UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 587

September Term, 2016

LORETTA KLINE, PERSONAL REPRESENTATIVE of the estate of ROGER LEE LARGENT

v.

STATE OF MARYLAND

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: April 18, 2017

Tried by a jury in the Circuit Court for Washington County, appellant, Roger Lee Largent, was convicted of second-degree rape and second-degree assault. The trial court sentenced appellant to 18 years in prison, after which he timely noted this appeal, presenting the following question for our consideration:

> Did the lower court err in allowing a nurse, who was neither tendered nor accepted as an expert witness, to offer testimony based on her prior training and experience to explain the lack of injury to the victim of a claimed sexual assault?

For the reasons that follow, we conclude that the trial court abused its discretion in permitting the testimony, and we shall reverse its judgments and remand for a new trial.

FACTS AND PROCEEDINGS

On the afternoon of June 30, 2015, M.F. and her husband, R.F., were at their home in Hagerstown, Washington County, waiting for appellant, M.F.'s stepfather, to pick them up and drive them to a scheduled doctor's appointment.[1] Appellant arrived early and asked M.F. for a glass of tea. When M.F. went into the kitchen to get his drink, appellant followed her, and as she turned away from the refrigerator, he was right behind her.

Appellant put his hand over M.F.'s mouth, touched her "in places that [she] didn't want to be touched," and kissed her. He then fondled her breasts and pulled her pants

[1] To preserve the privacy of the sexual assault victim, we will refer to her and her family members by their initials.

M.F. suffers from developmental disabilities and blindness in one eye, and R.F. is completely blind. They do not own a vehicle.

Although M.F.'s mother passed away in 2012, M.F. maintained a relationship with appellant, in part because M.F.'s adult son had lived with his grandmother and appellant and continued to live with appellant after the grandmother passed away.

down, warning her not to say a word or he would kill her. She told him to stop and screamed for help, but she could not get away because he was pressing her against the refrigerator.[2] Appellant penetrated her vagina with his penis from behind but stopped after she screamed for the third time and "he got done whatever he was doing." Again telling her not to say anything to anyone under threat of death, appellant returned to the dining room, and shortly thereafter, he took M.F. and R.F. to the doctor's office.

After the appointment, appellant returned M.F. and R.F. to their home and left. It was not until later that night that M.F. felt safe enough from him that she could tell R.F. what had happened. M.F. and R.F. called M.F.'s sister and the police, reporting that appellant had raped her. M.F. then went to Meritus Medical Center, where she underwent a full sexual assault forensic examination ("SAFE").

Ashley Hall, the emergency room SAFE nurse on call when M.F. was brought in, did not notice any bruises or red marks on M.F. when she conducted her examination, but Hall stated it was not unusual for one who has been sexually assaulted to have no external injuries. Although M.F. displayed no vaginal trauma, she was found to have "a normal variance of a cervical polyp on her cervix" and "cloudy white secretions at the bottom of her vaginal canal." A swab of the secretions was taken and made part of M.F.'s rape kit.[3]

Hagerstown City Police Detective Jesse Duffey contacted appellant on July 8, 2015

[2] M.F. explained that although her husband was in the house, he was upstairs in his "ham radio room," listening to the radio with the door closed and the air conditioner turned on. R.F. agreed that he was unable to hear anyone outside the room.

[3] M.F.'s medical records were admitted into evidence at trial as State's exhibit 1.

and asked him to come to the police station for an interview, which was recorded. The recording was played for the jury and transcribed on the record.

Therein, appellant initially declared that any story M.F. had told the police about him putting a hand on her was "all lies" and that "[n]othing happened" before he took her and R.F. to the doctor's office. He denied ever having had sexual intercourse, or any sexual contact, with M.F. After Detective Duffey informed appellant that his DNA was "all over her clothes, all over her home" and that his semen was found in M.F.'s underwear,[4] appellant changed his story to say that M.F. had "come on" to him and that he had put his finger in her "[j]ust a little" and placed his penis in her vagina for "[a]bout a second," but that the sexual contact was entirely consensual.

In his defense, appellant called Officer Joseph Delicati, who responded to M.F.'s home following her complaint of rape. Officer Delicati stated that he did not notice any red marks or bruising on M.F.'s arms or neck when he arrived at her home, but he agreed, on cross-examination, that he had not looked under her clothing at her torso for any injuries.

