UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 487

September Term, 2015

FRANCIS MADIKAEGBU

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 22, 2016

In the Circuit Court for Prince George's County, Francis Madikaegbu, the appellant, was indicted for sexual abuse of a minor and related offenses. After a jury convicted him of third-degree sexual offense, the court imposed a sentence of ten years' incarceration, with all but seven years suspended. The appellant timely appealed and presents one question for review:

> Did the trial court err in precluding the defense from adducing impeachment testimony from Edwina Sheriff?

For the following reasons, we shall affirm the judgment.

FACTS AND PROCEEDINGS

The victim, G.N., was nine-years old at the time of trial, in January 2015. She testified that, in September 2012, when she was seven, she was living in a house in Lanham with her parents, brothers, grandparents, aunt and uncle, and cousins. The appellant and his parents lived in the basement of the house. Even though they were not related, the appellant was "like an uncle," and G.N. used to call him "Uncle Francis." According to G.N., the appellant had free reign of the house and often played with her and her brothers. G.N. saw the appellant "sometimes a lot," and sometimes once a week.

On a date in October 2012, G.N. and one of her brothers went downstairs to the appellant's room and watched "Sleeping Beauty" on his laptop computer with him. During the movie, G.N.'s brother fell asleep and, while he was sleeping, the appellant "licked" G.N.'s neck. According to G.N., "[h]e said he wanted to play and he licked my neck." G.N. testified that, after he licked her, "[h]e touched me inappropriately." Asked to explain, G.N. said, "[h]e touched me around the private area." Shown a drawing of a girl,

G.N. circled the vaginal area to demonstrate. G.N. woke up her brother and they left the appellant's bedroom and went back upstairs. G.N. did not tell anyone what had happened because she "was scared that they would be mad" at her.

G.N. further testified that in December 2012, her mother, Ms. N., asked the appellant to come upstairs to watch the children while she and G.N.'s grandmother went to the store. (G.N.'s father was sleeping in his bedroom.) While watching a movie in an upstairs room, G.N. fell asleep on a bed. The appellant entered the room and started touching her on "the private area," over her clothing. He then "put his finger under [her] pants" and "[u]nder [her] underwear." G.N. asked the appellant what he was doing and he replied that he was "just playing." G.N. testified that the appellant "put his finger in his mouth," and then "touched me inappropriately" in her "private area." When asked whether the appellant had touched "on it or inside of it," G.N. replied, "[o]n it."

G.N. did not tell anyone about the incident that night. The next day, she told her friend S.D. what had happened. At S.D.'s urging, G.N. told her mother and the police. (S.D. testified and confirmed that G.N. had told her that the appellant had "licked his finger and put it in her private part.")

The following transpired during defense counsel's cross-examination of G.N.:

> Q. I know this was a long time ago. If you can remember, have you talked to your mom often about what happened?
>
> A. No.
>
> Q. In the past two years have you discussed with her sometimes about what happened back then?
>
> A. No.

Q. Back when it happened, at some point you told her what happened. Not just [S.D.], but you told her yourself?

A. Yes.

Q. You remember telling her back then what happened?

A. Yes.

Q. Did you have more conversations as time went on about what happened that day?

A. No.

Q. No more conversation.

A. Yes.

Q. So your mom hasn't gone over your story with you at all about what happened?

A. Yes.

Q. She has?

A. Uh-uh.

Q. So you have not spoken to her about it at all in the two years?

A. Yes.

Q. Yes you have or –

A. No.[1]

[1] G.N. testified that she did not tell her father about the incident because he "traveled." Her mother told her father about it.

Ms. N. testified on direct examination that the appellant and his parents lived in the basement of her house in Lanham, and the appellant would play with her children from time to time. Sometimes the children would go downstairs to play or watch movies in the appellant's bedroom. The children regarded the appellant as an uncle. In December 2012, G.N. told her that the appellant had "put his hand in her private area and licked her on the neck." G.N. said there were a total of two incidents involving the appellant. Ms. N. testified that she asked G.N. "over and over again and she kept saying the same story. That's when I called the police."

