UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2616

September Term, 2015

ANDRE LEONARD BROWN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Reed,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: December 6, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a two-day trial in the Circuit Court for Prince George's County, appellant Andre Brown was convicted of one count of sexual abuse of a minor, for which he received ten years imprisonment. Appellant presents two questions on appeal:

1. Was there sufficient evidence presented that the alleged victim was a minor at the time of the alleged offense?

2. Did the Circuit Court err in admitting evidence on cross examination of the appellant that he had been reprimanded by the principal for "inappropriate behavior with the students" as such evidence of prior bad acts was not relevant, biased and so prejudicial as to deny the appellant a fair trial?

As to the first question, we hold that appellant did not preserve the issue of evidentiary sufficiency for appellate review; alternatively, we hold that, even if preserved, appellant's contention substantively lacks merit. As to the second question, we hold that appellant's challenge to the admission of "bad acts" evidence was not preserved. Accordingly, we shall affirm the circuit court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 2010, appellant was employed as an intensive classroom special education teacher at High Point High School in Prince George's County, Maryland. He also served as a coach for the school's football team. In May of 2014, Principal Sandra Jimenez "heard a rumor" that appellant was having an inappropriate relationship with a student, A.H.. Jimenez sought out to find a teacher with a "close relationship" with A.H. to investigate the rumor. Eventually, Troy Grant, a social studies teacher, approached A.H. and questioned her about her relationship with appellant. A.H. apparently confirmed having sexual intercourse with appellant and wrote a statement for Principal Jimenez.

Jimenez notified her supervisor and child protective services. Jimenez's supervisor interviewed appellant and the police then escorted appellant from the building. Appellant testified he was placed "on leave with pay."

On May 22, 2014, appellant was interviewed by detectives of the Prince George's County Police Department. During the interview, appellant gave a statement in which he admitted to "inappropriate activities" with a female student. On June 10, 2014, a grand jury indicted appellant for one count of sexual abuse of a minor.

At trial, A.H. testified that she had sexual intercourse with appellant on one occasion between September 23 and September 28, 2013. Specifically, she described going with appellant to the football locker room to help him set up the football field for the homecoming game. Appellant came up behind A.H. in the coaches' room, kissed her, pulled down her pants, and had sexual intercourse with her. A.H. also testified that she was 19 years old at the time of trial, and that her birth date was "12-17-95." No additional testimony or evidence of A.H.'s age was presented. At the end of the State's case, appellant moved for judgment of acquittal. The court denied the motion, finding that "the issues generated by the evidence adduced at this point are factual as opposed to legal."

Appellant's defense was based on the theory that he did not have sexual intercourse with A.H. and was never alone with her in the football locker room. Appellant testified in his own defense. During cross-examination by the State, the following colloquy occurred:

> [PROSECUTOR]: Okay. And you received a training as to sexual harassment and all of that with the students, correct?
>
> [APPELLANT]: Yes.

[PROSECUTOR]: And on numerous occasions you were reprimanded by the principal for your inappropriate behavior with the students?

[APPELLANT]: No.

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Basis?

[DEFENSE COUNSEL]: No foundation for that.

[THE COURT]: Overruled.

[PROSECUTOR]: What's your answer?

[APPELLANT]: No.

[PROSECUTOR]: Okay. You were reprimanded for taking students out during lunchtime, correct?

[APPELLANT]: I took one student football player to McDonalds.

[PROSECUTOR]: And you were reprimanded for that, correct?

[APPELLANT]: Um-hum.

[PROSECUTOR]: You were also reprimanded because there were times when you didn't show up to work and people didn't know where you were at, correct?

[APPELLANT]: It was a mistake. I was in an IEP meeting.

At the conclusion of the evidence, appellant's trial counsel renewed a motion for judgment of acquittal. The court again found "the issues that are generated by the testimony adduced to this point remain factual, as opposed to legal," and denied the motion. Appellant was found guilty of sexual abuse of a minor and sentenced to ten years imprisonment. Appellant timely appealed.

DISCUSSION

I.

