Circuit Court for Frederick County
Case No. 10K16057756

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1905

September Term, 2016

MICHELLE LYNN ARTHUR

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: September 18, 2017

Michelle Arthur, appellant, was convicted by a jury sitting in the Circuit Court for Frederick County of third-degree sex offense and three counts of child sexual abuse.[1] Appellant asks three questions on appeal:

> I. Did the circuit court err in denying appellant's motion to dismiss the first charging document for failing to comply with the 180-day rule when the State, acting under an erroneous but genuine belief that the charging document was defective, dismissed the original charging document and recharged the case?
>
> II. Did the circuit court err in denying appellant's motion to dismiss the second charging document for failing to comply with the 180-day rule?
>
> III. Did the trial court err in denying appellant's motion for judgment of acquittal?

For the reasons that follow, we shall affirm the judgments.

[1] Appellant was convicted of third-degree sex offense between April 1, 2006 to May 10, 2007, under Md. Code Ann., Criminal Law (Crim. Law) §3-307(a)(5)(engaging in vaginal intercourse when the victim is 14 or 15 years old and the person performing the sexual act is at least 21 years old), and three counts of child sexual abuse between May 11, 2005 to May 31, 2006, April 1, 2006 to May 10, 2007, and May 11, 2007 to May 10, 2008 under Crim. Law §3-602(b)(prohibiting the sexual abuse of a person under the age of 18 by a household member).

Appellant was sentenced to 20 years of imprisonment, ten years suspended, followed by three years of supervised probation, on two counts of child sexual abuse, and a ten year sentence for third-degree sex offense; all sentences to be served concurrently. The court merged appellant's remaining conviction. Appellant was also required to register as a Tier II sex offender.

FACTS

The State alleged that between May 2005 and May 2008, appellant and Nicholas Tobery engaged in a sexual relationship while Tobery lived with appellant and her family, and that Tobery was 15 years old when the sexual relationship began. Tobery, his mother, and the investigating police officer testified for the State. The theory of defense was that the sexual relationship began after Tobery's 16th birthday and the relationship was consensual. Appellant testified in her defense.

Nicholas Tobery was born on May 11, 1990, and was best friends with, and a classmate of, Brandon Schaeffer, appellant's son. In the summer of 2005, after completing ninth grade, Tobery moved in with Brandon and his family, which consisted of appellant, her husband, and their six children. Tobery slept in various rooms in the house.

Tobery testified that one evening toward the end of the summer, he was lying on the couch in the living room when appellant came over to him and said "she could blow my mind." She then performed oral sex on him. Tobery was 15 years old at the time; appellant was 34 years old. After this event, the two engaged on a regular basis in what Tobery described as consensual sexual intercourse. Around Christmas of that year, appellant's husband moved out of the house. Soon thereafter, Tobery stopped attending school and worked two jobs.

Two children were born to appellant and Tobery. On January 8, 2007, appellant gave birth to their first child. Tobery testified that the child was conceived before his 16th birthday on May 11, 2006. A second child was born roughly three years later on December 8, 2009. In 2011, Tobery and appellant went to the Department of Social Services and filled out affidavits of parentage on the two children, affirming that he was their biological father. On January 11, 2015, after roughly ten years of living in appellant's house, Tobery moved out.

In May of 2015, Detective Anthony McPeak of the Frederick Police Department received a complaint from Tobery. On May 14, 2015, the detective called and spoke with appellant. She told him that she and Tobery had two children together and the oldest of the two was conceived on April 1, 2006, when Tobery was 15 years old. DNA samples were taken, and the parties stipulated that the results of the DNA testing showed that the probability that appellant was the biological father of the oldest child was 99.9%.

Appellant testified that her husband moved out in March 2006, and she and Tobery entered into an intimate relationship a few months later, on May 13, 2006, two days after Tobery's 16th birthday on May 11, 2006. She testified that Tobery was not like "other people his age" – he had a car, held a job, and was more serious. She testified that she and Tobery held themselves out as a family – often going on picnics, attending parties, and celebrating holidays together. She testified that when she told the detective that their first child was conceived on April Fools Day she was joking.

DISCUSSION

I.

