Circuit Court for Montgomery County
Case No. 127530C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2518

September Term, 2016

ROBERTO ENRIQUE HERNANDEZ

v.

STATE OF MARYLAND

Wright,
Graeff,
Krauser, Peter B.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Krauser, J.

Filed: September 12, 2018

Convicted after a bench trial, in the Circuit Court for Montgomery County, of sexual abuse of a minor and sex offense in the second degree, Roberto Enrique Hernandez, appellant, raises two issues for our review. Rephrased to facilitate review, they are:

1. Was the evidence sufficient to convict Hernandez of sexual abuse of a minor and sex offense in the second degree?

2. Did the trial court err in denying Hernandez a new trial based upon the State's purported *Brady* and discovery violations?

For the reasons that follow, we affirm.

TRIAL

The victim in this matter, "C.J.," was the five-year-old son of Hernandez's cousin, "Ana J." At trial, C.J., then seven-years-old, testified that the thirty-eight-year-old Hernandez "sucked on [his] pee pee" while C.J. and his mother were visiting with Hernandez and his children at Hernandez's home. That abuse purportedly occurred when C.J. and Hernandez were alone in the laundry room of Hernandez's home.

Ana J. then testified that, on November 11, 2014, she drove to Hernandez's home with her son, C.J. After arriving there, C.J. began playing with other children in the basement of the house while Ana J. and Hernandez remained upstairs. At some point, Hernandez went to the basement "to check on the kids," and, a short time later, returned upstairs. Approximately 45 minutes later, Hernandez again went to the basement to "check on the children" and, according to Ana J., was gone for approximately 15 to 30 minutes. At that point, Ana J. "thought something was wrong" and went down to the basement.

Then, upon going downstairs, Ana J. saw several children, but not C.J. When she asked the children where C.J. was, one of the children pointed to the laundry room, the door to which was closed. As Ana J. walked toward the laundry room, Hernandez opened the door and exited the laundry room. When Ana J. asked Hernandez, "what's going on," Hernandez replied, "so sorry, so sorry, so sorry." Ana J. then went into the laundry room and found C.J. there "in the dark." Ana J. and C.J. left Hernandez's residence "about 30 minutes" later. During their trip home, Ana J. told C.J. that she "need[ed] to know what happened" at Hernandez's home. After first denying that anything had occurred, C.J. stated that Hernandez had "pulled [his] pants down" and "sucked on [his] pee pee." Upon returning home, Ana J. gave C.J. a bath and put his clothes "in a Ziploc bag." The next morning, she called the police, and, two days later, she took C.J. and the bag of his clothing to the Tree House Assessment Center (the "Tree House"), a child advocacy center.

C.J.'s clothing was eventually handed over to the police for forensic analysis. Following Ana J.'s testimony, a forensic examiner with the Montgomery County Police Department testified that she performed DNA testing on C.J.'s clothing and that samples taken from C.J.'s underwear tested positive for Hernandez's DNA.

When, following the forensic examiner's testimony, Ana J. was recalled to the stand by the State, defense counsel asked Ana J. about her actions following the assault. She recalled that C.J. went to therapy "right after the incident for a few months" but "did not want to go back." Ana J. explained that she then met with "the previous State's Attorney," who "recommended" that C.J. "go back to the Tree House" because "it would help [C.J.]"

According to Ana J., C.J. eventually went back into therapy at the Tree House "every Friday" from "November" until "May." When asked at what point C.J. "started telling people at the Tree House that … this did happen," Ana J. responded that she "guessed" it was the "midpoint between November and May" and that C.J. "did tell [his therapist] what happened." Defense counsel then asked, "So from November to May before that happened had he – was he telling her – did he say that nothing ever happened? Was he denying something happened?" Ana J. answered, "No."

