Circuit Court for Montgomery County
Case No. 135855C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2587

September Term, 2019

SANTOS ERNESTO RODRIGUEZ

v.

STATE OF MARYLAND

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: February 9, 2022

A jury in the Circuit Court for Baltimore City convicted Santos Ernesto Rodriguez, appellant, of multiple sex offenses involving his niece M.[1] The court sentenced appellant to consecutive terms of imprisonment, as follows: 25 years, all but 15 suspended, on the conviction for the sexual abuse of a minor; 20 years, all but 15 suspended, on the conviction for second-degree rape; three terms of 20 years, all but 15 years suspended, on each conviction for second degree sexual offense (cunnilingus, fellatio, and digital penetration); and ten years, all but five suspended, on the conviction for the third degree sexual offense (kissing and sucking breasts).

On appeal, appellant contends that, as a result of the Court of Appeals' decision in *Vigna v. State*, 470 Md. 418 (2020), *cert. denied*, 141 S. Ct. 1690 (2021), issued while this appeal was pending, he is entitled to a new trial because the trial court erred in denying his motion to allow testimony of character witnesses with respect to the propriety of his behavior with minors. The State agrees, conceding "that the case should be remanded for a new trial" to allow appellant to present such evidence.

For the reasons discussed below, we shall reverse appellant's convictions and remand for further proceedings.

[1] We protect the victim-witness by referring to her by the initial of her first name and to her family members other than appellant by their relationship to her, along with the initials of their first names.

BACKGROUND

Appellant does not challenge the sufficiency of the evidence supporting his convictions. For that reason, our summary of the record merely provides context for our discussion of the evidentiary issue raised in this appeal. *See Washington v. State*, 180 Md. App. 458, 461 n.2 (2008).

Appellant's convictions were predicated on a continuing course of sexual abuse of M., who was born in 2000. After M. immigrated from El Salvador with her parents at age four, the family began living in the house of M.'s Aunt R. Also residing in the same household were other members of their extended family, including M.'s Aunt B. and her husband, appellant. In early 2011, M.'s parents returned to El Salvador, leaving her in the care of Aunt R.

At trial, M. was 18 years old. She recounted a continuing course of sexual activity with appellant from the time she was eight years old until she was 13 years old. She testified that the abuse began when she was living at Aunt R.'s house at the same time as appellant, and it continued at the trailer where Aunt B. and appellant subsequently moved.

M. testified that the sexual abuse consisted of vaginal intercourse beginning when she was eight or nine, as well as cunnilingus, fellatio, digital penetration of her vagina, and sucking her breasts. Appellant told her "not to tell [her] mom," and he said that, when she turned 16, she "was going to be all his."

M. eventually told her friends about the abuse, and then, at age 18, she told her mother. After consulting an attorney her parents knew, who had advised them on immigration matters, she reported the abuse to the police.

On the first day of trial, defense counsel sought to present testimony from character witnesses, proffering that they would testify that appellant is "sexually respectful of minor girls, or he's sexually appropriate with minor girls, or he's not sexually inappropriate," and he otherwise has a character trait for "sexual propriety," "sexual respectfulness," or "sexual normality." The trial court denied the defense motion, relying on this Court's decision and rationale in *Vigna v. State*, 241 Md. App. 704 (2019), *aff'd*, 470 Md. 418 (2020) (on harmless error grounds), *cert. denied*, 141 S. Ct. 1690 (2021).[2]

Appellant testified in his defense, denying any sexual contact with M. He stated that he worked six to seven days a week, leaving the shared residence at approximately 5:00 a.m. and not returning until 7:00 to 9:00 p.m. He testified that he was never alone with M. or any of the other four children in the house, at either of the residences where he lived.

Three female defense witnesses, including a friend's 15-year-old daughter, testified that appellant was someone who told the truth. Aunt B., appellant's ex-wife, testified that, while they lived at Aunt R.'s residence, appellant worked outside the home all day and never watched the children by himself. One of appellant's adult children testified that,

[2] In *Vigna v. State*, 241 Md. App. 704, 710–11 (2019), an elementary school teacher sought to defend himself against charges he sexually abused female students by eliciting testimony about his character for interacting appropriately with children in his care or custody. The trial court excluded such evidence on the ground that appropriateness with children is not a character trait within the scope of Md. Rule 5-404(a)(2)(A), which provides that "[a]n accused may offer evidence of the accused's pertinent trait of character." *Id.* at 717. This Court affirmed that decision, holding that the proffered evidence of the defendant's "appropriate interaction with children" was not a "pertinent character trait" within the scope of that rule. *Id*.

during the time period at issue, he never saw his father hang around with M. or the other children because his father was working most of the time. He also denied seeing appellant with M. in the kitchen on a specific occasion that M. testified he came in while they were clothed but having sexual intercourse at the kitchen sink.

