UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 330

September Term, 2016

KEVIN ROBERT MANNING

v.

STATE OF MARYLAND

Meredith,
Berger,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: January 24, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Tried by a jury in the Circuit Court for Washington County, appellant, Kevin Robert Manning, was convicted of two counts of sexual abuse of a minor by a household member.[1] The trial court sentenced appellant to 20 years in prison, after which he timely noted this appeal, presenting the following questions for our consideration:

1. Did the trial court err in allowing Detective Swope [to] testify on redirect examination that [E.S.]'s mother corroborated her account?

2. Did the trial court err in admitting [E.S]'s statements to April Shupp as a "prompt complaint" of sexual assault?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND PROCEEDINGS

E.S.,[2] born in January 2000, who was fifteen years old at the time of trial, testified that she was six or seven years old when appellant began dating her mother, Er.S., after her parents' separation. Appellant began to abuse her sexually when she was eight or nine years old, and she and her family were living in Anne Arundel County.[3]

When the family moved to a mobile home in Washington County in February 2013, Er.S. and appellant were not together as a couple, but they reunited shortly after the move. Thereafter, appellant stayed with Er.S. in the mobile home every other weekend, when E.S.

---

[1] The jury acquitted appellant of eight charges of sexual abuse of a minor by a household member and one charge of engaging in sexual abuse of a minor in a continuing course of conduct over 90 days or more. Appellant had been tried previously for these crimes; that proceeding ended in a mistrial.

[2] To protect the identity of the minor sexual abuse victim, we will refer to her and her family members and friends by their initials.

[3] At the time of trial, charges were pending against appellant in Anne Arundel County based on allegations of sexual abuse of E.S. in that jurisdiction.

and her younger brother were with their father in Pennsylvania; he generally arrived after work on Friday evening and left on Monday morning to go to work. On approximately eight to ten occasions, however, E.S. was present during appellant's weekend visits to the mobile home.

Several weeks after his reconciliation with Er.S., appellant again began to abuse E.S. sexually, either in her bedroom or on the living room couch where she sometimes slept. E.S. believed the abuse occurred on approximately 20 occasions between February 2013 and November 2013. On most occasions, she said, appellant got up very early on Monday mornings, before her mother's alarm went off at 5:00 a.m., and touched her until he heard her mother's alarm or he had to leave for work. E.S. stated that appellant placed his fingers in her vagina and, on one occasion, he placed his penis in her vagina.

E.S. confided the secret of the abuse to her best friend, S.M., but to no one else, as she was afraid appellant would hurt her or her mother. S.M. counseled E.S. to tell an adult, but E.S. said she did not think her mother would believe her.

E.S. told S.M. every time the abuse occurred, which, according to S.M., was "pretty much every other week maybe after the weekends."[4] For some period of time, the accounts ceased and S.M. thought "everything was going to be okay." But, then E.S. confided in

[4] S.M. was also witness to an incident that occurred after the girls had been swimming with appellant at a local creek. On that occasion, appellant commented to E.S., who was wearing spandex shorts and a sports bra, "Fucking trails is looking at you and then I realized whoa man, she's only 14."

S.M. that appellant had abused her again. At that point, S.M. convinced E.S. to tell an adult.

On December 11, 2013, E.S. slept at S.M.'s house and the girls went to school together on the morning of December 12, 2013. They asked to speak privately with their teacher, April Shupp, who was aware that E.S. had been having emotional problems. E.S. began to cry, whereupon, S.M. relayed E.S.'s story about being touched and raped by her mother's boyfriend until E.S. was able to take over the narrative. Shupp informed the school's principal, who contacted the Department of Social Services and the police.

Washington County Sheriff's Office Detective Casey Swope[5] was dispatched to Hancock Middle/High School in response to a report that a female student had confided in a teacher that her mother's boyfriend sexually abused her. Swope contacted the Child Advocacy Center of the Department of Social Services and scheduled a forensic interview of E.S. with a therapist. Swope witnessed the interview *via* closed circuit television.[6]

Based on E.S.'s forensic interview, and Swope's interviews with Er.S., S.M. and another friend of E.S., Swope contacted appellant on December 12, 2013 and asked him to submit to questioning. Appellant advised that he was not in the area but would contact

[5] During the course of the investigation of this matter, Detective Swope was unmarried and went by the surname "Nogle."

