Circuit Court for Prince George's County
Case No.: CT200984X

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 311

September Term, 2023

LORENZO SOSA MEJIA

v.

STATE OF MARYLAND

Tang,
Albright,
Kehoe, S.,

JJ.

Opinion by Kehoe, J.

Filed: October 25, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

On April 19, 2022, following trial in the Circuit Court for Prince George's County, a jury found Lorenzo Sosa Mejia, appellant, guilty of sexual abuse of a minor, second-degree rape, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault.

Thereafter, appellant discharged his lawyer, obtained a new lawyer, and filed a motion for a new trial, and a supplement to it, asserting various claims of ineffective assistance of trial counsel. After holding an evidentiary hearing on that motion, the court denied it in a written memorandum opinion and order dated February 10, 2023.

On March 23, 2023, the court sentenced appellant to 17 years' imprisonment for sexual abuse of a minor, plus 17 consecutive years' imprisonment for second-degree rape. The court suspended the sentence for third-degree sexual offense and merged the remaining counts for sentencing.

Thereafter appellant noted a direct appeal to this Court presenting the following questions which we have condensed[1]:

[1] Appellant presented his questions as follows:

> 1. Did the Circuit [Court] err as a matter of law and violated [sic] the Appellant's Sixth and Fourteenth Amendment Rights under the United States Constitution and Article 19 of the Maryland Declaration of Rights by denying the motion for new trial based on [trial counsel]'s totality of his errors that were unduly prejudicial and therefore constituted ineffective assistance of counsel?
>
> A. In particular, was [trial counsel] ineffective in failing to object to multiple hearsay and witness comments on the ultimate issue of assaultive behavior?

(continued)

1. Did the trial court abuse its discretion in denying appellant's motion for a new trial?

2. Did the trial court commit a plain error in not *sua sponte* dismissing the count charging sexual abuse of a minor on the basis that the evidence was legally insufficient?

The State has moved to dismiss the appeal on the basis that appellant's brief does not conform to all applicable rules and because he has failed to produce certain transcripts of trial. For the reasons discussed in this opinion, we shall deny the State's motion to dismiss the appeal, and we shall affirm the judgments of the circuit court.

THE STATE'S MOTION TO DISMISS

B. Was [trial counsel] ineffective in failing to request a *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)] hearing to exclude the testimony of Fattimata Ali?

C. Was [trial counsel] ineffective in failing to secure a rebuttal forensic medical examiner to rebut the State's experts when the family had the resources and money to so pay for the services of an expert?

D. Was [trial counsel] ineffective in not being apprised of *Vigna v. State*, [470 Md. 418 (2020)] the current case law concerning the availability of a jury instruction concerning the good character evidence of conduct toward children?

E. Was [trial counsel] also ineffective in failing to call readily available character witnesses for the character trait of peacefulness and the normal conduct toward minors?

2. Did the Circuit Court err as a matter of law and committed [sic] plain error in failing to *sua sponte* hold a *Rochkind* [*v. Stevenson*, 471 Md. 1 (2020)] hearing to examine the admissibility of the State's expert witness Fattimata Ali?

3. Was the evidence legally sufficient to convict [appellant] of child sexual abuse when there was no testimony that proved his supervision, control or provision of childcare to the victim?

The following non-exhaustive procedural background of this appeal sets the stage for our examination of the State's motion(s) to dismiss this appeal.

On April 19, 2023, appellant filed his notice of appeal in this case. About two months later, on June 15, 2023, he sought an extension of time to produce the trial transcripts, which we granted. On July 13, 2023, appellant produced most, but not all, of the trial transcripts. On August 17, 2023, citing to, *inter alia*, his identification of other appellate issues "upon [his] further review of the transcripts" appellant sought an extension of time to file a brief, which we granted.

On November 28, 2023, appellant filed his Brief of Appellant in this Court, which, upon motion of the State, we struck on December 21, 2023 because it failed to comply with a number of Maryland Rules governing the filing of briefs in this Court.[2] We gave appellant until January 18, 2024 to file a corrected brief in full compliance with the Maryland Rules and cautioned appellant that the failure to do so would result in dismissal.