Seventy days before the running of the 180-day deadline under Md. Code Ann., Criminal Procedure (Crim. Proc.) § 6-103[2] and Md. Rule 4-271[3] to commence trial, the State dismissed the original charges against appellant and filed a second criminal indictment, adding two additional charges. In response, appellant filed a motion to dismiss the criminal indictment, which the circuit court denied. Appellant appeals that denial, arguing that the two reasons offered by the State for its dismissal of the original charges were not legitimate, and that because the dismissal had the "effect" of circumventing the 180-day rule, the circuit court erred in not granting her motion to dismiss. The State responds that because the circuit court found that the prosecutor had not acted in bad faith

[2] Section 6-103 provides:

> (a) *Requirements for setting date*. – (1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
> (i) the appearance of counsel; or
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
> (2) The trial date may not be later than 180 days after the earlier of those events.

[3] Md. Rule 4-271 provides:

> (a) **Trial date in circuit court.** (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events.

in dismissing the first criminal action, the circuit court did nor err in denying appellant's motion to dismiss. We agree with the State.

Crim. Proc. § 6-103 and Md. Rule 4-271 set forth a 180-day deadline within which criminal cases in circuit court must be tried, and provides that a case can only be postponed beyond that period by the county administrative judge or that judge's designee for good cause. *See State v. Price*, 385 Md. 261, 278 (2005)(discussing the requirements of § 6-103 and Rule 4-271). The purpose of the 180-day requirement is to "obtain prompt disposition of criminal charges[,]" for the Maryland General Assembly "recogni[zed]the detrimental effects to our criminal justice system which result from excessive delay in scheduling criminal cases for trial and in postponing scheduled trials for inadequate reasons." *State v. Hicks*, 285 Md. 310, 316 (1979). The 180-day rule is mandatory and dismissal of the criminal charges is the appropriate sanction for violation of the rule. *Id.* at 318.

Ordinarily, when criminal charges are nol prossed and later refiled, the 180-day period to bring the case to trial begins anew with the arraignment or first appearance of defense counsel under the second prosecution. *State v. Huntley*, 411 Md. 288, 293 (2009) (citation omitted). The Court of Appeals in *Curley v. State*, 299 Md. 449, 458 (1984) identified two exceptions to the general rule, where the: (1) purpose of the nol pros, or (2) necessary effect of the nol pros is to circumvent the 180-day rule. *Huntley*, 411 Md. at 293 (citation and footnote omitted). Under those circumstances, the 180-day rule begins with the triggering event under the initial prosecution, and if trial does not begin within that time frame, the second prosecution must be dismissed. *Id*. at 293-94 (citation omitted). The *Curley* Court reasoned that without the two exceptions, the "State could evade the 180-day

period, whenever it desired a trial postponement beyond 180 days, by merely nol prossing the case and refiling the same charges, a tactic that would make the requirements of the statute and rule 'meaningless.'" *Id*. at 295 (quoting *Curley*, 299 Md. at 461). The *Curley* Court recognized, however, that the two exceptions do not apply where "the prosecution acts in good faith or so as to not evade or circumvent the requirements of the" 180-day rule. *Id*. (quotation marks and citation omitted). *See also White v. State*, 223 Md. App. 353, 375 n.18 (2015)("If . . . there is no bad faith or evidenced motive to delay trial, the nol pros is not considered an attempt to circumvent *Hicks*.")(emphasis and citations omitted). We turn now to the facts of this case.

On September 4, 2015, appellant was charged in a two-count criminal information with child sexual abuse and third-degree sex offense. Appellant's attorney entered his appearance on September 14, 2015, triggering the 180-day rule, meaning that the trial had to begin by March 14, 2016. Trial was scheduled for January 5, 2016, seventy days before the 180-day deadline. On that day, however, the State nol prossed the charges, and recharged, adding two new child sexual abuse charges.[4]

Appellant subsequently filed a motion to dismiss. At the ensuing hearing, defense counsel argued that the nol pros entered on January 5, 2016, circumvented the 180-day

[4] The State also expanded the dates of the alleged crimes. Under the original two charges, third-degree sex abuse and child sexual abuse, the crimes were alleged to have occurred on April 1, 2005. In the refiled charges, the third-degree sex offense was alleged to have occurred between April 1, 2006 to May 10, 2007, and the child sexual abuse was alleged to have occurred between May 11, 2005 to May 31, 2006, April 1, 2006 to May 10 2007, and May 11, 2007 to May 10, 2008.

deadline and was not made in good faith. Defense counsel related that the day before the trial date, the prosecutor informed him that the language used in the sexual abuse of a minor charge was correct but the section number was not. The prosecutor asked the defense to consent to changing the section number, adding that if the defense did not agree to the amendment, she would nol pros and recharge with additional charges. Defense counsel would not consent to the amendment. The prosecutor also advised that she wanted time to review the newly filed DNA evidence.