Appellant testified that after M.F. gave him the glass of tea he had asked for, she started kissing him, after which they had consensual sexual intercourse in her kitchen,

[4] The assertion that the police had identified appellant's DNA from M.F.'s clothing and home was untrue. The police had not yet submitted the swab from M.F.'s rape kit for testing, and after appellant's admission that he had ejaculatory sexual intercourse with her, they did not find a need to do so. Of course, "trickery and deception are ordinarily regarded as legitimate investigative techniques," *Whittington v. State*, 147 Md. App. 496, 521 (2002), and appellant does not assert otherwise.

unconcerned that her husband was upstairs. He denied forcing her or holding her down, and he further denied hearing her scream for help. Afterwards, he returned to the dining room, and she remained in the kitchen until they left for the doctor's appointment. Appellant said he initially lied to Detective Duffey because he "just didn't want to say," as he was embarrassed about having sex with his step-daughter.

DISCUSSION

Appellant contends that the trial court erred in permitting Ashley Hall to offer testimony that was based on her specialized knowledge, training, and experience as a SAFE nurse because she was neither offered to, nor accepted by, the court as an expert witness. He claims that Ms. Hall's expert opinion testimony, in the guise of lay opinion testimony, that the female anatomy makes it possible that non-consensual sexual intercourse may leave no evidence of physical injury, addressed the sole issue to be decided by the jury, that is, whether the sexual encounter between M.F. and appellant was consensual. Because Ms. Hall's testimony provided "critical guidance as to the only contested point at trial," appellant concludes, its admission cannot be deemed harmless and requires reversal.

The State first raises a preservation issue, arguing that defense counsel did not object to each of the prosecutor's questions to Ms. Hall regarding the possibility of lack of injury from non-consensual sexual intercourse and the fact that an adult female body will allow penetration to happen whether the intercourse is consensual or not. If preserved, the State continues, the trial court acted within its discretion in permitting Ms. Hall's testimony, and

even if it abused its discretion, any error was harmless beyond a reasonable doubt.[5]

In explaining to the jury the process of obtaining her forensic nurse licensure, Ms. Hall stated that, after becoming a registered nurse, she underwent an additional 40 hours of "didactic training" in the classroom, along with performing numerous required patient assessments, both with an instructor and on her own. She further explained the procedure associated with a SAFE examination, generally, and the procedure she employed with M.F., specifically.

When Ms. Hall testified that she observed no bruises or marks on M.F.'s body that would indicate where, if anywhere, the alleged victim had been held or restrained during the sexual encounter with appellant, the following colloquy occurred:

Q. Is that unusual?

A. No.

Q. Ah, why not?

A. There's a lot of reasons.

[5] We quickly dispatch the State's preservation argument. Defense counsel offered a general objection when the prosecutor asked Ms. Hall why it was not unusual for M.F. to have no marks or bruises to indicate that she had been restrained, and, as soon as the prosecutor asked Ms. Hall why someone who had been subjected to non-consensual sex might not have evidence of physical trauma, defense counsel objected on the ground that "now [the prosecutor is] starting to ask for expert opinions and she hasn't been offered as an expert in this field." *See, infra*.

In our view, pursuant to Maryland Rule 4-323(a), counsel objected as soon as the grounds of the objection became apparent, and the trial court was made aware of the nature of the objection in a timely manner. In addition, counsel asked for, and was granted, a continuing objection to Hall's testimony. The objections served adequately to preserve the issue for appellate review.

[DEFENSE COUNSEL]: Objection.

[PROSECUTOR]: Okay.

THE COURT: Well, the objection is sustained if there are a lot of reasons. It could be more than is relevant.

[PROSECUTOR]: Okay. Alright.

Q. So. . . but is it. . . have you ever examined someone who has been assaulted with no physical findings of that?

A. Yes.

Q. Now, you did in. . . an internal, exam, correct?

A. A vaginal speculum exam, yes.

* * *

Q. Okay. Now, while you're doing the specular exam do you notice any trauma to any of her. . . her skin, to any of her body?