[6] E.S. did not undergo a gynecological or hospital examination. E.S.'s mother recalled that the Child Protective Services' pediatrician believed a physical examination would be more traumatic than beneficial, especially given the length of time since the last stated abuse of the child, during which any physical injuries likely would have healed.

Swope the following day; however, he did not make further contact with Swope. Swope filed charges against him shortly thereafter.

DISCUSSION

I.

Appellant contends that the trial court erred in permitting Detective Swope to testify about corroborative evidence, given by the victim's mother, of E.S.'s claim of sexual abuse. The testimony, he avers, infringed upon the jury's role of judging the credibility of E.S., the only eyewitness to the alleged abuse and improperly bolstered her account of the events.

During his opening statement, appellant's trial counsel argued to the jury that the evidence against appellant consisted of "exactly one thing," the statement of a 13-year-old girl. He also suggested that the police investigation of the abuse, which occurred entirely within one day, resulted in a "rush to judgment."

To support that position, counsel cross-examined Swope about her criminal investigation, eliciting testimony that the detective had not ordered a gynecological examination of E.S., visited E.S.'s home to view its layout nor interviewed E.S.'s brother, who lived in the mobile home with her or determined whether any relevant DNA evidence existed at E.S.'s residence. Counsel concluded his cross-examination by reminding the jury that the detective had only the word of a thirteen-year-old child, garnered through a single twenty-four minute interview, as proof of appellant's crimes, but she nonetheless filed charges against him within twenty-four hours of E.S.'s complaint.

During his re-direct examination of Swope, the prosecutor asked the detective what

"corroborating evidence" of sexual abuse Er.S. and S.M. had provided to the investigation.[7] When defense counsel objected, the court overruled the objection on the ground that he had "opened the door" to the testimony. Thereafter, Swope was permitted to testify that Er.S. confirmed appellant's presence in her home when E.S. alleged the abuse to have occurred and S.M. confirmed that E.S. had complained to her about approximately seven occasions of abuse.

Indeed, as the Court of Appeals explained in *Bohnert v. State*, 312 Md. 266, 277 (1988):

> In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury. Therefore, the general rule is that it is error for the court to make remarks in the presence of the jury reflecting upon the credibility of a witness. It is also error for the court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying.

(Citations and footnote omitted).[8]

A distinction, however, must be drawn "between circumstances in which a witness expresses an opinion that simply vouches for the credibility of another witness, and situations in which a witness assesses whether a statement of another witness is consistent

[7] Appellant, in his brief, makes no claim of error in the detective's assertion of corroborative evidence obtained from S.M.

[8] In *Bohnert*, a social worker testified that, in her opinion as an expert in the field of child sexual abuse, based on her "intuitive reaction to the child's story," the 14-year-old girl was the victim of sexual abuse, despite the examinations of two medical doctors who found no evidence of abuse and the vehement denial by the defendant. 312 Md. at 270–71, 276. The Court of Appeals held that the trial court erred in admitting the social worker's testimony, which was "tantamount to a declaration by her that the child was telling the truth and that Bohnert was lying." *Id*. at 278–79.

with other facts known to the testifying witness." *Brooks v. State,* 439 Md. 638, 729 (2014). The *Brooks* Court pointed to *Bohnert* as an example of the former circumstance and to *Conyers v. State*, 354 Md. 132 (1999), as an example of the latter.

In *Conyers,* the defendant was charged with murder. When his former cellmate, Johnson, testified that Conyers admitted to him that he had shot the victim, defense counsel attempted to undermine Johnson's credibility by showing that Johnson had previously testified against other inmates as part of a self-serving plan to reduce his own prison time. *Id*. at 152. In support of that assertion, defense counsel suggested that Johnson obtained his information by reading Conyers's charging documents, and counsel called two other inmates who testified that they had seen Johnson looking through their own case files. *Id*.