Appellant contends that the evidence is insufficient to prove that A.H. was a minor at the time of the alleged crime. We hold that appellant's challenge to the sufficiency of evidence is not preserved. Maryland Rule 4-324(a) provides that, when moving for a judgment of acquittal, "[t]he defendant shall state with particularity all reasons why the motion should be granted." Compliance with the Rule is mandatory. *State v. Lyles*, 308 Md. 129, 135 (1986). In *Thomas v. State*, 128 Md. App. 274, 304 (1999), we held that a "[f]ailure to particularize a motion for judgment of acquittal waives appellate review of evidentiary sufficiency." *See also Taylor v. State*, 175 Md. App. 153, 159-60 (2007) ("When no reasons are given in support of the acquittal motion, this Court has nothing to review."); *Graves v. State*, 94 Md. App. 649, 683-85 (1993), *rev'd on other grounds*, 334 Md. 30 (1994) (holding that defendant's claim that evidence was insufficient to identify him as assailant was not preserved where identification issue was not raised in motion for acquittal); *Brooks v. State*, 68 Md. App. 604, 611 (1986) (holding that "a motion which merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with the Rule and thus does not preserve the issue of sufficiency for appellate review.").

In this case, defense counsel moved for judgment of acquittal both at the conclusion of the State's case and after the closure of the evidence. Counsel failed to articulate reasons in support of the motion on either occasion. At the conclusion of the State's case in chief,

counsel stated, "Motion for judgment of acquittal."[1] At the closure of all the evidence, defense counsel stated, "Renew my motion for judgment of acquittal." Counsel made no argument in support of either motion; significantly, counsel never mentioned the victim's age. Our decisions make clear that appellant's sufficiency of evidence argument is not preserved for appellate review.

Implicitly recognizing the obstacles to succeeding on his sufficiency claim under Rule 4-324(a), appellant argues that this Court should consider his sufficiency claim because the trial court precluded counsel from articulating reasons in support of the motion for acquittal. Appellant asserts that "before [defense counsel] could say another word (both times) the [trial] court ruled." This contention is unsupported by the record. The following colloquy occurred when appellant moved for acquittal at the end of the State's case:

> [THE COURT]: All right, state has rested its case in chief.
>
> [DEFENSE COUNSEL]: Motion for judgment of acquittal.
>
> [THE COURT]: All right, the Court believes that the issues generated by the evidence adduced at this point are factual as opposed to legal, so the motion for judgment of acquittal is denied.

When appellant moved for acquittal at the conclusion of all the evidence, the following exchange took place:

> [THE COURT]: All right, motion at the conclusion of all the evidence?
>
> [DEFENSE COUNSEL]: Renew my motion for judgment of acquittal.

[1] Even if appellant had asserted particular grounds when making this motion at the close of the State's case, by presenting evidence in his defense the motion was withdrawn. *See Steward v. State*, 218 Md. App. 550, 557 (2014).

> [THE COURT]: The Court believes that the issues that are generated by the testimony adduced to this point remain factual, as opposed to legal. Motion for judgment of acquittal is denied.

The record does not support appellant's claim that the trial judge prevented counsel from completing her argument. A motion was made and the trial court made a ruling. Appellant failed to object or protest in any manner. It is appellant's burden to make a sufficient record to permit appellate review. *See Diggs v. State*, 409 Md. 260, 294 (2009) (noting, in the context of judicial bias claims, that ordinarily the failure to object will only be excused when the judge demonstrates "repeated and egregious behavior of partiality, reflective of bias" and that in less egregious circumstances the court will not intervene).

Even if properly preserved, appellant's sufficiency argument lacks merit. Appellant contends that the evidence was legally insufficient because the only evidence of the victim's age was her uncorroborated testimony that she was born on December 17, 1995. In particular, he argues that, absent any corroborating evidence of the victim's age, a rational trier of fact could not find beyond a reasonable doubt that she was a minor when the sexual abuse occurred. Appellant fails to direct us to any law supporting his argument that the minor victim's testimony about her date of birth must be corroborated, and we are aware of none.

"[W]hen an appellate court is called upon to determine whether sufficient evidence exists to sustain a criminal conviction, it is not the function or duty of the appellate court to undertake a review of the record that would amount to . . . a retrial of the case." *State v. Albrecht*, 336 Md. 475, 478 (1994). Instead, "the duty of the appellate court is only to

determine 'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id*. at 479. "[T]o meet the test of legal sufficiency, evidence (if believed) must either show directly, or support a rational inference of, the fact to be proved." *Tasco v. State*, 223 Md. 503, 510 (1960) (internal quotation marks omitted).

In this case, A.H. testified that she was born on "12-17-95." The sexual assault occurred sometime between September 23 and September 28, 2013. A rational trier of fact could reasonably infer that A.H. was under the age of eighteen at the time of the assault. Accordingly, appellant's evidentiary sufficiency argument, even if preserved, is meritless.