On January 25, 2024, having not received a brief of appellant, we entered an order dismissing this appeal. Almost immediately after this Court issued that order, appellant filed a brief that did not conform to all applicable Maryland Rules, and a motion seeking an extension of time to file a brief. On January 30, 2024, the Court denied appellant's motion. Appellant then filed a motion for reconsideration, which, on February 2, 2024, we granted and, in so doing, we rescinded our January 25 order dismissing the appeal, and

[2] Among other things, the brief used an unauthorized font and font size (Rule 8-112), it exceeded the allowable number of words (Rule 8-503), it did not include a certification of the word count (Rule 8-504), and it was missing appellate counsel's attorney number in the signature block (Rule 20-107).

allowed the appeal to proceed.

On April 5, 2024, the State filed its Brief of Appellee which included a motion to dismiss the appeal. In that motion to dismiss, the State asserted that appellant (1) failed to produce a transcript of the second day of trial, April 12, 2022, as required by Maryland Rules 8-411 & 8-413, (2) failed to produce a transcript of a video-recording of an interview of the child victim in this case which was played for the jury on the fourth day of trial, April 14, 2022, and which was entered into evidence as State's Exhibit #21, and (3) referred to the child victim by her first and last name in his brief in violation of Maryland Rule 8-125.

On April 24, 2024, we issued an Order that, among other things, (1) sealed the brief filed by appellant on January 31, 2024, (2) ordered appellant to file a redacted brief in compliance with Maryland Rule 8-125, (3) ordered appellant to take all steps necessary to cause the transcript of April 12, 2022, and of State's Exhibit #21, to be filed on or before June 6, 2024, (4) deferred ruling on the State's motion to dismiss the appeal, (5) gave the State until July 8, 2024 to file a brief in anticipation of the aforementioned transcripts having been made part of this appeal, and (6) gave appellant until July 29, 2024 to file a reply brief.

On May 2, 2024, appellant filed a corrected brief of appellant which no longer referred to the child victim by her full name. On June 4, 2024, just two days before our deadline for him to produce the aforementioned transcripts was set to elapse, appellant filed a motion seeking additional time to produce them. Thereafter, on June 10, 2024, we received State's Exhibit #21, which is a DVD copy of the child victim's video recorded

interview played for the jury at trial.

On June 14, 2024, we issued an Order that, among other things (1) for the second time, ordered appellant to take all steps necessary to cause the transcript of April 12, 2022, and of State's Exhibit #21, to be filed on or before August 6, 2024, (2) deferred ruling on the State's motion to dismiss the appeal, (3) gave the State until September 5, 2024 to file a brief in anticipation of the aforementioned transcripts having been made part of this appeal, and (4) gave appellant until September 25, 2024 to file a reply brief.

On August 5, 2024, appellant filed a paper titled "Record Extract" which contained a copy of the transcript of the April 12, 2022 trial proceedings.

On September 3, 2024, the State filed its Brief of Appellee which includes within it a second motion to dismiss this appeal. The State asserts that we should dismiss this appeal because appellant still has not produced a transcript of State's Exhibit #21 despite having been twice Ordered by this Court to do so.[3]

On September 23, 2024, appellant filed a paper titled "Appellant's Reply Brief and Motion to Strike the State's Second Motion to Dismiss Appeal and Alternative Motion for Appropriate Relief." In that motion, among other things, appellant's counsel asserts that he had spoken with the Clerk's office in the Circuit Court for Prince George's County who informed him that exhibits, such as State's Exhibit #21, "used during cross-examination

[3] The State also asserts that appellant has referred to the child victim by name in violation of Maryland Rule 8-125. Perhaps the State is, or was, unaware of (1) this Court's April 24, 2024 Order sealing appellant's earlier filed brief, and (2) appellant's brief filed on May 2, 2024 which appears to be in compliance with Rule 8-125. The State's oversight could be forgiven given the procedural history of this appeal.

are admitted into evidence but are never transcribed by the Court Reporter's office. Rather, if requested by the Court they are transcribed by a separate entity other than the Court Reporter's office." Appellant's counsel also asserted that after learning that State's Exhibit #21 was filed with this Court, he contacted Clerk's office of this Court and, according to appellant's counsel, was told "that Exhibit 21 was filed, and the same was transcribed by for [sic] this Court."

