Circuit Court for Baltimore City
Case No. 117047038

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 240

September Term, 2018

WAYNE K. PARKER

v.

STATE OF MARYLAND

Fader, C.J.
Geter,
Wilner, Alan M.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: January 25, 2019

Appellant was convicted by a jury in the Circuit Court for Baltimore City of sexual assault of a minor and third degree sexual offense. For the first of those offenses, he was sentenced to 25 years in prison with all but 20 years suspended, with a period of probation to follow; for the second, he was given a consecutive sentence of five years. He complains in this appeal that the trial court erred (1) in restricting his cross-examination of certain State witnesses, and (2) in denying his motion to postpone sentencing in light of the State's delay in disclosing certain information regarding his 1991 rape-of-a-minor conviction in North Carolina. Finding no reversible error, we shall affirm the Circuit Court's judgment.

BACKGROUND

The victim in this case was an 11-year-old girl, whom we shall refer to as MM.[1] The child's parents were separated. MM lived mostly with her mother, Charise, but visited every other weekend with her father and stepmother Jasmine. On August 26, 2016, however, she and at least two of her sisters stayed at the home of her paternal grandmother, Elizabeth, which they did with some frequency.[2] According to Elizabeth, they arrived at around 11:25 in the evening. Appellant was in "a relationship" with Elizabeth and lived in

[1] Appellant also was charged with and convicted of sexually abusing MM's sister on the same evening. We are not concerned here with that conviction.

[2] MM believed that the events in question occurred on September 3, 2016. All of the other evidence established that the events occurred on the evening of August 26-27, 2016, and appellant does not contest that date.

her three-bedroom townhome.[3] He occupied one of the bedrooms and Elizabeth occupied another, although, when her grandchildren visited, they occupied that room. The third bedroom was a computer room.

Elizabeth had to work the night shift that evening and asked appellant to watch the children which, with some reluctance, he agreed to do. It was the first time he was alone with them.

MM – the first witness – testified that, while she was in the computer room watching the TV program Boston Legal, appellant entered and asked her to come into his room, which she did. She was dressed in a short-sleeve shirt and her underwear. She did not have pants on. He told her to lie on his bed, forced her to open her legs, got on top of her, "pulled his thing out," defining "his thing" as his genitals, and laid it on the side of her leg. She said it was "wrinkly, old, and had slimy stuff in it." She added that she was frightened but unable to escape because he was on top of her. She said that there was pornography on the television and that he displayed a knife and threatened her if she told anyone what happened.

Elizabeth testified that, when she returned home the next morning, everything seemed normal. Around 2:00 p.m., as she was preparing to take the children to her mother's house, MM emerged from the computer room and, in appellant's presence, told her what had occurred, adding that appellant "got between her legs [and] was rubbing all

[3] Elizabeth said he was a friend. Appellant told the children that he was her "husband."

over her." Elizabeth confronted appellant, who denied everything. She did not call the police but instead took the children over to her mother's house (MM's great grandmother).

Charisse confirmed that the events took place on August 26, when Elizabeth picked the children up around 5:00 p.m. Around noon the next day, she spoke with MM by phone. MM was crying and reported that appellant has sexually abused her. She immediately contacted MM's father and stepmother, who took her to Elizabeth's house, where the father called the police. They then got MM from the great grandmother's house and took her to the hospital. The stepmother testified that, in the early morning hours of August 27, she received a call from the cell phone that MM shared with one of her sisters and, when she answered, she heard MM screaming and yelling. She thought the girls were arguing and told them to calm down and go to bed. She later received the text message from Charisse.

In his own testimony, appellant denied that he had abused MM. He agreed that the events took place on August 26. He said that, as he was coming out of the bathroom, fully clothed, he encountered MM, who was crying because she missed her grandmother. He tried to console her, but she ran into his bedroom and laid down on his bed. He pulled her off the bed and told her to go back to her room. When she left, he closed the door, and that was the extent of his interaction with her. He also denied that there was any pornography on the television in his room. A serologist testifying for the defense examined vaginal and cervical swabs taken from MM, along with her underwear, and found no signs of semen or seminal fluid.

On this disputed evidence, the jury obviously found the State's evidence more persuasive.

