Circuit Court for Howard County
Case No. 16-56495

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2004

September Term, 2016

JOSE I. VILLARREAL

v.

STATE OF MARYLAND

Wright,
Kehoe,
Berger,

JJ.

Opinion by Berger, J.

Filed: November 17, 2017

*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.

Following a jury trial in the Circuit Court for Howard County, appellant Jose I. Villarreal ("Villarreal") was convicted of one count of sexual abuse of a minor by a household or family member and two counts of third-degree sex offense. Villarreal was sentenced to ten years' imprisonment with all but five years suspended for the sexual abuse of a minor conviction. For the two counts of third degree sexual offense, Villarreal received a suspended sentence of two years for each count. The circuit court further ordered that Villarreal be placed on supervised probation for five years following his release. Villarreal is required to register as a Tier III Sex Offender as a result of his conviction.

On appeal, Villarreal raises two questions for our review, which we have rephrased slightly as follows:

1. Whether the circuit court erred and/or abused its discretion by propounding a supplemental jury instruction in response to a jury note asking for a definition of the term "home."

2. Whether the circuit court abused its discretion in restricting defense counsel's cross-examination of the complaining witness.

For the reasons stated herein, we shall affirm.

FACTS AND PROCEEDINGS

We set forth the facts in the light most favorable to the prevailing party below. The incident giving rise to the instant appeal occurred on December 13, 2015. A.L.,[1] an eleven-

[1] Because at all times relevant to this case A.L. was a minor, we shall refer to her only by her initials.

year-old girl, alleges that she was sexually abused on that date by Villarreal, the long-term boyfriend of A.L.'s paternal grandmother ("Grandmother").[2]

On the date the incident giving rise to this appeal occurred, A.L. was sleeping at the home shared by Grandmother and Villarreal. Grandmother and Villarreal had been in a relationship for over thirty years, and A.L. viewed Villarreal as her grandfather. Grandmother testified that A.L. and Villarreal were very close, explaining that A.L. "liked Villarreal more than me, to be honest."

A.L. spent a significant amount of time at the home shared by Grandmother and Villarreal. A.L.'s mother explained:

> Yeah, [A.L.] spent about every other week [at Grandmother and Villarreal's home] because I'm in school and we decided to come back from overseas[3] due to the condition over there, safety. We're in a really, really small place. So my two daughters were switching off and one would go for five or more days to [Grandmother's] and [Villarreal's] and then the other one would switch off and go the next week. So [A.L.] was there about every other week.

When A.L. was at Grandmother's house, she stayed "[i]n a room at the back of the house."

On December 13, 2015, Grandmother left the home at approximately 7:00 to 7:30 a.m. to go to work. When A.L. woke up at approximately 9:00 a.m. on December 13, 2015, Villarreal was in her bed lying behind her with his chest and stomach touching her back. Villarreal's hand was under A.L.'s shirt, over her stomach and breast. A.L. got out of the

[2] A.L.'s father died in 2010.

[3] A.L. had resided in Egypt with her mother, step-father, and two sisters for eight to nine months prior to returning to Maryland.

bed and told Villarreal "you're driving me crazy." Villarreal left the room and A.L. went back to sleep. Approximately one hour later, A.L. woke up a second time and repeated the same behavior. A.L. got out of bed and said, "I'm done." Villarreal left the room.

Thereafter, A.L. sent a text message to Grandmother reporting what had occurred. Grandmother returned home, picked up A.L., and they together drove back to Grandmother's place of employment. Later that evening, Villarreal came to Grandmother's place of employment and spoke with A.L. After Villarreal left, A.L. and Grandmother returned to Grandmother's home, where Grandmother and Villarreal engaged in an argument. A.L.'s mother arrived at the home during the argument. A.L. left the home with her mother. Thereafter, A.L. and her mother went to the police station to report the abuse.

We shall set forth additional facts as necessitated by our discussion of the issues on appeal.

DISCUSSION

I.

Villarreal's first contention is that the circuit court erred by propounding a supplemental jury instruction on the definition of the word "home." Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" With respect to the appellate standard of review of a trial court's decision whether to propound a requested jury instruction, the Court of Appeals has explained:

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.

Stabb v. State, 423 Md. 454, 465 (2011) (citing *Gunning v. State*, 347 Md. 332, 351 (1997)).

