Circuit Court for Montgomery County
Case No.: 130282-C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3356

September Term, 2018

CORNELL YOUNG

v.

STATE OF MARYLAND

Kehoe,
Berger,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: February 12, 2020

A jury sitting the Circuit Court for Montgomery County found Cornell Young, appellant, guilty of one count of sexual abuse of a minor and two counts of second-degree sexual offense. The court sentenced appellant to 25 years' imprisonment with all but 20 years suspended for sexual abuse of a minor and to a consecutive 20 years' imprisonment for one count of second-degree sexual offense. The court merged the remaining offense for sentencing.

Appellant noted a timely appeal and he contends that the trial court erred in denying his motion *in limine* which, if successful, would not have permitted the State's expert witness to testify to certain hearsay statements made to her by the victim. For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

When the victim[1] in this case attended elementary and middle school in Maryland, she and her brother went to her paternal grandmother's townhouse after school for a few hours each day until her father[2] picked them up. Also present in the home at that time was the victim's grandfather, various cousins, and appellant, who lived in the basement. The victim thought of appellant as her "cool uncle" because he would let her and her brother watch movies and play video games after they finished their homework.

[1] Because the victim in this case was a minor at the time of the offenses, we refer to her as "the victim" to protect her identity.

[2] When the victim was in fourth or fifth grade, she and her brother moved to Maryland from Florida where she had been living with her mother. She spent summers and holidays with her mother.

When the victim was 10 years old, appellant began sexually abusing her in the basement. The first instance of abuse occurred one day when appellant and the victim's brother were sitting together on the couch watching a movie, and appellant sat the victim on his lap, put a blanket over the two of them and "groped [her] butt." The victim testified that: "My uncle was behind me and I was sitting in the front. We were kind of like on the edge of the couch … the TV was in front of us [and h]is back was close to the wall, at like the end of the couch, and I was on his chest." The victim said that appellant squeezed her "butt" over her clothing, for what she estimated was "maybe 10 minutes." She testified that she was "confused and unsure of what was happening" so she just continued watching the movie "like nothing was happening." The two never spoke about it again. She testified that she never told anyone about it because she "had no idea what it even was, so I pretended like it didn't happen, and I just went on with my life." This pattern continued three or four more times, except that during the subsequent incidents, appellant put his hands under her pants and underwear.

The victim testified that, subsequent to the foregoing incidents, appellant "actually raped" her. One day, after she and appellant had taken some popsicles to the basement freezer, appellant grabbed her by the arm, pulled down her pants and underwear, pulled down his pants and boxer shorts, and then he "put his dick in [her] butt" According to the victim, "with his dick in [her] butt, he used his hand to kind of push it up further." She said that his penis was hard, warm and eventually wet. She described the pain that it caused as "a stabbing" or "aching pain." After appellant was finished, he told her to go upstairs, which she did. When appellant later came upstairs, he "put his finger to his lips and was

like 'Shh' and then he left." She was not sure what had happened but she "knew it wasn't right." As before, the victim told no one about the incident. She said she had not been told about "the birds and the bees" and she did not know what sex or rape was.

After this first incident where appellant sodomized the victim, she made sure she always wore jeans with a tightly drawn belt to try to keep it from happening again. Nevertheless, the victim remembered that it happened at least two more times. During the last incident that she could remember, appellant did not remove her underwear, and she could feel "his dick poking [her] underwear." Appellant then began to talk to her "like it wasn't happening … [h]e was asking [her] about [her] day at school, and stuff like that."

In 2014, when the victim was eleven years old and on spring break, her mother, for the first time talked to her about "sex and [her] period, and [that she] could get pregnant by certain things, and stuff like that." The victim said that she did not then tell her mother about what appellant had done because she did not want to stop seeing her father and she "knew if she told [her mother] that, she would have taken me away from him." A week after the victim returned to Maryland, she got her period. Out of a fear of getting pregnant, she "told [appellant] to stop" to which appellant responded "like I know, I already did." The victim testified that, thereafter, she never went in the basement again and tried to keep her cousins away from appellant.

When the victim was thirteen years old and in seventh grade she was referred to a school counselor because she wrote on a desk "I want to die." The victim told the counselor "everything" including the fact that she had been sexually abused by appellant when she was ten years old. Ultimately, the counselor called the victim's father and, without sharing

with him what the victim had disclosed, recommended that he take her to the hospital, which he did. While at Walter Reed Hospital, the victim disclosed the sexual abuse to a therapist, and then to her father. She was later referred to Dr. Evelyn Shukat, a child abuse pediatrician and medical director of the Tree House Child Advocacy Center of Montgomery County to whom the victim was referred by Child Protective Services. Because Dr. Shukat's testimony is at the heart of this appeal, we shall examine it in some detail.

Dr. Shukat was accepted, without objection, as an expert witness in the fields of pediatrics and child abuse. She explained that her role was to rule in, or rule out, physical or sexual abuse or neglect in children. To accomplish that objective, it was her practice to perform a "nose to toes and all parts in between" examination of the child, conduct interviews with the child and parent, and test for pregnancy and sexually transmitted diseases.