Armed with that information, appellant asserted that the State has suffered no prejudice, and that there are no "good cause grounds" to dismiss the appeal. In the alternative, he asks for 60 more days to produce the transcript in the event that "any of the information [he] obtained were to be erroneous[.]"

As can be seen from the foregoing, the only outstanding issue appears to be the fact that appellant has still not produced a transcript of State's Exhibit #21, despite the fact that the applicable Rules place that burden squarely on him, and the fact that we have twice Ordered him to comply with those Rules.

Under such circumstances, we would be well within our rights to dismiss this appeal. Nevertheless, while it is true that appellant has failed to produce the transcript of State's Exhibit #21, the video recording of it is part of the record and we have reviewed it. Moreover, given our resolution of this case, the missing transcript is of minor importance. With all of that in mind, we are reluctant to visit the sins of appellant's counsel on appellant by dismissing his appeal because of his failure to have caused the missing transcript to become part of the appellate record.

We, therefore, deny the State's motion to dismiss this appeal.

BACKGROUND

Because our resolution of this case is not dependent upon the underlying facts and circumstances supporting the offenses that the jury found appellant guilty of, we need not dissect them in great detail.

As alluded to earlier, the jury found appellant guilty of sexually abusing E., the five-year-old daughter of D., who rented a room to appellant in her home starting about five months prior to E.'s disclosure of the abuse. Appellant sometimes brought toys or candy for E., who called him "grandpa, abuelo, in Spanish." D. testified that her family had a good relationship with appellant, that she trusted him, and that she "never imagined that he would do something to [her] daughter."

However, on August 16, 2020, E.'s mother, D., found E. in appellant's room with the door closed. D. brought E. downstairs where she started crying as she explained that appellant "had touched her" and that "he had told her if she said anything . . . that he will hit her[.]" She also said that appellant had "threatened her with a knife[.]" E. said that appellant "touched her part, . . . putting his fingers into her part, . . . he has laid her down, . . . he has put his part to her[]s." E. later told her father that appellant had "put his fingers in her and then he put his thing in her mouth."

Paula Dendy, a forensic specialist testified, *inter alia*, to the trauma that E. suffered as a result of the sexual abuse. Fattimata Ali, a social worker, testified, *inter alia*, to her interview with E. which, as noted earlier, was admitted into evidence as State's Exhibit #21 and played for the jury.

Appellant, who was 75 years old at the time of trial, testified in his own defense.

While he admitted that he lived with the victim's family, he categorically denied any wrongdoing.

DISCUSSION

I.

On April 19, 2022, the jury found appellant guilty of sexual abuse of a minor and related offenses. Thereafter appellant discharged his trial counsel and obtained the services of a different lawyer, who, on July 6, 2022, filed a motion for a new trial, and on September 13, 2022, filed a supplement to it. In those motions, appellant asserted, for various reasons, that he was denied his Sixth Amendment right to effective assistance of trial counsel. On December 15, 2022, the court held a hearing on appellant's motion. On February 10, 2023, the court denied the motion in a written memorandum opinion and order. As noted earlier, the court sentenced appellant on March 23, 2023.

Motions for a new trial are governed by Maryland Rule 4-331, which provides various timeframes for such motions. Each timeframe carries with it differing revisory power of the court. For example, on a motion filed within 10 days of the verdict, the court may order a new trial if it finds that such action is "in the interest of justice[.]" Md. Rule 4-331(a). If the motion is filed within 90 days after the sentencing proceeding, the court has the "power and control over the judgment to set aside an unjust or improper verdict[.]" Md. Rule 4-331(b).

Appellant filed his motion for a new trial with specific reference to Maryland Rule 4-331(c), which permits a court to grant a new trial based on newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial

pursuant to Rule 4-331(a). As pertinent to this case, such a motion must be filed within one year of the imposition of sentence, or the issuance of the mandate by the final appellate court to consider a direct appeal, whichever is later.

