Circuit Court for Dorchester County
Case No. C-09-CR-17-000004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1734

September Term, 2017

TIMOTHY SCOTT MOXEY

v.

STATE OF MARYLAND

Meredith,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 11, 2018

On June 26, 2017, at a bench trial in the Circuit Court for Dorchester County, Timothy Moxey, appellant, was found guilty of sexual abuse of a minor and sex abuse of a minor as a continuing course of conduct. On October 2, 2017, the trial court sentenced Moxey to twenty-five years' imprisonment with all but fourteen years suspended for sexual abuse of a minor, and thirty years' imprisonment with all but fourteen years suspended, to be served consecutively, for the continuing course of conduct charge.

QUESTIONS PRESENTED

Moxey timely appealed to this Court, and presents the following questions for our review:

1. Was the lower court's jury waiver colloquy constitutionally inadequate and thus, Mr. Moxey's waiver was not made knowingly?

2. Did the trial court err in allowing the improper testimony of Daniel Mills?

3. Did the trial court err in allowing the improper testimony of [C., Mr. Moxey's daughter-in-law]?

For the reasons stated herein, we shall affirm the judgments of the Circuit Court for Dorchester County.

FACTS AND PROCEDURAL BACKGROUND

Timothy Moxey fathered three children with Tammy S., but the two were never married. Moxey married another woman in March of 2004, and thereafter lived with his wife and their children.

There was evidence at trial of the following circumstances. One of the children Moxey fathered with Tammy was a daughter whom we shall refer to as "H." H. was born in 2000. Moxey's children with Tammy S., including H., stayed with Moxey and

his wife every other weekend beginning around 2006. Moxey began "grooming" his daughter H. sometime before 2010 by gaining her trust in order to sexually abuse her and maintain secrecy. After his wife's death on May 25, 2010, Moxey began sexually abusing his daughter H. Over the next year, Moxey abused H. approximately ten times while she was at his house.

At Moxey's trial, after hearing testimony from multiple witnesses, the court found Moxey guilty on all counts based largely on the testimony of the victim. The trial judge explained his findings as follows:

> And when you strip everything away, this case is [H.] She really, out of everyone I've heard from today, is the only truly unbiased person. Oddly, other than the charges, she has no skin in the game. She's a victim. And she bravely came forward and gave her story. And there's nothing nefarious about it. I believe that she told us what happened, and I believe beyond a reasonable doubt that it happened as she stated.
>
> * * *
>
> [E]lements that the Court has to consider regarding [H.'s] credibility include the fact that she was not anxious to disclose, and disclosure may never have come were it not for the consumption of alcohol last fall.
>
> As I stated, according to Pam Schulte [an expert in child abuse], a delayed disclosure is the norm . . . .
>
> * * *
>
> Another factor that leads me to believe [H.] is credible is her unwillingness to embellish the story. The testimony she gave today was consistent with the testimony, or the statement given to Danielle Collins, the social worker. And Ms. Collins' effort was not smooth, not even, but it was persistent. And I felt when I was watching that video as if she was trying to pull more from [H.], she wanted more facts, more types of abuse, and things such as that. And it would have been easy for [H.] to play along with that. But she didn't. She stated what happened and she stuck with that and was consistent.

> Another important aspect or element for the Court is, and I've racked my brain with this, but I simply find no motive for [H.] to lie. None . . . .
>
> * * *
>
> And we also look at [H.'s] life in the last three or four years, and generally she's had a reclusive life. She's been home-schooled. And that's her preference. She stopped going to her dad's. I looked back through the testimony, and she said that she pretty much stopped going to her dad's about the time she was 11, which would have been 2011, which would have been about a year after these events took place . . . .

Moxey timely moved for a new trial. The trial judge denied the motion and re-emphasized, as he had in his initial ruling, that his finding was based on H.'s credibility: "I, again, stated that the basis of my finding was overwhelmingly the credibility of [the victim's] testimony." Moxey filed a timely notice of appeal.

