Circuit Court for Wicomico County
Case No. C-22-CR-22-000435

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 222

September Term, 2023

RICHARD K. B.

v.

STATE OF MARYLAND

Ripken,
Tang,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 2, 2024

*This is a per curiam opinion. Consistent with Rule 1-104, the opinion is not precedent within the rule of stare decisis, nor may it be cited as persuasive authority.

Convicted by the Circuit Court for Wicomico County of sexual abuse of a minor by a family member and related offenses, Richard K. B., appellant, presents for our review two issues: whether the court erred in denying appellant's motion to suppress "the fruits of [a] wiretap," and whether the evidence is insufficient to sustain the conviction for sexual abuse of a minor by a family member. For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, the State called A., who at the time was twelve years old. A. testified that appellant is her grandfather, and at the time of trial, she had known appellant for four years. When A. was spending time with appellant, they "would go driving around Salisbury" and on trips. On more than one occasion, appellant told A. that "he was sexually attracted to" her. When A. was ten years old, appellant drove her "to the middle of nowhere," "turned off [the] car," and grabbed A.'s breasts over her clothes. Appellant then "took out [A.'s] boob" and touched it. When A. "told him to stop," appellant "put it back in [her] shirt and . . . drove off." When appellant and A. "got home," appellant "just kept apologizing."

Approximately "one or two months after," A. "was in [appellant's] car," when appellant touched both of A.'s breasts over her clothes for approximately five minutes. A. testified that "between . . . when it first happened and up until the last time it happened," appellant had done it "probably five or six" times. The "last time it happened," appellant was driving A. "in the middle of nowhere," when he "grabbed [A.'s] breasts" over her shirt and "basically said, like, you look beautiful today." After "each time it would happen," appellant "would text [A.] right after or tell [her] right after sorry and, like, it won't happen again." A. confirmed that there did "come a time when [appellant] told [her] that it was

okay for him to be doing these things." A. testified that she did not "tell [her] mom or anybody else that this was happening," because "the first time [appellant] did it, he asked [A.] so many times, just don't tell anybody, please don't, . . . you could never see me again, . . . please don't do this, please don't do that." A. later reported appellant's behavior to her former stepmother.

Appellant first contends that the court erred in denying his motion to suppress "the fruits of [a] wiretap." Prior to trial, appellant filed a motion to suppress any "illegally seized evidence and/or any statements or confessions, and/or evidence derived therefrom." Appellant specifically contended that "evidence obtained and statements made by [appellant] during a monitored telephone call were obtained in violation of" Md. Code (1974, 2020 Repl. Vol., 2021 Supp.), § 10-402 of the Courts & Judicial Proceedings Article ("CJP")[1] "and the 4th Amendment to the Constitution of the United States." Appellant

[1]CJP § 10-402(a) states, in pertinent part:

> Except as otherwise specifically provided in this subtitle it is unlawful for any person to:
>
> > (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
> >
> > (2) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or

(continued)

subsequently filed a "Memorandum in Support of Motion to Suppress," in which he contended "that his rights under the Fourth Amendment to the Constitution of the United States, as well as the Maryland Declaration of Rights, were violated when a law enforcement officer listened to and recorded a telephone conversation on or about July 19, 2022 because the police officer did so without a judicial warrant in violation of the holding of the Supreme Court[] in *Katz v. United States*, 389 U.S. 347 (1967)." (Italics added.) In argument, appellant contended, in pertinent part, that A. "purported to 'consent' to the monitoring of the call," A.'s consent to monitor the call may not have been valid, and an "officer's attempt at compliance with" the statute may be "a non-criminal act" if "the child's 'consent' is valid."

At a hearing on the motion, the State called Maryland State Senior Trooper Garrett Dick, who testified that he had been "assigned the case involving" appellant. Trooper Dick confirmed that "[a]s part of [his] investigation," he "determine[d] that a recorded call would be appropriate." Trooper Dick confirmed that only he and A. were "present for the recorded call," but A. had been "accompanied [first] to the Child Advocacy Center" and then to the trooper's barracks by her mother, who "allow[ed] for [A.] to participate in that . . . call." "Prior to conducting the call itself," Trooper Dick had A. "sign [a] consensual monitoring form," which is "a standard form that's used by the Maryland State Police" and

> (3) Willfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

"delineate[s] the exceptions to the wiretap statute in order . . . to conduct . . . recorded calls."[2] The State submitted the form into evidence. Trooper Dick confirmed that A. was accompanied by her mother to the location where the call took place, that he spoke to A.'s mother "in person," that he spoke to A.'s mother "at the Child Advocacy Center as well as the Maryland State Police barrack," and that he gave A. and her mother "some private time to talk and go over everything." Trooper Dick confirmed that "after [A. and her mother] spoke, they both agreed for [A.] to take part in the call." The trooper testified:

> The only thing her mother had asked originally is, she was curious if she could come back, she wasn't pushy to come back, but if she could be with her. And at that time we told her that it would probably be best if we, in a closed room, that we just did it ourselves, and she had no objection to that.

