as she told her of the abuse. After telling her mother, V.M. disclosed the abuse to a social worker, under the observation of a police detective. Police arrested Dame at Dulles airport upon his return to the United States on August 20, 2015.

The Text Messages

The state's final witness was Detective Chester Norton of the Havre de Grace Police Department. Detective Norton testified about his assignment to V.M.'s case. He described executing a search warrant for Dame's cell phone, prompting defense counsel to object in the course of the following exchange:

> [PROSECUTOR]: And you also got a search warrant in this case, correct?
>
> [DET. NORTON]: Yes, sir.
>
> [PROSECUTOR]: And that was for his—for his phone?
>
> [DET. NORTON]: Yes, sir.
>
> [PROSECUTOR]: And were you able to execute that search warrant?
>
> [DET. NORTON]: Yes, sir.
>
> [PROSECUTOR]: And were you able to retrieve a download from that phone?
>
> [DET. NORTON]: Yes, sir.
>
> [PROSECUTOR]: Were you able to read the text messages on that phone?
>
> [DET. NORTON]: Yes, sir.
>
> [PROSECUTOR]: And did anything stand out in your mind?

[DEFENSE COUNSEL]: Objection.

THE COURT: Approach.

(WHEREUPON, there was a conference at the bench with the Defendant present.)

[DEFENSE COUNSEL]: It is my understanding, Your Honor, that the—that he didn't do the download, that a technical expert at the Sheriff[']s Office did the download and then provided him with information in a short version and later in a longer version and I don't think he knows anything about the download other than what he was presented. So I don't think he should be testifying to it as something firsthand.

THE COURT: All right. Mr. [Prosecutor]?

[PROSECUTOR]: That is correct.

THE COURT: All right. Sustained. You can back up and make it clear who did the download.

[PROSECUTOR]: I'm going to end it there. I was going to try to get in what he observed and view[ed] and read from the download. The person who did the download is gone. They are in New Zealand.

THE COURT: So your objection is to this being discussed at all?

[DEFENSE COUNSEL]: Well—

[PROSECUTOR]: I'm not trying to get it. I'm not trying to admit the download. I'm trying to admit what he read from the Deputy.

[DEFENSE COUNSEL]: I would have objected to the download being [in] all together because it was done by an expert and apparently the State disclosed to me [] the State doesn't have that expert anymore. But now, I am, since that is not going to happen, I am definitely objecting to any effort to have him report what he was provided by an expert's work.

THE COURT: Sustained.

The prosecutor subsequently changed subjects and focused his final line of questions on the timeline of Dame's arrest.

Dame's Testimony

Dame testified in his own defense. He denied ever inappropriately touching V.M., performing oral sex on V.M., forcing V.M. to perform oral sex on him, or raping V.M. Dame claimed he became aware that V.M. was communicating with other girls and visiting websites containing images of nude women. He was opposed to homosexuality and believed that, given her young age, V.M. "wasn't sure about what she want[ed] to do, she need[ed] something to clarify what she want[ed] to do." According to Dame, he confronted V.M. about her sexuality and required her to write a note to "prove that [she was] willing to change." He told her that she needed some type of help. Using Google, Dame found a website to help V.M. overcome her attraction to women. He described "the process" as requiring V.M. to read the materials he printed from the website and report to him on her progress. Yet, during cross-examination, he could not remember the contents of the documents he required V.M. to read and report on. He admitted that he and V.M. would meet in the living room, the study, or the bedroom, with the door shut and sometimes locked to conduct "the process" outside the presence of the other children. Dame never informed mother or the other children about "the process."

On cross-examination, Dame acknowledged that he "often" sent text messages to V.M., but insisted that he texted with the entire family. Thereafter, the following exchange transpired among counsel, the court, and Dame:

[PROSECUTOR]: And did you ever text her for a quickie?

[DEFENSE COUNSEL]: Objection.

THE COURT: Approach.

(WHEREUPON, counsel approached the bench.)

THE COURT: Basis?

[DEFENSE COUNSEL]: If this text message is coming from the download that was done by the Sheriff[']s Office and the State has already indicated they are not putting it in evidence and now they are attempting to back door this by asking questions from it. I don't think they should be allowed to do that.