DISCUSSION

I.

Preservation of Alleged Violation under Rule 4-246(b)[1]

Moxey asserts that the colloquy about waiver of a jury was insufficient because he was not instructed (1) that he was presumed innocent and (2) that he would have to be

[1] Maryland Rule 4-246(b) states the procedure that must be followed for a court to accept a waiver of a defendant's right to a jury trial:

> **(b) Procedure for acceptance of waiver.** A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.

found guilty beyond a reasonable doubt. He argues that, because the colloquy on the record did not address these two points, the court deprived him of his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments. Moxey contends that, despite his failure to raise the issue at trial, this Court should exercise its discretionary authority under Maryland Rule 8-131(a) and review the merits of this claim.

During a pre-trial hearing, the court engaged Moxey in the following colloquy regarding the waiver of his right to be tried by a jury:

> THE COURT: All right. So it's my understanding you wish to waive your right to a jury trial. Were you here when I did the waivers before?
>
> [MOXEY]: Yes, sir.
>
> THE COURT: So you understand that you have a right to a jury trial, a trial to have twelve individuals selected randomly, individuals who are adult citizens of Dorchester County, to hear your case. We go through a process to determine which of those individuals are seated to be your jury, but once they are seated, the jury, all twelve jurors, have to agree upon their verdict. A verdict of not guilty has to be unanimous, a verdict of guilty would have to be unanimous in order to be accepted by the Court.
>
> The jurors are the triers of fact. They determine what facts they find and believe. And then what happens is the jury applies the facts as they find the facts to the law as the judge would instruct.
>
> So it's sort of a bifurcated process. They're the factfinders. The judge is the person that tells them what law applies.
>
> When you waive your right to a jury trial, the judge becomes both the factfinder and applies the law. You go from a group of twelve people who would decide the facts to one person that would decide the facts.
>
> So you have a right to a jury trial until you waive that right, and I've got to make sure that you've not been coerced in any way and you're doing this with your eyes wide open.

[Your defense counsel] represents that the two of you talked about this, and did you in fact have discussions about what, strategic discussions about a jury trial?

[MOXEY]: Yes, sir.

THE COURT: And based on those discussions you believe that you wish to have a bench trial; is that correct?

[MOXEY]: Yes, sir.

THE COURT: Has anybody threatened you to get you to do this?

[MOXEY]: No, sir.

THE COURT: Has anybody promised you some sort of reward to get you to do this?

[MOXEY]: No, sir.

THE COURT: Now, you understand, because the trial involved what it did, I would have a substantial number of jurors come in here on Monday, I will not have those jurors come in, I will not call them in. So when we get here Monday, you won't be able to change your mind unless I have really good evidence that somebody pressured you to do that. Do you understand that?

[MOXEY]: Yes, sir.

THE COURT: Do you have any questions you want to ask [your attorney] or me about that?

[MOXEY]: No, sir.

THE COURT: Okay. [Defense counsel], I know you've talked with your client. Do you believe that he has knowingly, intelligently, and voluntarily waived his right to trial by jury?

[DEFENSE COUNSEL]: I do, Your Honor.

THE COURT: Okay. And the Court makes that same finding.

Moxey did not raise any objection at that time regarding the court's finding that he had waived his right to be tried by a jury. The State asserts that he did not preserve his right to argue on appeal the alleged Rule 4-246(b) violation. We agree that this issue was not preserved.

To "preserve for appellate review a claim of non-compliance with Maryland Rule 4-246(b), the defense is required to object at the time of the waiver inquiry." *Spence v. State*, 444 Md. 1, 14 (2015) (citing *Nalls v. State*, 437 Md. 674, 693-94 (2014), and *Szwed v. State*, 438 Md. 1, 5 (2014)). If a defendant makes "no objection below to the waiver procedure, to its content, or to the trial court's announcement as to the 'knowingly and intelligently' made waiver of his right to a jury trial," the defendant's "challenge to the effectiveness of his waiver is not preserved for our review and is not properly before this Court." *Meredith v. State*, 217 Md. App. 669, 674-75 (2014). By not objecting to the jury waiver colloquy in the circuit court, Moxey failed to preserve the issue for our review, and it is not properly before this Court.

