UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1793

September Term, 2014

MICHAEL DAVID BROCHU

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: November 12, 2015

Michael David Brochu, appellant, was convicted in the Circuit Court for Prince George's County of three counts of third-degree sex offense. He raises one question for our review:

> "Did the trial court err in instructing the jury that the testimony of a single eyewitness if believed beyond a reasonable doubt was sufficient to convict?"

We shall affirm.

I.

Michael Brochu was indicted by the Grand Jury for Prince George's County with three counts of third-degree sex offense, three counts of unnatural and perverted practices and one count of solicitation of a minor. He proceeded to trial before a jury. The trial court granted a motion for judgment of acquittal to the unnatural and perverted practices charges and solicitation of a minor. The jury convicted him of three counts of third degree sex offense. The court imposed a term of incarceration of ten years on each sex offense charge, to be served consecutively, all but two years suspended, for a total of six years executed time, consecutive to the sentence he was then serving in other cases. The following facts were elicited during the jury trial.

Nicholas M. was born on February 16, 2000. When he was 11 years of age, he lived in Bowie with Evelyn Childs, his great-grandmother. That summer, he went to the Whitehall pool almost every day with his sisters and his friend Kenny. When he got cold at the pool,

he would go to the showers. He testified that he was molested by appellant in the shower. He stated that he was molested seven times but that he only remembered three times.

Nicholas testified that the first event occurred in June of 2011. Appellant and Nicholas were alone in the shower area; appellant told him to pull down his swim suit; and appellant groped Nicholas's penis by moving his hand up and down on his Nicholas's penis. Nicholas did not tell anyone because he was scared. Nicholas testified to a July 2011 event. He said he was in the pool when Brochu told him to go to the showers. Nicholas did so and appellant moved his hand up and down on Nicholas's penis. Nicholas described an August event which was similar to the two earlier incidents. During the summer of 2012, Nicholas saw appellant at the basketball court where appellant repeatedly told Nicholas he was sorry. Nicholas testified that he told his great-grandmother eventually and then talked to the police. He recounted that on two of the occasions he was with the sisters at the pool and that on all the occasions, there were always adults working at the pool.

Nicholas's grandmother, Ms. Child, testified that she drove the children to the pool almost every day and that she went inside with them two to three times a week during the summer of 2011. She knew appellant from the pool. On one occasion in 2012, appellant came over to her house and stayed two minutes. She did not know why he came over and she did not let him inside.

One evening in August, 2012, Nicholas was crying and would not go to sleep. Ms. Child asked him what was wrong, she stayed up with him for several hours that evening, and the next day she took him to the police station.

Appellant testified at trial, denying the offense. He explained his brief visit at Ms. Childs's home,[1] denied ever being in the shower room with Nicholas, denied any inappropriate touching and denied any apology.

[1] Appellant testified at trial as follows:

> "[DEFENSE COUNSEL]: Okay. Did there come a time when you discovered where Ms. Childs lived?
> [APPELLANT]: Yes.
> [DEFENSE COUNSEL]: How did that come about?
> [APPELLANT]: I have a friend who is an independent Realtor, . . . and we were talking about real estate and homes, and he mentioned that they had a – had a house that may be coming up that he was actually putting on the market. If they could get enough, a better price for it, they were going to sell it. If not, it was just going to stay a rental.
> So one day, coming home from work, I actually stopped by and parked in front of the house. And I heard a noise across the street, and that's actually when I saw Evelyn come out, and then she went back in the house, but I noticed who she was. And that was the only – that was the first indication I ever knew where she lived.
> [DEFENSE COUNSEL]: And what did you do?
> [APPELLANT]: After I looked over the house, I actually went across the street and knocked on the door just to say hi.
> [DEFENSE COUNSEL]: Was it a short visit?
> [APPELLANT]: Just a couple of minutes."