Upon the conclusion of Ana J's testimony, defense counsel, after informing the court that Ana J.'s testimony was "the first time [she had] heard anything about any therapy sessions … at the Tree House," asserted that she "should have been given notice of that" and that she "should have gotten any notes that [C.J.] was still denying [the abuse] to a State agent." Defense counsel then suggested that the State knew about the therapy because "the prior prosecutor," who was originally assigned to C.J.'s case and had since left the prosecutor's office, was the one who had suggested that C.J. "should go back to the Tree House from November to May," which, according to defense counsel, was when C.J. "changed to saying that [the abuse] happened." Based on that alleged discovery violation, defense counsel asked that the court dismiss the charges.

The prosecutor, who was not the original prosecutor assigned to C.J.'s case, responded that he was unaware that C.J. had been going to therapy and that Ana J.'s testimony was "the first time" he was "hearing about any therapy sessions." He further stated that any statements made by C.J. during therapy "would be in the possession of [the]

therapist" and that the therapist did not "report to the State's Attorney's Office." Ultimately, the court denied defense counsel's motion and found that the State had not committed a discovery violation because "the therapist wasn't part of anybody who is reporting to the State."

The State then called Evelyn Shukat, M.D., medical director of the Tree House, as a witness. Dr. Shukat recalled that, approximately one month after the incident, she examined C.J. and that, during that examination, C.J. stated that "Roberto" had "sucked on [his] pee pee" at "Roberto's home [] in the closet." The court was then shown a video of an interview of C.J. conducted by a forensic interviewer at the Tree House a few days after the assault. In that interview, C.J. denied ever being touched inappropriately by Hernandez.

At the conclusion of the bench trial, the court found Hernandez guilty of sexual abuse of a minor and of sex offense in the second degree. In so doing, the court stated:

> So then, of course, the question is has the State proved the actual act beyond a reasonable doubt. So the evidence to me is pretty clear that the child – of course the child was only 5 at the time. Now the child is 7. So a 5-year-old or a 7-year-old is going to be a little hesitant to testify just because he is so young.
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> And the fact that his testimony changed – I meant its significant, but it is certainly not dispositive because of, you know, that's just the way kids act. So you know when they go talk to a stranger in a strange place, the fact that they might at first say nothing happened that is not dispositive of whether something happened or didn't happen.
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> * * *

> So it is a factor but it is not certainly a dispositive factor. And then you have exactly what the mother saw or didn't see. Well, she didn't see something exactly happen but according to the mother's testimony the defendant was in the laundry room with the child. The defendant said I'm sorry. I'm sorry. So there is, you know, it looks like something is going on.
>
> But the real dispositive factor to me is the DNA evidence.
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> * * *
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> So yes. There might be some doubts but for the DNA evidence. But once you have the DNA evidence where it was then that removes all reasonable doubt. So I don't have any reasonable doubt[.]

MOTION TO DISMISS

After his trial had concluded, Hernandez filed a motion for a new trial, maintaining that the State had failed to disclose exculpatory information, namely, that C.J. had, during his therapy sessions following the alleged sexual abuse by Hernandez, made statements indicating that Hernandez had not abused him; that, after discontinuing his therapy sessions at the Tree House, C.J. had resumed those sessions at the insistence of the State; and, that C.J. had begun to suggest Hernandez had sexually abused him only after his therapy sessions had resumed. Hernandez maintained that, as a result of those purported "discovery violations" by the State, he was entitled to a new trial.

With his motion for a new trial, Hernandez also filed a subpoena seeking all correspondence, records, and treatment notes between any therapist or counselor at the Tree House and the States' Attorney's office regarding C.J. In response, the custodian of C.J.'s treatment records, the Montgomery County Department of Health and Human Services (the "Department"), filed a motion to quash the subpoena, contending that C.J.'s

mental health records were privileged. Then, following a hearing, the court granted the Department's motion, finding that "there [was] no discovery violation," that the records were privileged, and that the defense had failed "to provide some proffer that there's a reasonable likelihood that the privileged records will contain exculpatory evidence necessary for a proper defense." And it denied Hernandez's motion for a new trial "for the same reasons that were stated at trial and were stated at the time of the motion to quash."

