Circuit Court for Carroll County
Case No.: C-06-CR-19-000724

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2143

September Term, 2022

JOSE ROSALES

v.

STATE OF MARYLAND

Tang,
Albright,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: March 14, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Jose Rosales, was tried before a jury in the Circuit Court for Carroll County and convicted of sexual abuse of a minor and a continuing course of conduct of sexual abuse of a minor. On appeal, Rosales presents the following three questions:

1. Did the trial court err by refusing to ask Appellant's requested *voir dire* question?

2. Did the trial court err by allowing the State to introduce evidence that Appellant could not be excluded as a possible contributor from a partial Y-STR DNA profile obtained from a swab taken from underwear?

3. Does the commitment record need to be corrected?

Only the first question is properly before us on appeal. For the reasons provided below, we answer that question in the negative and affirm.

BACKGROUND

I. Factual Background

Rosales was charged with sexually assaulting "A." between May 1, 2018 and August 27, 2019, when she was between nine and eleven years old.[1] In 2018, A. and her mother moved to Westminster, Maryland from El Salvador. Shortly thereafter, A.'s mother met and began dating Rosales. In June of 2018, A.'s mother, Rosales, and A. began living in a bedroom with two beds in a home off of Geneva Drive in Westminster.

Around midnight on August 24, 2019, Rosales returned from work and said that he wanted A. to "give [him] a massage." When A.'s mother said "no," Rosales responded

[1] We refer to the victim by a letter selected at random to provide anonymity.

"yes" because he "purchase[s] food . . . for her to eat" and proceeded to lay down on A.'s bed, where A. was watching television.

A.'s mother, who was "very pregnant" and not feeling well, was laying on other bed in the bedroom at that time. When she sat up and saw Rosales touching A.'s "legs and . . . crotch[,]" she told Rosales to stop touching her daughter. Rosales protested and told A.'s mother to "turn the lights off." A.'s mother saw that Rosales "kept trying to touch [A.]" and when "[A.] would put a sheet over her legs[,]" he "kept pulling it off." After A.'s mother told Rosales to stop, Rosales went into a nearby bathroom. He called out to A. and made hand motions for her "to come over with him to the bathroom[,]" but A.'s mother told Rosales that A. was not allowed to leave the bedroom.

The next morning, after Rosales left, A.'s mother asked A. if Rosales had done other things to her. A. responded that Rosales had "forced her to have sexual relations with him." A.'s mother called a friend, who referred her to a nurse at a nearby hospital, who called the police. Police collected several items from the bedroom, including some of A.'s underwear.

On August 28, 2019, A. was taken to Carroll Hospital Center for a sexual assault forensic examination, or "SAFE" exam.[2] Dr. Cynthia Roldan, A.'s SAFE examiner and Chief of Pediatrics at Carroll Hospital Center, determined that the absence of A.'s posterior hymen was consistent with repeated vaginal penetration. On September 26, 2019, Rosales was charged with several sex offenses including sexual abuse of a minor, continuing course

[2] At trial, Dr. Cynthia Roldan explained that a SAFE exam is a "specialized exam" to "evaluate allegations or concerns of sexual assault or abuse."

of conduct of sexual abuse of a minor, sexual abuse of a minor household member, and second-degree rape.

II. Procedural Background

Prior to trial, defense counsel filed a motion *in limine* seeking to exclude the State's use of DNA evidence obtained on A.'s underwear. More specifically, defense counsel asserted that evidence of the partial Y-STR profile[3] obtained from A.'s underwear was prejudicial because there was not a "positive match of Mr. Rosales." In response, the State clarified that "it wasn't that they didn't find a match, it is just that he cannot be excluded" based upon the Y-STR results obtained, and that it "intend[ed] to have the DNA analyst explain what that means" at trial. The court denied the motion.[4]

[3] Tiffany Keener, the State's forensic scientist at trial, testified that "STR" stands for "short tandem repeat" and that it is a type of DNA analysis. A Y-STR analysis analyzes DNA on the Y chromosome, and is "male-specific DNA testing." As Ms. Keener explained:

> [S]ometimes we're working with samples that have a lot of female DNA and a very small amount of male DNA. If I were to test that sample with that limited percentage of male DNA, more than likely I would only see the female DNA present in that possible DNA mixture. When I have a low amount of male DNA, it's useful for a sample to process that with Y-STR testing to have a chance at observing the male DNA that may be present in low amounts.