Rule 8-131(a) provides that, although we will "[o]rdinarily" not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court," we have discretion to address an unpreserved issue "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." In our view, it is not necessary or desirable that we provide further guidance to the trial court on this issue, and we decline to exercise our discretion to address this unpreserved issue.

II.

Moxey asserts that three errors were committed by the trial court relative to the testimony of Daniel Mills.

A. Relevance of Daniel Mills's testimony that he "felt that the girls were fearful when they were around Mr. Moxey."

Daniel Mills was the father of Moxey's wife. At trial, Mills was called as a witness for the defense. On cross-examination he testified, over objection, that Moxey's daughters "were fearful" when they were around Moxey. Moxey asserts that the court erred in overruling his general objection to that testimony.

Reviewing a trial court's decision to admit evidence over a timely objection requires a two-step analysis. *Smith v. State*, 218 Md App. 689, 704 (2014). First, we must consider *de novo* whether the evidence is legally relevant. *State v. Simms*, 420 Md. 705, 725 (2011). If the evidence is relevant, we move on to the second step and review for abuse of discretion the "trial judge's discretionary weighing" of the evidence's probative value compared to its prejudicial weight. *Simms*, 420 Md. at 725.

At trial, Mills testified to the following:

> I noticed several oddities from time to time. I feel that the [S.] children . . . were not treated correctly, punished, the older two boys they could come and go as they pleased and do anything they wanted. I felt that the girls were fearful when . . . [(objection from Moxey, overruled)] they were around Mr. Moxey.

Moxey alleges, without elaboration, that this statement was "neither material nor probative of anything at all."

The State argues that Mills's perception of the girls was relevant to the credibility of the victim's testimony. The State notes that Moxey's theory of defense was that the victim had recently fabricated her story at the behest of her mother. Daniel Mills's testimony would tend to refute that theory, and would provide a reason for the victim waiting five years to come forward about the abuse: she was fearful of retaliation from Moxey if she told anyone about the abuse. This was consistent with testimony from Pam Schulte (an expert on child abuse) that victims sometimes delay reporting the abuse because they are fearful. Schulte testified as follows:

> [THE STATE]: Why might a child delay disclosure?
>
> [PAM SCHULTE]: Well, fear, shame, guilt. The fear is pretty complicated, depending on the age that the abuse started, how the child is processing that, the younger the child is the more difficult it is for them to make sense and kind of cope in their minds with it. So it's fear of the adult. . . .
>
> * * *
>
> . . . Again, depending how the parent has kept this a secret between them, if it's some kind of threat they're not going to do anything different. And if no one believes them and they have to keep going there, what will that parent do. Will things be worse[?] Will they get in trouble[?]

We agree with the State that Daniel Mills's testimony is legally relevant to the issue of H.'s delay in coming forward. *See* Maryland Rule 5-401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")

And there was no argument made at trial that the evidence should be excluded under Maryland Rule 5-403. In any event, with respect to prejudice, we "apply the more deferential abuse of discretion standard," *J. L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002), and determine whether the trial court abused its discretion in failing to rule, under Rule 5-403, the evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Parker v. State*, 408 Md. 428, 437 (2009) (citations omitted). Moxey does not explain how the court abused its discretion, but merely makes the bald assertion that it did. In our view, the trial court did not abuse its discretion in allowing Daniel Mills's testimony on this point.

B. Whether Daniel Mills's testimony that the girls were "fearful when they were around Mr. Moxey" was an inadmissible opinion.

