Circuit Court for Wicomico County
Case No. 22-K-16-000776

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 665

September Term, 2020

KELITE FERRERAS

v.

STATE OF MARYLAND

Nazarian,
Beachley,
Ripken,

JJ.

Opinion by Nazarian, J.

Filed: December 6, 2021

Kelite Ferreras was convicted in the Circuit Court for Wicomico County of one count of sexual abuse of a minor, one count of second-degree rape, one count of second-degree sexual offense, and one count of incest, all committed against his daughter. On appeal, he argues *first* that the evidence was insufficient to support the finding that he committed rape or sexual offense using force or threat of force; *second*, that the trial court erred in allowing the jury to hear testimony regarding his initial refusal to consent to DNA testing; *third*, that the court should have excluded testimony about his flight to Haiti while the charges were pending; and *fourth*, that the court should not have admitted statements the victim made to a detective regarding the report of sexual assault. We agree that the jury should not have heard that Mr. Ferreras declined to consent to DNA testing, but that error wasn't preserved, and we disagree with the remainder of his arguments and affirm the judgments.

I. BACKGROUND

The victim in this case, J, was eleven years old at the time of the incident. J lived with one of her brothers and Mr. Ferreras in Salisbury and attended middle school. On October 18, 2016, J arrived at school and reported to a school resource officer—via a note she had written—that Mr. Ferreras had assaulted her sexually the evening before. The school resource officer called the Wicomico County Sheriff's Department, and Deputy Bonnie Dolgos reported to the school and spoke to J about what had happened. The resource officer gave Deputy Dolgos the note and Deputy Dolgos spoke with J about its contents. After that conversation, J was taken to a Child Advocacy Center.

J testified at trial that on the evening of October 17, 2016, she was in her bedroom alone when Mr. Ferreras entered the room and took off her shorts and underwear. She testified that Mr. Ferreras touched her "boobs," touched the inside and outside of her vagina with his hand and penis, and touched the inside and outside of her "butt" with his penis. On October 18, 2016, after J's report to the school resource officer, she was examined by Amy Williams, a forensic nurse at Peninsula Regional Medical Center. Nurse Williams testified that she spoke with J about what Mr. Ferreras had done to her the evening before. Then she examined J and discovered an injury to J's perineum.

That same day, Detective Matthew Rockwell and another detective went to the Ferrerases' home and detained Mr. Ferreras. They transported him to the Salisbury Police Department and he recorded a video and audio statement. Detective Rockwell testified that during the interview, Mr. Ferreras consented initially to allow officers to collect his DNA, but after the interview concluded he changed his mind and refused. Detective Rockwell later obtained a search warrant for Mr. Ferreras's person and obtained a DNA sample.

Detective Rockwell also testified that Mr. Ferreras was released on bond but failed to appear in court in October 2017. Detective Rockwell stated that he had been in contact with the Maryland Fugitive Task Force and was notified by an officer in that unit that Mr. Ferreras potentially was in Haiti. Mr. Ferreras was eventually located by Interpol in Haiti and picked up between March 21 and March 23, 2019. His DNA was tested against several items collected from his home and DNA from J. Sara Lee, a forensic analyst, analyzed the information and testified that based on the results, she could not exclude Mr. Ferreras as a

contributor.

At the end of the State's case, and again at the end of trial, Mr. Ferreras moved for a judgment of acquittal. He argued that the State had not met its burden on the element of force necessary to prove second-degree rape and second-degree sexual offense. The court denied the motion and allowed the jury to decide if the element of force had been met based on the evidence and testimony presented at trial. The jury found Mr. Ferreras guilty of all four counts and the court sentenced him to three consecutive twenty-five-year terms and to lifetime supervision and registration as a Tier III sex offender.

Mr. Ferreras noted a timely appeal. We supply additional facts as necessary below.

