Circuit Court for Montgomery County
Case No.: 130281

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1070

September Term, 2017

LUIS MARTINEZ

v.

STATE OF MARYLAND

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

JJ.

Opinion by Alpert, J.

Filed: June 18, 2018

After a jury trial in the Circuit Court for Montgomery County, Luis Martinez, appellant, was found guilty of 4 counts of third-degree sexual offense against G.O., a minor. He was sentenced to incarceration for 4 concurrent terms of 10 years with all but 4 years suspended. This timely appeal followed.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the circuit court erred in determining that statements made by two witnesses for the State could be admitted as prior consistent statements. For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

G.O., who was born on February 12, 2000, lived in the Gaithersburg area of Montgomery County. From 2004 to 2008, appellant lived with her family. Initially, the family lived in a small house, but when G.O. was five years old, her family and appellant moved to a larger home. From 2005 to 2008, appellant touched G.O. in a sexual way about once a week, although G.O. testified that she could not recall how many times this occurred because it happened so often. The first time it occurred, G.O.'s father was sleeping and her mother was at work. G.O. and her brother were playing in the living room building a fort. At some point, her brother decided to go outside to play. G.O. remained inside and continued playing in the fort with her dolls. According to G.O., appellant lifted up the blanket, grabbed her, put her on the couch, and took off her shirt and pants. He caressed G.O.'s body and kissed her mouth and neck. Appellant got on top of G.O. and pulled the blanket over them. He kissed G.O.'s neck, put his hand inside her underwear, put his penis against her vagina and "started moving up and down" while kissing G.O.'s neck. After a

couple of minutes, appellant put his penis "back in" and then touched G.O.'s vagina for "a couple minutes." G.O. felt something wet between her legs.

On another occasion when G.O. was about six years old, she went to a play room that was near appellant's bedroom. G.O.'s father was upstairs eating, napping, or showering because he had just come home from work, and her mother was at work. Appellant grabbed G.O., took her into his bedroom, took off her clothes, and sat her on his bed. As he was taking off G.O.'s clothes, appellant kissed her neck. Appellant heard his roommate, Marcelo, coming, so he hid G.O. in a closet. Marcelo entered the bedroom, grabbed something, and then left. Appellant then took G.O. out of the closet, told her to put her clothes on, and left.

Another incident occurred when G.O. was about 7 years old and her brother was playing outside, her mother was at work, and her father was taking a shower. While G.O. was playing with her dolls, appellant put her on the couch in the living room and took off all her clothes. Appellant touched G.O.'s vagina, squeezed her "butt" with his hands, kissed her neck, lips, and vagina, and licked her vagina. On another occasion when G.O. was 7 years old, appellant put her on a couch, kissed her body, and "made" her put her hands in his pants and feel his penis.

G.O. did not tell anyone what appellant had done to her because she thought she "was going to be the one getting in trouble." G.O. testified that appellant told her she would get in trouble if she told anyone about what was happening. In addition, she believed she would get in trouble for violating the Ten Commandments' prohibition on premarital

sex. Appellant referred to what he did to G.O. as "a family game." He told G.O. that it was "our little secret," that it was "between us," and "not to tell anyone."

Beginning when G.O. was in the fifth grade and continuing through middle school, G.O. cut herself to relieve the pain and suffering she experienced from living "with this big secret." In 2015, G.O.'s cousin, Ana D., saw some scars from G.O.'s self-harming behavior. G.O. explained to her cousin what appellant had done to her.

In March 2016, G.O. saw appellant at a funeral. It was the first time she had seen him since he had moved out of her family's home in 2008. G.O. felt uncomfortable, experienced flashbacks, and had an anxiety attack. She told her parents she wanted to go home immediately and they took her home. G.O. started reliving the events that happened to her and again began to cut herself, something she had not done in the preceding year to year and a half. After a few days, G.O. decided to end her life by taking pills, but she could not go through with her plan because she was concerned about how her suicide would affect her mother. Eventually, when G.O.'s mother asked her what was wrong, G.O. started crying and told her that appellant had sexually abused her. G.O. did not want to be touched or hugged by her mother, felt "dirty," and had an anxiety attack. G.O.'s parents reported the sexual abuse to the police. G.O. was taken to the hospital because she was suicidal and remained there for five days. We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

Appellant contends that the trial court erred in permitting, for the purpose of rehabilitating G.O.'s credibility, testimony by Ana D. and G.O.'s mother about what G.O.

told them appellant had done to her. Under Md. Rule 5-616(c)(2), a witness's prior consistent statements are admissible, not as substantive evidence, but for the non-hearsay purpose of rehabilitating the witness's credibility. *Thomas v. State*, 429 Md. 85, 97 (2012)(citing *Holmes v. State*, 350 Md. 412, 416-17 (1998)). Use of prior consistent statements for rehabilitation is governed by Md. Rule 5-616(c)(2), which provides:

> (c) **Rehabilitation**. A witness whose credibility has been attacked may be rehabilitated by:
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> * * *
>
> (2) Except as provided by statute, evidence of a witness's prior statements that are consistent with the witness's present testimony, when their having been made detracts from the impeachment[.]