[4] Although not challenged on appeal, we note that in denying Rosales's motion, the court appears to have relied upon *Armstead v. State*, 342 Md. 38 (1996). In *Armstead*, the court considered DNA evidence offered under Md. Code Ann., Courts and Judicial Proceedings § 10-915, which does not apply to the facts in the record before us. *Id*. at 66. In any event, for the reasons set forth in the Discussion, Part II, below, we find no abuse of the court's discretion in admitting the evidence. *See Robeson v. State*, 285 Md. 498, 502 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm.").

The matter proceeded to a trial by jury on November 14 and 15, 2022. During voir dire, when defense counsel requested that the court "inquire if any member of the panel has children," the court asked, "what bias would that question be seeking to elicit?" Defense counsel replied, "if the answer is yes, I would argue it would merit further inquiry at the bench[.]" As to what further inquiry would be merited, this colloquy followed:

> THE COURT: What inquiry would it invite --
>
> [DEFENSE COUNSEL]: How old --
>
> THE COURT: -- that is not covered this? Because I took out, does anybody have an 11-year old? Does anybody -- because that is -- that doesn't go to a bias. That just goes -- and I am not required--
>
> [DEFENSE COUNSEL]: I would argue it does, Your Honor. It could possibl[y] go to an unconscious bias if we don't know how many children they have. And it -- I think going into this without knowing it, if someone has children, it could be certainly done unconscious by ----, but I would want to explore it, Your Honor.
>
> THE COURT: So I appreciate what you would -- that you would want the information, but that is not the reason that the Court asks *voir dire*. And I am not -- I am only required to ask questions that will uncover any bias. And whether or not -- I mean, my expectation would be if I ask the jury panel, "Do you have children?" that, you know, every single person could stand up, two-thirds of the people could stand up.

Noting that it would ask several alternative questions in response to defense counsel's assertions, the court, denying the request stated:

> I will add in as number 11, "Does any member of the jury panel" -- or "of the panel have strong feelings about the crime of sexual abuse of a minor?"
>
> And then, I think, with the addition of that strong feelings question, and then, A of question 10, if I add, "Any member of the jury panel or a member of your immediate family have been a victim of sexual abuse or sexual assault" in combination with 18 that already says, "Do you feel just because a child or adult testifies about sexual assault that it must be necessarily true or untrue?" -- I don't believe that adding -- asking the

> additional question if any member of the panel has children is going to be helpful in uncovering any bias. So I am going to deny that request.

At the end of voir dire, defense counsel renewed the request, which the court again denied:

> THE COURT: All right, any objections to the *voir dire*?
>
> [DEFENSE COUNSEL]: No. Well, I put the original objection on the record at this time.
>
> [THE STATE]: Not from the State.
>
> THE COURT: And that was that you want me to ask if any member of the jury panel has children?
>
> [DEFENSE COUNSEL]: Has children. Correct.
>
> THE COURT: Okay. And for the reasons stated on the record previously, I am going to deny that request. I believe that it is -- any bias is uncovered by the questions that the Court has already asked.

During the trial, A.'s mother testified that Rosales would watch A. while she worked twelve-hour shifts. A. testified that while her mother was at work, Rosales would touch her "private parts" with his hands and with his "private parts where he urinates[,]" and that Rosales penetrated her private part with his private part more than five times. Rosales had warned A. that if she told her mother about what he did, her mother "would not love [her]" anymore and "that he could do something to [A.'s mother] or [A.'s] family." A. testified that Rosales sexually abused her "basically the entire time" they lived in the home on Geneva Drive – over thirteen months – and that the last time was on a Thursday "close to when the police came" in August of 2019.

Tiffany Keener, a forensic scientist with the Maryland State Police, testified regarding a partial Y-STR DNA profile obtained on a swab taken from the "inner crotch

area" of A.'s underwear. Ms. Keener explained that "Y-STRs are inherited paternally, directly from father to son, an individual can never be considered a match[,]" because everyone in "the paternal line will share the same Y-STR profile[,]"[5] and that Rosales's Y-STR profile was "consistent" with the partial Y-STR profile obtained from A.'s underwear. No objection was made to Ms. Keener's testimony.