MM'S EXPOSURE TO PORNOGRAPHY

Prior to trial, the State moved *in limine* to preclude appellant from offering evidence relating to the viewing of pornography by MM. The motion alleged that, in a recent conversation, Elizabeth had indicated "from what she has been told," that MM had been exposed to pornography. Upon further questioning, Elizabeth said that she "had heard such things through someone named 'Joe' and from MM's great grandmother," that Elizabeth "had never personally witnessed [MM] viewing pornography and that all the information that she had regarding [MM] viewing pornography came from what she heard from other people." The State claimed that it was all inadmissible hearsay, that it was irrelevant, and that it was inadmissible under Maryland's Rape Shield Law (Md. Code, § 3-319(a) of the Criminal Law Article).

At a pretrial hearing, appellant argued that the evidence would rebut the inference that, as a minor, MM would not be able to allege sexual conduct unless it had actually occurred. The court rejected the State's argument that the Rape Shield Law applied but prohibited the defense from mentioning that evidence in opening statement so the court could give further thought to the matter, and defense counsel heeded that instruction. In his opening statement, the prosecutor asserted that young children have special needs, are perfect victims, that MM, only eleven at the time – 12 by the time of trial – "has Aspergers, a type of autism," and that when she is called to testify, "she isn't going to speak or talk like other 12 year olds."

The issue surfaced again during cross-examination of MM. Defense counsel got MM to admit that Boston Legal was her favorite TV show and asked why. The State objected on relevance grounds, whereupon defense counsel stated that it goes to the issue of pornography. The court immediately ruled that it would not permit the defense to contend that Boston Legal constituted pornography, which counsel conceded. He indicated, however, that he intended to ask MM about other incidents of pornography that she had watched, based on a statement by Elizabeth that she had found pornography on her cell phone that MM and her sister had been using and that when Elizabeth asked the children about that, the sister denied loading it on the phone but MM said nothing. The court stated that, subject to a *voir dire* of Elizabeth before she testified, it may allow her to be questioned about pornography on her cell phone but it forbid counsel to question MM about it because it would be more prejudicial than probative. The court ruled that counsel could ask MM what she saw on Boston Legal and what she saw on appellant's TV.

With respect to the latter, MM was asked how she knew what she saw on the TV was pornography, to which she responded "I don't know. I – I haven't watched it, but the thing is that – it was a man and a woman. I don't know what they were even doing, but it was disgusting to me."

With the jury excused, Elizabeth testified regarding her belief that MM "may have been exposed" to pornography. She said that had come from Elizabeth's mother – that because the girls had lived with her for some time and "she felt because there was a lot of inappropriate material coming on the internet and she was looking at the bill, that she said

it was inappropriate." Elizabeth recounted the time a year earlier when she found a pornographic cartoon on *her* phone. She said that an "app" that had been loaded on the phone depicted the cartoon, that she questioned MM and her sister about whether they had downloaded the "app", that the sister denied doing so and that MM looked down and said nothing. The cartoon she saw simply showed a naked woman with her legs spread out; no men were in the cartoon and no overt sexual activity was depicted.

Elizabeth added that, while using the computer at her mother's house on one occasion, a "very pornographic picture" displayed itself on the screen, which she asked her son to delete. When asked about who had access to that computer, Elizabeth said that "she" did not have access. Elizabeth did not elaborate on whom she meant by "she" and was not asked by anyone to do so. The State argues that, in context, Elizabeth was referring to MM. Appellant contends the reference was to Elizabeth's mother. The court, in announcing its findings, interpreted "she" to mean MM.

On this evidence, the State renewed its motion to preclude testimony regarding MM's exposure to pornography prior to August 26, 2016, which the court granted. The court found that none of Elizabeth's testimony regarding the "app" on the cell phone was relevant. It noted that MM never admitted downloading that "app" and refused to accept her silence when asked about that as an admission. There was no evidence that MM downloaded the "app" or ever saw the cartoon. The court found further that MM had no access to the computer in Elizabeth's mother's house, and that Elizabeth had no personal knowledge of the other alleged pornography she heard about from her mother.

Appellant disputes the trial court's conclusions. He claims that his requested cross-examination of MM and Elizabeth before the jury would have produced evidence of MM's exposure to pornography prior to the August 26-27 incident which, in turn, would have rebutted the inference that children of MM's age would not have experienced or known sexual behavior and therefore likely would be unable to make up the kind of story MM told. He claims that the cross-examination he sought was relevant, that it was not barred under Maryland's Rape Shield Law, that it would not have been unduly prejudicial, and that its disallowance cannot be regarded as harmless error.