Under Rule 5-616(c)(2), a prior consistent statement

> is admissible to rehabilitate a witness as long as the fact that the witness has made a consistent statement detracts from the impeachment. Prior consistent statements used for rehabilitation of a witness whose credibility is attacked are relevant not for their truth since they are repetitions of the witness's trial testimony. They are relevant because the circumstances under which they are made rebut an attack on the witness's credibility. Thus, such statements by definition are not offered as hearsay and logically do not have to meet the same requirements as hearsay statements falling within an exception to the hearsay rule, *e.g.*, Md. Rule 5-802(1)(b).

Holmes, 350 Md. at 427.

For an out-of-court statement to be admissible under Rule 5-616(c)(2), it must precede and be consistent with the witness's present testimony and "must meet at least the standard of having some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." *Thomas*, 429 Md. at 107-08 (quotation marks and citation omitted). *See also Hajireen v. State*, 203 Md. App. 537, 557

(2012)(stating that "a prior consistent statement must be more than a repetition of the trial testimony; the statement must, under the circumstances in which it was given, detract from the impeachment or rebut logically the impeachment"). Three prerequisites must be met before a prior consistent statement can be admitted as rehabilitation:

> (1) the witness' credibility must have been attacked; (2) the prior statement is consistent with the trial testimony; and (3) the prior statement detracts from the impeachment.

Hajireen, 203 Md. App. at 555.

A decision to admit evidence ordinarily is within the trial court's discretion and we generally review such decisions for an abuse of that discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). An abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. *Fishman V. Murphy*, 433 Md. 534, 546 (2013); *King v. State*, 407 Md. 682, 697 (2009)(quoting *North v. North*, 102 Md. App. 1, 13 (1994)); *Brass Metal Prods. v. E-J Enters.*, 189 Md. App. 310, 364 (2009). The court's discretion is not, however, unbounded. "[I]f prior consistent statements offered for rehabilitative purposes do not detract from the impeachment of a witness or rebut logically the impeachment undertaken, the statements are inadmissible under Rule 5-616(c)(2) and their admission may be reversible error." *Thomas*, 429 Md. at 98 (citing *Holmes*, 350 Md. at 427); *Hajireen*, 203 Md. App. at 552-57.

With those standards in mind, we turn to the instant case. Upon direct examination, G.O. was asked why she did not tell anyone what was happening at the time the abuse occurred. G.O. responded that she thought she would get in trouble and that appellant told

her that she would be the one to get in trouble. In addition, she was afraid she would get in trouble for violating the Ten Commandment's prohibition on sexual relationships prior to marriage. G.O. was also questioned about whether she had told anyone about the abuse between the time appellant moved out of the family home and the time she reported the abuse to her mother. She responded that in 2015, she told her cousin Ana D. about what had happened to her.

On cross-examination, defense counsel attempted to impeach G.O. by questioning her about other men who had lived in her family's home, other people she could have, but did not, tell about the sexual abuse, and her meetings with the State's Attorney's Office. G.O. testified that between 2005 and 2008, in addition to appellant and Marcelo, two of her uncles lived in the house and another uncle spent some time there. G.O. acknowledged that she did not tell any family member, including her mother, or any teacher or guidance counselor, that appellant was sexually abusing her. She also stated that she did not tell her best friend Kathy about the sexual abuse until after she had told her parents. G.O. also acknowledged that she spoke with people in the State's Attorney's Office between five and ten times about the incidents involving appellant.

That defense counsel's questions were intended to impeach G.O. was made clear in light of his opening statement in which he stated, in part:

> There were a number of gentlemen living in this house at the same time. You're going to hear names. I'm going to ask her mom about that about when they lived there, where they lived, what was going on, and I'm going to ask about her time in school, in elementary school. There are social workers, there's counselors, as we all grow up. She's close to her mom.

I understand the State's position that she kept this bottled up , but, also a great deal of time has passed between 2005 and now 2017, and that's a concern.

* * *

When people make allegations, and these are right now allegations, you have the ability to be charged, and he has been charged because there are allegations. That's a lot different than proof beyond a reasonable doubt. I don't know how she's going to testify. I don't know about her credibility. I don't know about her reliability; that's your job.

I will point concerns out to you, through questions that I have with her in terms of her credibility or reliability, but that's when you have to, after the end of the case, go back, and take this, and say is this enough to find a person guilty beyond a reasonable doubt.

* * *

And I'm just asking you to keep an open mind. Keep an open mind, and look for credibility, look for reliability, and the fact that something is said isn't necessarily as it is.