Because appellant sought relief under subsection (c) of the Rule, he was required to produce "newly discovered evidence" within the contemplation of the Rule in order prevail on his motion. *See Argyrou v. State*, 349 Md. 587, 600 (1998). In order to be "newly discovered" within the contemplation of the Rule, evidence "must not have been discovered, or been discoverable by the exercise of due diligence, within ten days after the jury has returned a verdict." *Argyrou*, 349 Md. at 600-01 (footnote omitted).

The circuit court denied relief, in part, on the basis that appellant had failed to meet his burden in demonstrating such newly discovered evidence.[4] In his briefs filed in this Court, appellant never mentions that ruling, never argues that it was incorrect, and, in fact, never mentions anything about newly discovered evidence. The closest reference to any allegation of newly discovered evidence that this Court has unearthed in this case comes from appellant's July 6, 2022 motion for a new trial. In that motion, after alleging the various ways in which he believes his trial counsel erred, appellant, with apparent reference to newly discovered evidence, stated "[c]learly, [appellant] could not have obtained any of the above factual information [related to counsel's alleged deficiencies] pretrial to conduct his own defense, since he was incarcerated pending trial and relied on the professional services of [his trial counsel] for that purpose."

[4] The circuit court also individually addressed appellant's ineffective assistance of counsel claims and determined that none had merit.

Because appellant does not challenge the circuit court's determination that his claims of ineffective assistance of counsel do not amount to newly discovered evidence as contemplated by Rule 4-331(c), we affirm the circuit court's decision to deny his motion

for a new trial.[5, 6] *See Bailiff v. Woolman*, 169 Md. App. 646 (2006) "[I]n situations in

[5] It does not appear that Maryland has had occasion to address the legal question of whether a claim of ineffective assistance of counsel can meet the definition of newly discovered evidence. If it has, the parties in this case have not directed our attention to any authority on the subject. Our research reveals that, at least once before, the issue has evaded review. *Crippen v. State*, 207 Md. App. 236 (2012). In that case, this Court decided that it lacked jurisdiction to review the question because the appellant in that case failed to file a timely notice of appeal from the denial of a post-sentencing motion for a new trial which had raised the issue.

Nevertheless, several United States Courts of Appeal have addressed the question. For example, in *United States v. Seago*, 930 F.2d 482, 488–89 (6th Cir. 1991), the court said:

> The majority view among the circuits is that an ineffective assistance of counsel claim cannot be considered newly discovered evidence for the purpose of a motion for new trial because the facts that give rise to the claim are necessarily known to the defendant at the time of the trial. *See, e.g., United States v. Lema*, 909 F.2d 561, 565 (1st Cir.1990); *United States v. Miller*, 869 F.2d 1418, 1421–22 (10th Cir.1989); *United States v. Ugalde*, 861 F.2d 802, 806–07 (5th Cir.1988), *cert. denied*, 490 U.S. 1097 (1989); *United States v. Dukes*, 727 F.2d 34, 38 (2d Cir.1984); *United States v. Lara–Hernandez*, 588 F.2d 272, 275 (9th Cir.1978); *United States v. Ellison*, 557 F.2d 128, 133 (7th Cir.), *cert. denied*, 434 U.S. 965 (1977). *But see United States v. Brown*, 476 F.2d 933, 935 & n. 11 (D.C.Cir.1973) (permitting defendant to raise issue of ineffective assistance of counsel and to support claim with evidence outside the record either on a motion for new trial or on collateral attack). The Sixth Circuit has not established a binding precedent on this issue. *See United States v. Oren*, 622 F.Supp. 936, 939 (W.D.Mich.1985). We now join the majority of circuits who have reached this issue in concluding that evidence of ineffective assistance of counsel is not newly discovered evidence for purposes of a motion for new trial where the facts supporting the claim were within the defendant's knowledge at the time of trial.

