Circuit Court for Cecil County
Case No. C-07-CR-16-000335

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2063

September Term, 2017

GERALD W. HAIRSTON

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: March 8, 2019

Appellant, Gerald W. Hairston, was convicted by a jury in the Circuit Court for Cecil County of second degree sexual offense, sexual abuse of a minor, second degree child abuse, and related offenses. Hairston presents for our review three questions, which for clarity we rephrase:[1]

1. Did the court err in granting the State's motion *in limine* to exclude evidence of the victim's prior sexual conduct?

2. Did the court err in finding that Hairston waived his right to be present and concluding the trial *in absentia*?

3. Did the court err in conferring with counsel on proposed jury instructions in Hairston's absence?

For the following reasons, we shall affirm the judgments of the circuit court.

Facts and Proceedings

At trial, the State called J.G., who testified that he is the father of C.D. J.G. stated that C.D., who was eleven at the time of trial, moved into his Delaware residence in August 2016. Prior to that month, C.D. lived with C.D.'s mother, Sharie D. ("Sharie"). J.G. saw

[1]Hairston's questions presented *verbatim* are:

1. Did the lower court err in excluding evidence that, before she alleged that Appellant abused her, the alleged victim was confronted and punished by her parents for sexually experimenting with her younger siblings?

2. Did the lower court err in finding that Appellant waived his right to be present at trial because he did not go to the courthouse after being discharged from the hospital?

3. Did the lower court violate Appellant's right to be present a[t] trial when it heard argument and ruled on the proposed jury instructions without Appellant present, and before finding that he had waived his right to be present?

Hairston "at [C.D.'s] address plenty of times," and knew that C.D. "called . . . Hairston dad."

In May 2016, J.G. was notified by a former girlfriend that she had discovered "videos . . . about rape and different things in that nature" on her son's "iPad." J.G. examined C.D.'s "tablet" and discovered that "she was looking up the same exact stuff." When J.G. asked C.D. what was "going on," C.D. stated: "I can't tell you because I'm going to get in trouble and I'm scared," and "[m]y dad is going to be mad at me if I tell you." J.G. then took C.D. to a medical center, and subsequently, to Christiana Hospital.

The State subsequently called C.D., who testified that before she moved into her father's residence, she lived "in Maryland" with her "[m]om, brothers and sisters[,] and . . . stepdad" Hairston. C.D. stated that she was testifying because Hairston had "hurt" her. On one occasion, Hairston entered C.D.'s room, "pulled down [her] pants and [her] underwear," and "put his penis in [C.D.'s] butt." On another occasion, Hairston called C.D. downstairs, pulled her pants and underwear down, "put Vaseline on his penis," and "stuck it in [C.D.'s] butt." C.D. "did scream, but" Hairston told her "to put [her] face in the pillow." On a third occasion, Hairston called C.D. "into [his] room" and told her "to be quiet because he didn't want . . . to wake" C.D.'s siblings. Hairston then "pulled down [C.D.'s] pants and . . . underwear, and . . . put his penis in [C.D.'s] butt." C.D. further testified that Hairston "once . . . told [her] to suck his penis," and she complied. Finally, C.D. testified that Hairston had beaten her with a belt and spatula, and punished her by making her hold weights over her head.

Discussion

I.

Prior to trial, the State filed a motion *in limine* in which it requested "[t]hat the defense be prohibited from introducing any evidence concerning [C.D.'s] prior sexual conduct pursuant to" Md. Code (2002, 2012 Repl. Vol., 2016 Supp.), § 3-319 of the Criminal Law Article ("CL"),[2] also known as the "Rape Shield Statute." When the parties

[2]CL § 3-319 states, in pertinent part:

> (a) *Reputation and opinion evidence inadmissible.* – Evidence relating to a victim's reputation for chastity or abstinence and opinion evidence relating to a victim's chastity or abstinence may not be admitted in a prosecution for:
>
> (1) a crime specified under this subtitle or a lesser included crime;
>
> (2) the sexual abuse of a minor under § 3-602 of this title or a lesser included crime; or
>
> (3) the sexual abuse of a vulnerable adult under § 3-604 of this title or a lesser included crime.
>
> (b) *Specific instance evidence admissibility requirements.* – Evidence of a specific instance of a victim's prior sexual conduct may be admitted in a prosecution described in subsection (a) of this section only if the judge finds that:
>
> (1) the evidence is relevant;
>
> (2) the evidence is material to a fact in issue in the case;
>
> (3) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and
>
> (4) the evidence:

(continued)

appeared for trial, the prosecutor stated that he filed the motion because Hairston and Sharie "indicate[d] in recorded interviews and . . . other statements . . . that there are allegations of sexual contact between [C.D.] and other persons." Defense counsel then proffered:

> Your Honor, . . . this is a situation where a ten-year-old has made some pretty horrific disclosures, allegations, to various individuals. What's going to be, I think, foremost in anybody's mind is how could she possibly know anything about this stuff?
>
> And again, what was disclosed in the interviews that I have seen and reviewed is that both Mr. Hairston and [Sharie] disclosed to the officers and CPS that indeed this child had exhibited sexual behavior before with other children in the family and that contact was actual oral sex. I believe that was the bulk of it. In addition to which, again, this whole thing gets started because [C.D.'s] father sees this girl looking at porn on the internet.
>
> . . . . That's basically what I would be talking to [Sharie] about, the mother, is concerning the contact she's had with [C.D.] directly about that prior sexual contact and how it came about and what was alleged and how they talked to her about it and what ended up happening.
>
> It goes both to explain to the jury how this child could have such knowledge. It also, I think, lends support for a motive perhaps once the pornography situation is discovered for the child to prevaricate about what's going on and to deflect responsibility from herself to someone not in her

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> (i) is of the victim's past sexual conduct with the defendant;
>
> (ii) is of a specific instance of sexual activity showing the source or origin of semen, pregnancy, disease, or trauma;
>
> (iii) supports a claim that the victim has an ulterior motive to accuse the defendant of the crime; or
>
> (iv) is offered for impeachment after the prosecutor has put the victim's prior sexual conduct in issue.

> family, a stepfather. So again, I think that that's going to be forefront in a juror's mind.
>
> And again, this isn't an allegation – because again, Mr. Hairston says there was never any sexual contact between [him] and her at all, ever, under any circumstances, in any way, manner, shape or form. So it's not a matter of any prior contact with him certainly.
>
> But the evidence is relevant. It's material to an issue in the case. It is, you know, perhaps i[n]flammatory but it doesn't outweigh its probative value in terms of how a jury is going to grapple with the issue of how does a ten-year-old know any of this stuff, not only just what they may see on the internet but actual sex and how she describes it and such.
>
> And again, I think that it does go to establishing perhaps an ulterior motive for [C.D.] to deflect and point to someone else once she's found looking at pornography on the internet. So I think I need to be able to present this stuff to the jury.

The court subsequently held a hearing on the motion. Hairston called Sharie, who testified that sometime "between 2010 and 2012," C.D.'s brother D.D. told Sharie and Hairston that C.D. had "performed sexual activity" upon him. D.D. stated that his three sisters "had all given him oral sex," and that C.D. "was the ringleader." C.D. ultimately admitted to Sharie that "she did do it." Sharie then contacted J.G., who "came over" and "beat [C.D. and her sister] with a belt."

Sharie further testified that during the summer of 2016, two of C.D.'s younger siblings told Sharie and Hairston that C.D. "did sexual things to them." When Sharie asked C.D. what she had done, C.D. replied: "I didn't do anything. I didn't touch her coochie." When Sharie asked C.D. "why she did it," she "shrugged her shoulders." Sharie stated: "[I]t's inappropriate and . . . you can't keep doing this. You're going to get in trouble. If I go and tell the cops what you did, you're going to get locked up."

Hairston then testified that in May or June of 2016, he and Sharie discovered that C.D. "was watching porn" on her "tablet." Hairston and Sharie "confiscated the tablets at the time." Hairston also testified about two "discussions with [C.D.] about actual sexual activity she's had." The first discussion occurred "years ago," when D.D. told Hairston that C.D. "had performed oral sex on him." The second discussion occurred in 2016, when Hairston "became aware that" C.D. had "[p]erformed oral sex on [his] daughter and . . . son." Hairston and Sharie told C.D. that "that was bad," and "if it was somebody else's kids, then [she] could have went to jail." Hairston stated that C.D. "was punished" by being "sent to her room."