Moxey next urges this Court to find that Mills's testimony that the girls were "fearful" was an inadmissible lay witness opinion. Maryland Rule 5-701 addresses the admissibility of lay opinion testimony:

> If the witness is not testifying as an expert, **the witness's testimony in the form of opinions** or inferences **is limited to those opinions or inferences** which are **(1)** rationally **based on the perception of the witness** and **(2) helpful to** a clear understanding of the witness's testimony or **the determination of a fact in issue.**

(Emphasis added.)

"Often the line separating fact from opinion is blurred by the language the witness uses to describe the relevant event," JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK 291 (4th ed. 2010), but, generally, "the decision to admit lay opinion

testimony lies within the sound discretion of the trial court." *Thomas v. State*, 183 Md. App. 152, 174 (2008), *aff'd*, 413 Md. 247 (2010).

Moxey alleges that Mills's statement was not rationally related to his own observations, but rather that he was testifying as to "the state of mind of the girls." Moxey analogizes this statement to the inadmissible statement at issue in *Bell v. State*, 114 Md. App. 480 (1997). In *Bell*, the defendant was charged with murder, and defended on the grounds of self-defense. 114 Md. App. at 483. Two witnesses testified "to the central issue concerning appellant's state of mind," *id.* at 509, that Bell felt that he was in imminent danger of serious bodily harm or death. *Id.* at 507.

The facts of *Bell* are inapposite to the case at hand. Mills was not testifying on the ultimate legal issue in this case, such as whether any abuse occurred, but rather was expressing his own opinion of the girls' demeanor based on his personal observations made during his time living with Moxey and his family. Mills based his opinion on his observations of the girls' facial expressions, and things Moxey said to them, such as Moxey's demeaning comments about the girls' diet and appearance. Having lived with the family for about three months, Mills's opinion was "rationally based" on his own perceptions. Rule 5-701.

And, even if Mills's testimony was an opinion regarding the girls' state of mind, it was properly admitted lay witness opinion testimony. Non-expert "[w]itnesses may testify that a person seemed to be frightened . . . ." *State v. Conn*, 286 Md. 406, 426 (1979) (quoting 31 Am. Jur. 2d Expert and Opinion Evidence § 161 (1967) (internal quotation marks omitted). The Court of Appeals held in *Conn*: "[A] lay witness may

describe what he has observed which is relevant to the issues then on trial before the court and he may state what conclusions he has drawn based upon those observations if they have been conducted over a sufficient period of time to permit his reaching a conclusion." *Id.* at 428. Accordingly, the trial court did not abuse its discretion in admitting Mills's opinion testimony that the girls were fearful around Moxey.

C. Moxey failed to preserve for appellate review the trial court's allegedly improper admission of Daniel Mills's testimony regarding his observations at the pool party in 2010.

Moxey's third argument relative to Mills's testimony relates to Mills's description of an incident he observed at a pool party. At trial, on cross-examination, Daniel Mills's testimony proceeded as follows:

> [THE STATE]: What did you notice at the pool party?
>
> [MOXEY'S COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [THE STATE]: You can answer.
>
> [DANIEL MILLS]: The most unusual thing I, or the thing that I observed, and not just me, several, that there were maybe a dozen 11-year-old girls in the pool, the only adult that was in the pool was Mr. Moxey. And he was playing with the girls, picking them up, like, body slamming them; but as he picked them up he'd place his hand over their vagina. And I thought that was just inappropriate.
>
> And it was more than one girl.
>
> [THE STATE]: Do you know if one of – did [the victim] attend that birthday party? Do you know?
>
> [DANIEL MILLS]: I don't believe so.