Defense counsel argued that the two reasons given by the prosecutor for the nol pros -- an erroneous belief that to amend the charging document the defense needed to consent, and the prosecutor's desire to review the newly filed DNA evidence -- were unfounded. Defense counsel explained. He argued that under Md. Rule 4-204 and established case law his consent was not needed to change the section number on the criminal information where the language of the charging document was correct. Changing the section number did not change the character of the charges.[5] Defense counsel added that the State did not need the DNA results because paternity was not an issue, and in any event, the police had, and therefore the State had access to, the DNA results since November 3, 2015. Because the

[5] *See* Md. Rule 4-204 (providing that "[o]n motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required."). *See also Corbin v. State*, 237 Md. 486, 489-90 (1965)(changing name of owner of stolen property was a change in form and not substance, and therefore, the amendment to the charging document was properly permitted, over objection of defense counsel) and *Thompson v. State*, 371 Md. 473, 487-95 (2002)(mid-trial amendment, over objection, to the indictment changing the statutory reference did not affect the character of the charged offense).

prosecutor's given reasons were not legitimate, defense counsel argued that it was clear that the State was not ready for trial, would not have received a continuance, and entered the nol pros to circumvent the 180-day rule.

In response, the prosecutor adamantly denied that she had tried to circumvent the 180-day rule, pointing out that on January 4, the victim had flown to Maryland from Florida, the State was paying for his room, and that she had interviewed both he and his mother at the pretrial hearing. She explained her actions by stating that she had a very strong case and had expected it to resolve. When it did not, she took "a very detailed look at the charging document to see if there's anything wrong with it because I couldn't understand why this case wasn't resolving." She believed that the charging document was faulty because it referenced the wrong section number and needed the consent of the defense to correct it. She noted that defense counsel did not correct her erroneous impression when she told him. She continued that after she discovered the alleged error in the charging document, she learned from the investigating detective that the DNA results had not been forwarded to her, although she conceded that the DNA evidence was not necessary because she had paternity affidavits signed by the defendant. In sum, the prosecutor vigorously argued that she had not acted in bad faith in entering the nol pros.

After hearing the parties' arguments, the court denied the motion, ruling:

> Whatever motivate, whatever, however correct or incorrect the State was, clearly the State did not, at least it appears objectively [that the] State was not nolle prossing for the purpose of trying to circumvent the speedy trial rights of the Defendant. The reference has been made to bad faith. Bad faith has sort of become the, the label for nolle prossing to circumvent the 180 days. So it's, but the Court does not refer at least in the [*State v.*] *Glenn* [, 299 Md. 464 (1984)] case to bad faith. Merely to the circumventing of the

> 180 days. I don't find that that was the intent and I will deny the motion to dismiss.

(Brackets added). Appellant argues that this ruling was in error.

We find no error and find *State v. Glenn*, 299 Md. 464 (1984) dispositive. In that case, the defendants were charged with distributing obscene material and their attorney entered his appearance on July 17, 1981. The 180-day time period for commencing trial was on January 13, 1982, and trial was scheduled for November 17, 1981. Sometime before trial, the prosecutor concluded that the charging documents were defective because they failed to allege that the defendants "knowingly" distributed the obscene material. *Id*. at 465. The prosecutor notified the defendants' attorney that he believed that the charging documents would have to be amended, and the defendants' attorney stated that he would object to the amendment. Believing that the amendment was a matter of substance and could not be made over an objection, on the day of trial and roughly 60 days before the expiration of the 180-day deadline, the prosecutor nol prossed the cases and refiled corrected charging documents alleging the same offense. *Id*. at 465-66. A new trial date was assigned for March 29, 1982.