II. DISCUSSION

Mr. Ferreras raises four issues on appeal that we have rephrased.[1] He contends *first* that the evidence introduced at trial was insufficient to support a finding that he committed

[1] Mr. Ferreras phrased his Questions Presented as follows:

> 1. Did the trial court err in finding that the there was sufficient evidence to deny Ferreras' motion for judgment of acquittal as to counts two and three of the indictment where there was insufficient evidence that the alleged acts of sexual abuse were committed by force or fear of force?
>
> 2. Was it error, subject to plain error review, to permit the jury to be told that Ferreras refused to consent to the search of his person for DNA and that a search warrant had to be obtained?
>
> 3. Did the trial court err in permit[ting] Detective Rockwell to testify concerning the circumstances surrounding Ferreras' arrest in Haiti and his return to the United States?
>
> 4. Did the trial court err in permitting Deputy Dolgos to testify to hearsay statements of J.F. regarding the note she had written and the specific details regarding the alleged sexual assault?

second-degree rape and second-degree sexual offense, and specifically that he used force or the threat of force in committing both crimes. *Second*, he contends that the trial court erred in permitting the jury to hear testimony about his refusal to provide DNA for testing and officers had to obtain a search warrant. *Third*, he contends that the trial court erred in allowing the jury to hear testimony about his flight to and arrest in Haiti. *And fourth*, he contends that the court erred in allowing Deputy Dolgos to testify about statements J made about the note she had written and the specific details about the sexual assault. For reasons to follow, we affirm Mr. Ferreras's convictions.

A. The Evidence Was Sufficient To Support Convictions For Second-Degree Rape And Second-Degree Sexual Offense.

Mr. Ferreras begins by arguing that evidence adduced at trial was insufficient to support his convictions for second-degree rape and second-degree sexual offense, and specifically that the evidence was insufficient to prove the "force or fear of force" element of those offenses. Mr. Ferreras also argues that counts two and three as outlined on the verdict sheet presented to the jury were ambiguous. We hold that the evidence was sufficient and the verdict sheet sufficiently clear for the jury to convict Mr. Ferreras of second-degree rape and second-degree sexual offense.

"'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.'" *State v. Suddith*, 379 Md. 425, 429 (2004) (*quoting State v. Smith*, 374 Md. 527, 533–34 (2003)). "We do not second-guess the jury's determination where there are competing

rational inferences available. We give deference 'in that regard to the inferences that a fact-finder may draw.'" *Smith v. State*, 415 Md. 174, 183 (2010) (*quoting State v. Smith*, 374 Md. at 533–34). "If the evidence 'either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt [,]' then we will affirm the conviction." *Bible v. State*, 411 Md. 138, 156 (2009) (*quoting State v. Stanley*, 351 Md. 733, 750 (1998)). A criminal conviction can rest "upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith v. State*, 415 Md. at 185.

Mr. Ferreras contends that the evidence was insufficient to establish the force element of second-degree rape and second-degree sexual offenses because the jury had little to no direct evidence that he used physical force or threatened force against J directly. But direct evidence isn't required—circumstantial evidence, in this case the circumstances surrounding the rape and sexual offenses, can satisfy the State's burden of proving force or a threat of force:

> [N]o particular amount of force, either actual or *constructive*, is required to constitute rape. Necessarily that fact must depend upon the prevailing circumstances. As in this case force may exist without violence. If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim—having regard to the circumstances in which she was placed—a real apprehension, due to fear, of imminent bodily harm, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.

Hazel v. State, 221 Md. 464, 469 (1960) (*citing State v. Thompson*, 227 N.C. 19 (1946)) (emphasis added). This was the standard of proof that prosecutors faced, and in our view

met.

At the time of the incidents at issue, Mr. Ferreras was thirty-three years old. J was eleven. He was the only adult and the known disciplinarian in the home for J and her brother, so he was the authority figure in age and position. Although there was some dispute about whether Mr. Ferreras "squeezed" J's neck or held on to her body to keep her from moving during the rape, there was testimony from which a jury could have found he did, plus an injury to her perineum diagnosed the following day. Under those circumstances, a rational trier of fact could have inferred that Mr. Ferreras used force or the threat of force in the course of assaulting J sexually.

Mr. Ferreras also argues that counts two and three, as written on the verdict sheet submitted to the jury, were ambiguous because the jury was presented with "both the theory of an age-based difference and [] the theory that the acts were committed by force or fear [of] force[.]" There was no ambiguity, though, because the jury was instructed on both theories before its deliberations began. The trial judge instructed the jury on each charge and noted specifically "under rape second degree and sex offense second degree, [the jury] must consider each theory of those charges." The trial judge then instructed the jury on the remaining counts and how both age and force or fear of force pertained to the counts. Upon reading the verdict, the jury foreperson highlighted both age and force or fear of force as it pertained to counts two and three. With such detailed guidance and a vocalized understanding of the different counts and acknowledgement of the different charging theories read by the jury foreperson, there is no ambiguity in the verdict sheet—the jury

was instructed to consider both theories and found Mr. Ferreras guilty under both.