[PROSECUTOR]: I'm certainly allowed to ask him the question if he ever tried to ask his daughter for a quickie. If he says, no, at least I can try to do it through him. Still allowed to ask him. Your daughter told me this; I have information from her and I have a copy of it. Just because it is not admissible as evidence doesn't mean I can't use it to try and impeach him or ask him questions about it.

THE COURT: Overruled.

(WHEREUPON, proceedings resumed before the Jury.)

[PROSECUTOR]: You can answer the question.

[DAME]: What was the question?

[PROSECUTOR]: Did you text your daughter for a quickie[?]

[DAME]: About a cookie. Not a quickie. Yes.

[PROSECUTOR]: Yes? I'm sorry. I'm not trying to be rude. I didn't understand you?

[DAME]: The answer is yes.

[PROSECUTOR]: Okay. Thank you, Your Honor. I have no further questions.

On redirect, defense counsel revisited the topic of the "quickie," in the following exchange with Dame:

> [DEFENSE COUNSEL]: You were just asked whether you ever sent a text to [V.M.] saying something about a quickie; your answer was yes?
>
> [DAME]: Yes, the question—I remember once a few times basically, we have this session of this thing where we work basically like a straight—it was text sometimes when she has all this document, when she has a bunch of them, maybe 10 or 20 pages working on it and actually this name role by. So the process was coming from her and one day she came up with quickie. She said, okay. The day that I just come for a question about what is happening, at this particular part, it was like code name, it would be a quickie. So basically that is what I understood by quickie. Regarding the time that we spoke about quickie, yes. I don't know what you mean by quickie here.
>
> [DEFENSE COUNSEL]: No further questions, Your Honor.

At that point, defense counsel renewed a motion for judgment of acquittal, arguing that the state had failed to establish a case before the jury as to all three counts. The court denied the motion, concluding that "this is really a jury issue."

During closing arguments, the State made repeated reference to Dame's affirmative response to the question about the "quickie:"

> The touching, the humping, the fact that he admitted on the witness stand he would send her text message[s] saying I want you to come for a quickie. I don't care where you live on this planet, we all know what a quickie means. That means a series of vaginal intercourse, a quickie, a quick period of time.
>
> * * *
>
> And a quickie is a quickie, folks. He admitted it. He said it. It came out of his mouth on the witness stand. I don't care where you live on this planet, we all know what that means.
>
> * * *
>
> And he gets her to remain silent. It will destroy your mother if she finds out you are gay. I'm going to tell her unless you do this stuff. . . . You need to come to my room. You need to come to my room for a quickie.

The jury convicted Dame of all three charges. On September 7, 2017, Dame was sentenced to 25 years for sexual abuse of a minor by a household member, which was merged with the sentence for sexual abuse of a minor by a person having temporary care,

custody, or responsibility for the supervision of that minor. He was sentenced to 30 years, suspended, for the sexual abuse of a child under the age of 14 in a continuing course of conduct over a period of 90 days or more. The court ordered the sentences be served consecutively. On September 13, 2017, Dame noted his timely appeal to this Court.

DISCUSSION

I.

Dame claims that the trial court abused its discretion by allowing the State to ask him, during cross-examination, whether he had "ever text[ed] [V.M.] for a quickie." Dame contends that it is professional misconduct for a prosecutor to ask a question that implies the existence of a fact that the prosecutor knows cannot be supported by admissible evidence, and in this case, the prosecutor was aware that the copy of Dame's texts from his cell phone, downloaded by the Sherriff's Office, was inadmissible. Relying principally on *Walker v State*, 373 Md. 360 (2003), and *Elmer v. State* 353 Md. 1 (1999), Dame contends that the court's decision to allow the question was reversible error. Further, he argues that if an error affects the jury's ability to assess a witness's credibility, the error is not harmless; and because this was "essentially a 'he said, she said'" case wherein credibility was paramount, the error "all but destroyed his defense."

The State responds that the question was admissible for several reasons. First, the State argues that the question was proper under Rule 5-613(a), which allowed the State to impeach Dame with "his prior inconsistent statement"—"his statement in the text message," which suggested that Dame had a sexual relationship with V.M., contrary to his adamant denials to having a sexual relationship with V. M. on direct examination. Had

Dame denied that he had ever texted V.M. for a quickie, the prosecutor would have been permitted but not required to provide extrinsic evidence through V.M.'s testimony.

