Circuit Court for Caroline County
Case No. C-05-16-46

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2309

September Term, 2017

ERIK PERNELL CARROLL

v.

STATE OF MARYLAND

Beachley,
Fader,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, J.

Filed: October 25, 2018

This case arose out of an investigation by the Caroline County Department of Social Services into allegations that the victim, a minor, had been sexually abused by a family member. Although appellant Erik Carroll was not the initial subject of the investigation, the victim identified him as having abused her. After a bench trial, the Circuit Court for Caroline County convicted Mr. Carroll of two counts of third-degree sex offense, two counts of second-degree child abuse, and two counts of sexual abuse of a minor. The court sentenced Mr. Carroll to a total of 40 years of actual incarceration time on the sexual abuse counts, plus probation, and merged the remaining convictions for sentencing purposes.

Mr. Carroll contends that (1) it was error for the circuit court to deny his motion for a mistrial and (2) the evidence was insufficient to sustain his convictions for second-degree child abuse. We affirm the court's decision to deny the motion for mistrial but vacate Mr. Carroll's child abuse convictions.

BACKGROUND

During 2015 and 2016 the then-six-year-old victim lived in a house with several people, including her grandmother and Mr. Carroll, who was then her grandmother's boyfriend. In June 2016, the Caroline County Department of Social Services received a call regarding incidents of sexual abuse involving the victim and her step-uncle, J.H., who was also a minor at the time and who stayed at the house on weekends. A caseworker with Child Protective Services began an investigation that, at its inception, focused on J.H. During an interview, however, the victim claimed that Mr. Carroll had also touched her inappropriately. The State charged Mr. Carroll with two counts of third-degree sex offense,

two counts of second-degree child abuse, two counts of sexual abuse of a minor, two counts of second-degree sex offense, and one count of neglect.[1]

The Trial

The core issue on appeal relates to events that transpired during a brief break in the victim's trial testimony. Before the break, the victim testified that Mr. Carroll had touched her in a way that she did not like. When asked to elaborate, she stated that on more than one occasion, Mr. Carroll had rubbed her rear end with his hand under her clothes. She also recalled Mr. Carroll apologizing to her for treating her like an adult but then engaging in the same conduct again. However, when asked to elaborate and to relay other information that she had previously provided, the victim said she could not remember. Among other things, she did not remember other inappropriate touching and denied that Mr. Carroll's "private part" had been in the area of her mouth.

At that point, the State asked the victim if she would like to take a break so that she could "think about it," and she agreed. The court granted a brief recess and admonished those in the courtroom that "no one should speak with the witness" during the recess. Accounts of the events that transpired during the break will be addressed below.

Following the break, the State showed the victim pictures she had drawn during her sessions with the Child Protective Services investigator prior to trial. After reviewing the pictures, the victim testified that she remembered Mr. Carroll putting his hands on the sides of her face and placing his penis near her mouth while the two were together. The victim

[1] The court acquitted Mr. Carroll of the second-degree sex offense and neglect charges during trial.

also stated that, at the time, Mr. Carroll "was trying to move it" and that she "was trying to move [her] head." Later in her testimony, the victim confirmed that Mr. Carroll had put his "private area" around her mouth and that he stopped and "ran downstairs" when "he thought that [another resident] was coming upstairs." She also recalled that he later apologized to her about the incident "upstairs."

During the victim's testimony after the break, when it became obvious that her memory was substantially improved, defense counsel moved for a mistrial on the ground that the victim's improved memory was the result of improper contact during the break. Placing the victim's testimony on hold, the court heard testimony from six witnesses as to what had transpired during the break. Based on the testimony, counsel stipulated that the break had lasted approximately two minutes, that the victim had been escorted out of the room by her caseworker, that she had been brought back into the courtroom by the State's Attorney's Office's victim witness coordinator, and that she had then sat next to her father on a courtroom bench. Witnesses testified further to the following:

- After the pause, the victim testified that no one had told her "to say anything." She said that during the break she had been with her caseworker, her father, and, perhaps, her grandfather. When asked what they talked about, the victim responded, "Um, nothing," and then added that she had "started laughing."