"The burden is on the complaining party to show both prejudice and error." *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

The pattern jury instruction on child sexual abuse sets forth the particular elements that must be satisfied in order to find that a defendant committed child sexual abuse:

> The defendant is charged with the crime of child sexual abuse. Child sexual abuse is sexual molestation or exploitation of a child under 18 years of age caused by [a parent of] [a family member of] [a member of the household of] [a person with permanent or temporary care, custody, or responsibility for the supervision of] a child. In order to convict the defendant of child sexual abuse, the State must prove:
>
> (1) that the defendant sexually abused (name) by [rape] [incest] [sodomy] [other sexual offense] [unnatural or perverted sexual practices] [sexual exploitation];
>
> (2) that at the time of the abuse, (name) was under 18 years of age; and
>
> (3) that at the time of the abuse, the defendant was [[a parent] [a family member] [a member of the household] [a person with permanent or temporary care, custody, or responsibility for the supervision] of (name)] [under a duty to care for (name) because of a contract to provide care for (name)].
>
> [In order to convict the defendant, you must all agree that the defendant sexually abused (name), but you do not have to all agree on which specific act or acts constituted the abuse.]

> [Family member means a relative of the child by blood, adoption, or marriage.]
>
> [Household member means a person who, at the time of the alleged abuse, lived with or was regularly present in the home of (name).]
>
> [Abuse does not include the performance of an accepted medical or behavioral procedure ordered by a health care provider authorized to practice by law and acting within the scope of that authorization.]

Maryland Criminal Pattern Jury Instructions ("MPJI-Cr") 4:07.2 (2nd ed., 2012). *See also* Md. Code (2002, 2012 Repl. Vol.), § 3-602 of the Criminal Law Article ("CL") (setting forth the elements of child sexual abuse).

The trial judge propounded the pattern jury instruction as adapted to the particular offense charged. Villarreal raised no objection to the court's jury instruction on the elements of child sexual abuse, and Villarreal raises no objection to the giving of the pattern jury instruction on appeal. During deliberations, however, the jury sent a note to the judge asking for the definition of the term "home."[4] Defense counsel argued that the court should

[4] The record reflects that the circuit court judge read the note from the jury:

> [THE COURT]: Okay. I've already discussed in chambers with Counsel a note with two questions, which are really basically the same question . . . [S]o, the jury's question is;
>
> > " . . . On form MPJICR407.2, parens, child abuse dash sexual abuse, ends parens, what is the definition of, quote, home, end quote, question mark, related to explanation of household member, end parens?"

respond by giving an "instruction just say[ing] something to the effect you have all the information to decide, simply it is for you to decide based on, you know, what you have received. So, it simply is for you to decide I think is the only fair and proper response."

The prosecutor urged the court to provide the jury with an instruction based on the Court of Appeals's opinion in *Wright v. State*, 349 Md. 334 (1998), a case in which the Court discussed the meaning of the term "home" in the context of the sexual abuse of a minor statute. The court observed that *Wright* was "pretty close to being right on point" and explained that it would instruct the jury based upon the definition provided in the *Wright* opinion. Defense counsel "strenuous[ly] object[ed]" and argued that such an instruction "would be fundamentally unfair." Over defense counsel's objection, the circuit court instructed the jury that "[a] home for the purpose of the child abuse statute is a place of residence where the child eats, sleeps, bathes, a place where the child forms a part of the household. A child may have more than one home."

On appeal, when determining whether the circuit court abused its discretion by propounding the instruction, we consider (1) whether the instruction was a correct statement of the law, (2) whether it was applicable under the facts of the case, and (3)

> And then the next section is;
>
> " . . . What is the definition of home of [A.L.], question mark, parents, exclamation, of household member, end parens?"

(Ellipses in original.)

whether it was fairly covered in the instructions actually given. *Stabb*, *supra*, 423 Md. at 465. In the instant appeal, Villarreal presents no argument with respect to the second and third factors set forth by the Court in *Stabb*. Indeed, the instruction was obviously applicable by the facts of the case. Further, the definition of "home" in the child sexual abuse statute was covered in the instruction given. Villarreal focuses on the first factor, arguing that the instruction was not an accurate statement of the law. Villarreal asserts that the circuit court's instruction was improper because it was based upon dictum rather than the Court's holding. As we shall explain, we disagree that the language from *Wright* that formed the basis for the circuit court's instruction constituted dictum.

The circuit court's instruction was based on the following language from the *Wright* opinion discussing whether a temporary residence constituted a "home" under the statute:

> Queen's "permanent" home -- her domicile -- was with her mother. Through consensual arrangements among Queen, Shirley, and their mother, however, Queen was living with Shirley when the criminal activity occurred. Given that Queen, according to her testimony and that of her mother, had been at Shirley's house for about two weeks and was intending to stay another two weeks, it is a fair inference that at least some part of her clothes and other personal belongings were also at Shirley's house; that is **where she slept, bathed, and ate**; that is where her friend, Tomika, was staying with her. **That was the place where, at the time, she formed part of Shirley's household, a household of which Wright was a member**.

Wright, *supra*, 349 Md. at 356-57 (emphasis supplied). Villarreal argues that the passage from *Wright* relied upon by the circuit court when fashioning a response to the jury "was either obiter dicta or judicial dicta" that "should not have been afforded the weight of

precedential value." Villarreal further argues that "[i]t was not the *ratio decidendi* of the case, and therefore not a holding."