On cross-examination, Ms. N. agreed that she was not friendly with the appellant's mother, but that the appellant "felt like a younger brother" to her. Ms. N. denied asking the appellant to move out of the house before G.N. made the allegations against him. She testified, on the contrary, that the appellant told her that he was going to move out. He gave notice either the "same day or the day before" G.N. told her about the abuse. She acknowledged that she would sometimes go to the basement to do laundry and would talk to the appellant. She denied attempting to have a sexual relationship with him.

Ms. N. agreed that she had spoken to G.N. about her upcoming testimony, but said it was "[n]ot much" and that "I don't like to talk to her. I don't talk about it." She confirmed that she had had G.N. repeat to her the story about what the appellant had done but maintained that she did so to be "sure" before contacting the police. She denied telling G.N. what to say:

> Q. Were there times after that did you talk to her about what her story was?

A. No.

Q. Not at all?

A. She could remember everything so I didn't have to tell her what the story was. The way she narrated the story to me doesn't look like she didn't know what she was saying. I didn't have to tell her all this, or talk to her about the story. The times I repeated the story with [G.N.] was because I want to call the police. I wanted to be sure. I didn't want to call the police on something that was wrong.

* * *

I don't talk to her about the story before she go anywhere. She know her story, I don't have to talk to her about it. Wherever I go just be honest, just say the truth. If it is something that happened she could always remember. I don't have to tell her this is what you have to say. She already know what she has to say.

Also on cross-examination, Ms. N. denied knowing a woman named Edwina Sheriff:

Q. Let me ask a question. Do you know Edwina Sheriff?

A. Say that again.

Q. Do you know Edwina Sheriff?

A. The sheriff?

Q. Edwina?

A. Who is Edwina?

Q. You don't know Edwina?

A. Edwina? Uh-uh.

Q. She used to work with you. Your testimony is you don't know her and you didn't talk to her about your daughter's testimony?

A. I talked to – I talked to a sheriff when we went to the station.

Q. The last name is Sheriff. The first name is Edwina.

A. I have talked to one sheriff before.

Q. The question is a woman named Edwina, she used to keep a child at your house. You do not know her?

A. Edwina?

Q. Is your testimony you don't know who she is?

A. Edwina? They used to keep a child at my house? Who is Edwina? No, I don't remember Edwina. Maybe she has another name. Edwina?

Ms. N. denied asking the appellant and his mother to move back in to her house in 2013, after the incident with G.N. She testified, "[M]y God. Why would I offer someone who touched my daughter?" and "That's insane. No. Never. After that incident I didn't talk to [the appellant], I haven't talked to the mother."

The defense called Edwina Sheriff as a witness. Ms. Sheriff testified that in 2012, she and Ms. N. had worked at the same nursing company in Washington, D.C. She clarified that she and Ms. N. worked for the same company, but did not work together. She met Ms. N. one day when they were picking up their paychecks. Ms. N. and Ms. Sheriff talked, and Ms. N. said her mother-in-law ran an in-home daycare at Ms. N.'s house, and they exchanged telephone numbers. Ms. Sheriff took her son to that daycare for a total of five days when he was four months old. She stopped taking her son there because she learned the daycare was not licensed. She did not know the appellant but had seen him in the house.

Ms. Sheriff further testified that on some unspecified occasion, she and Ms. N. were sitting on the balcony in front of the house, while G.N. was inside, when the appellant arrived home in his dark blue Honda. He was wearing an Army uniform. Ms. Sheriff assumed that the appellant was in the Army. The appellant walked quickly to the back of the house. Ms. Sheriff stated that, based on "[t]he way [Ms. N.] looked at him and the way – the hi, the way they said hi to each other, I guess something [romantic] was going on [between them]. I don't know."

In around June 2014, Ms. Sheriff ran into the appellant at a check-cashing store. She testified that she learned then that he was no longer living at Ms. N.'s house and that there was a court case pending against him. After this chance meeting, Ms. Sheriff met with the appellant's lawyer.