Before instructing the jury, the court held an instruction conference. Appellant objected to the State's requested Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 3:30 on eyewitness identification.[2] His objection was based on several grounds—including that the instruction was appropriate only when the State was relying on pretrial identification procedures and that the instruction impacted on reasonable doubt. He stated that eyewitness identification was not an issue in the case, arguing that there was no show-up, no line-up, no

[2] The court instructed the jury as to eyewitness identification as follows:

> "The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it.
>
> You have heard evidence about the identification of the defendant as the person who committed the crimes. You should consider the witness's opportunity to observe the criminal act and the person committing it including the length of time the witness had to observe the person committing the crime, the witness's state of mind and any other circumstance surrounding the events.
>
> You should also consider the witness's certainty or lack of certainty, the accuracy of any prior description, the witness's credibility or lack of credibility as well as any other factor surrounding the identification.
>
> The identification of the defendant by a single eyewitness as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant; however, you should examine the identification of the defendant with great care. It is for you to determine the reliability of any identification and give it the weight you believe it deserves."

pre-trial identification whatsoever. Following the court's correction that Nicholas did identify appellant, he argued as follows:

> "They did get it in. Okay. But there was no pretrial identification whatsoever. And really, as you said, this comes down to the jury's determination of credibility.
>
> You have a reasonable doubt instruction. That should be the foundational basis of their entire assessment of this credibility. That is the standard. When you have that, it is placing undue emphasis on, really, what is a pretrial I.D. issue.
>
> So many times, Your Honor, I know when you were a prosecutor, when I was a prosecutor, we had these murder cases, these robbery cases, where in terms of criminal agency, all they had was the single photo I.D. All they had was the lineup.
>
> That's what that instruction is for, to tell the jury okay, but they—that's a different circumstance. That's talking about the pretrial identification of a person. It can be based on a single photographic identification or a single lineup identification, but that's what that pertains to.
>
> When you take that instruction, which has no applicability to this scenario, because there was no pretrial identification, you are taking the jury away from the a reasonable doubt standard and you're saying, hey, one witness is all they need.
>
> Really, it almost goes to the same misleading that the Court of Appeals decried in that case dealing with the—remember the anti-CSI effect instruction that was struck down by the Court of Appeals, that anti-CSI effect tried to set the jury up for the State by saying, oh, they don't need DNA, fingerprints, forensics, dah, dah, dah, dah.
>
> * * *

. . . We do not mess in Maryland with beyond a reasonable doubt. And that is something our State and our case law finds that is sacrosanct.

And I know you're giving that instruction, but in this kind of simple case, it's a simple credibility case, it's not complicated, for you to give the identification instruction which clearly, historically and an impractical application through thousands of trials that you, and I, and the State have all participated in, it goes to a pretrial I.D.

You are basically—I know this is not your ulterior motive, but by giving that instruction, you are basically doing the same thing that the CSI, or anti-CSI effect instruction sought to do, to take away from the reasonable doubt standard and to say, hey, one witness is all they need.

I think it's very dangerous. It is not even a slippery slope. It is just misleading in this context. This is a pretrial I.D. instruction. It is not a general instruction applicable in all cases.

No one is saying that it is illegal for them to get a conviction based on a single witness. I'm not going to argue that that's illegal. *I'm going to argue that it's not enough, but that doesn't generate the pretrial I.D. instruction.* The pretrial I.D. instruction just says a pretrial I.D., a single pretrial I.D. can be sufficient evidence.

And it takes the jury's focus away from the overall standard of proof, and I think it's very misleading. I'm paraphrasing, of course, the instruction, but three quarters of that has to do with a pretrial identification procedure.

All those annotations, we've been over this before, every single one of the annotations in the comments of the Maryland Pattern Jury Instructions, absolutely every one, deals with a pretrial I.D.

> None of them, not one, deals with a case such as here where there is no pretrial I.D. procedure, and you just give it because the State has a — essentially, their entire case, the corpus delecti, everything is really on one witness. And so I think it's inappropriate. I object to it vigorously. I think it's misleading. It is not applicable."