- Mr. Carroll's mother testified that she had seen the victim in the hallway outside of the courtroom and that the victim "ran over and hugged [her]." Another woman who had been with the victim then came over and "yanked her away."

- The victim's grandmother testified that she saw the victim come out of the courtroom with "the lady that walked with her" and that, at one point, the victim had gone into the State's Attorney's office. She had not seen the victim speak with anyone.

- Mr. Carroll testified that he saw the victim speak with "her father and the lady that took her out" during the break. He did not hear the conversation.

- The victim witness coordinator testified that she saw the victim leave the courtroom with her caseworker and that "less than a minute" later she retrieved the victim from the State's Attorney's Office, where the victim had been sitting with several people, including her caseworker. She then returned the victim to the courtroom, where she sat next to her father.

- The victim's father testified that she sat next to him when she returned to the courtroom and asked him "if she could have her lip gloss." He told her that she could not and that "she couldn't leave the courtroom."

- The caseworker testified that during the break she took the victim into the State's Attorney's Office and that the victim's father, mother, grandmother, and others were also there. The caseworker saw the victim talking but did not hear what she said.

After this testimony, defense counsel pressed for a mistrial, arguing that one was required because of the combination of the fact that the victim had conversations in violation of the court's instructions and "now she can remember everything." The State argued that the break did not affect Mr. Carroll's right to a fair trial.

The court denied the motion. It observed that the victim "was not out of the courtroom for more than a couple of minutes." The court accepted the father's testimony that the victim's request for lip gloss was "the only thing that transpired between the two of them," and found that this interaction did not violate the "spirit of the order," which was to prevent "conversations that would affect the witness's truth telling on the stand." The court further remarked that "the fact that the witness may have talked to other people" did not actually violate the order, as the order meant that "other people shouldn't talk to her." While the court stated that it was "monumental bad judgment" for the victim's handlers to

take her to an area where there were witnesses and then to have her sit next to her father in the courtroom, the court found there was "no evidence that there was any discussion that prompted [the victim's] recollection of the events that she testified to after the break." To the contrary, the court believed the victim's recollection was prompted by the prosecutor "showing her the drawings that she made while she was in [the caseworker's] company."

Mr. Carroll testified in his own defense and denied all allegations that he had touched the victim inappropriately. In announcing its verdict, the court compared Mr. Carroll's testimony with that of the victim. The court found that the victim "gave a clear and accurate account" of the events, that "her testimony was extremely credible," and that it was not the result of any coaching. In contrast, the court found Mr. Carroll's testimony contained inconsistencies and that parts of it were "fabricated" and not "at all credible." This timely appeal followed.

DISCUSSION

I. THE COURT DID NOT ERR IN DENYING THE MOTION FOR A MISTRIAL.

Mr. Carroll argues that the circuit court erred when it denied his motion for a mistrial. He contends that his primary defense against the charges "was that the victim . . . was confused because she had suffered sexual abuse at the hands of another family member . . . and that she was coached." Mr. Carroll maintains, therefore, that the court should have granted a mistrial because the victim, who "was unable to testify to any abuse by appellant prior to the break," had "conversations with other witnesses" and then "testified to abuse

by appellant after the break." According to Mr. Carroll, a mistrial "was the only appropriate remedy to ensure a fair trial under the circumstances."

The State counters that a mistrial was not required because there "is no evidence in the record that anyone discussed the underlying case with the victim during the short break." The State contends, as the trial court concluded, that the victim's ability to recall the incident with Mr. Carroll was attributable not to any conversation during the break but rather "to the prosecutor refreshing her recollection with [her] own drawings . . . ." Thus, the State argues, given the lack of evidence suggesting that any of the victim's interactions influenced her testimony, the court did not abuse its discretion in denying Mr. Carroll's request for a mistrial.