Dr. Shukat said that when she first met the victim, she introduced herself and explained that she was a doctor who talks to, and examines, children. She testified that the victim was very cooperative, mature for her age, and engaged in the medical interview. When asked why she thought she was seeing Dr. Shukat, the victim told her that she was there to make sure she did not have any infections from the penile rectal penetration she suffered between the age of 10 years old and when she first got her period.

Dr. Shukat testified that the victim told her that, after she had been rectally penetrated, she was in so much pain that she could hardly sit, she experienced pain while defecating, and that she soiled herself. Dr. Shukat explained that those symptoms were

consistent with someone who has experienced anal penetration.[3] Dr. Shukat then conducted a physical exam of the victim, including a genital examination, and found that the physical examination was normal with no physical signs of anal penetration. She attributed the normal finding to the fact that the examination took place at least a year after the last time she had been rectally penetrated, and therefore, whatever trauma had occurred, had healed by the time of the examination.

Dr. Shukat also talked to the victim about her mental health, and the victim revealed that she had considered suicide and had been cutting her arm. She noticed that victim had multiple healed linear scars on the inside of her left forearm. The victim told Dr. Shukat that she got depressed a few months before her father took her to the hospital and since then, she had been in therapy, but not regularly. The victim revealed that she did not feel responsible for the abuse, and that she did not have any suicidal thoughts at the time she met with Dr. Shukat.

Based on her physical examination and discussion with the victim, Dr. Shukat explained that "based on [the victim's] symptoms that she correlated to blunt penetrating rectal trauma via penis, her physical pain associated with that, her emotional reactions to that, her depression, her suicidal ideation and gestures," she came to the conclusion that the victim's history was consistent with child sexual abuse, which a physical examination could not confirm or rule out.

[3] Dr. Shukat testified that there need not be bleeding with rectal penetration of a child's external sphincter.

Dr. Shukat referred the victim for "specific trauma-focused cognitive behavioral therapy" which she called the "gold standard" for mental health therapy for trauma.

DISCUSSION

Prior to Dr. Shukat taking the witness stand, appellant moved *in limine* to preclude the doctor from testifying to any statements that the victim made to her on the basis that, if such statements were admitted for their truth, they were inadmissible hearsay. Appellant claimed the victim's statements to Dr. Shukat did not fall within the so-called "Statements for Purposes of Medical Diagnosis" hearsay exception because, according to appellant, Dr. Shukat was not a treating physician, but was rather an examining physician and therefore the statements were not made for the purposes of medical diagnosis or treatment.

The trial court denied appellant's motion and determined that Dr. Shukat would be permitted to testify to what the victim had told her as it related to her medical diagnosis and treatment but would not be permitted to testify that the victim told her that appellant was the person who had abused her. The following exchange took place on the record after the trial court inquired whether the defense's concerns had been assuaged:

> [DEFENSE COUNSEL]: No, Your Honor. We still have a concern. So –
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> THE COURT: You don't think that she should be able to say anything about, about that, how she felt or what the, what we just heard in there. Oh, I disagree. I thought we were fighting over a statement implicating the defendant. But she's in there clearly getting treatment from Dr. Shukat –
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> [DEFENSE COUNSEL]: Your Honor, she's not getting treatment. She's already been treating and being continued to be treated by Walter Reed.
>
> THE COURT: I think you have the misconception that you can only be treated once. And that that treatment is over. You're in the ER. That's it. You're done. But medically, people get referred all over the place. I

> understand there's a forensic component here. But what I'm hearing, and, but that doesn't mean, and then I understand that Dr. Shukat is going to testify as to making other referrals. So isn't Dr. Shukat, I think I'm saying this hypothetically, and rhetorically, she's another person in the chain of treatment that this little girl got. The same as if now she was at a psychiatric or psychologist maybe, or psychiatrist.
>
> So Shukat is going to say, I looked at all of these things. Fine. [Defense counsel] is not, or maybe she is, I don't think she was objecting to the physical exam.
>
> [DEFENSE COUNSEL]: No, I think she gets to talk about the physical exam.
>
> THE COURT: Okay, right. And then you're going to object specifically if she says was there pain in the anus or something like that.
>
> [DEFENSE COUNSEL]: Correct.

The court continued:

> I also think, considering the age of this little girl, that the questions she's asking her certainly appear that they are necessary for the treatment and the diagnosis, which protects it from being contrived or thought out. And unless on cross-examination or there is some reason to believe that somebody went over her testimony with her with respect to what should have happened and if she had been anally raped, and I'm not hearing anybody saying that.