DISCUSSION

I.

Hernandez contends that the evidence was "insufficient to convict [him] of sexual abuse of a minor and of second degree sex offense."

"The test of appellate review of evidentiary sufficiency is 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.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (citations omitted). That test applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witnesses accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Where, as here, we are called to evaluate the sufficiency of the evidence in a non-jury trial, "'the judgment of the circuit court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the

credibility of the witness.'" *Brown v. State*, 234 Md. App. 145, 152 (2017) (quoting *Dixon v. State*, 302 Md. 447, 450-51 (1985)).

Hernandez was convicted of sexual abuse of a minor in violation of Section 3-602 of the Criminal Law Article of the Maryland Code. That section provides, in pertinent part, that "[a] household member or family member may not cause sexual abuse to a minor." Md. Code, Crim. Law § 3-602(b)(2). Section 3-601(a)(3) of the Criminal Law Article defines "family member" as "a relative of a minor by blood, adoption, or marriage." And, finally, Section 3-602(a)(4) of that same Article defines "sexual abuse" as "an act that involves sexual molestation or exploitation of a minor" and includes "sexual offense in any degree" and/or "unnatural or perverted sexual practices."

Hernandez was also convicted of second degree sexual offense in violation of Section 3-306 of the Criminal Law Article of the Maryland Code. That section provides, in pertinent part, that a person may not perform "a sexual act with another … if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim." Md. Code, Crim. Law §3-306(a)(3), *repealed by* Acts 2017, c. 161, §1, eff. Oct. 1, 2017. A "sexual act" includes "fellatio" and/or an act "that can reasonably be construed to be for sexual arousal or gratifications, or for the abuse of either party." Md. Code, Crim. Law § 3-301(d)(1).

We hold that the evidence adduced at trial was sufficient to convict Hernandez of both crimes. C.J., who at the time was a minor and a blood relative of Hernandez, testified that Hernandez had "sucked on" his "pee pee" while at Hernandez's home. C.J.'s mother,

Ana J., testified that C.J. made identical statements when questioned by her upon leaving Hernandez's home on the day of the assault. She also testified that, prior to the assault, Hernandez went to the basement to "check on the kids" two separate times; that she became suspicious when Hernandez did not return upstairs following the second trip; that, after going downstairs, she found Hernandez and C.J., alone and isolated from the other children, in a dark room with the door closed; and that, when Hernandez exited the room, he stated "so sorry, so sorry, so sorry." Furthermore, Dr. Shukat, who examined C.J. a month after the assault, testified that C.J. told her that "Roberto" had "sucked on [his] pee pee" at "Roberto's home [] in the closet." And, finally, Hernandez's DNA was found in C.J.'s underwear following the assault.

Hernandez nevertheless asserts that the circuit court "made it clear that the only direct evidence produced by the State, the testimony of seven-year-old [C.J.], alone was insufficient to establish, beyond a reasonable doubt, that [he] committed the crimes charged." He further asserts that, "without the DNA evidence that was presented by the State, the court would have concluded that the evidence was insufficient" because the court declared that the DNA evidence "removes all reasonable doubt." Finally, Hernandez maintains that the evidence was insufficient because "the inference that [his] DNA was transferred to [C.J.'s] underwear while performing fellatio on [C.J.] was based on nothing more than speculation and conjecture."

We find Hernandez's argument unpersuasive. The circuit court never stated that C.J.'s testimony was insufficient to establish the crimes charged or that, but for the DNA

evidence, it would have found the evidence insufficient. To the contrary, after considering Ana J.'s testimony, the court summarized its findings by stating that "there might be some doubts but for the DNA evidence." Indeed, at no time did the court state that it was discounting or ignoring C.J.'s testimony or that the DNA evidence was the sole basis for the court's decision to find Hernandez guilty of the crimes charged. Rather, the court was merely noting that the DNA evidence dispelled any doubts that it may have had about C.J.'s testimony.

