Circuit Court for Baltimore City
Case No. 115343016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2082

September Term, 2016

ALGEE ALSTON

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Beachley,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: August 7, 2017

A jury in the Circuit Court for Baltimore City convicted Algee Alston, the appellant, of four counts of sexual abuse of a minor. The court imposed three 20-year sentences and one 25-year sentence, all to be served consecutively.

In a timely appeal the appellant presents the following questions for our review:

> I. Did the trial court err by permitting testimony by the mother of the complaining witness, which was outside the scope of cross-examination and was hearsay?
>
> II. Did the trial court abuse [its] discretion by permitting the complaining witness and her mother to sit in close proximity to the jurors?
>
> III. Is the evidence legally insufficient to sustain [the] convictions?

For the following reasons, we shall affirm the judgments.

FACTS AND PROCEEDINGS

D.L., the victim, was 17 years old at the time of trial. She testified that she had known the appellant her whole life as her stepfather, lived with him in Baltimore City, and called him "Dad." In the spring of 2009, when she was 10 years old, the appellant "molested" her. According to D.L., they were in the kitchen of their house when the appellant started "feeling on [her] butt" and "touched [her] boob area[.]" D.L. asked the appellant why he would do that, and he replied, "it's okay." D.L. then went upstairs. Apparently, the appellant followed her. He again touched her "boob area[,]" then lifted her shirt and "started to proceed to lick on it." D.L. did not tell anyone about this incident. When asked why, she testified that she was "scared" and "couldn't grasp what was going on because [she] was so young."

D.L. testified about another incident that took place the fall of 2011, when she was in seventh grade and was 12 or 13 years old. She was sitting on the bed in her mother's bedroom. The appellant asked if he could "taste [her]." D.L. replied, "[W]hat does that mean[?]" The appellant pulled her underwear to the side and "[p]ut his mouth on [her] vagina." According to D.L., the appellant's "mouth touched [her] clitoris." The appellant also put his finger in her vagina. D.L. testified that she did not say anything because she "didn't know what was going on" and she couldn't "grasp . . . of what's going on because this is new to me." She was "disgusted" and stated, "I've never been fingered. I never been had oral performed on me" and "I don't know what's going on so obviously it's different."

D.L. also did not tell anyone about this incident either, testifying that she was "scared" and "terrified." Asked to explain, D.L. said she "thought it was going to break up my family" and she "didn't know what was going on." She also testified: "I didn't learn about sex until after like the spring when we took sex ed in middle school. So I didn't, that was, eighth, seventh grade. I didn't know what was going on."

Another incident occurred about two years later, in the summer of 2013, when D.L. was 14 years old. She was sleeping downstairs when she woke up to find the appellant's "finger rubbing against [her] clitoris." His hands were below her shorts, and his skin was touching her skin. When asked what she did after this event, D.L. testified that she became angry and "distanced" herself from everyone. She did not tell her mother what happened, even though they had a good relationship.

Approximately two years later, on October 28, 2015, D.L. was again sexually assaulted by the appellant, for what would be the last time. That evening, D.L was sleeping when she woke up to find the appellant "playing with my clitoris and fingering." The appellant was "[r]ubbing on my clitoris, finger motion, finger is inside of my vagina hole." Neither D.L. nor the appellant said anything. He left after she woke up.

The next day, D.L. decided to report these assaults. She called 911 from her workplace. She also called her mother and told her that the appellant had been molesting her for the last six years. Following the 911 call, Detective Edgardo Hernandez spoke to D.L. at a police station. According to the detective's testimony at trial, D.L. told him that "her mother's boyfriend had touched her vagina."

Following D.L.'s testimony, the jury heard from D.L.'s mother. She testified that she and the appellant, then 48 years old, started living together in 2002. D.L. was approximately two years old at the time. D.L.'s mother thought that D.L. had a good relationship with the appellant, until October 2015, when D.L. told her that the appellant had been "touching" her and "giving her oral sex[.]" She testified that when D.L. disclosed this information she was upset and crying and said, "I can't have him touching me anymore."

We shall include additional facts as necessary to our discussion.

DISCUSSION

I.

On cross-examination, D.L.'s mother testified that she had a good relationship with her daughter but that D.L. did not tell her that the appellant was sexually abusing her

until October 28, 2015. On redirect examination, the prosecutor asked D.L.'s mother: "Did D.L. tell you why she didn't disclose to you earlier?" Defense counsel objected, without giving a reason, and the court sustained the objection.

At the prosecutor's request, the court then held a bench conference. The prosecutor argued that he was asking the question because defense counsel had elicited on cross-examination of D.L.'s mother that D.L. had not disclosed the abuse to her for years without eliciting why. Defense counsel argued that the mother could not testify about the reason D.L. had given for not reporting the abuse earlier. Specifically, he stated, "all of sudden, the person finally comes forward," and "tells their mother, but the reason for it wouldn't be, you know wouldn't be for her [the mother] to say." Defense counsel clarified his objection, stating that "it was on [D.L.], it's on [D.L.], not for the mother to testify."

