Circuit Court for Wicomico County
Case No. 22-K-16-000072

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1733

September Term, 2016

KEITH VANCE

v.

STATE OF MARYLAND

Woodward, C.J.
Graeff,
Kenney, James A. III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 25, 2017

Appellant, Keith Vance, was convicted by a jury in the Circuit Court for Wicomico County of second and third-degree sexual offenses and sexual abuse of a minor. The court imposed a sentence of forty years' imprisonment, with all but twenty-five years suspended, and with the first fifteen years to be served without parole followed by a three year term of supervised probation and lifetime registration as a Tier III sex offender.[1] Appellant presents the following questions for our review, which we have rephrased slightly:[2]

1. Did the trial court err in allowing the victim's mother to testify about the victim's report of abuse?

2. Was the evidence sufficient to sustain appellant's convictions?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

BACKGROUND

Appellant and Danny Mosley had been friends for over twenty years. Mr. Mosley's wife, Katrina Mosley, testified that between 2011 and 2013, except for a period of about three or four months, appellant lived with Mr. and Mrs. Mosley, and their four children, D.M., who, at the time of trial, was age sixteen, A.M., who was age twelve, G.H., who was

[1] The State did not seek, and the court, finding that no sentence should be imposed either because of merger or the rule of lenity, did not impose a sentence on the conviction for third-degree sex offense.

[2] Appellant phrased the questions as:

1. Was it error to admit into evidence the substance of the child's first complaint about what allegedly happened, at least, two years earlier?

2. Was the evidence sufficient to sustain [a]ppellant's convictions, beyond a reasonable doubt?

age thirteen, and A.H., who was age nine. The home was located at 8933 Elzey Church Road in Bivalve, Wicomico County, and consisted of a two-bedroom trailer and an adjacent house, which was in the process of being remodeled. In the house was a sitting room, a play room for the children, and one bedroom, but no kitchen or bathroom. The trailer had a kitchen and bathroom, one bedroom that Mr. and Mrs. Mosley shared, and a second bedroom that the children shared. Appellant's bedroom was located in the house, but he used the bathroom located in the trailer, and shared meals with the family or prepared his own meals in the kitchen.

Appellant lived with the Mosleys for a total of eight years at four different residences. Mrs. Mosley testified that appellant was like a "brother" to her and her husband, and "like an uncle" to their four children. Mr. Mosley and appellant "grew up together, they did everything together," and appellant was "always with the kids" who "loved him." Every other weekend, G.H., would go to stay with his biological father, and D.M. and A.M. would go their biological mother's house, leaving A.H. at home. On those weekends, Mr. and Mrs. Mosley would have a "date night," and appellant would "babysit [A.H.]."

On New Year's Eve 2015, when A.H. was eight years old, she informed Mrs. Mosley that she had something to tell her, but that she did not want Mrs. Mosley to be mad at her for what she had to say. After Mrs. Mosley assured A.H. that she would not be mad at her, A.H. told her "that [appellant] had made her perform oral sex on him." When A.H. made this disclosure to her mother, A.H. "fell apart … was inconsolable" and was "sobbing." She made "noises" that Mrs. Mosley had "never heard [her] little girl make."

A.H. testified that when she was six years old, appellant had lain on her parents' bed in front of her, lowered his pants and exposed himself to her, and that she had placed her mouth on his penis.

Detra Kelly, a child abuse protective services worker for Wicomico County, testified that she interviewed A.H. on January 12, 2016. The audiovisual recording of that interview was played for the jury and introduced into evidence. Ms. Kelly testified that during the interview, A.H., indicated that she had touched appellant's penis with her mouth and her hand. During that interview, A.H. identified the penis shown on an anatomy identification sheet as where she had touched appellant. The anatomy sheet was introduced into evidence.

Maryland State Police Corporal Donna Hale testified that A.H. identified appellant from a photographic array. Detective Edward Fissel of the Salisbury Police Department testified that he interviewed A.H.'s family members, and then interviewed appellant, who was not in custody. After advising appellant of his rights, the detective asked him about A.H.'s accusation. Appellant denied the charge and "laughed throughout the whole interview."

