UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1695

September Term, 2015

KEVIN COLE

v.

STATE OF MARYLAND

Meredith,
Leahy,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 12, 2016

At the conclusion of a jury trial in the Circuit Court for Baltimore County, the court convicted Kevin Cole, appellant, of multiple sex offenses he committed upon one of his daughters, including three counts of sexual abuse of a minor, second-degree rape, two counts of incest, fourth-degree sexual offense, five counts of third-degree sexual offense, and two counts of second-degree sexual offense.[1] The trial court sentenced appellant to prison terms totaling 80 years, and ordered him to register as a Tier III sexual offender. Appellant filed a timely notice of appeal.

In his brief on appeal, appellant raises a single question: "Is the evidence legally sufficient to sustain Appellant's convictions?" Because the arguments in appellant's brief asserting insufficient evidence were not presented to the trial court, the arguments were not preserved for appellate review. Consequently, we shall affirm the judgments of the circuit court.

BACKGROUND

C.C., aged 18 at the time of trial, is appellant's biological daughter.[2] After C.C.'s birth, she lived with her mother, Dolores W., until just prior to her eighth birthday, when C.C. was removed from the home because her mother was unable to care for her. From then until she was almost 16 years old, C.C. lived with appellant. Over the years, they lived at four different locations in Baltimore County — Elton Avenue and Four Georges Court in Dundalk and on Eastern Avenue and Stemmers Run Road in Essex.

[1] The jury acquitted appellant of one count of sexual abuse to a minor, and, at a September 30, 2015 hearing, the State *nolle prossed* the first nine counts of the indictment that had been severed and were to be tried separately.

[2] We will use initials in identifying witnesses to protect the privacy of the victim.

C.C. testified that, shortly after she moved in with appellant, he began to abuse her sexually. She said appellant touched her sexually on numerous occasions while they lived on Elton Avenue, and she recounted three specific incidents she recalled, the first of which occurred in a swimming pool at the home of a relative of appellant's then-girlfriend, Lisa C. While C.C. and appellant were in the pool, appellant slid her bathing suit to the side and inserted his penis into her vagina until he ejaculated.

On another occasion when she was eight years old, C.C. and her younger half-sister, S.C., were in the bathtub together when appellant entered the bathroom and instructed the girls to rub and kiss each other's breasts. They complied, using their hands and mouths to touch each other. S.C. confirmed C.C.'s version of events and stated that she had not alerted anyone to the incident because she was afraid of appellant.

Also during their residence at the house on Elton Avenue, appellant sat C.C. on a pool table in the basement, placed his mouth on her breasts, told her to remove her pants, and placed his penis into her vagina. She recalled that her two half-sisters and appellant's girlfriend were upstairs during that sexual encounter.

While they were living at the home on Four Georges Court, just before C.C.'s thirteenth birthday, appellant created a "game" for C.C., telling her that if she drank a shot of liquor, he would give her a hint about the location of her birthday gift, and if she smoked marijuana, he would tell her where the gift was. C.C. became intoxicated and did not remember much of that evening, but she did recall seeing camera flashes.

Although she was unable to remember other specific incidents of abuse at the Four Georges location, she stated that the abuse by appellant occurred "[a]lmost every night." On some of those occasions, appellant offered her gifts in exchange for sexual acts.

At one point in time, C.C.'s grandparents shared the one bedroom apartment on Eastern Avenue, and, during that period, C.C. and appellant both slept on blankets on the living room floor. On one occasion, appellant came into the living room, reeking of alcohol. C.C. pretended to be asleep, but appellant rubbed her head before pulling down her pants and having sexual intercourse with her. Although she was unable to remember additional specific acts of abuse that occurred at the Eastern Avenue apartment, she was sure there were others.

When C.C. was approximately 14 years old and living with appellant on Stemmers Run Road, appellant offered her alcohol at least once or twice a month and marijuana once or twice a week. On one occasion, while C.C. drank and smoked with appellant in the basement, he insisted that she perform oral sex on him, after which they had sexual intercourse. She testified that she regularly put her mouth on appellant's penis, and that he put his mouth on her vagina before having sex with her.

On another occasion, C.C. discovered her father's cell phone propped up against CD cases on an entertainment unit in the Stemmers Run house. On the phone, she found recorded videos of herself getting dressed after taking a shower. She was able to delete the videos, after which she returned the phone to appellant, telling him to hide it better the next time. Another time, she found a cell phone on her dresser, wedged between two stuffed

animals; although that phone was password-protected, C.C. was able to remove the memory card and view more videos of herself getting dressed. She again deleted the videos and returned the phone to appellant.

C.C. ceased living with her father shortly before her sixteenth birthday. C.C. moved in first with a boyfriend, and then with appellant's ex-girlfriend, Lisa C., whom she referred to as her "stepmother." C.C. told Lisa C., as well as "the authorities," and workers from the Department of Social Services about the video recordings on appellant's cell phones. Although she believed the authorities investigated the incidents, she did not think appellant was charged with a crime.