"[T]he granting of a mistrial is an extraordinary remedy that should only be resorted to under the most compelling of circumstances." *Bynes v. State*, 237 Md. App. 439, 457 (2018) (emphasis removed) (quotation omitted). "[A] mistrial is an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *McIntyre v. State*, 168 Md. App. 504, 524 (2006) (quoting *Coffey v. State*, 100 Md. App. 587, 597 (1994)). "Put another way, '[t]he determining factor as to whether a mistrial is necessary is whether the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.'" *Winston v. State*, 235 Md. App. 540, 569-70 (quoting *Kosh v. State*, 382 Md. 218, 226 (2004)), *cert. denied sub nom. Mayhew v. State*, 458 Md. 593 (2018). "The defendant bears the burden of

showing that the prejudice arising from the trial court's error demands the declaration of a mistrial." *Fleming v. State*, 194 Md. App. 76, 94 (2010).

"[A] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court." *Winston*, 235 Md. App. at 570 (quoting *Cooley v. State*, 385 Md. 165, 173 (2005)). "That discretion is often quite broad because a trial judge is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case, and therefore to determine whether a mistrial is appropriate or required." *Watters v. State*, 328 Md. 38, 50 (1992). "An appellate court will not reverse a denial of a mistrial motion absent clear abuse of discretion, and certainly will not reverse simply because it might have ruled differently." *Winston*, 235 Md. App. at 570 (citations omitted). "A trial court abuses its discretion when its ruling is 'clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.'" *Id.* (quoting *King v. State*, 407 Md. 682, 697 (2009)).

Here, once counsel made his motion for mistrial the court acted promptly to ascertain exactly what had transpired during the break. Testimony from six different witnesses did not reveal evidence of any contact or communication that appeared likely to have improperly influenced the victim's testimony. Indeed, the only conversation anyone recalled having with the victim or overhearing was her father's response to her inquiry about lip gloss. The court determined that the very short duration of the break also made

it unlikely that the witness's testimony had been improperly influenced and, after observing her testimony, found that she had not been coached.

The circuit court did not abuse its discretion in denying Mr. Carroll's request for a mistrial. "[T]he judge [wa]s physically on the scene, able to observe matters not usually reflected in a cold record." *Simmons v. State*, 436 Md. 202, 212 (2013) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)). It was thus within the court's sound discretion to conclude that the contact that the victim had with individuals during the break did not have any discernable effect on her subsequent testimony and to allow the trial to proceed. *See Reed v. Balt. Life Ins. Co.*, 127 Md. App. 536, 569 (1999) (holding that the trial court did not err in permitting a witness to testify after the witness violated the court's sequestration order because, in part, "there [was] no evidence that the testimony [the witness] allegedly overheard influenced his own testimony"); *see also Bynes*, 237 Md. App. at 457 ("If every modest error could abort a trial, it would be a rare, rare case that would ever make it to the rendering of a verdict.").

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS FOR SECOND-DEGREE CHILD ABUSE.

Mr. Carroll also contends that the evidence was insufficient to sustain his convictions for second-degree child abuse because there was no evidence of "physical injury." The State has conceded this issue and we agree. The State indicted Mr. Carroll for second-degree child abuse under § 3-601(d) of the Criminal Law Article. To convict him, the State was required to prove that the victim sustained "physical injury . . . as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances

that indicate that the minor's health or welfare is harmed or threatened by the treatment or act." Crim. Law § 3-601(a)(2). As the State now concedes, there was no evidence at trial that the victim sustained any physical injury as a result of Mr. Carroll's conduct. We therefore vacate Mr. Carroll's two second-degree child abuse convictions. Because both convictions were merged for sentencing purposes, we need not remand for resentencing.[2]

JUDGMENTS OF THE CIRCUIT COURT FOR CAROLINE COUNTY REVERSED AS TO APPELLANT'S CONVICTIONS OF SECOND-DEGREE CHILD ABUSE; ALL OTHER JUDGMENTS AFFIRMED; COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY CAROLINE COUNTY.

[2] In light of our decision to vacate these convictions, we do not address Mr. Carroll's argument that his counsel's failure to move for judgment of acquittal of these counts amounted to ineffective assistance of counsel.