In response, appellant argued that, "[u]nder this scenario, they could just keep going to doctors" and "just keep getting it under the hearsay rule even though they aren't actually treating because the child would have been treated for any physical ailments from this[.]" The trial court disagreed and further explained its ruling:

> Well, at some point, the Court would rule that it's no longer in the treatment process. Now if, and also, at some point, they would reach a point of diminishing returns, which might be probably the next doctor. But I'm not hearing, I'm hearing Walter Reed, and I'm hearing, and I don't know what they're equipped for children or anything else. There is no testimony to that. She treated there. That the direction goes towards the assault, according to the father.

> What's actually done at Walter Reed is not in evidence. But Shukat is going to come in and say I am the person in Montgomery County when kids get abused. And I look at them. I know what kind of treatment they need because I'm a pediatrician. I've heard her testify before, and she's known to the Court. So we're not dealing with a situation where a cop is shopping her testimony all over Montgomery County to get somebody to come in here and just add to it.
>
> We're not, we're not at a point, not even close to a point when we have multiple doctors all coming in and saying the same thing. In fact, you even point out, nobody from Walter Reed is coming in here. I don't know if they, if they even deal with where she was with adolescents or children. Well, she is a child under the law.
>
> So for all these reasons, I'll sustain, I'll overrule the objection. And now that I'm, as I said, I'm more, I'm comforted now that we're not getting into anything the uncle might have done.

In response to a question from appellant seeking clarification, the trial court said:

> Well, anything the doctor asks her with respect to what happened to her, I will overrule the objection and allow her to answer with respect to these incidents. That's part and parcel of what she's examining. And that's going to be a foundation for what she would expect to find with respect to any tearing or any, any type of trauma. So, yes, everything except for the nexus or mentioning that, who the perpetrator was.

Preservation

Maryland Rule 4-323(a) provides, in pertinent part, as follows:

> An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived.

That an objection was raised in a motion *in limine* does not obviate the need for a contemporaneous, and timely, objection when the evidence is elicited at trial. *See Reed v. State*, 353 Md. 628, 643 (1999) (when evidence that has been contested in a motion *in limine* is admitted at trial, a contemporaneous objection must be made pursuant to Md.

Rule 4-323(a) in order for that question of admissibility to be preserved for appellate review).

At trial, appellant did not once contemporaneously object to Dr. Shukat's testimony on the basis that it contained hearsay. As a result, his contention that the trial court erred, and/or abused its discretion in admitting any hearsay statements of the victim through Dr. Shukat is not preserved for appellate review.[4]

Merits

Even if appellant had preserved the issue for appeal, he would fare no better because we are persuaded that the trial court did not err or abuse its discretion when denying appellant's motion *in limine*.

Maryland Rule 5-801 provides that, "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible. Maryland Rule 5-803(b)(4) makes an exception for statements made for purposes of medical treatment or medical diagnosis. The Rule specifically excepts the following from the ban on the use of hearsay:

> Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

"'The rationale behind this exception is that the patient's statements are apt to be sincere and reliable because the patient knows that the quality and success of the treatment

[4] In addition, in his brief before this Court, appellant never identifies exactly which statements of the victim that Dr. Shukat testified to that he believes were inadmissible.

depends upon the accuracy of the information presented to the physician.'" *Webster v. State*, 151 Md. App. 527, 536 (2003) (quoting *In re Rachel T.*, 77 Md. App. 20, 33 (1988)); *see also Low v. State*, 119 Md. App. 413, 419 ("The guarantee, rather, was that no one would willingly risk medical injury from improper treatment by withholding necessary data or furnishing false data to the physician who would determine the course of treatment on the basis of that data"), *cert. denied*, 350 Md. 278 (1998).

If the patient believes that the primary purpose of the examination is forensic or investigative, rather than medical diagnosis and treatment, the same guarantees of reliability cannot be assumed. *State v. Coates*, 405 Md. 131, 147 (2008) (holding that the medical treatment exception did not apply where the young patient expressed her understanding that the purpose of the examination was so that the police could go find the man who had raped and abused her). The focus of our inquiry, therefore, must be on the patient's state of mind at the time of the examination. *Id*. at 145. However, "the existence of dual medical and forensic purposes for an examination [does] not disqualify an otherwise admissible statement under Rule 5-803(b)(4)." *Id*. at 143.

The trial court's admissibility determination in the instant case was predicated on its finding that Dr. Shukat was, at least in part, a treating physician. We discern no error or abuse of discretion in that finding. Dr. Shukat testified about her role and that the purpose of her meeting with and examination of the child was to determine what other treatment or therapy was indicated as a result of the child's medical and mental health condition. She also testified that the child told her that she understood she was to be examined to make sure she did not have any infections as a result of the abuse. Moreover, the trial court ensured that Dr. Shukat would not testify to any statements of the victim's which would have implicated appellant in the abuse.

Under the circumstances, we are persuaded that the victim was aware that the quality and success of her treatment depended on the accuracy of the information she presented to Dr. Shukat, and therefore her statements were "apt to be sincere and reliable" and hence admissible under Md. Rule 5-803(b)(4). *See Webster*, 151 Md. App. at 536.

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