The jury found Rosales guilty of sexual abuse of a child and a continuing course of conduct of sexual abuse of a child. He was sentenced to fifty-five years of imprisonment. This appeal followed.

DISCUSSION

I. The court did not abuse its discretion in declining to ask Rosales's proposed voir dire question.

Rosales asserts that the court improperly declined to ask his proposed voir dire question to the potential jurors regarding whether they had children because "potential jurors who have children, and especially children of similar age to the complainant, could very likely harbor 'an unconscious' bias[.]" He adds that "[n]one of the other *voir dire* questions" asked by the court covered the potential bias "that would stem from [the jurors'] role as parents."

[5] A. testified that she had not met anyone else from Rosales's paternal line:

> [THE STATE:] And the next one is going to sound kind of weird, okay? Did you ever meet [Rosales's] father or grandfather or uncle or brother?
>
> [A.:] No. No.

The State counters that the proposed question "was too broad to reasonably reveal specific, disqualifying biases." It argues that Rosales failed to demonstrate "a correlation between potential jurors' status as parents and a bias that is directly related to the crime, the witnesses, or himself." In addition, it asserts that the other questions asked by the court sufficiently "tested the jury for bias, partiality, and prejudice related to children and child sex crimes[.]" We agree.

"It is well-settled that a trial judge has broad discretion in the conduct of voir dire, especially regarding the scope and form of the questions propounded[.]" *Thomas v. State*, 454 Md. 495, 504 (2017); *see also Davis v. State*, 93 Md. App. 89, 103 (1992) (noting that "[t]he pervasive theme that underlies any consideration of what happens in the course of *voir dire* examination of jurors is that it is something entrusted to the wide discretion of the trial judge"), *aff'd*, 333 Md. 27 (1993). For that reason, the court "is not required, with some limited exceptions, to ask specific questions requested by trial counsel." *Washington v. State*, 425 Md. 306, 315 (2012). Indeed, the court "need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Thomas*, 454 Md. at 504.

There are two types of causes for disqualifications: '"(1) a statute disqualifies a prospective juror; or (2) a collateral matter is reasonably liable to have undue influence over a prospective juror.'" *Id*. at 505 (cleaned up) (quoting *Pearson v. State*, 437 Md. 350, 357 (2014)). Here, Rosales asserts the second type: '"biases directly related to the crime, the witnesses, or the defendant[.]'" *Pearson*, 437 Md. at 357 (quoting *Washington*, 425 Md. at 313). A party seeking to uncover bias through voir dire for that reason must show a

"demonstrably strong correlation between the status in question and a mental state that gives rise to cause for disqualification[.]" *Dingle v. State*, 361 Md. 1, 12-13 (2000) (quotation marks and citation omitted).

In determining whether a proposed question is reasonably likely to reveal disqualifying bias, the court "weigh[s] the expenditure of time and resources in the pursuit of the reason for the response to a proposed *voir dire* question against the likelihood that pursuing the reason for the response will reveal bias or partiality." *Perry v. State*, 344 Md. 204, 220 (1996). The court is not required to ask questions that "may consume an enormous amount of time." *Pearson*, 437 Md. at 359.

In addition, "a prospective juror's status, whether that be professional, social, or whatever, is not by itself a sufficient ground for disqualifying the juror[.]" *Hernandez v. State*, 357 Md. 204, 222 (1999) (emphasis omitted). The Supreme Court of Maryland has "explicitly distinguished status from the venire person's state of mind, in which could inhere some bias, prejudice, or preconception, that would render the person partial and hence unfit as a juror." *Id*. at 223 (quotation marks and citation omitted).