Granting the motion *in limine*, the court stated:

> The [c]ourt finds that the testimony which is offered by Mr. Hairston through Ms. D[.] and himself in the [c]ourt's opinion is an attempt to depict this victim as a sexually-active person. That it is contrary to the very purpose of the Rape Shield Statute. I don't find it to be relevant with regard to the issues before the [c]ourt. I don't find it to be relevant or material to any fact in issue.
>
> It doesn't support a claim that this victim has some sort of ulterior motive to accuse Mr. Hairston of a crime. In fact, I find the opposite. It indicates to me that Ms. D[.] and Mr. Hairston were certainly aware that this child had been sexually active. And it wouldn't in any way indicate to me that she has a motive to say he is in fact the person that has perpetrated acts upon her. And certainly I find that the probative value is not outweighed by any prejudicial effect.
>
> So it's the [c]ourt's ruling – I also find that with regard to [CL §] 3-319, the other subsections aren't even applicable. Subsection No. 1, this isn't past conduct with the defendant, and No. 2, it isn't sexual activity showing the source or origin of semen, pregnancy, disease or trauma. So I deem that this evidence is prohibited by 3-319.

Hairston contends that the court erred in granting the State's motion for two reasons. He first claims that evidence of C.D.'s prior sexual conduct was admissible under CL § 3-319(b)(4)(iii), "as it supported the claim that C.D. had an ulterior motive to accuse [Hairston] of abuse – either because she was angry with him for punishing her, or because she wanted to deflect blame and avoid being punished again." But, Hairston did not present any evidence that he personally punished C.D. for her sexual activity with her siblings. Hairston presented evidence that J.G. punished C.D. for the sexual activity that occurred between 2010 and 2012, and for the sexual activity that occurred in 2016, C.D. was generally punished by being sent to her room. Hairston did not specify any punishment that he individually imposed upon C.D. for either instance, and hence, the evidence of her sexual activity was not admissible under CL § 3-319(b)(4)(iii).

Hairston next claims that evidence of C.D.'s prior sexual conduct was admissible under CL § 3-319(b)(4)(ii), "as it tended to show the alleged abuse was not the source for this ten-year-old child's traumatic, precocious knowledge of sex." But, CL § 3-319(b)(4)(ii) governs the admissibility of a specific instance of sexual *activity*, not the acquisition of knowledge, and the phrase is "an enumeration that has strong *physical* connotations," rather than mental or emotional. *Shand v. State*, 341 Md. 661, 675 (1996) (emphasis added). *See also State v. DeLawder*, 28 Md. App. 212, 215 (1975) (noting that a "defendant may introduce evidence of acts of prior unchastity of the prosecutrix as tending to show that another was responsible for . . . trauma" when the trauma at issue is the rupturing or injuring of the prosecutrix's hymen). Hence, the evidence was not admissible under CL § 3-319(b)(4)(ii).

Hairston cites *State v. Budis*, 593 A.2d 784 (N.J. 1991), in which the Supreme Court of New Jersey concluded that "evidence of [the victim's] prior abuse by her stepfather and her consequent knowledge of sexual acts [was] relevant to the defense[.]" *Id.* at 791. But, the case is inapplicable. Budis was

> convicted . . . of two counts of aggravated sexual assault . . . . The charges stemmed from two incidents in 1988 between [Budis] and his cousin's nine-year-old daughter, T.D. At trial, [Budis] sought to cross-examine both T.D. and the investigating detective about the sexual abuse of T.D. by her stepfather in 1987. T.D. gave virtually identical descriptions of her stepfather's conduct and of [Budis's] acts. The purpose of the cross-examination was to show that T.D. had acquired knowledge of oral and vaginal sex from a source other than [Budis]. . . . . The trial court admitted evidence of T.D.'s accusation against her stepfather and of the ensuing police investigation, but excluded the details of the stepfather's abuse. The [intermediate appellate court] reversed. [The Supreme Court of New Jersey] granted the State's petition for certification[.]

Id. at 786 (citation omitted). Affirming the intermediate appellate court's judgment, the Court concluded that the evidence was relevant "to rebut[] the inference that T.D. acquired the knowledge to describe sexual matters from her experience with" Budis. *Id.* at 791 (citation omitted).

Here, unlike in *Budis*, C.D.'s description of Hairston's conduct was vastly different than the conduct in which she engaged with her siblings. Also, Hairston did not present any evidence that any of the pornography viewed by C.D. contained depictions of anal intercourse. Hence, evidence of the source of C.D.'s sexual knowledge was not relevant, and the court did not err in granting the State's motion *in limine*.

