Circuit Court for Charles County
Case No. 08-K-16-000235

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 11

September Term, 2018

DONALD MCCOY STANCELL, JR.

v.

STATE OF MARYLAND

Friedman,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 28, 2019

A jury sitting in the Circuit Court for Charles County convicted Donald McCoy Stancell, the appellant, of one count of sexual abuse of a minor. The charge arose from Mr. Stancell's alleged sexual abuse of his former stepdaughter, A.S., over a three-year period beginning when she was 14 years old. The court sentenced Mr. Stancell to a term of 25 years. On appeal, he seeks plain error review of a jury instruction and the failure to restrict what he deems to be improper prosecutorial closing argument. Because we conclude that plain error review is not available on the first issue and not warranted as to the second issue, we shall affirm the judgment of the circuit court.

The only count that was before the jury for decision charged that on November 4, 2015, Mr. Stancell caused his penis to touch A.S.'s genitals. At that time, A.S. was 17 years old. Mr. Stancell was then married to A.S.'s mother and lived in the household with her.

The State's evidence at trial showed that A.S. reported the sexual abuse to a school counselor on November 6, 2015; that a forensic examination of her performed that same day confirmed recent sexual activity; that she reported to a forensic nurse that Mr. Stancell had vaginal intercourse with her twice on November 4, 2016, once in the morning and once at night; and that she was wearing a pair of red underwear that day. Julie Kempton, a forensic scientist with the Maryland State Police, testified as an expert. She analyzed a stain found on the inside crotch of the red underwear and found it was consistent with the presence of possible saliva or semen. The stain was negative for spermatozoa, which Ms. Kempton opined would be consistent with semen from a male

who had undergone a vasectomy,[1] and contained DNA, less than one-percent of which was male. Using Y-STR testing,[2] Ms. Kempton obtained a male DNA profile from at least two male contributors, including a major contributor. Mr. Stancell's DNA was consistent with and could not be excluded as the major contributor, whereas A.S.'s boyfriend was excluded. Ms. Kempton opined that the likelihood that another male would have this Y-STR DNA profile was one in 8,621.

A. Jury Instruction

The circuit court instructed the jury, without objection:

> In order to convict the defendant of child sexual abuse, the State must prove that the defendant sexually abused [A.S.] by other sexual offense, to wit, Defendant did touch the genitals of [A.S.] with his penis, that at the time of the abuse, A.S. was under eighteen years of age, and that at the time of the abuse, the defendant was a member of the household [with A.S.] . . . .
>
> In order to convict the defendant, you must all agree that the defendant sexually abused [A.S.], *but you do not have to all agree on which specific act or acts constituted the abuse.*

(Emphasis added.)

[1] Mr. Stancell had undergone a vasectomy prior to the date of the alleged sexual abuse.

[2] The analyst testified that there are two types of STR, which stands for single tandem repeat, DNA analysis: autosomal STR and Y-STR. The former analyzes areas on the X and Y chromosomes and the latter analyzes areas only on the Y-chromosome. Y-STR analysis is used when female DNA would otherwise overwhelm male DNA in a given sample. Y-STR testing cannot produce a unique DNA profile, however, because all males in a paternal bloodline have the same Y chromosome.

Mr. Stancell contends the italicized language should have been excised from the pattern instruction because the only charged conduct was his alleged touching of A.S.'s genitals with his penis on a single date.[3] He acknowledges that he did not lodge any objection at trial to the instruction as given. Further, the instruction, which is a slightly modified version of Maryland Criminal Pattern Jury Instruction 4:07.2, titled "Child Abuse – Sexual Abuse," was specifically requested by Mr. Stancell. During a discussion of the instructions, defense counsel made clear that he had reviewed the pattern instruction, requested and then later withdrew a request for an unrelated modification to it, agreed to a modification proposed by the court,[4] and stated that he otherwise was satisfied with it. Having requested the instruction and, through counsel, affirmatively stated on the record that he was satisfied with it being given as modified by agreement, plain error review is not available. *See State v. Rich*, 415 Md. 567, 580 (2010) (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) ("If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.").

[3] As mentioned, Mr. Stancell was alleged to have engaged in two acts of sexual abuse on that day, however.

[4] The court proposed excising part of the pattern instruction that provided that sexual abuse "does not include the performance of an accepted medical or behavioral procedure ordered by a health care provider authorized to practice by law and acting within the scope of that authorization" because there was no evidence generating it. MPJI-CR 4:07.2. The parties agreed to that modification.

B. State's Closing Argument

Mr. Stancell contends that he was deprived of a fair trial by the prosecutor's "improper and misleading statements made during closing argument [that] completely misstated the significance of the forensic evidence and implied facts that were never in evidence." Specifically, the prosecutor argued repeatedly that the Y-STR testing determined that Mr. Stancell's DNA was "on the inside crotch [of A.S.'s underwear.]"

Mr. Stancell concedes that he did not lodge an objection to this allegedly improper argument and thus seeks plain error review.[5] It is a "fundamental tenet[] of appellate review [that]: Only a judge can commit error. Lawyers do not commit error." *DeLuca v. State*, 78 Md. App. 395, 397-98 (1989). Further, "great leeway" is afforded to lawyers with respect to closing argument. *Pickett v. State*, 222 Md. App. 322, 329 (2015) (citation omitted). We are not persuaded that the trial judge erred by not intervening *sua sponte* to restrict the prosecutor's comments upon the meaning of Ms. Kempton's testimony that Mr. Stancell's DNA was "consistent with" the sample obtained from A.S.'s underwear. On that basis alone, plain error review is foreclosed. *See Givens v. State*, 449 Md. 433, 469 (2016) (the first prong of the test for plain error review requires that there be an

[5] In his closing argument, defense counsel did not dispute that the DNA found on A.S.'s underwear was from Mr. Stancell's paternal bloodline but argued that it was not ejaculate and could have been transferred there from other items of clothing or household items belonging to Mr. Stancell or one of his sons. Mr. Stancell and A.S.'s mother had two sons together who also lived in the home at the time of the alleged abuse. They were then ages 6 and 8.

error). Even if the court had erred, the error was neither clear nor obvious and did not "affect[] the fairness, integrity or public reputation of judicial proceedings," making our exercise of plain error review inappropriate. *Savoy v. State*, 218 Md. App. 130, 145 (2014).

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.