Now, finally, [the Prosecutor] said that there's – look for the no doubt in her voice and the like. I understand that this is a difficult subject, it's a difficult experience, but, also you have to understand that this event has been scheduled for a number of months, and, obviously, any witness who comes into court knows that the event is happening, and knows that they're coming into court, and practices their testimony, and that you have to take into consideration, as well.

So, look for that. Look for how she testifies. Look for the other considerations that I mentioned about that time period, the length of time, and the number of people in the house that were living there that were not family members. And I'd ask you to take a look at that in making a determination of whether there's proof beyond a reasonable doubt that Mr. Martinez is guilty.

During the direct examination of G.O.'s mother, the prosecutor inquired about whether G.O. told her who had abused her. Defense counsel objected on the ground that the question called for hearsay. The prosecutor argued that G.O.'s statement to her mother

was admissible as an excited utterance and as a prior consistent statement. With respect to the admission of that testimony as a prior consistent statement, the prosecutor pointed out that defense counsel had questioned G.O. about the number of times she spoke to people in the State's Attorney's Office prior to trial. He maintained that because G.O.'s statements to her mother predated the statements made to people in the State's Attorney's Office, it would counter the defense's suggestion that G.O.'s testimony was fabricated. The trial judge agreed that statements made by G.O. to her mother were admissible as prior consistent statements because the defense had attempted to impeach G.O. by suggesting that there were other people who potentially could have been involved in abusing G.O. and numerous people that G.O. could have told about the abuse. Thereafter, upon questioning by the prosecutor, G.O.'s mother testified that G.O. told her that appellant abused her for three years when they lived at the big house in Gaithersburg. G.O. also told her mother that she did not report the abuse sooner because she thought she had violated the Bible's prohibition against sex before marriage and was afraid that her mother would "reject her, or scold her, yell at her."

The prosecutor later advised the court that it wished to question Ana D. about what G.O. told her in 2014 or 2015. The prosecutor argued that G.O.'s statement to Ana D. would detract "from the impeachment G.O. was exposed to by the [d]efense" because the statements to Ana D. predated G.O.'s multiple meetings with people in the State's Attorney's Office. Defense counsel objected to the questioning of Ana D., and the following colloquy occurred:

> [DEFENSE COUNSEL]: [That's the] whole gist of my objection. In talking to her, or questioning her on cross-examination, I just brought out the point. I think I brought it out in opening that when you – every witness is going to have an opportunity to talk to officials, and they're going to feel more comfortable. That doesn't mean I'm accusing her of lying, or I'm accusing of her for rehearsing, or worse that somebody planted this. So, I think that there's not the rehabilitation aspect of it that's required by statute.
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> THE COURT: Why? Didn't you question her about reports that she didn't make to people who were close to her? And isn't the State allowed to repair that damage that may have been done to her testimony by virtue of pointing out to the jury or emphasizing to the jury that she didn't make a prior disclosure?
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> [DEFENSE COUNSEL]: Well, I think she did testify that she did make a disclosure. She's testified it to Ana that I did tell Ana when I was 14 or 15.
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> THE COURT: Of course, she did, but then on cross-examination you said, well, who is your friend, is this person your friend, did you tell them, no. It was the implication being that there would have been a number of opportunities for her to tell people, and she never did. So, then the State came back with a witness that said she did tell somebody –
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> [DEFENSE COUNSEL]: Okay.
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> THE COURT: -- her mother. So I'll overrule the objection, but, again. I know you're not going to, but it's only with respect to statements she made before there was any motive to testify falsely or to fabricate.

The prosecutor then questioned Ana D. about what G.O. told her. Ana D. testified that in the summer after eighth grade, "like around August 2014," G.O. told her that:

> every time she would be alone, like her parents would not be around, [appellant] would come to her, while she was playing, and he would like ask her to play. And he would take his pants down, and he would start touching himself in front of her, and she was scared because she couldn't do anything. And then she told me she wouldn't tell anyone, because he would like threaten her to kill her, to kill his mom, I mean to kill her mom if she were to like tell her mom or something.

Ana D. explained that she did not tell anyone about what G.O. said because G.O. "told me to keep a promise, and I felt like she would hate me if I ever tell her, tell anyone, so I kept it to myself." The court instructed the jury that it could only use G.O.'s prior statements to evaluate her credibility.

Appellant argues that the trial court committed reversible error in admitting G.O.'s statements to her mother and Ana D. as prior consistent statements because G.O.'s statements to her cousin were not consistent with her trial testimony and the statements to both witnesses did not detract from impeachment. Appellant also maintains that the statements made to G.O.'s mother and cousin did not detract from the suggestion that someone else in the family home might have assaulted G.O.

