Circuit Court for Cecil County
Case No. K-15-1678

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1297

September Term, 2016

JULIUS DEVINCENTZ, JR.

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: September 25, 2017

Julius Devincentz was charged with a number of offenses, pled not guilty and proceeded to a jury trial in the Circuit Court for Cecil County. The jury convicted him of sexual abuse of a minor and assault in the second degree. During trial, the circuit court sustained objections to statements by Mr. Devincentz's son that the victim, K.C., was untruthful and that once, during a fight with Mr. Devincentz, she said that "she could do [things] that would get [Mr. Devincentz] in trouble." Mr. Devincentz challenges these rulings, but his arguments are not preserved for appellate review.

I. BACKGROUND

In 2008, Mr. Devincentz and Yvette Devincentz met, began a romantic relationship, and eventually married. Ms. Devincentz and her two minor children, including her daughter, K, moved in with Mr. Devincentz and his three children. In April 2015, K was placed at the Maryland Salem Children's Trust residential facility.

On September 17, 2015, K told her therapist that Mr. Devincentz had sexually abused her. These allegations were reported and the Elkton Police Department began an investigation. Mr. Devincentz spoke with the police and denied the allegations.

K testified at trial that when she was seven years old, Mr. Devincentz asked her to sit on his lap while he watched pornography on a computer in the living room and touched the inside of her vagina with his finger. She described another incident that occurred two weeks later, when Mr. Devincentz lay down on a futon in the living room with her while no one was home, again inserted his finger into her vagina, then gave her five dollars so that she would not tell her mother. She testified as well that between the time when she

was ten and twelve, on four or five occasions, Mr. Devincentz offered her money to lift up her shirt, which she declined, and also grabbed and slapped her buttocks over her clothes while they both were in the kitchen.

At trial, Mr. Devincentz called his twenty-year old son, Joshua ("Son"), in his defense. Son testified that he lived in the same household, and described an argument between Mr. Devincentz and K over a cell phone. The court allowed Son to testify about K's conflicts with the people in the family, including Mr. Devincentz, but sustained the State's objection when Son stated that K had reacted to the quarrel by "screaming and saying things that she could do that would get [Mr. Devincentz] in trouble." The Court also sustained the State's objection to Son's statement that K "would not tell the truth about certain things."

The jury convicted Mr. Devincentz of sexual abuse of a child and second-degree assault, and Mr. Devincentz appeals.

II. DISCUSSION

Mr. Devincentz raises two issues on appeal.[1] *First*, he contends that the circuit court abused its discretion when it sustained the State's objection to Son's testimony that K

[1] In his brief, Mr. Devincentz phrased the Questions Presented as follows:

> 1. Did the trial court abuse its discretion in limiting appellant's examination of Joshua Devincentz, a defense character witness?
>
> 2. Did the trial court err in sustaining the State's objection after Joshua Devincentz testified that he heard [K.C.] threaten to get appellant in trouble?

would not tell the truth about certain things, which limited Son's testimony regarding his opinion of K's credibility. *Second*, he contends that the circuit court abused its discretion when it sustained the State's objection to the Son's testimony that, during an argument between K and Mr. Devincentz, K said "she could do [things] that would get [Mr. Devincentz] in trouble." The State contends that these issues were not preserved for appellate review, and we agree.

A. Mr. Devincentz Did Not Preserve His Relevance Argument Regarding Son's Testimony That K Was Untruthful.

Mr. Devincentz argues that "[r]eversal is required because: (1) the testimony is admissible under the Maryland Rules of Evidence [5-608]; and (2) the error in precluding this testimony is clearly not harmless beyond a reasonable doubt."

The State responds that this issue is not preserved for appellate review because the defense never proffered regarding the relevance of Son's testimony. The State contends as well that even if the issue was preserved, the court properly sustained the State's objection because "[Son] was expressing an opinion based on events that were at least two years in the past, and thus his opinion was not pertinent to the witness's testimony at trial." And even if the argument was preserved and the testimony was relevant character witness testimony, the State argues that alleged error was harmless because the excluded testimony would not have contributed to the verdict.