On appeal, "we review a trial judge's decisions during voir dire under an abuse of discretion standard." *Thomas*, 454 Md. at 504. In doing so, we look "at the record as a whole to determine whether the matter has been fairly covered." *Washington*, 425 Md. at 313-14. We recognize that "[t]he trial judge has had the opportunity to hear and observe the prospective jurors, to assess their demeanor, and to make factual findings." *Id*. at 314. Accordingly, voir dire determinations are "entitled to substantial deference, unless they are

the product of a voir dire that 'is cursory, rushed, and unduly limited.'" *Id*. (quoting *White v. State*, 374 Md. 232, 241 (2003)).

Here, we are not persuaded that the court abused its discretion in declining to ask the proposed voir dire question. When the court asked what bias the question would seek to uncover, defense counsel merely responded that an affirmative response could "possibl[y] go to an unconscious bias" and thus "merit further inquiry[.]" That response does not demonstrate a "strong correlation" between an affirmative response to the proposed question and a mental state giving rise to "cause for disqualification." *Dingle*, 361 Md. at 14. Nor does Rosales provide any support for disqualifying or identifying jurors based only upon their status as parents. *Id*. at 13 ("[M]ere status . . . is insufficient to establish cause for disqualification of a prospective juror." (quotation marks and citation omitted)).

Noting that "every single person could stand up, two-thirds of the people could stand up[,]" the court properly considered the likely "expenditure of time and resources" in asking Rosales's proposed voir dire question. *Perry*, 344 Md. at 220. The court was under no obligation to ask such a broad question based upon the record before us. *See also Pearson*, 437 Md. at 359-60 (noting that the court was not required to ask a question that could apply to "[m]any (if not most) prospective jurors").

Moreover, the court asked several other questions more directly aimed at uncovering the "unconscious bias" claimed by Rosales, including: (1) whether any member of the panel "ha[s] strong feelings about the crime of sexual abuse of a minor[,]" (2) whether any member of the panel has been, or has an immediate family member who "ha[s]

been a victim of sexual abuse or sexual assault[,]" and (3) whether any member of the jury panel believes that "just because a child or adult testifies about sexual assault that it must be necessarily true or untrue[.]" Considering "the record as a whole[,]" Rosales's bias concerns were "fairly covered" by the other questions asked by the court. *Washington*, 425 Md. at 313-14. In short, we perceive no abuse of the court's discretion.

II. Rosales failed to preserve his challenges to the DNA evidence obtained from A.'s underwear.

Rosales asserts that the DNA evidence introduced by the State was irrelevant and thus improperly admitted because "it confirm[ed] nothing more than the mere possibility that [he] may have contributed to the sample, not that he actually did." He adds that, even if relevant, the "minimally probative value" of the evidence "was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury." The State responds that because Rosales failed to "lodge a single objection" during the challenged testimony, his assertion has not been preserved for our review. But even if preserved, the State argues that admission of the evidence "constituted a sound exercise of [the court's] discretion[.]"

The Supreme Court of Maryland has made clear that, '"where a party makes a motion *in limine* to exclude irrelevant or otherwise inadmissible evidence, and that evidence is subsequently admitted, the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve its objection for appellate review.'" *Reed v. State*, 353 Md. 628, 637 (1999) (cleaned up) (quoting *United States Gypsum Co. v. Mayor of Baltimore*, 336 Md. 145, 174 (1994)); *see also Huggins v. State*, 479 Md. 433,

447 n.7 (2022) ("It is important to note that if the court denies the motion in limine to exclude evidence, the party seeking its exclusion must still object when the evidence is offered for admission at trial."). This is because "[a]n objection is required to let the court know that the party still believes the evidence should be excluded, and gives the court the opportunity to make a more informed decision with the benefit of the evidence adduced since the initial ruling." *Huggins*, 479 Md. at 447 n.7.

Here, Rosales does not dispute that he failed to object to the testimony regarding the DNA evidence obtained on A.'s underwear at trial. Accordingly, his challenges are not preserved for our review. *See* Md. Rule 8-131(a). ("Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Had Rosales preserved this issue for review, he would fare no better. Generally, "all relevant evidence is admissible." Md. Rule 5-402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. The Supreme Court of Maryland has noted that "[h]aving 'any tendency' to make 'any fact' more or less probable is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018) (quoting *State v. Simms*, 420 Md. 705, 727 (2011)).