Defense counsel asked Ms. Sheriff, "what, if any contact you had with [Ms. N.] with or without [G.N.] present?" After Ms. Sheriff testified that G.N. was inside the house and asked defense counsel to repeat the question, counsel rephrased and asked, "What, if anything, do you remember [Ms. N.] doing or describing to you concerning the reason you are here today?" The prosecutor objected. The court called the parties to the bench, and the following ensued:

> [DEFENSE COUNSEL]: It is tricky. There is a lot of hearsay.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: I think she can get around that and describe her impressions.
>
> THE COURT: Whose impressions about what?

[DEFENSE COUNSEL]: My client's impressions of what [Ms. N.] was doing.

THE COURT: What will she say?

[DEFENSE COUNSEL]: Basically her testimony is, without using hearsay, Ms. [N.] was coaching her daughter as to what to say.

THE COURT: Based on what?

[DEFENSE COUNSEL]: Based on what? That she heard and observed things. I can get her to do this without hearsay. Granted, it's tricky. I have instructed her –

THE COURT: As I understood the testimony, you asked her what interaction did she have, or what did she observe between [G.N.] and [Ms. N.], the mother and daughter, and she said I don't know what you mean. Then ultimately she said that the daughter was in the house and mainly was just she – that is the witness and [Ms. N.] the mother.

[DEFENSE COUNSEL]: Most of her conversation was with the mother. They were friends at the time.

THE COURT: I'm not sure what it is that you are trying to elicit from this witness.

[DEFENSE COUNSEL]: That the mother – that her impressions were that the mother was manipulating the daughter as to what to say, and that she was vindictive against my client. A motive for doing so.

THE COURT: Okay.

[PROSECUTOR]: I would object to any of her talking about what the mother said. She actually – she went further and said the only time she would see [G.N.] would be hi, how are you, that's it. The child was with her friends and that she did not interact with her. What her observations were, she can't get – there is nothing.

[DEFENSE COUNSEL]: I will continue to instruct her without saying what anyone said, but what she observed.

> THE COURT: Well, as to what her impressions are, or her conclusions, or her hypothesis, that's not admissible. Her hypothesis as to what was going on is not admissible.

Defense counsel then proffered that Ms. Sheriff would testify that she had seen Ms. N. spanking G.N. "for not responding directly to her questions about how she was touched and things like that." The court agreed to hear from Ms. Sheriff, outside the presence of the jury.

After the jury was excused, and after some questioning by the court, Ms. Sheriff testified that in April 2013 she visited Ms. N. at her house and the following ensued:

> THE WITNESS: [Ms. N.] was talking to the daughter. She was telling the daughter – at first I didn't know what she was saying. She was telling the daughter when they ask you you have to say – she mentioned his name, Mr. Francis put his finger inside of you and he was trying to play with you. So you have to say Mr. Francis put his fingers inside of you. She was doing her fingers like.
>
> I sat done [sic] because I wanted to understand what she was saying. Then later on I asked her, I said, Mr. Francis, who is Mr. Francis? The guy that lives in the basement. Like I will show him because – she said her and his mother got into an altercation.
>
> THE COURT: I'm sorry, who got into an altercation?
>
> THE WITNESS: [Ms. N.] and Mr. Francis' mother, they got into an altercation. Instead of Mr. Francis supporting her, Mr. Francis supported his mother, which is obvious. I guess she is mad about that. She was like, oh, he thinks because he is in the Army he is all bad. I will destroy his career. I was like why would you do something like that? Don't you know this is America, even if you say somebody put his fingers, or tried to rape your daughter, don't you think that they will do like a medical check. If someone tries to rape your daughter, of course they will take the child to do a medical check. I know that. That is why I didn't say rape, I said his finger.
>
> I was like regardless of that I'm sure they will find out. I said if they find out that you are lying you will get in trouble.
>
> She was like they will never find out because that's why I'm teaching her this now. I really wanted the State to know what the whole outcome was, but I had to go to work that day. I just left. That was about it.

THE COURT: Does anybody have any other questions based on mine?

[PROSECUTOR]: I don't.

[DEFENSE COUNSEL]: Did she give you any other motive for why she would do that?

THE WITNESS: She just said that I guess she was trying to get with Mr. Francis and he is doing this because he is in the Army, he is being such a bossy person.