The court disagreed, stating, "you [defense counsel] opened the door when you asked her, did she ever tell you. You said, she never told you, correct and she said, correct." The court then asked the prosecutor to proffer the question he wanted to ask D.L.'s mother. The prosecutor replied that he wanted to ask: "[D]id [D.L.] tell you why she didn't disclose to you." The court overruled defense counsel's objection, ruling as follows:

> [THE COURT]: . . . *I think you [defense counsel] opened the door with it because you did lead her to say that she never, never told you about it. I think the State does have a right to say if she never told you about it, did she tell you why she never told you. And that's what they want to ask.* I think that's a very limited question and I'm going to be listening very carefully to the answer. If it gets into this long drawn out this, then that's a problem.

> [DEFENSE COUNSEL]: Sure.
>
> THE COURT: But if it's just a simple matter, yeah she said, blah, blah, blah. It's not corroborating what [D.L.] said, it is simply a response to your question saying it was never, she never told you and the answer is, there's a reason why she didn't. So, I may be wrong, but time will tell, but I think I'm correct.

(Emphasis added.)

When the bench conference concluded, the prosecutor continued with redirect examination of D.L.'s mother, as follows:

> [PROSECUTOR]: [D.L.'s mother], did [D.L.] tell you why she didn't disclose to you earlier?
>
> [D.L.'S MOTHER]: Yes. Um, she said that she didn't understand what exactly was going on with her because she was so young. She didn't know what was happening. . . .
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.

The appellant contends the trial court erred by permitting the prosecutor to elicit this testimony because it was (1) outside the scope of cross-examination and (2) inadmissible hearsay.

Ordinarily, on appeal we will not consider "any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court[.]'" *King v. State*, 434 Md. 472, 479 (2013) (quoting Md. Rule 8-131 (a)). "[W]hen specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011) (reiterating that "when an objector sets forth the specific grounds for his objection . . . the

objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified") (citation omitted); *Robinson v. State*, 209 Md. App. 174, 202 (2012) ("Because [the defendant's] arguments were not raised below, they are not preserved for appellate review.").

Here, the record is clear that the appellant did not object to the question at issue on the ground that the testimony it was meant to elicit was outside the scope of cross-examination nor did he object on the stated ground of hearsay. In some cases, a hearsay objection has been held to have been made even though "hearsay" was not referred to, because the substance of the objection was sufficient to communicate a hearsay concern. *See, e.g., Carter v. Aramark Sports & Entm't Servs., Inc.*, 153 Md. App. 210, 229–30 (2003); *Pitt v. State* 152 Md. App. 442, 464 (2003). The objection made here did not clearly invoke a hearsay concern. Moreover, it is obvious from the court's ruling that the judge did not consider a hearsay issue to have been raised.

Neither argument advanced by the appellant was preserved for review. Even if they had been, and if the court had erred, we would hold that the error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (noting 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 *Smallwood v. State*, 320 Md. 300, 308 (1990) (in turn quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))). D.L. testified repeatedly that the reason she did not disclose the abuse to anyone, including her mother, earlier was because she was "scared" and "couldn't grasp what was going on

because [she] was so young." She also testified that she thought "it was going to break up my family." The testimony by D.L.'s mother merely was cumulative of D.L.'s own account and was not prejudicial to the appellant.

II.

Before the trial court instructed the jury, defense counsel asked to approach the bench, and the following ensued:

> [DEFENSE COUNSEL]: Uh, I would ask that the victim and her mother certainly have a right to be here would not sit so close to the jury and on the same side as where the jury is.
>
> THE COURT: No.
>
> [DEFENSE COUNSEL]: My people's family are sitting in the back row as far away from the jury as they can.
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> THE COURT: That's, I'm not going to tell people where they can and can't sit except no one [sic] can sit in the first row. So if your family wants to sit over there, the whole courtroom is open. I'm not telling people where to sit except for no front row people.
>
> [DEFENSE COUNSEL]: All right. I take exception. Thank you, sir.
>
> THE COURT: Mm-hmm.

The appellant contends this ruling was an abuse of discretion.

> Generally:
>
> "The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge and an appellate court should in no case interfere with that judgment unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party."

Cooley v. State, 385 Md. 165, 176 (2005) (quoting *Wilhelm v. State*, 272 Md. 404, 413 (1974)). The reason for this has been explained as follows:

> "The fundamental rationale in leaving the matter of prejudice *vel non* to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters. That is to say, the judge has a finger on the pulse of the trial."

Bruce v. State, 351 Md. 387, 393 (1998) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)).