In support of this assertion, Villarreal cites Chief Judge Bell's concurring and dissenting opinion in *State v. Baby*, 404 Md. 220, 274-80 (2008). Critically, however, Villarreal does not explain how the relevant portion of *Wright* constitutes dictum. In *Wright*, one of the specific issues before the Court was whether the defendant qualified as a "household member" under the child sexual abuse statute, which was defined then as it is now as "a person who lives with or is a regular presence in 'a home of a child at the time of the alleged abuse.'" *Wright*, *supra*, 349 Md. at 355 (quoting the child sexual abuse statute then set forth in Maryland Code, Article 27, § 35C(a)(5)). *See also* CL § 3-601(a)(4) (defining "household member" as "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse."). The Court considered the plain language of the statute, commenting that the "[u]se of the indefinite article 'a,' as opposed to the definite article 'the,' [preceding the word "home"] itself indicates a legislative recognition that, for purposes of the child abuse statute, a child may have more than one home." *Wright*, *supra*, 349 Md. at 355. The Court, therefore, concluded that based upon the factors it had set forth previously, it was "not an unreasonable recognition" that the defendant was a household member of the victim's home.

This language was not dictum because the issue before the Court was whether, for purposes of the child abuse conviction, the defendant constituted a household member under the statute. Indeed, "[a] matter is not dictum if 'the question was directly involved in the issues of law . . . and the mind of the Court was directly drawn to, and distinctly

expressed upon the subject.'" *Bowers v. State*, 227 Md. App. 310, 322 (2016) (quoting *Schmidt v. Prince George's Hosp.*, 366 Md. 535, 552 (2001)). In *Wright*, the Court was required to expressly determine whether, under the specific facts and circumstances of the case, the defendant fit the definition of a household member. This language, therefore, was "a deliberate expression of [the Court's] opinion" on the question of the definition of the term "household member" and did not constitute dictum. *Bowers*, *supra*, 227 Md. App. at 322.[5] Accordingly, we hold that the instruction propounded by the circuit court was a correct statement of the law.

The circuit court has broad discretion in the context of jury instructions, and when determining whether the trial court abused its discretion by propounding a particular jury instruction, we consider the following:

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order [of the trial court] is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

[5] Furthermore, Villarreal has presented no authority in support of his assertion that a jury instruction based upon dictum is inappropriate. We will, therefore, not address this unsupported contention. *See Diggs & Allen v. State*, 213 Md. App. 28, 70 n. 13 (explaining that we will not address an issue when a party "provides no argument as to why it was incorrect, nor authority in support of his attack"), *aff'd sub nom. Allen v. State*, 440 Md. 643 (2014).

Bazzle v. State, 426 Md. 541, 549 (2012) (quoting *Stabb*, *supra*, 423 Md. at 465 (quoting *In re Don Mc.*, 344 Md. 194, 201 (1996))). In the instant case, the instruction propounded by the court was a correct statement of the law and was applicable under the facts of the case. Whether or not to give the instruction addressing the definition of "home" under the statute was, therefore, a discretionary determination for the circuit court, and one that we will not disturb on appeal.[6]

II.

Villarreal further contends that the circuit court erred by limiting his cross-examination of A.L. Villarreal specifically sought to cross-examine A.L. about a previous statement she had made alleging that she had been sexually abused by her stepfather. A.L. had previously reported the alleged sexual abuse by her stepfather to her mother and/or Grandmother, but the accusation was never reported to law enforcement.

Villarreal argues that, because the prior allegation of abuse was never reported to law enforcement, a reasonable inference can be drawn that A.L.'s accusation "could have been, and was likely, false." Villarreal asserts, therefore, that he had a "very strong and reasonable basis" for cross-examining A.L. about her prior allegation of sexual misconduct. The State argues that the circuit court properly determined that there was no evidence that A.L.'s prior allegation of abuse was false and precluded Villarreal's inquiry about the prior allegation. The State further asserts that any probative value was

[6] By so holding, we do not intend to suggest that such an instruction was required, but only that the circuit court did not abuse its discretion by propounding the requested instruction.

outweighed by the potential for prejudice. As we shall explain, we agree with the State that the circuit court properly limited Villarreal's cross-examination of A.L.