In response, the prosecutor called, as a rebuttal witness, one of the detectives who had interviewed Johnson. The prosecutor asked the detective whether Johnson had given him any information that was "above and beyond that which was contained" in Conyers's charging documents. *Id.* The detective agreed that many factual statements made by Johnson were not in those documents. He testified: "These statements which I knew upon hearing them from Mr. Johnson to be truthful, and I was able to verify each and every statement that he gave us." *Id*. at 153.

On appeal, Conyers argued that the detective's rebuttal testimony should have been excluded, pursuant to *Bohnert*. *Id*. Although determining that Conyers had failed to preserve the issue for appellate review, the Court found that *Bohnert* was distinguishable because the detective "was not offering an opinion as to . . . Johnson's credibility as a witness." Instead, the detective "was stating that certain information . . . Johnson had

supplied him with prior to trial was not contained in [Conyers's] papers and, because he was able to confirm that information, he regarded it as accurate and, therefore, truthful." *Id.* at 153-54.

The Court held that the detective's testimony did not invade the province of the jury. *Conyers, supra* 354 Md. at 154. The Court explicitly denied a holding that a witness may testify that another witness told the truth, concluding that the detective had not offered an opinion as to Johnson's credibility as a witness, generally. Instead, the detective testified that certain information provided to him by Johnson was confirmed by other information known to the detective. *Id*.

We hold similarly here. In response to the prosecutor's rebuttal questioning in an attempt to refute defense counsel's claim of a "rush to judgment" based on nothing more than the word of a child, Detective Swope did not offer an opinion that E.S. was telling the truth. She stated only that E.S.'s mother had provided certain information that confirmed information she had obtained from interviews with E.S., including the fact of appellant's presence in their home on days and times when E.S. said the sexual abuse occurred, which guided and informed the course of her investigation. We therefore find no error in the trial court's admission of Swope's testimony.

Even if it were error for the trial court to overrule appellant's objection to the prosecutor's questions, we would have no difficulty finding that any such error was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976). Er.S., herself, testified, without objection, that appellant spent most weekends at the mobile home she shared with her children, usually arriving on Friday evenings and leaving on Monday

mornings. She also testified that E.S. had been present in the home on eight to 10 of the weekends appellant was there. Our appellate courts have long held that, "'[w]here competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received.'" *Yates v. State*, 429 Md. 112, 120 (2012) (quoting *Jones v. State*, 310 Md. 569, 588–89 (1987)). *See also DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection.").

II.

Appellant also contends that the trial court erred in admitting E.S.'s accusations of abuse through her teacher, April Shupp, as a "prompt complaint" of sexual assault exception to the hearsay rule. Because E.S. could not remember with precision when any of the alleged abuse occurred, appellant continues, the State failed to show the timing of the events in relation to the reporting of them to the teacher and thus did not meet its burden of admission of the hearsay statement.

Shupp testified that E.S. and S.M. came to her on December 12, 2013, stating that they wanted to speak with her. When Shupp began to relate what the girls had told her, defense counsel objected:

> [DEFENSE COUNSEL]: Objection.
>
> [PROSECUTOR]: Your Honor, this is not being offered for the truth of the matter asserted but for the effect on the listener, what action she took as a result of what being told [sic].
>
> [DEFENSE COUNSEL]: Well, that's the question then. Of being what you've been told, what was the response or action?

> [PROSECUTOR]: I disagree [Y]our Honor. The rules of evidence, as long as it's not being offered for the truth of the matter asserted, she is allowed to testify as on what basis she acted.
>
> [DEFENSE COUNSEL]: And on the basis she acted is A) clearly hearsay, B) prejudicial to my client.
>
> THE COURT: It's also prompt report. Overruled.

Shupp went on to testify that the students told her E.S.'s mother's boyfriend had abused E.S. in an ongoing manner.