There does not appear to be a case in Maryland directly addressing courtroom seating arrangements. In *United States v. Turkette*, 656 F.2d 5, 10 (1st Cir. 1981), the court observed that a courtroom seating arrangement "depends upon such a variety of factors, *e.g.*, the size of the courtroom, the number of spectators, the number of defendants and lawyers, acoustics, security provisions, etc., that we would be loathe to interfere unless there was a clearcut abuse of discretion." *See also Commonwealth. v. Campbell*, 393 N.E.2d 820, 831 (Mass. 1979) ("We have repeatedly held that court room seating is a matter within the discretion of a trial judge.").

Courtroom seating arrangements, like the conduct of the trial itself, are matters best left to the discretion of the trial judge. Here, the court considered defense counsel's request, including his proffer that the appellant's family were seated some distance away from the jury. Hearing this, the court noted that the appellant's family members, just as the victim's family members, were free to move and sit anywhere they liked, except in the front row. We are unable to conclude, from these facts, that the court abused its considerable discretion in this matter.

III.

Finally, the appellant contends the evidence was legally insufficient to sustain his convictions because there were questions about the accuracy of D.L.'s testimony, there was no physical evidence corroborating her accounts, nor was her mother able to corroborate the allegations, and D.L. may have had a motive to accuse the appellant based on her belief that he was not contributing to the family finances. The State responds that these arguments go to the weight of the evidence, and not its sufficiency. We agree with the State.

In considering a challenge to the sufficiency of the evidence, we ask "'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.'" *Grimm v. State*, 447 Md. 482, 494–95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656–57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256, *cert. denied*, 448 Md. 726 (2016) (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)). In doing so, the jury is free to "'accept all, some, or none'" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013) (quoting *Allen v. State*, 158 Md. App. 194, 251 (2004)). "Such deference is accorded, in part, because it is the trier of fact, and not the appellate court, that possesses a better opportunity to view the evidence presented first-hand, including the demeanor-based evidence of the witnesses, which weighs on their credibility." *State v. Manion*, 442 Md. 419, 431, *recons. denied* (2015) (citing

Walker v. State, 432 Md. 587, 614 (2013)). Finally, as the appellant concedes, the evidence of a single eyewitness is sufficient to sustain a conviction. *Branch v. State*, 305 Md. 177, 184 (1986); *accord Reeves v. State*, 192 Md. App. 277, 306 (2010).

Maryland Code (2002, 2012 Repl. Vol.), section 3-602(b)(1) of the Criminal Law Article ("CL") provides that "[a] parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor." CL section 3-602(b)(2) also provides that "[a] household member or family member may not cause sexual abuse to a minor." "Sexual abuse" is defined in CL section 3-602(a) as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." CL § 3-602(a)(4)(i). "Sexual abuse" includes "1. incest; 2. rape; 3. sexual offense in any degree; 4. sodomy; and 5. unnatural or perverted sexual practices." CL § 3-602(a)(4)(ii).

There is no dispute that the appellant was a "household member" under the statute. *See* CL § 3-601(a)(4) ("'Household member' means a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse."). As for the element of sexual abuse, D.L. testified to at least four separate incidents, all of which amounted to separate sexual offenses against her. When she was 10 years old, the appellant touched her "butt" and "boob area." This was a sexual offense in the third degree. *See* CL § 3-307(a)(3) (prohibiting "sexual contact," as defined in CL § 3-301(f), with a victim under 14 years old where the perpetrator is at least four years older than the victim).

When D.L. was either 12 or 13 years old and in seventh grade, the appellant forced cunnilingus on her and placed his finger in her vagina. This was a sexual offense in the second degree. *See* CL § 3-306(a)(3) (prohibiting the performance of a "sexual act," as defined in CL § 3-301(e), upon a victim under 14 years old by a person four years older than the victim).[1]

The last two incidents were: (1) when D.L. was 14 years old, the appellant rubbed her clitoris with his finger; and (2) on October 28, 2015, when D.L, was approximately 16 years old, the appellant rubbed her clitoris and placed his finger in her vagina. At minimum, these incidents met the definition of sexual abuse of a minor. *See Tribbitt v. State*, 403 Md. 638, 649 (2008) ("The plain language of [CL section 3-602] clearly contemplates that all acts of sexual molestation and exploitation fall within the definition of sexual abuse.").

The appellant makes no argument directed to legal sufficiency. Instead, as the State observes, his arguments go entirely to the weight of the evidence and the credibility of the victim and her mother. These factual considerations were clearly in the province of the fact-finders, *i.e.*, the jury. It was for them to decide whether to accept the evidence presented at trial. And, there is no requirement that the victim's testimony be supported, substantiated, corroborated, or documented. *See, e.g., Walters v. State*, 242 Md. 235, 238 (1966) ("The testimony of a victim, unlike that of an accomplice, needs no

[1] Effective October 1, 2017, sexual offense in the second degree is repealed and reclassified as rape in the second degree. *See* 2017 Md. Laws, 1401, 1417.

corroboration.") (additional citations omitted). The evidence was sufficient to sustain the appellant's convictions.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.