Moreover, Hernandez's DNA was found in C.J.'s underwear, and there was other evidence, namely the testimony of C.J., Ana J., and Dr. Shukat, that supported a finding that Hernandez transferred his DNA to the underwear during his sexual abuse of C.J. For that reason, the cases cited by Hernandez in support are inapposite.

In fact, the principle Maryland case relied upon by Hernandez, *Colvin v. State*, 299 Md. 88 (1984), actually supports the court's finding of guilt. In that case, the defendant, Eugene Colvin, was arrested and charged with several crimes, including armed robbery and murder, after an elderly woman was stabbed to death during a home invasion in Baltimore. *Id.* at 94-95. In establishing that Colvin was the perpetrator, the State presented evidence at trial showing that Colvin's fingerprints had been found on broken glass from the home's basement door (the point of entry) and that Colvin had later pawned several items stolen from the residence during the home invasion. *Id.* at 95-96. Following his convictions, Colvin noted an appeal, arguing that the evidence was "insufficient to show his criminal agency." *Id.* at 110.

The Court of Appeals disagreed and held that the evidence was sufficient. *Id.* Regarding the fingerprint evidence, the Court recognized that "fingerprint evidence found at the scene of a crime must be coupled with evidence of other circumstances tending to reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime." *Id.* at 110 (citations and quotations omitted). The Court further recognized that such "other circumstances" include "the location of the print, the character of the place or premises where it was found and the accessibility of the general public to the object on which the print was impressed." *Id.* at 110-11 (citations and quotations omitted). The Court then noted the relevant "other circumstances" in Colvin's case, namely, that the residence was private and not accessible to the general public; that the basement door was located at the back of the residence; that Colvin was a stranger to the premises; and, that the basement door's glass was found to be intact just prior to the home invasion. *Id.* at 111. Based on those facts, the Court concluded that "there was sufficient evidence from which the jury could 'reasonably exclude the hypothesis that the print was impressed at a time other than that of the crime.'" *Id.* at 111 (citations omitted).

Here, like in *Colvin*, there were sufficient "other circumstances" from which a rational jury could exclude the hypothesis that Hernandez's DNA was transferred to C.J.'s clothing at a time other than that of the crime. Hernandez's DNA was found not just on C.J.'s clothing, but on his underwear, and no evidence was presented to provide an innocuous explanation for how the DNA was transferred there. *See Id.* at 111 (noting that "[t]here was no evidence that [Colvin] was anything but a stranger to the premises.").

Moreover, although the forensic examiner could not determine whether the DNA came from Hernandez's saliva or some other source, C.J., Ana J., and Dr. Shukat all provided testimony to support the inference that Hernandez's DNA was transferred to C.J.'s underwear during the sexual abuse. In other words, although the DNA evidence did not, by itself, definitively establish Hernandez's guilt, when considered in conjunction with the other evidence, it did provide circumstantial evidence to support the crimes charged. *See Derr v. State*, 434 Md. 88, 130-32 (2013) (holding that circumstantial evidence of a match between the defendant's DNA and that of DNA collected from a rape victim was sufficient to sustain the defendant's conviction, where the defendant matched the description of the suspect given by the attacker).

II.

Hernandez next contends that the circuit court erred in denying his motion for a new trial after the State, according to Hernandez, withheld *Brady*[1] evidence and violated its discovery obligations under various provisions of Maryland Rule 4-263.

"'Whether to grant a new trial lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of discretion.'" *Johnson v. State*, 228 Md. App. 391, 433 (2016) (citations omitted). "The abuse of discretion standard requires trial judges to use their discretion soundly, and we do not consider that discretion to be abused unless 'the judge exercises it in an arbitrary or capricious manner

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

or when he or she acts beyond the letter or reason of the law.'" *Brewer v. State*, 220 Md. App. 89, 111 (2014) (citing *Washington v. State*, 424 Md. 632, 667-68 (2012)).