B. Mr. Ferreras Didn't Preserve His Argument That The Court Erred In Allowing Testimony About His Refusal To Consent To DNA Testing.

Second, Mr. Ferreras argues that the trial court erred in admitting testimony about his refusal to consent to the search of his person for DNA. He acknowledges that he didn't object during trial, but argues that we should review the trial court's admission of such testimony for plain error because the testimony could have led the jury to deliberate under the impression that "Ferreras believed that the DNA would produce inculpatory evidence[.]" We decline to exercise our discretion to review this issue for plain error.

At trial, the State called Detective Rockwell to testify about his involvement in this case, not only as the investigator assigned to the Child Advocacy Center but also as one of Mr. Ferreras's interviewers. In the course of his testimony, Detective Rockwell explained that he asked Mr. Ferreras to give a DNA sample, and that he agreed at first but later refused:

> [STATE:] During the course of your interview with [Mr. Ferreras] did you speak to him about obtaining a DNA sample from him?
>
> [DETECTIVE ROCKWELL:] Yes. So I basically said we should have some possible DNA from this allegation. During the interview Mr. Ferreras advised he would offer me consent to collect his DNA, however, at the end of the interview, I believe after he had been escorted back downstairs I was preparing to collect his DNA, at which time he refused to offer consent so a search warrant had to be obtained for his person to collect the DNA.

The defense did not object to this testimony or seek to strike it. Indeed, the remainder of

the State's direct examination of Detective Rockwell continued with only one objection after a question regarding Mr. Ferreras's flight to Haiti (an issue we address below).

Mr. Ferreras acknowledges, as he must, that this error is not preserved for appellate review; there was no timely and clearly stated objection by defense counsel, which is required for proper preservation:

> The appellate court will not entertain a hidden error as the basis for a reversal. *What is required is a timely and clearly stated objection made to the trial court so that the court has an opportunity to consider the issue and to correct the error* . . . . It is not intended to punish the negligent party nor reward the diligent. It is first, last, and always an insistence that the trial court has been given the opportunity to correct its own error.

Jordan v. State, 246 Md. App. 561, 586–87 (2020) (emphasis added). Instead, he argues that this testimony was so prejudicial, and the error in allowing it so plain, that we should exercise our discretion to review this issue for plain error. Mr. Ferreras points us to *Longshore v. State*, a case in which the appellant had objected to the admission of testimony about his refusal to consent to the warrantless search of his vehicle and which held that the trial court erred in denying a motion for mistrial on that ground. 399 Md. 486, 535 (2007). Mr. Ferreras contends that if the error here were preserved, *Longshore* would compel us to reverse his convictions.

We have the discretion to address and remedy unpreserved errors, but we exercise this discretion "'only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Givens v. State*, 449 Md. 433, 469 (2016) (*quoting State v. Rich*, 415 Md. 567, 578 (2010)). And although it's true that he was not obliged to consent to a

warrantless DNA test (the test could have been compelled later, after he was charged, but he was tested before that point), Mr. Ferreras's refusal to submit to a test might have been admissible anyway. *See Stevenson v. State*, 222 Md. App. 118, 146–47 (2015) (post-arrest refusal to submit to DNA test admissible for consciousness of guilt). Even so, we recognize that Mr. Ferreras may have a viable post-conviction argument—there are a lot of parallels between this case and *Longshore*, including a sense that a curative instruction might only have made things worse and that the trial court might well have granted a mistrial had the defense asked for one. It's also hard to see the tactical reason why defense counsel would have decided to allow this testimony to come in without objection. Still, those are questions addressed properly on a post-conviction record, not on direct appeal. For present purposes, the unpreserved error falls short of plain, and we decline to exercise our discretion to address it here.

C. The Trial Court Did Not Err In Admitting Testimony About Mr. Ferreras's Flight To Haiti And Return To The United States.