The trial court disagreed with appellant's interpretation of the applicability and scope of the eyewitness jury instruction, pointing out that the instruction was not limited to pretrial identification procedures and that the State has the burden in every case to prove that a crime was committed and that the defendant was the person who committed that crime. The court indicated that it intended to give the instruction, not reading the portion referring to pretrial identification, but giving the bracketed portion stating that the identification of a single eyewitness of a defendant as the person who committed the crime, if believed beyond a reasonable doubt, can be enough to convict the defendant.

The court instructed the jury and the jury returned guilty verdicts on the third degree sex offenses. Following sentencing, appellant noted this timely appeal.

II.

Before this Court, appellant presents several arguments, most of which were never presented to the trial court. In fact, he abandons his primary argument from below, that the instruction is directed primarily to pretrial identifications. First, he argues that the instruction invites the jury to believe one particular witness over the others.[3] Second, he argues that an instruction which strays too close to the facts of the case is error, and here, the jury could have construed the eyewitness instruction "as a directive to convict based upon what the judge knew of the jury's deliberations." Third, he likens the eyewitness jury instruction the court gave in this case to the anti-CSI instruction disapproved by the Court of Appeals. He explains that "[t]he use of the single eyewitness instruction in the unique context of this case had the inevitable tendency of steering the jury toward conviction by placing undue emphasis on the sufficiency of the child's testimony." Finally, he discusses a separate case, *State v. Brochu*, No. 1426, Sept. Term 2013 (filed July 9, 2015) (Arthur, J.), wherein this Court reversed the judgment. Appellant represents that both appeals involved the same trial court,

[3] Appellant supports this argument with the note sent to the trial court by the jury foreman at the close of all of the evidence but before jury instructions. The note read as follows:

> "Bailiff Brown, is there any way to request one or two more witnesses on each side to determine their characters?"

Appellant's counsel suggested telling the jury that "you have heard all of the evidence you are going to hear." The court adopted appellant's suggested response and so informed the jury.

same trial judge, same Assistant State's Attorney, same defense counsel, the same defendant, identical testimonial circumstances *and the same trial error*. He concludes that based on *stare decisis* and for the sake of justice and systemic consistency, this Court should decide this appeal consistently with No. 1426.[4]

The State responds: Appellant's first and second arguments were never presented to the trial court and are not preserved for appellate review. On the merits, the State asserts that (1) the evidence generated the eyewitness identification instruction because appellant elicited evidence that would have allowed him to argue that another person, not appellant, had abused Nicholas; (2) the instruction did not convey the judge's view of the evidence; (3) it did not shift the burden of proof or relieve the State of its burden to prove appellant's guilt beyond a reasonable doubt; (4) even if erroneous, it was harmless; and (5) as to *State v. Brochu*, No 1426, Sept. Term 2013, that unreported case has neither precedential value nor persuasive authority, and in any case, is distinguishable on its facts and record.

[4] In response to the State's argument on this issue, appellant maintains that the instruction was inappropriate because identification was not an issue in this case.

III.

Maryland Rule 4-325 addresses jury instruction in criminal cases. Rule 4-325 (c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law . . . ." We review jury instructions under an abuse of discretion standard. *Stabb v. State*, 423 Md. 454, 465 (2011). In determining whether the trial court abused its discretion, we consider whether the instruction was a correct statement of the law, whether it was generated by the evidence and considering the instructions as a whole, whether it was fairly covered by the instructions given by the court. *See Bazzle v. State*, 426 Md. 541, 549 (2012).