After the jury convicted appellant, he moved for a new trial, arguing that the trial court "likely committed reversible error by denying the Defendant's *Motion In Limine* to allow personal opinion character evidence regarding the Defendant's sexual propriety with minors." In support, appellant pointed out that the Court of Appeals had granted *certiorari* in *Vigna* "following this trial." The trial court initially held its ruling on the character trait issue in abeyance pending a decision by the Court of Appeals, but at appellant's sentencing hearing on February 20, 2020, the court declined to further postpone proceedings, and it denied appellant's motion for a new trial and sentenced appellant.

This timely appeal followed.

DISCUSSION

Appellant contends that the trial court erred in excluding testimony regarding his character for appropriate interaction with minor girls on the ground that it was not relevant. He notes that, on August 20, 2021, while this appeal was pending, the Court of Appeals decided *Vigna*, disagreeing with this Court's interpretation of Rule 5-404(a)(2)(A). *Vigna*, 470 Md. at 444. The Court held that "evidence of a defendant's character for appropriateness with children in his or her custody or care (or a similarly worded trait) may be admissible in a case where the defendant is charged with sexual abuse of a minor or a similar crime against a child." *Id.*

The majority in *Vigna* reasoned that, consistent with the majority of other states that have considered the issue, evidence that a defendant acted appropriately with children in his care, "or a similar trait involving a disposition toward children," may be sufficiently specific and relevant to qualify as a character trait for purposes of Md. Rule 5-404(a)(2)(A) governing character evidence of the accused in a child sexual abuse case.[3] *Id*. at 443–44. The Court held that, if the character trait is relevant to the charges in question, a trial court then should consider whether, under Rule 5-403, the probative value of the proffered evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, etc."[4] *Id*. at 453.

The State agrees that, based on the Court of Appeals decision in *Vigna*, appellant's conviction should be reversed and the case should be remanded for a new trial. We also agree.

The decision in *Vigna* applies to appellant because his case was pending appeal when it was decided. *See Rochkind v. Stevenson*, 471 Md. 1, 38–39 (2020) (a new

[3] Two judges disagreed, stating that "[a]ppropriateness with children in his care or custody is not a trait of character" and testimony regarding such a "reputation" would not be "pertinent" in a child sex abuse trial. *Vigna v. State*, 470 Md 418, 460–64 (2020) (concurring op.) (Hotten, J., joined by Watts, J.), *cert. denied*, 141 S. Ct. 1690 (2021).

[4] The Court ultimately held, however, that although the trial court erred in excluding the proffered character evidence, the error did not require reversal of Vigna's conviction. *Id*. at 456. Because Vigna was permitted to present nine witnesses who "supported [his] argument that the jurors should believe his denial of the charges[,]" by testifying about his character in a manner that "was functionally the equivalent of an opinion that Vigna was the type of person who was appropriate with children[,]" the error in excluding the proffered evidence was harmless beyond a reasonable doubt. *Id*. at 455–56.

interpretation of a rule of evidence applies to "'cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review.'") (quoting *Kazadi v. State*, 467 Md. 1, 47 (2020)). Here, the issue was raised and decided below. Appellant asked the court to admit character testimony regarding his sexual appropriateness and respectfulness toward minor girls, and therefore, the issue is preserved for review. The evidence was proffered in the context of sexual abuse charges with respect to a child with whom appellant had a relationship, and therefore, pursuant to *Vigna*, the trial court erred in excluding the evidence on the ground that it was not relevant.

The State further concedes, and we agree, that the error in excluding such evidence in this case was not harmless. "The exclusion of evidence is harmless if it is 'unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.'" *Vigna*, 470 Md. at 453 (quoting *Dionas v. State*, 436 Md. 97, 117 (2013)). For example, exclusion of evidence may be considered harmless when the substance of the excluded evidence was cumulative of other evidence. *Vigna*, 470 Md. at 454–56.

In *Vigna*, ten defense witnesses, including Vigna, testified to his trustworthiness with children, his law-abiding character, and his moral "fiber," which went to his defense that he was "not the type of person who would commit the specific violations of the law with which he was charged." *Id*. at 454–55. In this case, by contrast, appellant's testimony was that he lacked the opportunity to commit the offenses. His witnesses testified to his character for truthfulness, but there was no testimony about his character for being law-abiding, his appropriate interactions with children, or that the witnesses had entrusted their own children to him. Accordingly, we cannot conclude in this case that the error in

precluding testimony from witnesses regarding his sexual appropriateness and respectfulness toward minor girls was harmless error.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.