"The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83 (1963), that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good fair or bad faith of the prosecution.'" *Yearby v. State*, 414 Md. 708, 716 (2010) (quoting *Brady*, 373 U.S. at 87). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "An alleged *Brady* violation is a constitutional claim, based on the Due Process Clauses of the Fifth and Fourteenth Amendments." *Yearby*, 414 Md. at 719.

Maryland Rule 4-263, on the other hand, is "not grounded in either the Federal or State Constitution." *Id.* at 720. Rather, that Rule sets specific guidelines regarding pre-trial disclosure of information and is designed "to assist the defendant in preparing a defense and to protect the defendant from surprise." *Thomas v. State*, 397 Md. 557, 567 (2007). Under that Rule, the State, prior to trial and without the necessity of a request, is obligated to provide certain enumerated information to the defense, including "exculpatory information." Md. Rule 4-263(d)(5); *see also* Md. Rules 4-263(d). The Rule also provides that the State's Attorney's discovery obligations "extend to material and information … that are in the possession or control of the attorney, members of the attorney's staff, or any

other person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case." Maryland Rule 4-263(c)(2).

Applying the foregoing legal principles, we hold that the court did not abuse its discretion in denying Hernandez's motion for a new trial. To begin with, there is no evidence in the record that the State withheld or suppressed discoverable material in violation of *Brady* or Maryland Rule 4-263. Although the State may have known that C.J. had been in therapy at the Tree House prior to trial, there is absolutely no evidence that the State knew about the content of those therapy sessions, nor is there any evidence that any statements made by C.J. during those therapy sessions were ever in the State's possession or were, in any way, revealed to the State. Indeed, the therapist to whom C.J. made those statements was not a State actor and did not report to the State's Attorney's office regularly or in regard to C.J.'s case.

Finally, Hernandez, in claiming the aforesaid discovery violations by the State, ignores one salient fact: that the information sought involved communications between a patient, C.J., and a private therapist during therapy sessions. Such communications, absent a waiver or circumstances showing that that the communications were kept or required to be kept by a state agency, are privileged and not discoverable pre-trial. Md. Code, Cts. & Jud. Proc. § 9-109 (b)(1); *see also State v. Johnson*, 440 Md. 228, 240 (2014); *Goldsmith v. State*, 337 Md. 112, 125-26 (1995).

To be sure, the privilege recognized in psychotherapist-patient communications is not absolute and "may yield to the criminal defendant's constitutional rights at trial."

Johnson, 440 Md. at 247 (emphasis removed). In other words, although pre-trial discovery of privileged information is generally prohibited, review of the same information may be permitted at trial to protect "'a defendant's federal and state constitutional rights to obtain and present evidence necessary to the defense.'" *Id.* (quoting *Goldsmith*, 337 Md. at 121). In striking a balance between those competing interests, the Court of Appeals has determined that "a defendant must meet a minimum threshold to be entitled to an *in camera* review of the evidence." *Id.* As part of that "minimum threshold," a defendant must make a proffer showing "'a reasonable likelihood that the privileged records contain exculpatory information necessary for a proper defense.'" *Id.* at 248 (quoting *Goldsmith*, 337 Md. at 133-34). "Moreover, the required showing must be more than the fact that the records may contain evidence useful for impeachment on cross-examination." *Id.* (citations and quotations omitted).

Here, the only "evidence" presented by Hernandez showing that C.J.'s privileged records contained exculpatory information was testimony from Ana J., who, when asked at what point C.J. "started telling people at the Tree House that…this did happen," testified that she "guessed" it was the "midpoint between November and May" and that C.J. "did tell [his therapist] what happened." Other than that, Hernandez presented no evidence that C.J. had ever made any exculpatory comments to his therapist. In fact, when defense counsel asked Ana J. whether, prior to the November to May timeframe, C.J. said "that nothing ever happened," Ana J. responded, "No." In short, Hernandez failed to show a

reasonable likelihood that the privileged records contained exculpatory information, and, as a result, the trial court did not abuse its discretion in denying his motion for a new trial.

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