We agree with the State that Mr. Devincentz did not preserve for appellate review his contention that Son's excluded character testimony, that K "would not tell the truth about certain things," was relevant. To preserve an issue for review, the proponent must make a proffer of the substance and relevance of the evidence at issue. *Merzbacher v. State*, 346 Md. 391, 416 (1997) ("Ordinarily, a *formal proffer* of the contents and relevancy of the excluded evidence must be made in order to preserve for review the propriety of the trial court's decision to exclude the subject evidence.") (emphasis added) (citations omitted). Generally, an issue will not be reviewed "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). And with character testimony, the witness must have an adequate basis on which to form and offer his opinion about the defendant's character. MD. CODE ANN., CTS. & JUD. PRO. § 9-115 (2013 Repl. Vol.).

Mr. Devincentz's counsel sought to elicit—and indeed did elicit—Son's opinion about the victim's truthfulness. But when the State objected and the objection was sustained, the defense made no proffer regarding the relevance of or a basis for the testimony that the circuit court excluded. This is the full extent of the dialogue between the parties and the court:

> [DEFENSE COUNSEL]: I asked you a question about the cell phone situation. Without characterizing how that came up, as a result of that argument, what occurred?
>
> [SON]: She was unhappy with my father's decision on the argument. And once it was resolved by a third party she was yelling and screaming and saying things that she could do that would get him in trouble.

[STATE'S COUNSEL]: Objection.

[STATE'S COUNSEL]: Objection.

THE COURT: Sustained.

Without a proffer, the circuit court had no basis on which to rule on the "substance and relevance" of the testimony. *See Conyers v. State*, 354 Md. 132, 164 (1999). There is an exception to the principle: where the record demonstrates clearly what the testimony would have established if it had been admitted, the error can be considered preserved if "the tenor of the questions and the replies they were designed to elicit is clear[.]" *Peregoy v. Western Md. Ry. Co.*, 202 Md. 203, 209 (1953). But this exchange does not qualify because the relevance of a question about a fight over a cell phone is far from obvious in this sexual assault case, especially where the questioning was not offered to prove bias or a motive to make a false claim.

B. Mr. Devincentz Did Not Preserve His Arguments Regarding Son's Testimony That K Could "Get [Mr. Devincentz] In Trouble."

Similarly, the circuit court sustained an objection by the State after Son testified that, during an argument "over a cell phone," K reacted by "screaming and saying things that she could do that would get [Mr. Devincentz] in trouble." Mr. Devincentz contends that the circuit court abused its discretion in refusing to admit this testimony because it was relevant to show K's bias and not to prove the truth of the matter asserted. Alternatively, he argues that even if the statement is hearsay, it is directly covered by the "Then Existing

Mental, Emotional, or Physical Condition" exception to the hearsay rule set forth in Maryland Rule 5-803(b)(3).[2]

The State counters that Mr. Devincentz's arguments are not preserved for appellate review, but that even if they are, the statement is hearsay that doesn't qualify for any exception. And if the statement were to surmount those hurdles, the State argues, the circuit court properly sustained the objection because K's statement neither showed bias nor was relevant to her sexual assault allegations.

We agree that these arguments aren't preserved. Once the trial court sustained the objection, the defense, as the party offering the evidence, bore the responsibility to make a proffer explaining why, as Mr. Devincentz argues now, the statement wasn't hearsay and was relevant. *Convyers*, 354 Md. at 164. If anything, an attempt to invoke this more unusual hearsay exception requires more than the usual degree of specificity, since a court is less likely to understand that it might be at issue:

> Rule 5-803(b)(3) … is one of the more esoteric of the hearsay exceptions. We have serious doubt that a trial judge should be deemed guilty of error for not having delved *sua sponte* into its

[2] Maryland Rule 5-803(b)(3) provides:

> Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

> mysteries when counsel never argued that the objection called for anything beyond a determination of whether a declaration was or was not hearsay.

See Figgins v. Cochrane, 174 Md. App. 1, 24 (2007).

But Mr. Devincentz made no proffer. On direct examination, defense counsel inquired about K's relationship with Mr. Devincentz:

> [DEFENSE COUNSEL]: Would you describe what you mean by that?
>
> [THE SON]: [K] had a problem with her mouth. She would say things to people, about people, and then she would like to argue with you. And she would not tell the truth about certain things.
>
> [STATE'S COUNSEL]: Objection.
>
> THE COURT: I'll sustain that. But she would argue with people, right?

After the objection and ruling Mr. Devincentz proffered neither of the theories of admissibility he presses now: he never explained how the question and reply were relevant to bias, nor did he argue that the testimony falls within Rule 5-803(b)(3). And because the trial court had no opportunity to consider either of these theories of admissibility, they are not preserved for our review. Md. Rule 8-131(a).

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. APPELLANT TO PAY COSTS.