II.

Appellant next contends that the trial court erred in admitting evidence that he had been reprimanded by the school principal for inappropriate behavior with other students. This "bad acts" evidence, he contends, is inadmissible under Maryland Rule 5-404(b). According to appellant, the impermissible evidence came in through the following exchange during his cross examination:

> [PROSECUTOR]: Okay. And you received a training as to sexual harassment and all of that with the students, correct?
>
> DEFENDANT]: Yes.
>
> [PROSECUTOR]: And on numerous occasions you were reprimanded by the principal for your inappropriate behavior with the students?
>
> [DEFENDANT]: No.
>
> [DEFENSE COUNSEL]: Objection.

[THE COURT]: Basis?

[DEFENSE COUNSEL]: No foundation for that.

[THE COURT]: Overruled.

The State asserts that appellant's argument that "bad acts" evidence was improperly admitted is not preserved. We agree. First, appellant answered the question prior to counsel's objection. As the Court of Appeals noted in *Bruce v. State*, 328 Md. 594 (1992):

> The Maryland Rules provide, however, that "[a]n 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…." Md. Rule 4-323(a). Therefore, "[i]f opposing counsel's question is formed improperly or calls for an inadmissible answer, counsel must object immediately. Counsel cannot wait to see whether the answer is favorable before deciding whether to object." 5 L. McLain, *Maryland Evidence* § 103.3 at 17 (1987); *Moxley v. State*, 205 Md. 507, 515, 109 A.2d 370, 373 (1954).

In *Williams v. State*, 99 Md. App. 711 (1994), *aff'd*, 344 Md. 358 (1996), we examined the following colloquy:

> [PROSECUTOR]: Did you tell the police officers that Miss Jones could vouch for your whereabouts?
>
> [APPELLANT]: No, I haven't. I told my lawyer.
>
> [PROSECUTOR]: Did you tell the State's Attorney's Office?
>
> [APPELLANT]: No.
>
> [DEFENSE COUNSEL]: Objection, Your Honor; the defendant has no necessity of talking to the police or the State.
>
> THE COURT: I realize that. The objection is overruled.

Id. at 716-17. We held that, because the objection was not immediately made, the issue was not preserved for appellate review. *Id*. at 718. Our analysis in *Williams* is instructive:

> The appellant failed to object after the first question in this regard was asked. He answered the question and the answer was in the record without objection. Even when the prosecutor asked a second question bearing on the same subject, no objection was immediately lodged and the answer came in. It was only then that the appellant objected. The appellant, however, never moved to have the answer stricken from the record. As Judge Chasanow explained for the Court of Appeals in *Bruce v State*, 328 Md. 594, 628-629, 616 A.2d 392 (1992), the preservation requirements for this sort of objection are very strict.

Id. at 717. In the present case, counsel did not object until after appellant had answered the question. Moreover, as in *Williams*, counsel never moved to have the answer stricken. We are persuaded that *Williams* is controlling; accordingly, the alleged evidentiary error is not preserved for our review.

The alleged evidentiary error is not preserved for a second, independent reason. After the trial court asked appellant's counsel to state a basis for the objection, counsel replied, "No foundation for that." Appellant now asserts that the testimony was inadmissible as evidence of prior bad acts.

Under Maryland Rule 4-323 (a), "The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." In *DeLeon v. State*, 407 Md. 16, 24-25 (2008), the Court of Appeals noted that "a party basing an appeal on a 'general' objection to admission of certain evidence, may argue *any* ground against its inadmissibility." (emphasis in original). Citing *Boyd v. State*, 399 Md. 457, 476 (2007), the *DeLeon* Court noted,

> An objection loses its status as a "general" one "where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and '*where the objector, although not requested by the court, voluntarily offers specific reasons for objection to certain evidence*[.]'"

DeLeon, 407 Md. at 25 (citations omitted) (emphasis in original).

DeLeon is controlling on this point. There, defense counsel made a foundation objection (reliability and basis of knowledge) to the State's question about him being a gang member. In this case, appellant made a foundation objection to the State's question concerning appellant's reprimands for inappropriate behavior with students. The *DeLeon* Court held that DeLeon's argument that the testimony constituted impermissible "bad character" evidence was not preserved; we likewise hold that appellant failed to preserve his objection to the admission of "bad acts" evidence.[2]

We therefore affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] Because appellant denied being reprimanded by the school principal, it is arguable whether any "bad acts" evidence was before the jury as a result of the colloquy appellant challenges on appeal.