II.

On the second day of trial, the State called five witnesses, and Hairston called one witness. Following testimony, the court ordered the parties to return at 8:45 the following morning.

At 8:56 a.m. the following morning, defense counsel appeared before the court and stated that "shortly before" 8:30 a.m., he received a call from Sharie, who stated that Hairston had been "taken by ambulance to Union Hospital." The court asked defense counsel to "contact the [h]ospital and get them to send something as to what is going on over there right now." At 9:19 a.m., defense counsel returned and stated that his office had been told that Hairston "was admitted at 8:44 a.m. for chest pains, [and had] not been seen by a provider yet." When the court stated that it could not "start [the] case without" Hairston, defense counsel stated: "I agree. I had already informed [the prosecutor] that I have no more witnesses to call. . . . . And, you know, as far as I'm concerned, my case is done. I've already gone over that with my client. I fully expect him to assert his privilege[.]" (Indentation omitted.) After reviewing other matters, the court recessed so that defense counsel could "work on" obtaining "something that documents that [Hairston] needs medical care."

At 12:20 p.m., defense counsel reappeared before the court and stated that he had gone to the hospital and "had a conversation" with Hairston, who "was hooked up to an IV," was "being monitored electronically for various things," and "had received some medication." Defense counsel stated: "[H]e's asked me to ask for a mistrial, and so I'm asking for a mistrial." The court denied the request and recessed for the jury's lunch break.

At 1:44 p.m., the prosecutor and defense counsel appeared before the court, and the court noted that Hairston was not present. The court stated that, during the break, the prosecutor informed the court that "he believed . . . Hairston was no longer at the emergency room." Defense counsel stated: "I can tell Your Honor that I called the number that I have and have contacted Mr. Hairston at before. Nobody picked up. I did leave a message to that effect, that he must be here at 1:30."

The State then moved to try Hairston *in absentia*. In support of the motion, the State called Elkton Police Detective Lindsey Ziegenfuss, who testified that she had gone to the hospital and discovered that Hairston had been discharged at 12:10 p.m. Detective Ziegenfuss stated that she had watched a video surveillance recording which showed Hairston and a female companion exit the emergency room, enter a vehicle, and exit the parking lot.

Following Detective Ziegenfuss's testimony, defense counsel asked the court to "just wait a little bit," because the parties "really [did not] know anything yet," and Hairston had "indicated [that] he may wish to testify in this matter." Following argument, the court took judicial notice of Hairston's address and found that it "is seven minutes from the courthouse," and that Hairston "had plenty of time to go home, change his clothes, take a shower, get dressed, [and] come back" to court. The court subsequently found that Hairston was "knowingly and voluntarily waiving his right to be present," and that trial would proceed. Defense counsel then closed his case, stating: "I object to being required to close without my client, who has indicated both a desire to be here and potentially even

testify." The State subsequently called one rebuttal witness and closed its case. The court then instructed the jury, and following argument, the jury returned its verdicts.

Hairston contends that the court "erred by trying [him] *in absentia* because the State did not establish that he knowingly waived his right to be present or that administrative efficiency justified *in absentia* adjudication." We conclude that this contention is not preserved. In *Reeves v. State*, 192 Md. App. 277, 293 (2010), we stated that where counsel "never expressly objected to the court's acceptance of a verdict not influenced by the appellant's absence," and "failed to raise this issue in a post-trial motion or even mention it at the sentencing hearing," the issue "may not be preserved," and "there is authority from other jurisdictions that a defendant waives the right to argue this issue on appeal if it was not raised in a post-trial motion as grounds for a new trial." *Id.* at 293 (citation omitted). Here, like in *Reeves*, counsel failed to object to the court's acceptance of the verdict, and did not challenge the conclusion of trial *in absentia* in a post-trial motion or at the sentencing hearing. Hence, we cannot reach the contention.