Second, the State argues that the prosecutor was entitled to attempt to authenticate Dame's statement under Md. Rule 5-803(a)(1) as a statement by a party opponent. If Dame denied making the statement and the prosecutor failed to provide extrinsic evidence, then State contends, Dame could have requested that the question be stricken from the record and the jury given a curative instruction.

Lastly, the State distinguishes the instant case from *Walker* and *Elmer* because, here, the prosecutor had extrinsic evidence—independent from the inadmissible text-message report—to prove that Dame texted V.M. for "a quickie," and because Dame's affirmative answer to the question negated the need for extrinsic proof. Furthermore, the State avers that the "question asking Dame if he had ever sent V.M. a text message asking her for a 'quickie' did not put before the jury inadmissible hearsay because the statement was not offered for the truth of the matter asserted." We agree with these last contentions. As we explain further below, we conclude the prosecutor did not ask a question that could not be proven by admissible evidence because, even if Dame had not testified that he sent V.M. the text, V.M. could have testified that she received a text from Dame asking for a quickie.

Standard of Review

When an accused testifies on a non-preliminary matter, the State may cross-examine him or her "on any matter relevant to an issue in the action." Md. Rule 5-611(b)(2). The trial court may, however, restrict a party's right to cross-examine in certain circumstances. *Pantazes v. State*, 376 Md. 661, 680 (2003). As "[t]he scope of cross-examination lies

within the sound discretion of the trial court[,]" we review such decisions for an abuse of discretion. *Id.* at 681. Whether there has been an abuse of discretion depends upon the exigencies of the particular case. *Id*. at 681. A trial court judge has abused his or her discretion when "no reasonable person would take the view adopted by the [trial] court," when the court acts "without reference to any guiding rules or principles[,]" "where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court," or "when the ruling is violative of fact and logic." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (internal citations and quotations omitted).

Other Extrinsic Evidence

Initially we observe that Appellant's argument relies heavily on the mistaken presumption that because the person who downloaded the text messages from Dame's phone was not available to testify at trial, the text messages were inadmissible. However, Dame's text messages could have been admitted into evidence through the testimony of a witness with knowledge under Rule 901(b)(1). *See Donati v. State*, 215 Md. App. 686, 712 (2014). In this case, Dame's admission obviated the need for the State to offer further extrinsic proof that he sent the text message to V.M.[1]

[1] As the State correctly points out, the question posed by the prosecutor in this case, "And did you ever text her for a quickie?" was not seeking to elicit a statement offered for the truth of the matter asserted. Therefore, Md. Rule 5-803(a)(1) (statement by a party opponent) is not particularly relevant to our analysis. And, although we agree with the State that use of a statement for impeachment purposes is not hearsay, "since only the fact that the statement was made is being offered, not the truth of the statement[]," *Devincentz v. State*, 460 Md. 518, 555 (2018), the question in this case operated to confirm or deny (continued)

Even if Dame had denied sending the text, consistent with Rule 5-901(b)(1), the prosecutor could have supported the factual predicate in his question through at least one clear source of extrinsic proof: the testimony of V.M. The prosecutor made this point to the trial court in response to Dame's objection:

> I'm certainly allowed to ask him the question if he ever tried to ask his daughter for a quickie. *If he says, no, at least I can try to do it through him*. Still allowed to ask him. *Your daughter told me this*; I have information from her and I have a copy of it.

(Emphasis added).

We disagree with Dame's supposition that the question contained a factual predicate that was not provable apart from the text message report. Clearly, Dame could admit that he sent the text, as he did in this case. And, like in *Donati*, in which police officers were permitted to confirm emails they exchanged with the appellant, V.M. could have testified, consistent with Rule 5-901(b)(1), that she had received a text from Dame requesting a quickie. *See* 215 Md. App. at 712-13. Additionally, other circumstantial evidence in this case supported asking the question, including that V.M. had testified that she received numerous texts from Dame soliciting sex; I.D.'s testimony that Dame texted V.M., and Dame's testimony that he texted V.M. "often." *See Dickens v. State*, 175 Md.

whether Dame undertook a certain action. *Cf. Garner v. State*, 414 Md. 372, 388 (2010) (holding that caller's request, "can I get a 40," made by an unnamed caller to defendant's cell phone and intercepted by a police officer did not constitute inadmissible hearsay evidence because "the rule against hearsay does not operate to exclude evidence of the 'verbal act' that established a consequential fact: Petitioner was in possession of a telephone called by a person who requested to purchase cocaine.").