Third, Mr. Ferreras argues that the trial court erred in admitting hearsay testimony that was prejudicial when it allowed Detective Rockwell to testify about Mr. Ferreras's flight to Haiti and arrest there by Interpol to bring him back to Maryland to stand trial. "We review *de novo* the circuit court's determination of whether evidence is admissible under a hearsay exception," *Vigna v. State*, 241 Md. App. 704, 729 (2019) (*citing Gordon v. State*, 431 Md. 527, 538 (2013)), *aff'd*, 470 Md. 418 (2020), and find that in this instance, the testimony was appropriate for the non-hearsay purpose of showing Mr. Ferreras's consciousness of guilt.

"A statement that is offered substantively, to prove the truth of its contents, is hearsay . . . . By contrast, a statement that is offered for a purpose other than to prove its truth is not hearsay at all." *Hardison v. State*, 118 Md. App. 225, 234 (1997) (cleaned up). "A person's behavior after the commission of a crime may be admissible as circumstantial evidence from which guilt may be inferred. This category of circumstantial evidence is referred to as 'consciousness of guilt.'" *Thomas v. State*, 372 Md. 342, 351 (2002) (*quoting Snyder v. State*, 361 Md. 580, 591 (2000)). The Court of Appeals has stated prior that "it is well settled that evidence of flight is admissible to show awareness of guilt." *Whittlesey v. State*, 340 Md. 30, 64 (1995). After his release from jail on bond in 2017, Mr. Ferreras failed to appear in court and was ultimately found in Haiti. He was brought back to the United States in 2019. At trial, Detective Rockwell testified about Mr. Ferreras's whereabouts after his release on bond:

> [STATE:] But there was a time when Mr. Ferreras was released on bond?
>
> [DETECTIVE ROCKWELL:] Yes.
>
> [STATE:] Was there a time subsequent to that that Mr. Ferreras did not appear for any hearings that were scheduled for this matter?
>
> [DETECTIVE ROCKWELL:] Yes, he failed to appear for court regarding this case.
>
> [STATE:] Do you recall on what date he failed to appear specifically?
>
> [DETECTIVE ROCKWELL:] March 30th, I believe of either 2016 or '17.
>
> [STATE:] Would it have to be '17?
>
> [DETECTIVE ROCKWELL:] Yes.
>
> ***

> [STATE:] Okay. Did you obtain any information as to the whereabouts of Mr. Ferreras subsequent to his failure to appear?
>
> [DETECTIVE ROCKWELL:] So I was in contact with the Maryland Fugitive Task Force. My point of contact was Officer Jones from the Sheriff's Department. I was informed by him that he was potentially in Haiti.
>
> [STATE:] Was Mr. Ferreras eventually located in Haiti?
>
> [DETECTIVE ROCKWELL:] He was, I guess with coordination with the task force and Interpol. He was located and I believe arrested --
>
> [COUNSEL FOR DEFENDANT]: Objection, Your Honor.
>
> THE COURT: Basis?
>
> [COUNSEL FOR DEFENDANT]: Hearsay.
>
> [STATE:] He's testifying to evidence he knows about as to his whereabouts.
>
> THE COURT: Overruled.
>
> [DETECTIVE ROCKWELL:] He was picked up in Haiti by Interpol between March 21st and March 23, 2019.
>
> [STATE:] Was he subsequently brought back to the United States?
>
> [DETECTIVE ROCKWELL:] He was.

In order to admit evidence of a defendant's consciousness of guilt, the State must build an evidentiary foundation from which the jury can draw connections "(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Thomas*, 372 Md. at 352. Applied to this case, the question is whether the evidence developed at trial would allow a jury to connect (1) that Mr. Ferreras fled to Haiti to avoid prosecution; (2) that he fled prosecution out of consciousness of guilt; (3) that his

consciousness of guilt related to the sexual assault of J; and (4) that his consciousness of guilt about the sexual assault of J flowed from his actual guilt for the sexual assault of J. We ask whether the evidence of Mr. Ferreras's flight was connected sufficiently with the sexual assault of his daughter and whether its probative value was outweighed by any unfair prejudicial effect. *See id.* at 356.

The evidence presented at trial in this case satisfied that standard. The evidence revealed that Mr. Ferreras failed to appear in court for a scheduled appearance in this case after being released on bond in connection with these charges. Mr. Ferreras was fully aware of the charges against him and his obligation to appear, but he absconded. From that evidence alone, the jury could conclude that Mr. Ferreras fled to avoid facing these very charges, and the fact that he was found later in Haiti supports the inference that his flight reflected consciousness of his guilt for the sexual assault of his daughter. Although that obviously is a prejudicial set of inferences, the prejudice wasn't unfair—it connected directly to his decision to flee after being released on bond for these charges, explained the two-year delay in the prosecution, and is sufficiently probative of his consciousness of guilt here. And for those reasons, the Detective's references to Mr. Ferreras's flight and apprehension were admitted properly for a non-hearsay purpose.