Preliminarily, we consider the State's contention that appellant's argument was not preserved properly for our review. The State argues that any objection to the testimony of G.O.'s mother and Ana D. regarding prior consistent statements was waived because the defense failed to object when G.O. testified about her conversations with her mother and Ana D. It is well established that a challenge to a trial court's decision to admit testimony is not preserved unless an objection is made each time a question eliciting that testimony is posed. Md. Rule 4-323(a); *Ridgeway v. State*, 140 Md. App. 49, 66 (2001)("A challenge to the trial court's decision to admit testimony is not preserved unless an objection is made each time that a question eliciting that testimony is posed."). The record reveals that no objection was lodged to G.O.'s testimony on direct examination. G.O. was asked why she told her cousin and, in response, G.O. stated that she "explained to her like what happened,

and like why I had those scars." G.O. also gave the following testimony about when she told her mother what had happened to her:

> Q. So, what did you do next?
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> A. Then I like, I like told myself to suck it up. And then I was like I have to go on. So, then I like just left the pills, and then I went to the living room to finish up my homework. And I was there, and then my mom walks in and she asks me, she's like what's wrong. And then that's when I just bursted out crying, and I told her what had happened to me.
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> Q. When you say what had happened, do you mean what the – do you mean the defendant sexually abusing you?
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> A. Yes.

Although G.O. did not testify in detail about the specific conversations she had with her cousin and mother, her other testimony described how appellant sexually abused her. Thus, it was implied that "what had happened" was the sexual abuse about which G.O. had testified. Because G.O.'s statements to both her mother and cousin were admitted without objection, the defense waived any objection it might otherwise have had to the later admission of the same evidence through the testimony of G.O.'s mother and cousin.

Even if the defense's objection to the testimony of G.O.'s mother and cousin was sufficient to preserve this issue for our consideration, appellant would fare no better. The defense clearly attempted to impeach G.O., as evidenced by the opening statement and defense counsel's questioning of her about the fact that she did not tell her mother, other family members, church members, teachers, or guidance counselors about the abuse. As we have long recognized, impeachment can occur from the tenor of questioning alone or from suggestions of counsel in argument. *Craig v. State*, 76 Md. App. 250, 290-91 (1988),

rev'd on other grounds, 316 Md. 551 (1989), judgment vacated on other grounds, 497 U.S. 836 (1990); *see also Elmer v. State*, 353 Md. 1, 15 (1999)("It would be folly to suggest that questions alone cannot impeach.") The opening statement combined with defense counsel's questioning of G.O. clearly implied that the events did not occur as G.O. said they did and opened the door for the State to produce testimony of prior consistent statements by G.O. that detracted from that impeachment.

Appellant argues that the statements made by G.O. to her mother and cousin were not consistent with her trial testimony and did not meaningfully detract from the challenge to her testimony based on her delay in reporting the abuse, the suggestion that she might have rehearsed her testimony in the meetings she had at the State's Attorney's Office, and the suggestion that someone else in the family home might have assault G.O. In support of those arguments, appellant relies on our opinion in *Hajireen v. State*, 203 Md. App. 537 (2002).

In *Hajireen*, the defendant was accused of sexually assaulting J.M., an eight-year-old girl. Defense counsel attacked J.M.'s credibility by exposing inconsistencies between her trial testimony and prior out-of-court statements and suggested that she "was making up stories" and "made up the entire incident, from the beginning when she told her mother." *Hajireen*, 203 Md. App. at 554. In particular, the defense established that J.M.'s prior statements had not included an allegation, made at trial, that the defendant had digitally penetrated her. *Id.* at 556. The trial court permitted the State to attempt to rehabilitate J.M.'s credibility by introducing evidence of prior statements made by J.M. to a social worker, some of which repeated her allegations, but not the allegation that defendant had

digitally penetrated her. *Id.* at 555-56. On appeal, we held that the trial court abused its discretion in admitting J.M.'s statements to the social worker under Rule 5-616(b)(2), because "none of [the victim's] statements to the social worker were consistent with her trial testimony" that she had been digitally penetrated. *Id.* at 557.

The facts of this case are distinguishable from *Hajireen*. The defense clearly suggested that G.O. was not credible because she did not tell others about what had happened to her and waited years before making allegations that appellant abused her. The testimony of G.O.'s mother and cousin provided prior consistent statements that were a direct response to the impeachment and put into perspective G.O.'s failure to report the abuse when it occurred because she was afraid. The testimony of G.O.'s mother and cousin possessed "some rebutting force beyond the mere fact that the witness had repeated on a prior occasion the statement consistent with [her] trial testimony." *Id.* at 557 (internal quotations and citations omitted). Consequently, even if this issue had been preserved properly for our consideration, we would find no abuse of discretion on the part of the trial judge in permitting the testimony of G.O.'s mother and cousin under Rule 5-616(c)(2).

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.