Appellant testified and denied A.H.'s allegation. Defense counsel moved for judgment of acquittal as to all charges at the close of the State's case, and again at the close of all evidence. The court denied both motions.

Additional facts may be included in the Discussion section of the opinion.

DISCUSSION

I.

Admissibility of Hearsay Testimony

Appellant contends that Mrs. Mosley's testimony describing her daughter's first complaint of abuse was hearsay and that the circuit court erred in not excluding it. The State responds that appellant failed to preserve this claim for appeal, but if his claim was preserved, the trial court did not abuse its discretion in allowing the testimony as a prompt complaint of sexually assaultive behavior, which is an exception to the hearsay rule.

Mrs. Mosley testified as follows:

> [PROSECUTOR]: When did you first realize that something may have occurred?
>
> MRS. MOSLEY: New Year's Eve.
>
> [PROSECUTOR]: Of just this past year?
>
> MRS. MOSLEY: Just this year, yeah.
>
> [PROSECUTOR]: What happened?
>
> [DEFENSE COUNSEL]: Objection. May we approach?

At the ensuing bench conference, the following colloquy occurred:

> THE COURT: What was the question you asked, [prosecutor]?
>
> [PROSECUTOR]: I asked her when she became aware that something may have happened. When [A.H.] told her essentially something happened.
>
> THE COURT: What's the basis?
>
> [DEFENSE COUNSEL]: My objection for that is that the allegations are that this happened between 2011 and 2013 and we're having a disclosure in 2016;

it's not a prompt complaint. It's offered for the truth of the matter asserted so it's not admissible under any hearsay exception.

THE COURT: Well, the girl is going to testify, isn't she?

[PROSECUTOR]: Yes.

THE COURT: So what difference does it make?

[DEFENSE COUNSEL]: I don't want it to be repeated right now.

[PROSECUTOR]: It's not going to specifics, it's just when she told her.

THE COURT: Overruled. As long as it's not specific, overruled.

[DEFENSE COUNSEL]: May I be heard?

THE COURT: No, overruled.

[DEFENSE COUNSEL]: I want my objection I noted.

THE COURT: It's noted.

When Mrs. Mosley's testimony resumed, she testified as follows:

[PROSECUTOR]: So what happened on New Year's Eve?

MRS. MOSLEY: [A.H.] came to me and told me that [appellant] had made her perform oral sex on him.

Following Ms. Mosley's explanation of her daughter's disclosure, defense counsel failed to object to or move to strike Mrs. Mosley's response.

The Court of Appeals has often stated its "commitment to the requirement of a contemporaneous objection to the admissibility of evidence in order to preserve an issue for appellate review." *Brown v. State*, 373 Md. 234, 242 (2003). "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 4-323(a). *See also Ridgeway v. State*, 140 Md. App. 49, 66 (2001) ("A challenge to the trial court's decision to admit testimony is not preserved unless an objection is made each time that a question eliciting that testimony is posed."); *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (holding that appellant's objection to testimony was waived when he failed to object to the testimony following the denial of his motion in limine and failed to request a continuing objection); *Prince v. State*, 216 Md. App. 178, 194 ("[T]here is no bright-line rule to determine when an objection should be made. But the objection must come quickly enough to allow the trial court to prevent mistakes or cure them in real time.") (citation omitted), *cert. denied*, 438 Md. 741 (2014).

Mrs. Mosley's response clearly exceeded the scope of the trial court's ruling that her response "not [go] into specifics," but defense counsel did not object, renew his earlier objection, or move to strike Mrs. Mosley's response.[3] Therefore, this argument challenging the admissibility of her testimony regarding A.H.'s report of abuse is not preserved for review.

But, even if it were preserved, appellant would fare no better. Rule 5-802.1(d) provides for the admission of "[a] statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony" as an exception to the hearsay rule, so long as the declarant testifies at trial and is subject to cross-examination.

[3] The trial court's ruling was limited to when the complaint was made but not to the specifics of the complaint.