On February 18, 1982, the defendants' attorney filed a written motion to dismiss, arguing that the 180-day period for trial under the initial charging document continued to run after the nol pros. The circuit court agreed and dismissed the cases. The Court of Appeals reversed. The Court found that the prosecutor's purpose in nol prossing the charges was not to evade the 180-day rule. The Court stated: "The record clearly establishes, with no basis for a contrary inference, that the charges were nol prossed

because of a legitimate belief that the charging documents were defective and because the defendants' attorney would not agree to amendment of the charging documents." *Id*. at 467. The Court also noted that the effect of the nol pros was "not necessarily to evade" the 180-day rule because, when the case was nol prossed, 57 days remained before the expiration of the 180-day deadline, unlike *Curley*, *supra*, where the case was nol prossed on the 180th day. *Id*.

Here, the motions court credited the prosecutor's explanation that she nol prossed the charges based on an erroneous but genuine belief that the charging document was defective and could not be amended because the defense would not consent. It is axiomatic that we accept the findings of a denial of a motion to dismiss unless clearly erroneous. *Glover v. State*, 368 Md. 211, 221 (2002) (citations omitted). Thus, we find no error by the circuit court in ruling that the prosecutor did not dismiss the first charging document for the purpose of circumventing the 180-day rule. Additionally, because there was still 70 days left before the expiration of the 180-day deadline, the necessary effect of the nol pros was not to circumvent the 180-day rule. Accordingly, we find no error by the circuit court in denying appellant's motion to dismiss.

II.

Appellant argues that the circuit court erred when it denied her motion to dismiss the second charging document because the State failed to try her within 180-days. Specifically, she argues that: 1) the record is unclear whether the critical good cause determination postponing the case beyond the 180-day rule was granted by an administrative judge or that judge's designee, and 2) the delay of less than three months

between the good cause determination on June 9, 2016, and the start of trial on August 30, 2016 was unreasonable. The State responds that appellant has failed to preserve her arguments for our review because she did not raise them below, but in any event, the arguments lack merit. We agree.

"The critical order by the administrative judge, for purposes of the dismissal sanction, is the order having the effect of extending the trial date beyond 180 days." *State v. Frazier*, 298 Md. 422, 428 (1984). As related above, a case can only be postponed beyond that period by the county administrative judge or that judge's designee for "good cause." *See* Crim. Proc. § 6-103, Md. Rule 4-271, and *Price*, 385 Md. at 278 (discussing § 6-103 and Rule 4-271).

In determining whether a *Hicks* violation has occurred, we first ascertain the critical date and then we apply a two-step analysis. *State v. Parker*, 347 Md. 533, 540 (1995). "First, we must ask whether there was good cause for the postponement which occurred on the critical date[.]" *Id.* Second, "we must determine if there was inordinate delay between the time of the good cause postponement and the trial date[.]" *Id*. The determination of what constitutes good cause is discretionary. *Marks v. State*, 84 Md. App. 269, 277 (1990) (citations omitted), *cert. denied*, 321 Md. 502 (1991). A good cause determination carries the presumption of validity. *State v. Barber*, 119 Md. App. 654, 659-60 (1998) (citations and quotation marks omitted). The defendant bears the burden of showing a clear abuse of discretion, and a good cause determination is rarely reversed on appeal. *Parker*, 347 Md. at 538-39 (citation omitted).

Defense counsel entered his appearance on January 19, 2016, triggering the 180-day rule, meaning that the trial had to begin by July 18, 2016. When the parties appeared for trial on June 9, 2016, the State requested a postponement because the prosecutor assigned to the case was in trial in a different courtroom. The circuit court granted the postponement, over defense counsel's objection. Appellant's trial took place on August 30, 2016.

Appellant is correct that the transcript is silent on the matter of whether the circuit court judge that granted the critical postponement was the administrative judge or an assignee of the administrative judge, but appellant did not raise this argument below. *See* Md. Rule 8-131(a)("Ordinarily, the 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 she raised this issue below it could have been resolved quickly by the postponing judge. Where the transcript is silent, however, the presumption of regularity controls and we will not find reversible error. *Harris v. State*, 406 Md. 115, 122 (2008)(quoting *United States v. Morgan*, 346 U.S. 502, 512 (1954)("It is presumed the [trial court] proceedings were correct and the burden rests on the [challenger] to show otherwise") and *Skok v. State*, 361 Md. 52, 78 (2000)("[A] presumption of regularity attaches to the criminal case[.]")(citations omitted).