A. Ah, other than the normal variant, no.

Q. Okay. And, ah, the complaint though is. . . is penile penetration, correct?

A. Yes.

Q. Would you expect to find, ah, damage or, ah, evidence of injury?

A. Not necessarily.

Q. Okay. Why would someone not necessarily, if they were having un. . .non-consensual sex, not have evidence of trauma?

[DEFENSE COUNSEL]: I'm going to object at this point, [Y]our Honor. If we can approach?

THE COURT: Please approach. Hang on, please a second.

(Whereupon, counsel and the defendant approach the bench and the following proceedings take place out of the hearing of the jury:)

THE COURT: Make sure you're at the microphone. What's up, Miss [Defense Counsel]?

[DEFENSE COUNSEL]: My only objection is going to be I think now she's starting to ask for expert opinions and she hasn't been offered as an expert in this field.

[PROSECUTOR]: I don't think she's been asked to offer expert opinions. I mean based on her experience.

THE COURT: You're not planning on . . . .

[DEFENSE COUNSEL]: It's not specialized knowledge with. . .

THE COURT: Qualifying her as an expert?

[PROSECUTOR]: No, she's . . . .

THE COURT: She's just a fact witness?

[PROSECUTOR]: Uh huh.

THE COURT: Objection. . .objection is overruled. She can testify as to what she normally sees, what she doesn't normally see, ah, as a factual witness, not necessarily as an expert witness. She's not going to offer an opinion. She's going to testify as to what she observed.

[PROSECUTOR]: Oh, no. Uh uh.

THE COURT: And why.

[PROSECUTOR]: Uh huh.

[DEFENSE COUNSEL]: But just now she was trying to offer an opinion as to why or it wouldn't be [sic] that you may see trauma or not.

[PROSECUTOR]: No, that's not an opinion. She's saying that these are reasons that it happens. It's not like she's taking this and she's forming an opinion that she's going to. . . . I think what she's describing is physiology, the human body. That's . . . where I'm going with this, is typical physiology, which unfortunately. . . .

> [DEFENSE COUNSEL]: (unintelligible) call. . . .
>
> [PROSECUTOR]: Or fortunately, most people would understand.
>
> THE COURT: Yeah. I don't think you have to be an expert to say that if you're struck you bruise or if you're not struck you're not bruised. I mean that's similar to what. . . .
>
> [PROSECUTOR]: Uh huh.
>
> THE COURT: Types of questions you're asking her.
>
> [PROSECUTOR]: Well, basically where I'm going with this is that, you know, the body will react to certain things and these are. . . this is a part of the body that is designed to expand to either have a child or create a child. So, that's why you're not always going to see. . . .
>
> THE COURT: That's where you're going with it.
>
> [PROSECUTOR]: Yeah. That's where I'm going. So, if you think that's objectionable, but that's where I'm going.
>
> [DEFENSE COUNSEL]: It just sounded like you were crossing the line of in my opinion offering expert testimony, when she's not an expert and then you can't sit there and tell me that a lot of what she's talking about is within the knowledge of the everyday common sense of the jury. It does take specialized knowledge and training and that's why she went through all those courses, and got her Bachelor's, and is taking forty hours of this. She is a specialized nurse.
>
> THE COURT: Objection is overruled. You may stand back. (Ellipses in original).

The prosecutor then asked Ms. Hall if she would expect to find trauma or evidence of injury when the patient's allegation is non-consensual intercourse. When the nurse tried to demonstrate her response with a physical object representing a woman's hymen, the court asked the prosecutor to rephrase the question. The prosecutor did so, asking Ms. Hall if a woman's prior sexual activity would have any bearing on whether there would be

trauma during non-consensual sexual intercourse. Ms. Hall explained:

> A. It can.
>
> Q. And why is that?
>
> A. Ah, well once an estrogenized female, you know someone who has hit over puberty, ah, the body allows it to happen. . . penetration.
>
> Q. Okay. And it doesn't matter if it's non-consensual, the body's just going to react?
>
> [DEFENSE COUNSEL]: Object to the form of the question. And can I please have a continuing objection based upon I put at the bench.
>
> THE COURT: Objection is overruled, but a continuing objection is granted.
>
> [DEFENSE COUNSEL]: Thank you.
>
> Q. I don't remember what my question was. Ah, it can. . . and the body will still react even if it's a non-consensual. . .would the body still react even if it's non-consensual intercourse?
>
> A. Yes. (Ellipses in original).