Indeed, relevant evidence will be excluded only "when its unfairly prejudicial nature substantially outweighs its probative value." *Woodlin v. State*, 484 Md. 253, 265 (2023) (emphasis omitted). Evidence may be unfairly prejudicial if it "'tends to have some adverse effect'" beyond proving the fact at issue, *State v. Heath*, 464 Md. 445, 464 (2019) (quoting

Hannah v. State, 420 Md. 339, 347 (2011)), or if it may cause the jury "'to disregard the evidence or lack of evidence'" regarding the crime charged. *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Lynn McLain, *Maryland Evidence State and Federal* § 403:1(b) (2009 Supp.)). In such instances, we have said that "[t]he inflammatory nature of the evidence must be such that [its] 'shock value' on a layperson serving as a juror would prevent the proper evaluation or weight in context of the other evidence." *Urbanski v. State*, 256 Md. App. 414, 434 (2022), *cert. denied*, 483 Md. 448 (2023).

"[W]hen weighing evidence, 'a trial court is given significant deference in its determination that probative evidentiary value outweighs any danger of prejudice.'" *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 373 (2012) (quoting *S. Mgmt. Corp. v. Mariner*, 144 Md. App. 188, 197 (2002)), *aff'd*, 430 Md. 431 (2013). On appeal, we review *de novo* whether evidence is legally relevant. *Montague v. State*, 471 Md. 657, 673 (2020). If the evidence is relevant, we then consider "whether the trial court abused its discretion by admitting relevant evidence which should have been excluded as unfairly prejudicial." *Id*. An abuse of discretion is a decision "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *State v. Matthews*, 479 Md. 278, 305 (2022) (quotation marks and citation omitted).

We are persuaded that the evidence at issue did have a "tendency to make the existence of any fact that is of consequence" more or less probable. Md. Rule 5-401. The State's forensic scientist explained that the Y-STR profile is inherited. Therefore, the paternal line and the partial Y-STR profile obtained from A.'s underwear was "consistent with the Y-STR profile of Jose Rosales." The expert explained how "rare" that was at trial:

> In order to provide how rare that profile is in the general population, we use what's called a counting method to best estimate the rarity of the profile in the general population. To do that we take a database of approximately 5,717 unrelated males, and I searched that database to see if that same partial DNA profile was present within the database.
>
> And from that I did not observe that in any other males in that population database. So based on these number -- this number of observations, I can expect to see this partial Y-STR profile that was obtained in the underwear approximately 1 in 9 -- excuse me, 1 in 1,909 unrelated males.

In addition, A. testified that she had not met anyone else in Rosales's paternal line.

We disagree that the evidence "confirm[ed] nothing more than the mere possibility" that Rosales contributed to the sample, or that it was not relevant under the facts of the case. Nor do we agree that the probative value of the evidence was outweighed by the danger of unfair prejudice, or that it could have "influence[d] the jury to disregard the evidence or lack of evidence" regarding the crimes charged. *Odum*, 412 Md. at 615 (quotation marks and citation omitted). Moreover, the additional evidence introduced against Rosales at trial included A.'s testimony, eyewitness testimony from A.'s mother, and testimony from the doctor who conducted a SAFE exam on A. and who's findings were consistent with A.'s allegations of sexual abuse. As the court noted at Rosales's sentencing, "the DNA in this case is not the smoking gun, so to speak. That is [A.'s] eyewitness testimony. The DNA just corroborates what she said." Simply put, the DNA evidence was not improperly admitted.

III. Rosales's request to correct the commitment record is not properly before us.

Finally, Rosales requests that this Court "order the circuit court to correct the commitment record, because it fails to reflect that Appellant received credit for pretrial incarceration." The State asserts that we "should reject Rosales's argument because he has not moved to correct or amend the commitment record in the circuit court, and this direct appeal is not the proper way to do so." As the Supreme Court of Maryland has made clear, "the failure to award credit for time served is an issue resolved by filing a motion pursuant to [Maryland] Rule 4-351." *Bratt v. State*, 468 Md. 481, 507 (2020); *see also* Md. Rule 4-351(b) ("The commitment record may be corrected at any time upon motion, or, after notice to the parties and an opportunity to object, on the Court's own initiative."). That was not done.

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