As this Court explained in *Gaerian v. State*, 159 Md. App. 527, 535–37 (2004):

> Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Md. Rule 5-801. Hearsay is considered to be generally unreliable and thus inadmissible. Md. Rule 5-802. A hearsay statement may be admissible, however, under certain recognized exceptions to the rule if circumstances provide the requisite indicia of trustworthiness concerning the truthfulness of the statement. *Parker v. State*, 156 Md. App. 252, 259, 846 A.2d 485, *cert. denied,* 382 Md. 347, 855 A.2d 350 (2004) (citations omitted).
>
> Maryland law recognizes certain exceptions to the hearsay rule, some of which are set forth in Maryland Rule 5-802.1. Pertinent here is subsection (d), which, together with the Rule's introductory language, reads:
>
>> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>>
>> * * *
>>
>> (d) 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[.]
>
> * * *
>
> The purpose of Maryland's prompt complaint of sexual assault exception to the rule against hearsay is to corroborate the victim's testimony, and not simply to combat stereotypes held by jurors regarding nonreporting victims.

> *Parker*, 156 Md. App. at 267, 846 A. 2d 485 (citation omitted). The victim's complaint to another is admissible as substantive evidence to contradict the inference that the failure to complain was inconsistent with the victim's trial testimony concerning the attack. *Nelson*, 137 Md. App. at 411, 768 A.2d 738 (stating that the legally sanctioned function of the prompt complaint of a sexual attack is to give added weight to the credibility of the victim).

(Internal quotation marks omitted).

To be admissible as a prompt complaint of sexual assault, the victim must testify, the complaint must be timely and references to the complaint "'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)). Appellant only makes the claim that E.S.'s complaint to her teacher did not meet the promptness requirement.

What comprises promptness is "a flexible concept, tied to the circumstances of the particular case." *Gaerian*, 159 Md. App. at 540. Maryland case law does not specify a time frame within which a complaint of sexual assault must be made under Rule 5-802.1(d), as there "'may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject.'" *State v. Werner*, 302 Md. 550, 564 (1985) (quoting *Legore v. State*, 87 Md. App. 735, 737 (1898)).

Other states with comparable exceptions to the hearsay rule have ruled complaints "prompt" when they occurred weeks, months or even years before the disclosure. *See*

Gaerian, 159 Md. App. at 544 and cases cited therein.[9] We therefore leave it to the discretion of the court, under the particular facts of the case and the expectation of a reasonable victim, to determine whether the complaint was made sufficiently promptly so as to be admissible as an exception to the hearsay rule. *Id*. at 545.

Here, the trial testimony established that E.S. confided in S.M. numerous times, each time appellant sexually abused her between February and November 2013, with the last such incident occurring approximately two weeks before the girls approached Shupp on December 12, 2013. E.S. was 13 years old at the time and appellant, who is 31 years older than E.S., 6'2" tall and weighed 220 pounds, lived in her household for a portion of each week. E.S. reasonably explained that she had not told anyone about the abuse earlier because she was afraid that appellant might hurt her and her mother and that her mother would not believe her.

The trial court heard this evidence and, in admitting Shupp's testimony as a prompt complaint exception to the hearsay rule, implicitly ruled that the complaint to Shupp was sufficiently prompt under the circumstances. We agree that the circumstances of the case permit the conclusion that E.S.'s report to her teacher was "prompt" under Rule 5-802.1(d). We therefore hold that the trial court did not abuse its discretion in permitting Shupp to

[9] In *Gaerian*, this Court found no abuse of discretion in the trial court's admission of an October 31 complaint about sexual abuse that occurred on October 1 under the prompt complaint exception to the hearsay rule. 159 Md. App. at 545.

testify about E.S.'s complaint to her as an exception to the hearsay rule.[10]

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

[10] To the extent that appellant also claims that the prompt complaint exception to the hearsay rule cannot serve to bolster E.S.'s testimony by confirming its details, that argument is not preserved for our review, as appellant made no such argument before the trial court. *See* Md. Rule 8-131(a). Even were we to consider that argument, we would find it unavailing because Shupp's testimony, as an exception to the hearsay rule, was properly limited to the fact that the complaint was made, the circumstances under which it was made and the identification of the abuser.