Villarreal argues that the proffered testimony was proper under Maryland Rule 5-608(b), which permits inquiry about a witness's prior conduct that the court finds probative of a character trait of untruthfulness. Generally, a witness "may be cross-examined on such matters and facts as are likely to affect his credibility, test his memory or knowledge, show his relation to the parties or cause, his bias, or the like." *Lyba v. State*, 321 Md. 564, 569 (1991) (internal quotation omitted). A trial court possesses broad discretion when ruling on the scope of inquiry during cross-examination. *Martin v. State*, 364 Md. 692, 698 (2001). "We will overturn a trial court's ruling on such matters only if the court exercise[d] discretion in an arbitrary or capricious manner or act[ed] beyond the letter or reason of the law." *Thomas v. State*, 422 Md. 67, 73 (2011) (internal quotations omitted) (alterations in original). The Court of Appeals has further explained that the trial court abuses its discretion in this context only when the "limitations upon cross-examination . . . inhibited the ability of the defendant to receive a fair trial." *Pantazes v. State*, 376 Md. 661, 681-82 (2003).

Maryland Rule 5-608(b) permits a witness to be cross-examined with prior conduct that did not result in a conviction that is probative of a character trait of truthfulness or untruthfulness. The Rule mandates, however, that upon objection, "the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred." The Court of Appeals discussed the requirements of Rule 5-608(b) in *Pantazes*, *supra*, explaining as follows:

> [T]he right to cross-examine witnesses regarding the witness' own prior conduct not resulting in a criminal conviction is limited by Rule 5-608(b) in several ways. First, the trial judge must find that the conduct is relevant, *i.e.*, probative of untruthfulness. Second, upon objection, the court must hold a hearing outside the presence of the jury, and the questioner must establish a reasonable factual basis for asserting that the conduct of the witness occurred. Third, the questioner is bound by the witness' answer and may not introduce extrinsic evidence of the asserted conduct. Finally, as with all evidence, the court has the discretion to limit the examination, under Rule 5-403, if the court finds that the probative value of the evidence is outweighed by unfair prejudice.

376 Md. at 686-87. The Court "emphasized that inquiries into prior acts of witnesses are evaluated rigorously." *Id.* at 685.

Villarreal argued before the circuit court that A.L.'s prior allegation of sexual abuse by her step-father was probative because "if that was a false allegation, nothing was done about that allegation and if that's true, it's something that I believe related to no possible motive or bias in this case." The prosecutor, in response, argued that the inquiry was not probative, was not proper impeachment evidence, and there was "nothing to suggest [that A.L.] was lying when" she made the prior allegation. The prosecutor argued that "it's not probative of this case . . . whether the adults in her life didn't follow through on th[e prior] complaint" by A.L. The circuit court initially sustained the objection "[b]ased on what [it had] heard so far."

The parties addressed the matter again the following day of trial. The prosecutor further asserted that permitting the inquiry would obscure the issues in the case and cause "more embarrassment" and make things "unnecessarily difficult" for A.L. The circuit

court asked defense counsel if he had any evidence that A.L.'s prior allegation of abuse was false. Defense counsel responded:

> [W]ell, that's the argument, it's either untrue or true.
>
> Again, the proffer was that the mother was also made aware of that allegation and then didn't do anything. So, if they didn't do anything about it essentially they're regarding it as untrue.
>
> It's true there wouldn't have been any testimony from the step-father, but . . . that's it, so that would be the [argument] that it's untrue.
>
> And then again, it it's true and nothing's done about it that gives incentive to make some other allegation that's not false, that's the Defense theory.

The circuit court found that there was no evidence that A.L.'s prior allegation was false or had been recanted, and, therefore, that it had no relevance to A.L.'s truthfulness. The circuit court further found that the prejudice and potential for confusion outweighed any probative value, explaining as follows:

> [T]here is nothing that indicates [that A.L.'s allegation of sexual abuse by her stepfather has] been proven false or recanted by; I beg your pardon; [A.L.].
>
> So, my assessment I think is in agreement with [the prosecutor] that the prejudicial value outweighs any potential probative value. The potential for confusion and outweighs any probative value, especially in the absence of any information that the information was proven false or recanted by [A.L.].
>
> So, I'm going to reaffirm my decision to preclude you from using it either to impeach [A.L.], essentially I think that's what you sought to do, impeach [A.L.].

In our view, the record reflects that the circuit court engaged in the precise inquiry contemplated by Rule 5-608(b) and discussed by the Court of Appeals in *Pantazes*, *supra*, 376 Md. at 686-87. We agree with the circuit court that defense counsel proffered no information that would prove that A.L.'s prior allegation of abuse was untruthful.

Villarreal's assertion that the accusation was "likely false" merely because it was never reported to law enforcement is wholly speculative. There are myriad reasons why a particular allegation would not have been reported to law enforcement by A.L.'s mother or Grandmother. We, therefore, reject Villarreal's contention that any prior allegation of sexual abuse not reported to law enforcement is presumptively untruthful. Accordingly, we hold that the circuit court did not abuse its discretion by finding that there was no indication that A.L.'s prior allegation was false, by finding that the probative value of such an inquiry was outweighed by prejudice, and by, therefore, limiting the scope of Villarreal's cross-examination of A.L.

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