Even after disclosing the fact that appellant made inappropriate recordings of her on his cell phones, however, C.C. did not initially report other instances of sexual abuse to anyone because she thought no one would believe her. But, on one occasion when she was 16 years old, she got so drunk she ended up in the hospital in restraints. When she regained consciousness, a social worker told her that she had revealed abuse. Because she had already made some disclosures, C.C. decided at that point that she might as well "tell it all." She later gave two recorded statements to Sherry Lally, a social worker at the Children's Advocacy Center.

Upon cross-examination at trial, C.C. admitted that, before she was removed from her mother's home, she had made an allegation to a doctor about a "bad touch" involving someone other than appellant, which triggered the assignment of social workers in whom she could have confided about her father's subsequent abuse but did not. She further admitted

that, prior to moving out of her father's home, she and her father had clashed about issues such as her curfew, cutting school, shoplifting, wearing revealing clothing, and obtaining tattoos and piercings. C.C. agreed that the more she got into trouble, the more her father cracked down on her, to the point that she decided to move out, confident she was ready to live on her own.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal, which will be discussed more fully below. Appellant put on no evidence.

DISCUSSION

Appellant's sole contention on appeal is that the evidence presented at trial was insufficient to sustain the convictions. In support of this claim, he argues in his brief, in essence, that the State's witnesses were not worthy of belief.[3]

We agree with the State that appellant has failed to preserve these arguments for appellate review.

[3]Among the arguments included in appellant's brief are assertions that the State failed to prove its case because: 1) C.C.'s accounts of sexual abuse were implausible because she and appellant never lived alone, and their opportunities to engage in illicit sexual activity without being discovered were very limited; 2) C.C.'s trial testimony that she was eight years old during the pool incident and that the incident ended when appellant ejaculated inside her was inconsistent with a prior statement she had given to a social worker that she was 10 or 12 years old and the encounter ended when she swam away from appellant; 3) C.C.'s testimony that she and her half-sister S.C. remained very close diverged from S.C.'s testimony that the two women did not spend much time together; 4) the State did not produce any physical evidence of abuse; and 5) C.C. acknowledged that she had had numerous opportunities to report the abuse but did not do so until her life was spiraling out of control, and, at that point, her claims of abuse were nothing more than an attempt to deflect attention from her own bad behavior.

When a jury is the trier of fact in a criminal matter, appellate review of the sufficiency of the evidence is available "'only when the defendant moves for judgment of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking.'" *Walker v. State*, 144 Md. App. 505, 545 (2002) (quoting *Anthony v. State*, 117 Md. App. 119, 126 (1997)), *rev'd on other grounds*, 373 Md. 360 (2003). "A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to 'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Starr v. State*, 405 Md. 293, 302 (2008) (quoting *State v. Lyles*, 308 Md. 129, 135-36 (1986)). The language of the rule is mandatory. *Whiting v. State*, 160 Md. App. 285, 308 (2004), *aff'd*, 389 Md. 334 (2005). Sufficiency arguments that were not presented to the trial court that are then presented to this Court will be rejected as waived. *Starr,* 405 Md. at 303.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal. At that point, his entire argument focused on a claim that the State's evidence had failed to establish the time periods that had been alleged in the indictments. Defense counsel moved for judgment of acquittal on all counts, and stated:

> Beginning with the tenth count through and including the twenty-fourth count, Your Honor. The way the indictments are drawn up, the State alleged certain time periods. I believe the testimony failed on establishing those time periods because those time periods are part and parcel of the indictment it was an element that needed to be proved. The State has failed to meet its burden and I'd ask that all the counts be dismissed.

The court pointed out that neither side had correlated C.C.'s testimony about her age at the time of the alleged incidents of abuse with the dates set forth in the indictment, and the

court instructed the attorneys to discuss the matter during the lunch recess, after which the court would rule on appellant's motion. Following the lunch break, defense counsel advised the court: "[A]fter discussing the matter with [the prosecutor], I agree that they were able to, though they did it in a different way, they, they were able to offer evidence sufficient to account for the time and the age." As a consequence, defense counsel told the court: "I have no other arguments to make. It's essentially a jury question." The trial judge responded: "I think you're absolutely right about that. So to the extent your Motion has not been withdrawn, it's most respectfully denied." Thereafter, appellant offered no evidence, and articulated no further arguments regarding the insufficiency of the State's evidence. The court proceeded with jury instructions.

Appellant never made the arguments to the trial court that he now raises on appeal. And he makes no argument on appeal regarding the adequacy of the State's evidence of the time periods when the abuse occurred. Accordingly, appellant has failed to preserve for appellate review any issue regarding the sufficiency of the evidence.

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