Appellant argues that A.H.'s complaint to Mrs. Mosley was not sufficiently prompt to satisfy the rule. At trial, A.H. testified that she was six years old when the incident occurred, and that she was eight or nine when she disclosed the incident to her mother. In appellant's view, a two year delay in reporting a sexual offense does not satisfy the requirement of Rule 5-802.1(d) that the report be "prompt." The State counters that given that A.H. was six years old at the time of the abuse, her stated fear that her mother "would hate her," appellant's long relationship with her parents, and the fact that he continued to live with her family for a period of time after the abuse, her delay in reporting the abuse for nearly two years was not unreasonable. We agree.

We have explained that the purpose of the prompt complaint of sexual assault exception to the hearsay rule is to aid in corroboration of the victim's story, not simply to combat stereotypes jurors might have about non-reporting victims. *Gaerian v. State*, 159 Md. App. 527, 537 (2004)(citation omitted). "The question [of] whether a complaint is sufficiently prompt to be presented to the jury is one that is best committed to the sound discretion of the [trial] court." *Id.* at 545. In *Gaerian*, we explained that "promptness is a flexible concept, tied to the circumstances of the particular case. *Id*. at 540. We note that there is nothing in the rule stating that any particular length of time is *per se* insufficiently prompt. In exercising its discretion, the trial court "should consider whether the complaint is prompt as 'measured by the expectation of what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so.'" *Id*. at 545 (citing *Nelson v. State*,

137 Md. App. 402, 418 (2001)) (recognizing that "reasonable time frames [of promptness] would vary with circumstances.").

In *Gaerian*, we recognized that there is no bright-line rule governing what, in terms of timing, constitutes a prompt complaint, citing with approval *Commonwealth v. Fleury*, 417 Mass. 810 (1994), a case in which the Massachusetts court upheld a fourteen-year-old victim's complaint made twenty-one months after the sexual assault. *See Gaerian*, 159 Md. App. at 542. In this case, considering A.H.'s age at the time of the incident, her stated fear that her mother would be mad at her, appellant's close relationship to the family, and his continued residency with the family following the incident, we are not persuaded that the admission of A.H.'s complaint to her mother constituted error or an abuse of discretion.

Although a "trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal … the factual findings underpinning this legal conclusion necessitate a more deferential standard of review." *Gordon v.* State, 431 Md. 527, 538 (2013). Here, there was competent evidence detailing A.H.'s fears and the close relationship that appellant had with her family over the course of many years to support a determination that A.H.'s complaint was admissible as a sufficiently prompt complaint of sexual abuse.

But, were we to determine that Mrs. Mosley's testimony about A.H.'s complaint should not have been admitted, we are persuaded that its admission in this case was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013)(stating that an error is harmless when a reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of - whether erroneously admitted or excluded -

may have contributed to the rendition of the guilty verdict")(quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). *Accord Potts v. State*, 231 Md. App. 398, 408 (2016).

In *Yates v. State*, 429 Md. 112, 120 (2012), the Court of Appeals stated: "Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." (citation and internal quotation marks omitted). The details of the incident were presented to the jury when A.H. testified that while home alone with appellant, appellant had lain on her parents' bed, lowered his pants and exposed himself to her, and that she placed her mouth on his penis. A.H.'s description of the incident was also consistent with and corroborated by her disclosure during her recorded interview with Ms. Kelly.

In sum, A.H.'s testimony regarding the incident and her disclosure during the recorded interview were substantially similar to the complaint that she made to her mother, and minimized any prejudice to appellant from the testimony of Mrs. Mosley. Accordingly, in our view, its admission in this case was harmless beyond a reasonable doubt.

II.

Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to sustain his convictions because the State failed to establish, beyond a reasonable doubt, the specific sexual act or contact that he had committed, and that he was living as a member of the household at the time of the offense. The State responds that appellant failed to preserve his challenge to the evidence regarding the sex act or contact because appellant failed to make the argument

at trial that he now raises on appeal, but if preserved, appellant's challenges to the sufficiency of the evidence of the sex offense convictions are without merit.