Moreover, in *United States v. Smith*, 62 F.3d 641 (4th Cir. 1995), the court determined that "[a]fter the period for new trial motions based on anything other than newly discovered evidence has expired, a new trial motion based on ineffective assistance of counsel will not lie, for, as we hold today, facts giving rise to an ineffective assistance claim do not count as "evidence" for purposes of [Federal Rule of Criminal Procedure 33's] two-year time limit." *Id*. at 651. In *United States v. Ugalde*, 861 F.2d 802 (5th Cir.1988), the court held similarly: "If we were to create such an exception for evidence of ineffective

(continued)

which there is one or more alternative holdings on an issue, the appellant's failure to address one of the holdings results in a waiver of any claim of error with respect to the court's decision on that issue" so long as the ruling "legally constitute[s] a freestanding basis in support of the trial court's decision." *Id*. at 653 (cleaned up).

II.

Appellant next claims that the evidence is legally insufficient to support the count charging sexual abuse of a minor.[7] In total, he argues the following:

> Lastly, when read in its totality, there was no legally sufficient evidence to convict [appellant] of child abuse, because he was not a household member, but rather a tenant whom the [victim's] family rented a room. *See, infra*.
>
> As a tenant, he had no custodial or familial care or connection to [the victim] sufficient to be found guilty of child sexual abuse, and even if the issue was

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assistance of counsel, we would greatly expand the opportunities to make a late request for a new trial. Defendants could easily search out some fact about their lawyer's pre-trial preparation, and make that fact the basis for an otherwise untimely motion for new trial." *Id*. at 809.

"Most circuits have concluded that facts about counsel's performance which the defendant knew, but did not appreciate as legally significant, are not "newly discovered" within the meaning of Rule 33." *Ugalde*, 861 F.2d at 806. (citations omitted). "Rule 33 on its face requires that the evidence itself, not merely the legal implications of the evidence, be "newly discovered." *Id*.

[6] Nothing in this opinion should be read as commenting on appellant's ability to pursue his claims of ineffective assistance of counsel in a petition filed pursuant to the Uniform Postconviction Procedure Act as codified in Section 7-101 *et. seq*. of the Criminal Procedure Article.

[7] In the "Questions Presented" section of his Brief filed in this Court, appellant asks "Did the Circuit Court err as a matter of law and committed plain error in failing to *sua sponte* hold a *Rochkind* hearing to examine the admissibility of the State's expert witness Fattimata Ali? Other than recite the law explaining the existence of plain error review, nowhere in his briefs in this Court does appellant ever argue that the court made an error, plain or otherwise, in failing to hold a "*Rochkind* hearing." As a result, we have determined that he has abandoned this claim of trial court error.

not preserved, it was plain error for the court to permit this count to go the jury.

From his exceedingly brief argument on the subject, we discern that he believes that there was insufficient evidence of his status as a "household" member because he rented his bedroom from the victim's mother and had no familial connection to the victim.

He acknowledges that he failed to make this argument at trial, and that the issue is, therefore, not preserved for appeal. He asks us to review the error under our authority to review unpreserved errors pursuant to Maryland Rule 8-131(a) which provides that, "[o]rdinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Maryland Supreme Court has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (quotation marks and citation omitted). Therefore, plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted). Under the circumstances presented, we decline to overlook the lack of preservation, and thus exercise our discretion to not engage

in plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis omitted).

Even if we were to review this claim, we would determine that the evidence was legally sufficient to support the count charging sexual abuse of a minor. The child abuse statutes in Maryland require that, in addition to proving the abusive conduct, the State is also required to prove the criminal defendant's status as (1) a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor, (2) a household member, *or* (3) a family member. Crim. Law § 3-602(b)(1-2) (emphasis added). As germane to this case, Crim. Law § 3-601(a)(4) defines "household member" as "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse."

Appellant's sufficiency argument seems to add an additional element not required by the statute, *i.e.* that the State needed to show that appellant was a household member *and* a family member. This is not so. The State met its burden of production on the issue of whether the appellant was a household member when D. testified that the appellant lived in the same home as E. Moreover, appellant's own testimony at trial that he rented a room and lived with the victim and her family corroborated the State's evidence on the question of whether appellant was a person who lived with the victim and therefore a "household member" within the meaning of Crim. Law § 3-602(b)(2). As such, the evidence was legally sufficient.

We affirm the judgments of the circuit court.

MOTION TO DISMISS APPEAL DENIED. JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.