Under Maryland Rule 5-701, testimony by a lay witness "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Expert opinion testimony, on the other hand, is "based on specialized knowledge, skill, experience, training, or education . . . [and] need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). But, before a witness may give expert testimony, the trial court must determine: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the

particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." *Id.*; Md. Rule 5-702.

The Court of Appeals discussed the issue of lay versus expert opinion testimony at length in *Ragland*. In that case, two police officers offered what the State deemed "lay opinion" testimony, based on their training and experience as police officers, that a particular series of events constituted a drug transaction. 385 Md. at 709. As in the case at bar, the State did not notify the defense that the witnesses would testify as experts, nor did it proffer them as experts; neither did the trial court make any finding as to whether the offered testimony would satisfy the requirements of Rule 5-702. *Id.* at 710-11.

The jury convicted Mr. Ragland of distribution of a controlled dangerous substance. Mr. Ragland appealed his conviction, arguing that the officers' evidence should only have been admitted as expert testimony, subject to the appropriate qualification and discovery procedures. *Id.* at 709.

The Court of Appeals distinguished lay and expert opinion testimony. The Court pointed out, however, that it is possible for some opinions to fall into both categories: "A witness who has personally observed a given event may nonetheless have developed opinions about it that are based on that witness's specialized knowledge, skill, experience, training, or education. The question then becomes whether the fact of personal observation will permit admission of the opinion of a lay witness under Rule 5-701, or whether the 'expert' basis of the opinion will require compliance with Rule 5-702 and admission as expert testimony." *Id.* at 718.

When the prosecutor asked one of the officers in *Ragland* on what his opinion that the exchange he observed comprised a drug deal was based, he replied, "[b]ased on two temporary assignments in a narcotics unit; two and a half years with this unit; involved in well over 200 drug arrests." *Id.* at 726. The other officer similarly related extensive training and experience in the investigation of drug cases. *Id.* The Court of Appeals concluded that the officers' testimony could not be considered lay opinion, as the witnesses had devoted considerable time to the study of the drug trade, and they offered their opinions that, among the numerous possible explanations for the events, the correct one was a drug transaction. *Id.*

The connection between the officers' training and experience and their opinions was explicit, and the Court held that "Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725. As the discovery and evidentiary predicates had not been met, and because the Court did not find the error harmless beyond a reasonable doubt, Mr. Ragland's conviction was reversed and the matter remanded for a new trial. *Id.* at 727.

This Court came to a different conclusion in *Fullbright v. State*, 168 Md. App. 168 (2006). In that case, the defendant attacked his girlfriend with a knife. *Id.* at 172. The police recovered the knife, which was covered with blood. *Id.* at 174. At trial, the defense made much of the fact that the knife was never fingerprinted. *Id.* at 175. When the responding police officer was asked why no prints had been collected from the knife, he replied, "At the time of the incident, there was blood that was still on there. It was in a wet condition. You know, stating that, from my past–from my experience—." *Id.* at 175-6.

The court overruled defense counsel's objection at that point, and the officer continued to explain that in his "experience and training in the Police Academy in regards to recovering latent prints. . . [o]ff the knife or off of wet objects, it's pretty much–it's hard to get good prints off of blood." *Id.* at 176.

Following his conviction, Mr. Fullbright, relying on *Ragland*, argued on appeal that the trial court had erred in admitting testimony by the officer, based on his training and experience, that it is "hard" to recover "good" latent fingerprints from wet objects. *Id.* at 177. By admitting the testimony explaining the reason the officer did not obtain fingerprints from the knife, Mr. Fullbright contended, the trial court improperly permitted the officer to give an unqualified expert opinion that "plugged a hole in the State's case." *Id.*

We explained that Mr. Fullbright's reliance on *Ragland* was misplaced because, first, the officer's testimony that, based on his training and experience, it is difficult to get good prints off wet objects, was not opinion evidence, expert or lay, because the State did not offer the testimony for its truth. *Id.* at 181. In *Ragland*, the State offered the officers' opinions that the events they observed constituted a drug transaction in order to prove that those events were, in fact, a drug transaction. In *Fullbright*, however, the State did not elicit the officer's opinion that it was, in fact, difficult to get good fingerprints off wet objects. Instead, the investigating officer's opinion was sought for the sole reason of explaining to the jury his conduct, that is, why he did not submit the knife for fingerprint analysis. Therefore, the jury was not called upon to determine the truth or falsity of his opinion. *Id.* at 181-2.