D. Mr. Ferreras's Challenge To The Victim's Statements To Detectives Was Not Preserved.

Finally, Mr. Ferreras argues that Detective Bonnie Dolgos's testimony about the sexually assaultive behavior that J experienced and reported to her was inadmissible hearsay because it exceeded the scope of information acceptable under Md. Rule 5-

802.1(d). "We review *de novo* the circuit court's determination of whether evidence is admissible under a hearsay exception," *Vigna*, 241 Md. App. at 729 (2019) (*citing Gordon*, 431 Md. at 538), but in this instance we find that this argument wasn't preserved for appellate review.

Generally, an out-of-court statement offered to prove the truth of the matter asserted is hearsay and is inadmissible. *See* Md. Rules 5-801, 5-802. A hearsay statement may be admitted, however, if it falls within one of the recognized exceptions, one of which is "[a] statement that is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]" Md. Rule 5-802.1(d). This rule is "'subject to limitations such as 1) the requirement that the victim actually testify; 2) the timeliness of the complaint; and 3) the extent to which the references may be restricted to the fact that the complaint was made, the circumstances under which it was made, and the identification of the culprit, rather than recounting the substance of the complaint in full detail.'" *Nelson v. State*, 137 Md. App. 402, 411 (2001) (*quoting Cole v. State*, 83 Md. App. 279, 289 (1990)).

Mr. Ferreras argues that Detective Dolgos's testimony about information J reported to her was inadmissible because it recounted J's experience and exceeded the bounds of the "prompt complaint" J had made about the assault. *See* Md. Rule 5-802.1(d). Although the statements did recount the incident, Mr. Ferreras failed to preserve this issue by objecting when the testimony was presented. Mr. Ferreras takes issue with the italicized statement in the following exchange:

[STATE:] Did you speak with [J] alone?

[DETECTIVE DOLGOS:] Yes.

[STATE:] Did you ask her specifically about that note that she had written?

[DETECTIVE DOLGOS:] Yes

[STATE:] Did she acknowledge she had written that note that morning?

[COUNSEL FOR DEFENDANT]: Objection, hearsay.

[STATE]: It's a prompt report of sexual assault, Your Honor.

THE COURT: Overruled. You can answer.

[DETECTIVE DOLGOS:] Could you re ask?

[STATE:] Did she acknowledge that she had written that note that morning?

[DETECTIVE DOLGOS:] Yes.

[STATE:] What did you ask her specifically about what had occurred to her?

[DETECTIVE DOLGOS:] I asked her to verify it if that was the note that she had written. She said yes. I asked her if what she wrote on the note is something that happened and she said yes.

[STATE:] Did you ask her further about what had taken place?

[DETECTIVE DOLGOS:] I asked her if she could tell me what happened.

[STATE:] And what did she say at that time?

[DETECTIVE DOLGOS:] *She advised that last evening her dad came into her bedroom while she was sleeping, shook her arm, woke her up, squeezed her neck. He apparently took his shorts off, took her shorts off, placed his hand in her private area and also placed his private area into her private area.*

[STATE:] What was her demeanor when she was describing these events to you?

[DETECTIVE DOLGOS:] Crying. Very subdued, crying.

[STATE:] Is that the extent of what she told you about what had happened to her the previous night?

> [DETECTIVE DOLGOS:] Yes.
>
> [STATE:] After you had this conversation with [J] that morning what did you do?
>
> [DETECTIVE DOLGOS:] I had made contact with the CAC and referred the information to them to investigate further.

(Emphasis added.)

As the transcript reveals, though, Mr. Ferreras failed to object to the portion of Detective Dolgos's testimony describing what happened, even after objecting to statements that J acknowledged the note that described what had happened. Mr. Ferreras did not make a continuing objection to Detective Dolgos's testimony, nor did he object during or after Detective Dolgos recounted the story. *See Kang v. State*, 393 Md. 97, 119 (2006) (explaining that "[a]t the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party"). As such, this issue was not preserved for appellate review and we will not consider it.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. APPELLANT TO PAY COSTS.