She was mad about that, and he supported his mother in the fight. It didn't make sense to me. Why would you want to do that? Just say stuff and mess up someone's career. It doesn't make sense. I didn't see him like that kind of person.

After Ms. Sheriff stepped down, the following took place at the bench:

[PROSECUTOR]: The State would be objecting. It is only hearsay. She did not watch anything, observe anything.

[DEFENSE COUNSEL]: She did watch and observe, that is what she said. She saw her doing it.

[PROSECUTOR]: She heard her saying it and that's hearsay.

[DEFENSE COUNSEL]: I understood that she said she heard it so she sat down to understand what was going on, why she would do it. Even interjected as to why you would say these things. I will show him, whatever.

THE COURT: So what is your response to her objection of her hearsay?

[DEFENSE COUNSEL]: Admittedly it is hard to get around the hearsay. I'm struggling with that.

THE COURT: Well.

[DEFENSE COUNSEL]: I can ask her not to say what anyone said, but what did you see, what did you see [Ms. N.] do.

> THE COURT: What would the answer be? The answer would be at best what she saw, without saying what she heard, would be that she saw the mother talking to the daughter, right?
>
> I will sustain the objection. There has been no explanation for why it is not hearsay. Moreover, I find that it – I find any probative value of this is far outweighed by the danger of, frankly, confusion.
>
> [DEFENSE COUNSEL]: The only thing I could offer –
>
> THE COURT: And distraction of the issues.
>
> [DEFENSE COUNSEL]: The effect on what she believes was happening was kind of shocking to Edwina, not necessarily for the truth of the matter asserted.
>
> THE COURT: Edwina's state of mind or the effect on her is not of relevance. Frankly, I don't believe that. She said she wanted to tell the State, but she let two years go by because she had to go to work. That is just my observation. It doesn't have anything to do with my ruling.
>
> My ruling is that her state of mind and the effect of anything she observed on her state of mind is not at issue in this case. So the objection is sustained.

Defense counsel then called the appellant's mother, Ifeuma Madikaegbu, to testify. Ms. Madikaegbu claimed that Ms. N. was having an affair with her fiancé. Ms. Madikaegbu testified that when she was living in the basement of Ms. N.'s house with her son, no one, including the children, would come down to their residence, and her son did not go upstairs. Ms. Madikaegbu agreed that she was traveling much of the time in 2012.

The appellant testified on his own behalf. He lived in the basement of Ms. N.'s house from approximately November 2009 until December 2012. There were a lot of children upstairs because it was used part time as a daycare center. Around September 2012, Ms. N. became "provocative" toward him and was, he thought, "trying to create an affair." He never had a sexual relationship with Ms. N. and avoided her advances. He was

"interested" in Ms. N.'s sister, who lived in the house for a short while in 2012. Ms. N. "got jealous and kicked the sister out."

After this, Ms. N. started "acting weird with" him. At some point, she accused him of taking a wallet, which led to an argument in the basement between the appellant, his mother, and Ms. N. The appellant got angry and called Ms. N. "the 'B' word and walked away and left." As a result, other arguments ensued between the appellant and Ms. N.'s husband. The appellant testified that he moved out of the house after a county inspector found mold there.

The appellant also testified that he had "zero access" to the house, other than the basement. The door from the basement to the rest of the house was childproofed from the other side, so he could not open it. He only went upstairs when invited. Ms. N. would come downstairs from time to time, however. The children would come down only "very rarely." The appellant denied that he watched over the children, testifying that "I have never, and I swear on my life, I have never babysat for them ever."

The appellant denied ever touching G.N. He testified that the "incident never took place. I have not—I have never been alone with that child."

DISCUSSION

The appellant contends the trial court erred by ruling inadmissible the proffered testimony by Edwina Sheriff that she heard Ms. N. coaching G.N. about her trial testimony. He argues that this testimony was impeachment evidence that was admissible under Rule 5-613.

The State responds that this argument is not preserved for review because it was not raised or decided below. The appellant never argued that Ms. Sheriff's proffered testimony was being offered for impeachment, even when invited by the court to argue why the proposed testimony was not hearsay. Nor did the appellant ever mention Rule 5-613. On the merits, the State responds that there was an insufficient foundation for Ms. Sheriff's proposed testimony to be admitted under Rule 5-613.