> [THE STATE]: Did you ever hear this defendant speak ill of [H.'s mother] in front of the girls?
>
> [DANIEL MILLS]: I'm pretty sure so.
>
> [THE STATE]: That's all I have. Thank you.
>
> THE COURT: All right. Any redirect?
>
> REDIRECT EXAMINATION
>
> [DEFENSE COUNSEL]: Sir, did you ever talk to anybody about this pool party, your concerns?
>
> [DANIEL MILLS]: It just shocked me. I, I just thought it was inappropriate. Other than maybe a close family member, no, I didn't.
>
> [DEFENSE COUNSEL]: Okay. []

As the excerpt above reflects, Moxey did not object when Mills testified about Moxey's inappropriate conduct at the pool party. Moxey objected only to the State's unobjectionable question, "What did you notice at the pool party?" The objection to that question was properly overruled; the trial court had no indication that the answer would mention anything inappropriate. And, after Mills stated that Moxey touched the swimmers' vaginas, there was no objection and no motion to strike.

"[A]n objection must be made when the question is asked or, *if the answer is objectionable, then at that time by motion to strike*." *Ware v. State*, 170 Md. App. 1, 19 (2006) (emphasis added). The purpose of the contemporaneous objection requirement is two-fold:

> (a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the

> trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

Maryland State Bd. of Elections v. Libertarian Party of Maryland, 426 Md. 488, 517 (2012) (citations omitted).

And two rules specifically require an objection to evidence as soon as potential grounds for objection are known, or else any objection is deemed waived. *See* Maryland Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."); Maryland Rule 5-103(a)(1) ("Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record.").

Because Moxey neither objected nor moved to strike after Daniel Mills testified, Moxey "cannot now raise such objections on appeal." *Breakfield v. State*, 195 Md. App. 377, 390 (2010) (citation omitted).

III.

Moxey contends that the State, on cross-examination of Moxey's daughter-in-law, C., exceeded the scope of direct examination and elicited improper testimony. Maryland Rule 5-611(b)(1) addresses the scope of cross-examination as follows:

> **(b) Scope of Cross-Examination.**
> (1) Except as provided in subsection (b)(2), cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Except for the cross-examination of an accused who testifies on a preliminary matter**, the court may, in the**

> **exercise of discretion, permit inquiry into additional matters as if on direct examination.**

(Emphasis added.) "Managing the scope of cross-examination is a matter that falls within the sound discretion of the trial court." *Simmons v. State*, 392 Md. 279, 296 (2006).

On direct examination, Moxey questioned C. about the fact that she did not want to come back to Maryland from California to testify at trial.

> [DEFENSE COUNSEL]: And did you want to come back here today?
>
> [C.]: No, absolutely not.

On cross-examination, the State sought to follow up on why C. did not want to testify at trial by asking her the following questions:

> [THE STATE]: Let me ask you this first. Why didn't you want to be here today?
>
> [C.]: It's a tough situation, you know, my husband is involved, my other family is involved and . . . I just didn't want to be here.
>
> [THE STATE]: Not a good place to be?
>
> [C.]: Right.
>
> [THE STATE]: During the year and a half that you lived with the Defendant, was there a time that you felt uncomfortable around him?
>
> [C.]: At one point, yes.
>
> [THE STATE]: Can you tell the Court about that?
>
> [C.]: So it was –
>
> [DEFENSE COUNSEL]: Objection. Beyond the scope, Your Honor.
>
> [THE COURT]: Overruled.

> [THE STATE]: You can answer.
>
> [C.]: So one morning I was in bed and I just woke up, and he came in the room with the lights off and sat on the bed. And I didn't feel comfortable with that.
>
> * * *
>
> [C]: I didn't feel comfortable, I didn't want to make him upset or make any family problems or . . . you know, I just didn't, it was uncomfortable, I didn't see it as a big deal at the time.

In our view, the State's questions reasonably related to testimony covered during C.'s direct examination about not wanting to come back to Maryland to testify at trial, and the State's question that drew the objection was within the scope of a matter addressed during direct examination.

But, even if the question had been beyond the scope of topics covered by Moxey on direct, Maryland Rule 5-611(b)(1) expressly provides that a trial court may "permit inquiry into additional matters as if on direct examination." Consequently, even if the questions had been beyond the scope of direct examination, it would not have been an abuse of discretion for the court to permit the questions posed by the State.

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