We address first appellant's *stare decisis* preclusive effect argument related to *State v. Brochu*, No. 1426, Sept. Term 2013. We agree with the State. The unreported case is not binding on this Court and has no precedential value as to this case nor any preclusive effect. Moreover, the facts and record below in that case are distinguishable from the instant case.[5] In No. 1426, counsel below objected to the language of the eyewitness instruction, complaining that because the instruction repeatedly assumes that a crime was committed, it shifted the burden of proof to the defendant. In addition, the State conceded on appeal that

[5] We note, however, that if the record was the same, *e.g.*, if counsel in both cases had made the same objections to the giving of the instruction, and if the factual record was exactly the same, the prior opinion of a panel of this Court would give us great pause. Such is not the case here, as we explain above.

on the facts of No. 1426, the instruction was superfluous. In the instant case, appellant made no such objection below and indeed, does not make such objection before this Court. Nor does the State concede that the instruction was superfluous. Appellant's counsel told the trial court specifically that he was not going to argue that a single eyewitness identification is illegal—just "that it's not enough, but that doesn't generate the pretrial I.D. instruction." In addition, the defense generated evidence that appellant was not at the pool when Nicholas claimed he was abused and that the pool was so heavily trafficked that anyone could have abused Nicholas in the showers.

We do not find that the eyewitness instruction invited the jury to believe one particular witness over the others. Nor do we find that the instruction strayed too close to the facts and directed the jury to convict appellant based upon what the judge may have known about the jury deliberations. Finally, this instruction, read in context is not similar to the anti-CSI instruction and does not unduly emphasize one witnesses testimony, *i.e.*, that of Nicholas, over other testimony in the case. In fact, the court instructed the jury to examine Nicholas's testimony with great care.

The eyewitness instruction did not place undue emphasis on Nicholas's testimony. The court told the jury an accepted principle of law—that if believed, a victim's testimony is sufficient to convict and needs no corroboration. In this case, however, there are many items of significant corroboration.

The court told the jury that "[i]t is for *you* to determine the reliability of any identification and to give it the weight *you* believe it deserves." In addition, the court told the jury to examine the witness's testimony "with great care." The judge did not express personal views upon the facts of the case. In *Mack v. State*, 69 Md. App. 245, 252-53 (1986), this Court was presented with a similar complaint, and reasoned as follows:

> "Appellant's argument ignores the fact that the judge instructed that the testimony of a single eyewitness, *if believed*, would be sufficient to convict. There is nothing in the instructions that might suggest to the jury any obligation to believe one witness or the other, or any witness for that matter. The trial judge clearly advised the jury that it was 'not bound to believe the testimony of any witness' and gave full and fair instructions respecting witness credibility and the State's burden of proof."

The same reasoning applies to the instant case. The jury note requesting additional witnesses doesn't change the analysis. Any impact by the jury note on the jury instruction is not preserved for our review. Appellant did not make this argument below and did not mention the note in the colloquy regarding the eyewitness instruction. Moreover, the note did not refer to additional eyewitnesses but instead asked for witnesses related to character of the witnesses.

The instruction did not shift the burden of proof to appellant. Reading the eyewitness instruction, and then reading the instructions as a whole, we are satisfied that the court instructed the jury properly, repeatedly that the *State* must prove the case beyond a reasonable doubt.

Finally, assuming error *arguendo*, we agree with the State, if error there be (which we do not find), it is harmless beyond a reasonable doubt in that the error in no way influenced the verdict. Although not all superfluous instructions are harmless, *Brogden v. State*, 384 Md. 631 n.6 (2005), over-informing the jury with such instructions is frequently not prejudicial, *Perry v. State*, 150 Md. App. 403, 427 (2002). Appellant's closing argument makes clear to the jury the import of the instruction:

> " . . . There's an instruction here on the identification of the defendant. Don't be confused about that, and keep that in perspective. It says, The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it.
>
> * * *
>
> . . . Even in the identification instruction it says, The burden is on the State to prove beyond a reasonable doubt. They keep talking about that throughout all these instructions. The burden is on the State to prove, prove, prove beyond a reasonable doubt. That is fundamental to this whole case."

This instruction did not shift the burden of proof, did not constitute an unfair comment by the judge on the evidence and did not prejudice appellant.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.