In addition, the officer's opinion regarding the quality of fingerprints on wet objects was not introduced to prove an "essential element" of the charged crimes; it was solely directed at the issue of the adequacy of the police investigation. The unimpeached eyewitness testimony of the victim was sufficient to support the conviction. *Id.* at 182. In *Ragland*, on the other hand, the proof was circumstantial and came from an inference based on the police officers' opinion testimony that the transaction they observed was a drug deal. Thus, the opinion of the officers was necessary to prove an essential element of the charge against Mr. Ragland. *Id.*

We considered the issue of lay/expert opinion testimony in the context of a SAFE examination in *Jones-Harris v. State*, 179 Md. App. 72 (2008). There, the SAFE nurse cataloged the rape victim's physical injuries, including bruises and a broken nose, and then, to ascertain whether there were any lacerations present that were not apparent to the naked eye, the nurse applied blue toluidine dye to the victim's anal region.[6] She explained that if there are any lacerations or breaks in the skin, the dye remains observable on the skin after one tries to wipe it away. In the case of Mr. Jones-Harris's victim, the toluidine dye revealed positive findings, meaning there were lacerations in the victim's external anal region. *Id*. at 80-1. The defense objection to the nurse's testimony as an expert opinion was overruled when the witness stated, in response to a question by the court, that the remaining dye was "something [she] can simply observe with [her] eyes." *Id*. at 83-4.

[6] The victim asserted that the defendant penetrated her anally.

We agreed with the trial court's ruling, noting that the nurse's testimony was "a report of an observation, not an opinion. In the portion of the nurse's testimony to which appellant objected, [she] did not testify that, in her opinion, the presence of the laceration was evidence of a sexual assault; instead, she merely stated that after applying the dye and wiping it away, she saw a laceration." *Id*. at 84.

Citing the Court of Appeals' decision in *Dorsey v. Nold*, 362 Md. 241(2001), we explained that "a medical care provider does not testify as an expert when his or her testimony is limited to what the provider did and what he or she observed while treating the patient." *Id*. We concluded that *Jones-Harris* was distinguishable from *Ragland* because, although the nurse "indisputably had medical knowledge far superior to that of a layperson, the objected to testimony did not call for the expression of an opinion by her," as any person with normal vision would be able to see the laceration revealed by the dye. *Id*. at 84, 85.

In this matter, by way of contrast, Ms. Hall's testimony was not limited to what she did or what she observed while treating M.F. Her testimony did call for her opinion that a victim of non-consensual sexual intercourse might not exhibit any physical injuries, based on her SAFE nurse and general nursing training and medical knowledge of the physiology of the female anatomy, including the process of changes to a woman's body following the onset of puberty and sexual activity.

And, Ms. Hall's testimony was introduced to prove an essential element of the rape charge, that is, that M.F. may not have consented to the intercourse even if her SAFE examination showed no physical trauma. Because appellant admitted to having had sexual

intercourse with M.F. on the day in question, the only real issue before the jury was whether the intercourse was consensual, as appellant claimed, or non-consensual, as M.F. insisted.

Therefore, the trial court abused its discretion in permitting Ms. Hall to offer her lay opinion testimony that an adult female body can permit non-consensual intercourse and yet leave no physical injuries, as Ms. Hall relied on scientific and medical training beyond the understanding of the average juror when offering her testimony. *See Warren v. State*, 164 Md. App. 153, 166 (2005) ("The decision to admit lay opinion testimony is vested within the sound discretion of the trial judge."). Because Ms. Hall's testimony addressed the core issue of M.F.'s consent, the trial court's error in admitting her testimony cannot be deemed harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 659 (1976).

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR A NEW TRIAL; COSTS ASSESSED TO WASHINGTON COUNTY.