[2]These exceptions are listed in CJP § 10-402(c)(2), which states in pertinent part:

> (i) This paragraph applies to an interception in which:
>
> 1. The investigative or law enforcement officer or other person is a party to the communication; or
>
> 2. One of the parties to the communication has given prior consent to the interception.
>
> (ii) It is lawful under this subtitle for an investigative or law enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication in order to provide evidence:
>
> 1. Of the commission of:
>
> * * *
>
> R. Sexual abuse of a minor[.]

A. subsequently placed the call, which was "placed on speaker in order for [Trooper Dick] to be able to listen in." During the call, which "was approximately six to seven minutes" long, appellant made "admissions about what he had done with" A., and "also apologized to her for those acts." Appellant "admit[ted] to having touched [A.'s] breasts on repeated occasions" and to "still looking at her . . . as a sexual manner," and indicated "that he was very attracted to her."

Following the hearing, defense counsel argued that, for numerous reasons, "the Supreme Court holding in *Katz* . . . requires any time there's a telephonic interception of a telephone call[] for the State to get judicial authorization to do that," and that if CJP § 10-402 "means to say that it authorizes it under the Fourth Amendment," then the statute is unconstitutional. Defense counsel argued in pertinent part:

> [I]t's a red herring as to whether or not [A.] consented to the call, constitutionally. It might matter as to whether it's a felony under the statute or not, we understand that. But it's completely immaterial to his expectation of privacy in the phone call.

Following argument, the court denied the motion. At trial, the State submitted into evidence a transcript of the recorded call. The State also submitted into evidence a transcript of an interview of appellant conducted by Trooper Dick subsequent to the recorded call.

Appellant contends that, for the following reasons, the court erred in denying the motion to suppress:

> The consent Trooper Dick obtained from twelve-year-old [A.] to conduct the controlled call was invalid because she was a minor. Trooper Dick was required to obtain vicarious consent from [A.'s] mother . . . , and the facts here do not indicate that he did so. Even if [A.] was able to consent, the State

> failed to demonstrate that [A.'s] consent was made freely and voluntarily. Without valid consent, the controlled call in this case was conducted in violation of [CJP § 10-402] and, pursuant to CJP § 10-405(a),[3] the direct evidence – the recorded call itself – and the evidence derived from the call – [appellant's] statement following his arrest based on the contents of the call – must be suppressed.

The State counters that appellant "did not preserve his present claim that the evidence should have been suppressed based on an alleged violation of" CJP § 10-402. Alternatively, the State contends that CJP § 10-402 "was not violated."

We agree with the State that appellant's contention is not preserved for our review. We have held that "if a defendant fails to raise a ground seeking suppression of evidence, which is required to be raised pre-trial by Rule 4-252, the defendant has waived his or her right to appellate review of that issue." *Carroll v. State*, 202 Md. App. 487, 513 (2011). Here, appellant did not specifically contend in the motion to suppress, his supporting memorandum, or his argument at the hearing on the motion, that Trooper Dick failed to obtain valid consent to record the call. Indeed, defense counsel stated at the hearing that the sole ground on which appellant moved to suppress was that "the Supreme Court holding in *Katz* . . . requires any time there's a telephonic interception of a telephone call[] for the State to get judicial authorization to do that," and explicitly referred to the issue of "whether or not [A.] consented to the call" as "a red herring." Appellant failed to raise the issue of

[3]CJP § 10-405(a) states: "Except as provided in subsection (b) of this section, whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle."

whether Trooper Dick obtained valid consent to record the call, and hence, appellant has waived his right to appellate review of that issue.

Even if appellant's contention was preserved for our review, he would not prevail. Trooper Dick explicitly testified that prior to A.'s signing of the consensual monitoring form and the recording of the call, the trooper spoke to A.'s mother "in person" at both "the Child Advocacy Center as well as the Maryland State Police barrack," and gave A. and her mother "some private time to talk and go over everything." Trooper Dick then confirmed that "after [A. and her mother] spoke, they both agreed for [A.] to take part in the call," and testified that A.'s mother "had no objection to" the trooper conducting the call with A. alone. From this testimony, a rational trier of fact could conclude that A.'s mother gave vicarious consent to the recording of the call, and hence, the court did not err in denying the motion to suppress.

Appellant next contends that "the evidence was insufficient [to] convict . . . of sexual abuse of a minor by a family member," because the "evidence was insufficient to prove beyond a reasonable doubt that [appellant] was a blood relative of" A. *See* Md. Code (2002, 2021 Repl. Vol.), § 3-601(a)(3) of the Criminal Law Article (defining "family member" as "a relative of a minor by blood, adoption, or marriage"). We disagree. At trial, the State produced the following evidence:

- Testimony by A. that appellant is her grandfather and her mother's father.
- Testimony by A.'s mother that A. is her "biological daughter" and appellant is her "biological father."
- Testimony by A.'s former stepmother that appellant is the father of A.'s mother.
- Appellant's statement, made during his interview with Trooper Dick, that A.'s mother is appellant's daughter, and A. is appellant's granddaughter.

From this evidence, a rational trier of fact could conclude beyond a reasonable doubt that appellant is a relative of A. by blood, and hence, the evidence is sufficient to sustain the conviction of sexual abuse of a minor by a family member.

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