We review a challenge to the sufficiency of the evidence to determine "'whether, after viewing 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.'" *Hobby v. State*, 436 Md. 526, 538 (2014) (quoting *Derr v. State*, 434 Md. 88, 129 (2013)) (emphasis in original). In applying that test, "[w]e defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Neal v. State*, 191 Md. App. 297, 314 (2010) (citation and internal quotation marks omitted). And, importantly, we defer to "any possible reasonable inferences" a jury could have drawn in reaching its verdict. *State v. Mayers*, 417 Md. 449, 466 (2010).

A. Sexual Offenses

Rule 4-324(a) requires a criminal defendant who moves for judgment of acquittal to "state with particularity all reasons why the motion should be granted[,]" and he "is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (citations and quotation marks omitted). In support of appellant's motion for judgment of acquittal on the sexual offenses, appellant's trial counsel argued that "it's unclear… what sort of sexual act or sexual contact happened or was alleged to have happened as it was not articulated very well[.]" On appeal, appellant notes that A.H.'s testimony was that her mouth touched "[o]ne of his privates," and that she did not "touch any part of his body" with her "hand." Because that is essentially the same argument that

appellant presented to the trial court in his motion for judgment of acquittal, we consider the argument preserved for our review.

As the State points out, however, the testimony cited by appellant was not the only testimony regarding the specific sexual act or contact described by A.H. When asked during direct examination to indicate on a drawing of the male anatomy what she meant by "privates," A.H. pointed to the penis. Ms. Kelly also testified that during her interview with A.H., which was played for the jury, that A.H. circled a picture of a penis and "said that's where she had touched [appellant] on his body." A.H. also indicated during that interview that the fellatio occurred more than once, and that on other occasions, "instead of [her] putting it in [her] mouth he made [her] touch it," specifically, that she "put [her] hand on it."[4]

A "victim's testimony, standing alone, if believed, is sufficient to sustain [a] conviction." *Moore v. State*, 23 Md. App. 540, 551 (1974) (citation omitted). Moreover, the Court of Appeals has consistently recognized that independent corroboration evidence is not necessary when the victim testifies. *Lawson v. State*, 389 Md. 570, 606 (2005) (citing cases). "[I]t is the role of the jury to resolve any conflicts in the evidence and assess the credibility of the witnesses." *Gupta v. State*, 227 Md. App. 718, 746 (2016) (citation and internal quotation marks omitted), *aff'd*, 452 Md. 103 (2017). A.H.'s testimony, if believed, was sufficient for a reasonable jury to conclude that appellant had engaged in a

[4] The recorded interview was played for the jury, and a redacted transcript of the recording was given to the jurors while the recording was being played. The redacted transcript was marked for identification only, and was not admitted into evidence.

sex act of fellatio with a child under the age of 14 years and had sexual contact with a child under the age of 14 years.

B. Sexual Abuse Charge

Appellant also contends that the evidence was insufficient to sustain his conviction for the sexual abuse of a minor because the State failed to prove that he was a member of A.H.'s household at the time of the abuse. Section 3-602(b)(2) of the Criminal Law Article ("C.L.") of the Maryland Code (2002, 2012 Repl. Vol., 2016 Supp.) provides that a household member or family member may not "cause sexual abuse to a minor." A "household member" is defined as "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse." C.L. §3-601(a)(4).

Mrs. Mosley testified that appellant lived with the Mosley family for about eight years in four different residences. According to Mrs. Mosley, appellant lived with the Mosleys at their residence at 8733 Elzey Church Road from 2011 to 2013, except for "maybe three or four months, but for the most part he was there the whole time." Appellant was "like an uncle" to the Mosley children, and he was "always with the kids" who "loved him."

A.H. was born in 2007. She testified that appellant sexually abused her when she was six years old, which would have been 2013. Mrs. Mosley testified that she observed behavioral changes in A.H. when she was six years old, during the time that appellant lived with them. She explained that A.H. "had a few instances where she was super emotional," she "tore apart her room," and nothing "would calm her down." In addition, "[t]hings that used to interest her no longer did and she became very fearful of everything around her."

Based on this evidence, a jury could reasonably find that either appellant was living with the Mosley family during 2013 or that he was a "regular presence" in the family's home, and that during that time he sexually abused A.H.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.