App. 231, 238-39 (2007). This extrinsic proof was more than sufficient to support the prosecutor's question.

Dame's reliance on *Elmer* and *Walker* is misplaced. In *Elmer*, the Court of Appeals dealt with the admissibility of an out-of-court statement that a co-defendant witness made to his counsel, who in turn relayed the statement to the State during a plea settlement conference.[2] 353 Md. 1, 4-9 (1999). Specifically, the prosecutor attempted, during cross-examination, to elicit an affirmative response as to whether the co-defendant had made certain incriminating statements about the identity of the person who had pulled the trigger of a gun fired outside of a car. *Id.* at 5. The prosecutor asked the witness:

> Mr. Brown, did you ever make the statement . . . that at that point in time Allen Elmer put that gun out the window, pulled the trigger, the gun boomed, and the first thing you said to him is what the F did you do? Did you ever make that statement?

Id. Defense counsel objected several times, stating "I want to formally object for the record that Your Honor permitted the state's attorney to ask questions about plea negotiations." *Id.* 6-8. The co-defendant denied making the statement. *Id*. at 7-8. The prosecutor had no competent evidence to prove that the co-defendant made the statement, but nevertheless continued to question the co-defendant in such a way as might mislead the jury into treating the question as actual evidence—conveying to the jury the impression that the prosecutor had personal knowledge that the co-defendant stated that Elmer had fired the gun. *Id*. at 9. The Court of Appeals held that the prosecutor's inquiry was "highly

[2] Statements made during plea negotiations are inadmissible against the defendant who took part in those negotiations under Maryland Rule 5-410(4). *See Elmer*, 353 Md. at 10.

prejudicial and inadmissible," noting that a prosecutor may not ask questions that suggest the existence of facts he or she knows cannot be proven or when there is no good faith basis for the factual predicate implied in the question. *Id*. at 14-15. *See also Farewell v. State*, 150 Md. App. 540, 579 (2003) (holding, *inter alia*, that the prosecutorial error of using inadmissible evidence under the pretext of refreshing a witness's recollection will usually require a new trial).

Similarly, in *Walker*, the Court of Appeals considered the admissibility of a witness's out of court statement. 373 Md. at 392. The state attempted to impeach its own recanting witness with a prior inconsistent statement made to the prosecutor prior to trial. *Id.* The statement was inadmissible because it was not signed or otherwise adopted by the witness. *Id.* at 368. The state nevertheless attempted to impeach the witness with his prior statement, asking questions such as "[y]ou don't recall telling me that?" and making statements such as "[t]hat is what you told me Friday." *Id.* at 372. The Court of Appeals held that, as in *Elmer*, the prosecutor had "created a situation where the jury was required to weigh the prosecutor's 'word' against the witness's 'word,'" thereby infringing on the defendant's right to a fair trial. *Id.* at 403. Through the improper form and content of the questions, the prosecutor unfairly misled the jury and created a situation where the prosecutor could not be cross-examined on his assertions of fact, which were not properly in evidence. *Id.*

Returning to the case at bar, we see no similarity between the prosecutor's conduct here and that of the prosecutors in *Elmer* and *Walker*. In *Elmer* and *Walker*, the prosecutors each attempted to impeach a witness with evidence to which *only the witness or counsel*

could testify. *See Elmer*, 353 Md. at 4-9 (where only defense counsel, the witness, and the prosecutor were privy to the witness's out-of-court statement made during a plea settlement conference); *see also Walker*, 373 Md. at 392 (where the witness's out-of-court written statement was unsigned or otherwise not adopted by the witness and thus inadmissible). Dame's text message about the quickie was known to the witness, the prosecutor, *and to V.M.*, who was available to testify further about the texts she received from Dame. Furthermore, unlike the situation in *Elmer*, Dame could answer the question without disclosing privileged communications made by him to his attorney during plea negotiations, and, unlike the situation in *Walker*, the prosecutor did not ask a question that implied the prosecutor had personal knowledge about a fact that could only be proven if the prosecutor herself was subject to cross-examination.

We discern no error or abuse of discretion in the trial court's decision to allow the question.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED; APPELLANT TO PAY COSTS.