The thrust of his argument hinges on the point made in *State v. Jacques*, 558 A.2d 706, 708 (Me. 1989) that, when the victim is a child, "the lack of sexual experience is automatically in the case without specific action by the prosecutor" and "[a] defendant therefore must be permitted to rebut the inference a jury might otherwise draw that the victim was so naïve sexually that she could not have fabricated the charge."

We accept the principle in that statement but not its full breadth. As other cases indicate, the extent to which a defendant may elicit prior sexual experiences of a child victim, even for that limited purpose, usually depends on the facts and circumstances of the case. *See State v. Molen*, 231 P.3d 1047, 1052 (Ida. 2010); *State v. Payton*, 165 P.3d 1161 (N.M. 2007); *State v. Budis*, 593 A.2d 784 (N.J. 1991); *Montgomery v. Commonwealth*, 320 S.W. 3d 28 (Ky. 2010). Relevant, in addition to any statutory criteria, are the age of the child,[4] the degree to which the prior conduct has been proven,

[4] Most of the cases include the child's age as an important factor. As the *Payton* court noted that, "[a]t some point, the dynamic requiring a defendant to be able to show an

the resemblance of the prior conduct to the current acts, necessity for the evidence, and whether the evidence is more probative than prejudicial. *Payton*, at 1165.

Viewed in that light, we have no difficulty in affirming the court's ruling. Notwithstanding the court's instruction not to inquire of MM "about a pornographic act," defense counsel asked her how she knew that what she saw on *appellant's* television was pornography, to which she replied "I haven't watched it, but the thing is that – it was a man and a woman. I don't know what they were even doing, but it was disgusting to me." Notwithstanding that there was no evidence that MM ever saw the cartoon on Elizabeth's phone (and, indeed, although a belated objection was sustained to the question, she flat-out denied ever taking Elizabeth's phone and looking at pornography), what of any relevance would her viewing a cartoon of a naked woman add to what she saw on appellant's television?

POSTPONEMENT OF SENTENCING

Sentencing was scheduled for and held on March 29, 2018. On March 12, a Pre-Sentence Sex Offender Mental Health Assessment prepared by a unit of the State Health Department was sent to the judge, the prosecutor, and defense counsel. In that Assessment, the unit reported that, in 1990, appellant had been charged with first and second degree rape in North Carolina, that in 1991 he pled guilty to second degree rape,

alternate source of sexual knowledge loses force as the child becomes older" and "may have doubtful application once a child turns twelve or thirteen." *Id.* at 1165. MM was 12 at trial. *See also Budis. supra*, 593 A.2d at 791.

that he received a 12-year sentence but was paroled in 1995, and that the victim was the nine-year-old daughter of his former girlfriend. The Assessment stated that, despite the guilty plea, appellant "emphatically denied the allegations" and stated that the police "found no evidence of any wrongdoing on his part."

When the parties appeared in court for sentencing on the 29th, defense counsel informed the court that on the previous afternoon he was handed 40 pages of documents, of which 30 to 35 pages concerned appellant's North Carolina conviction, and that he had not had an opportunity to read those pages. He acknowledged that he was aware of the 1991 conviction. The documents in question were not presented to the trial court and were not intended to be presented to that court but were added to the record before us. They include the indictment, witness statements, and police records in the case. The prosecutor received them from the North Carolina police and sent a copy of them to defense counsel. The prosecutor agreed that counsel should have an opportunity to look at them but asked for a brief recess rather than a rescheduling of the sentencing proceeding. It was then 10:00 a.m. The court agreed to recess until 11:30, but, at *defense counsel's* request, shortened the recess to 11:00.

When court resumed, at 11:07, defense counsel again requested a postponement, which the court denied. Victim impact testimony was then presented, following which, after hearing argument, the court pronounced the sentence. Appellant now claims that the State violated Rule 4-342(c), which provides:

> "Sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate, the State's Attorney shall disclose to the defendant or counsel any information *that the State expects to present to the*

> *court for consideration in sentencing*. If the court finds the information was not timely provided, the court shall postpone sentencing." (Emphasis added).

The State notified counsel prior to the sentencing hearing that it intended to inform the court of the 1991 conviction. As noted, counsel had the Assessment indicating the identity of the victim in that matter. The 30-35 pages of extraneous material was never presented to the court. Defense counsel therefore had all the information he was entitled to "sufficiently in advance of sentencing to afford the defendant a reasonable opportunity to investigate."

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.