We agree with the State that the issue the appellant advances on appeal was neither raised in nor decided by the trial court, and therefore is not preserved for review. *See* Md. Rule 8-131(a). Defense counsel sought to elicit from Ms. Sheriff that, in her presence, Ms. N. instructed G.N. that she had to testify that the appellant "put his fingers inside her." The prosecutor objected on the basis of hearsay—*i.e.*, that Ms. Sheriff's testimony about the words spoken by Ms. N. to G.N. were being offered for their truth, that is, that Ms. N. in fact told G.N. how she had to testify. Defense counsel acknowledged that the proffered testimony was hearsay. Despite being given the opportunity to argue that it was not hearsay, defense counsel did not do so. Only on appeal does he argue for the first time that Ms. Sheriff's testimony was being offered as extrinsic impeachment evidence. Under the circumstances, that issue is not properly before this Court to decide.

Even if the issue were preserved, we would reject it on the merits. Rule 5-613 provides:

> (a) **Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the

> contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence of prior inconsistent statement of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

The appellant argues that he was seeking to use Ms. Sheriff's proffered testimony to impeach Ms. N.'s credibility with extrinsic evidence of a prior inconsistent statement. Specifically, through Ms. Sheriff's testimony that Ms. N. told G.N. that she had to testify that the appellant put his fingers inside her, he was attempting to impeach Ms. N.'s trial testimony that she never told G.N. what to say.

As Rule 5-613(b) makes clear, for extrinsic evidence of a prior inconsistent oral statement by a witness to be admissible, the witness must be informed of the contents of the statement and its circumstances, including to whom it was made, and must be given an opportunity to explain or deny it. That did not happen here. On cross-examination of Ms. N., defense counsel made no specific reference to her supposed prior oral statement to Ms. Sheriff instructing G.N. how to testify against the appellant, and of course, not having given her the information, did not give her the opportunity to explain or deny it. Accordingly, the alleged prior oral statement by Ms. N. was not admissible through Ms. Sheriff.[2]

[2] We note that defense counsel did not ask G.N. about such a statement by her mother either.

As the State acknowledges, Rule 5-613(b) provides for an exception from the foundational requirements when it is in the "interests of justice." In *Fontaine v. State*, 134 Md. App. 275 (2000), we affirmed a trial court's ruling denying defense counsel's request to introduce extrinsic impeachment evidence "in the interests of justice" because an adequate foundation had not been laid. We recognized that the Reporter's Notes for Rule 5-613 seemed to suggest that the "interests of justice" provision may apply "where the statement was by a hearsay declarant who did not testify [*see* Rule 5-806], or 'where the statement was not discovered until after the witness had become unavailable.'" *Id.* at 291 (alteration in original). We noted that one treatise commenting on analogous Federal Rule 613 suggested "that the foundational requirements may be dispensed with when the party does not learn of the prior inconsistent statement until the witness leaves the courthouse and is no longer under the court's jurisdiction." *Id.* (Citing 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 613.05[4][a] (Joseph N. McLaughlin ed., 2d ed. 1997)). We explained:

> Weinstein's commentary implies, and the orderly administration of justice requires, an obligation of reasonable diligence on the part of counsel to be aware of a witness's prior statements or testimony when that witness takes the stand. Weinstein cautions that judges should use the "interests of justice" provision to admit evidence sparingly and should not consider dispensing with the foundational requirements *unless counsel did not know of the statement prior to the witness's testimony and the witness was unavailable to be recalled*.

Id. at 292 (emphasis added) (citation omitted).

The extrinsic evidence offered to impeach Ms. N., through the testimony of Ms. Sheriff, was not admissible under the "interests of justice" exception to the foundational

requirements of Rule 5-613(b). Defense counsel knew about the testimony he expected Ms. Sheriff to give before trial, and before he cross-examined Ms. N. (and G.N.); and he easily could have satisfied (or attempted to satisfy) the foundational requirements when questioning them. In that circumstance, the "interests of justice" exception did not apply.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.