Even if we could reach the contention, we would conclude that the court did not err. In *Reeves*, we stated that "[a]lthough the trial judge did not conduct an extensive inquiry on the record into [Reeves's] whereabouts and any reason for his absence, we believe the circumstances provided the judge a sufficient basis to conclude that [Reeves] voluntarily failed to appear[.]" *Id.* Those circumstances included Reeves's "presence . . . at one portion of trial, but his absence at another," his "presence in court when informed of the date and time to return," the serious nature of the crimes with which he was charged, the stiffness of the sentences that he faced if convicted, the strength of the State's case, and the

likelihood that Reeves would "be incarcerated immediately after having been convicted." *Id.* at 294-95 (citations omitted).

Here, Hairston did not fail to appear until after five witnesses, including C.D., testified for the State. The court ordered defense counsel to obtain documentation that Hairston required medical care that would prevent him from attending trial, and assuming that defense counsel communicated that order to Hairston, he failed to comply. Hairston also instructed defense counsel to move for a mistrial, from which the court could infer that Hairston did not wish for trial to continue. At the time that the court ordered that Hairston be tried *in absentia*, he had not responded to defense counsel's message or otherwise contacted defense counsel in at least ninety minutes to communicate his whereabouts and additional need, if any, for medical care. The court also noted that, even if Hairston had wanted to go home following discharge to make himself presentable, he had received more than enough time to do so, especially in light of the proximity of Hairston's residence to the courthouse. Hairston was charged with very serious crimes, and faced a potential sentence of life imprisonment plus consecutive time if convicted. Finally, the testimony of C.D., if believed, would have been sufficient to convict Hairston of the offenses, and it was likely that Hairston would be incarcerated immediately after having been convicted. We conclude that these circumstances gave the court a sufficient basis to conclude that Hairston voluntarily failed to appear.

Hairston further contends that he "was deprived of his constitutional right . . . to elect whether or not to testify in his own defense." We disagree. When defense counsel visited Hairston in the hospital and discussed how to proceed, Hairston asked defense

counsel to request not a continuance so that Hairston could testify, but a mistrial. Before the State moved to try Hairston *in absentia*, defense counsel emphatically stated that he had "no more witnesses to call," his case was "done," and he "fully expect[ed Hairston] to assert his privilege." It was not until after the State moved to try Hairston *in absentia* that defense counsel contended that Hairston "may wish to testify" or would "potentially" testify. At no time did defense counsel unequivocally state that Hairston would testify, and Hairston did not contend in a post-trial motion that he would have elected to testify.[3] Hence, the court did not deprive Hairston of his right to testify, and the court did not err in concluding the trial *in absentia*.

III.

After Hairston went to the hospital, but before the court recessed so that defense counsel could visit Hairston there, the following colloquy occurred:

> THE COURT: [Defense counsel], did you have an opportunity to review [the prosecutor's] instructions?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: And we talked about that. We can do some of that here too.
>
> THE COURT: The defendant is not here, but I just wanted to make sure that you've reviewed them. Have you talked with Mr. Hairston about them?

[3]We further note that while the court and counsel were reviewing proposed jury instructions, defense counsel stated: "Let me say that Mr. Hairston would have to fire me before I would let him testify."

> [DEFENSE COUNSEL]: About the jury instructions, no. Normally I don't go over jury instructions with my client. I go over them with counsel. I go over them with the [c]ourt. And I don't know – again, in many cases we've done preliminary instructions before going on the record with counsel and the [c]ourt, so, you know, certainly we can proceed along those lines.

The court then conferred with counsel on the proposed jury instructions.

Hairston contends that the court "violated [his] right to be present . . . when it heard argument on the proposed jury instructions without him present" (capitalization and boldface omitted), because the conference "was a material part of the trial." We disagree. In *Brown v. State*, 272 Md. 450 (1974), the Court of Appeals stated:

> We are fully cognizant of the necessity of conferences between the court and counsel – either before or during a trial – for the purpose of discussing scheduling, other collateral matters of procedure, to hear arguments of law on evidentiary rulings, *to confer on proposed instructions to the jury*, and the like. [S]uch conferences have not been held to be a part of the trial. To require that all such conferences be conducted in open court, or that the defendant be present in chambers, or at a bench conference, on each occasion would create administrative burdens, diminish the decorum of the proceedings, and in many instances involve security risks – one of which can be balanced by any gain from the defendant's presence.

Id. at 479-80 (footnote omitted) (emphasis added). Here, the conference held between the court and counsel in Hairston's absence concerned only proposed jury instructions. This conference was not a part of the trial, and hence, the court did not err in holding the conference in Hairston's absence.

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