Appellant's second argument, that there was an unreasonable delay between the postponement and her ultimate trial date, is likewise not preserved because she did not raise it below. *See* Md. Rule 8-131(a), *supra*. Additionally, even if preserved, it lacks merit. The unavailability of a prosecutor may constitute good cause for a postponement. *See State*

v. Toney, 315 Md. 122, 131 (1989)("the unavailability of a prosecutor does not, as a matter of law, constitute a lack of good cause for a postponement"). Based on the proffer that the prosecutor assigned to the case was in another trial, the circuit court found "good cause" for the postponement, stating that it was "unfortunate" and "hoping … we can get it back in before 180 [days.]" When considering whether the postponement was unreasonable, we have stated that "the trial judge (as well as an appellate court) shall not find an absence of good cause unless the defendant meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law." *Frazier*, 298 Md. at 454. Appellant has failed to persuade us of either where the postponement was from June 9 to August 30, a span of less than three months.

III.

Appellant argues that the trial court erred in denying her motion for judgment of acquittal, arguing that the evidence was insufficient: 1) to sustain her conviction for third-degree sex offense because of her testimony that she and Tobery did not engage in sex until after he turned 16, and 2) to sustain her convictions for child sexual abuse because there was insufficient evidence that she "sexually exploited" Tobery. The State responds that appellant has again failed to preserve her arguments for our review because she did not raise them below, but in any event, the arguments lack merit.

Md. Rule 4-324(a), provides that "[a] defendant may move for judgment of acquittal on one or more counts . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted." The particularity requirement is mandatory. *Berry v.*

State, 155 Md. App. 144, 180 (citation omitted), *cert. denied*, 381 Md. 674 (2004). Additionally, "[o]rdinarily, the 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[.]"). Md. Rule 8-131(a).

Here, after the State rested, defense counsel moved for judgment of acquittal arguing, "of the four counts that the Defendant is facing we believe that the uncorroborated evidence presented so far by the State do not make out enough of the State's burden on this matter to proceed any further[.]" The court denied the motion. Defense counsel renewed his motion after appellant testified, arguing, "We now have testimony from [appellant] that contradicts that of Mr. Tobery regarding when intercourse occurred as, as well as when conception would have been. The, other than that there's no other corroboration as to the elements of those offenses." The court again denied the motion, stating, "And once again it's conflicting evidence here and it's up for the jury to decide who is credible and that is their decision."

In sum, appellant argued below that there was no corroboration of Tobery's version of events and that the conflicting version of events between her and Tobery's testimony should be resolved in her favor. This is essentially the same argument she raises on appeal as to her conviction for third-degree sex offense, but different than her argument on her child sexual abuse convictions. Accordingly, appellant has only preserved for our review her sufficiency argument as to her third-degree sex offense conviction, although the argument is nonetheless meritless.

The standard for 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.'" *Tracy v. State*, 423 Md. 1, 11 (2011)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). "Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence." *State v. Suddith*, 379 Md. 425, 447 (2004) (quotation marks and citation omitted)(brackets in *Suddith*). Thus, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Allen v. State*, 158 Md. App. 194, 249 (2004) (quotation marks and citation omitted), *aff'd*, 387 Md. 389 (2005).

It is axiomatic, as appellant recognizes in her brief, that the jury was free to discredit all or some of her testimony. *See State v. Stanley*, 351 Md. 733, 750 (1998)(It is long settled that "[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder.")(citing *Binnie v. State*, 321 Md. 572, 580 (1991)). *See also Jones v. State*, 343 Md. 448, 460 (1996)(a fact-finder is free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony)(citing *Muir v. State*, 64 Md. App. 648, 654 (1985), *aff'd*, 308 Md. 208 (1986)). Based on the evidence presented, a rational juror could

have credited Tobery's testimony and concluded that appellant engaged in sexual intercourse with Tobery before he turned 16. Accordingly, we shall affirm the judgments.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.