Circuit Court for Prince George's County
Case No. CT201206X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 875

September Term, 2023

Jose Lisandro Palacio

v.

State of Maryland

Arthur,
Reed,
Zarnoch,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: October 9, 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 Rule 1-104(a)(2)(B).

This matter is an Appeal of Jose Lisandro Palacio's ("Appellant") criminal conviction. On December 9, 2022, he was convicted by a jury in the Circuit Court for Prince George's County on one count of sexual abuse of a minor, and three counts of third degree sexual offense. The victims in this case were minor children who lived with Appellant.

In bringing his appeal, Appellant presents two questions for appellate review:

I. Did the trial court err by not allowing Appellant to offer testimony relevant to his defense?

II. Did the trial court err in allowing a lay witness to give prejudicial expert testimony?

For the following reasons, we hold neither of these questions were preserved at trial for our review. We do not overlook the lack of preservation and decline to review either issue.

BACKGROUND

Factual and Procedural Background

The victims, G.B., and L.H., are Appellant, Jose Lisandro Palacio's nieces[1]. The victims and the Appellant resided together in Hyattsville, Maryland during different periods between 2010 and 2019. Both victims alleged that when they resided with Appellant he touched them inappropriately, including grabbing their genitals, involuntarily kissing them, striking their buttocks, and touching their breasts. Both victims were minors when the abuse occurred.

[1] Appellant is in a long-term relationship with the victims' biological aunt, but they are not legally married.

In December 2019, G.B. disclosed the abuse to a high school teacher. The teacher proceeded to report the abuse to the police and an investigation followed. On March 2, 2020, the Appellant was charged in two separate district court cases[2]. On December 15, 2020, the district court cases were consolidated and transmitted to the Circuit Court for Prince George's County. In circuit court Appellant was charged with the following:

Count 1	Sexual Abuse of a Minor – A household or family member (G.B.)
Count 2	Third Degree Sexual Offense (G.B.)
Count 3	Third Degree Sexual Offense (G.B.)
Count 4	Sexual Abuse of a Minor – A household or family member (L.H.)
Count 5	Third Degree Sexual Offense (L.H.)
Count 6	Second Degree Assault (L.H.)

Appellant plead not guilty to all charges. A jury trial was held on December 5-9, 2022. On December 9, 2022, the jury found Appellant guilty as to counts 1, 2, 3, and 5,

[2] District court case nos. 1E00709703, 5E00709703

and not guilty as to counts 4 and 6. On June 9, 2023, Appellant was sentenced to 10 years of incarceration[3]. On June 30, 2023, Appellant filed a notice of appeal. The instant appeal followed.

Relevant Testimony

The questions Appellant presented for review each deal with a specific portion of trial testimony. For clarity, we summarize the relevant testimony now.

I. K.B.'s Testimony

K.B. is the victims' cousin, and the Appellant's niece. She was called by the Appellant at trial. During direct examination, the following exchange occurred:

> **Appellant's Trial Counsel**: Okay. You know about this case?
>
> **K.B.**: Yep.
>
> **Appellant's Trial Counsel**: How did you find out about the case?
>
> **K.B.**: Well, a long time ago, the police called me, say there was a matter between [L.H.], going on with her. I never showed up to the police department. I never knew what was that about, and then I called [G.B.], asking her what was going on with [L.H.], but I never had an idea. So they told me what was going on at that time and they wanted me to lie about [Appellant] assaulting them.
>
> **The State**: Objection.
>
> **The Court**: Sustained.

Appellant's trial counsel did not ask the State to explain the grounds for the objection or ask the trial judge why the testimony was excluded. Appellant's trial counsel did not argue that the testimony should have been admitted. After the trial judge sustained

[3] Specifically, Appellant was sentenced to 20 years, with 10 years suspended on count 1, and received two-year concurrent sentences on the remaining counts.

the objection, Appellant's trial counsel began a new line of questions about an email between G.B. and K.B.:

> **Appellant's Trial Counsel**: Okay. What, if any contact did you have with [G.B.] about the case?
>
> **K.B.**: After that, I didn't have any other contact with her about the matter because-
>
> **The Court**: Next question.
>
> **The State**: Objection.
>
> **Appellant's Trial Counsel**: Okay. Was there any communication at all between you-all?
>
> **K.B.**: After everything happened, no.
>
> **Appellant's Trial Counsel**: Okay. There was no conversation at all between you-all?
>
> **The State**: Asked and answered.
>
> **The Court**: Sustained. Next Question.
>
> **Appellant's Trial Counsel**: What, if any, email did she send to you regarding this?

The State objected to admitting the email, arguing it contained hearsay. A lengthy discussion about the admissibility of the email followed, and the trial judge ultimately excluded it. The exclusion of the email is not a subject of this appeal.

II. Detective Neeld's Testimony

The State called Gloria Neeld, a Detective in the Special Crimes Division of the Prince George's County Police Department. Detective Neeld detailed her experience investigating sexual abuse cases, and explained different types of cases she investigates. She was never qualified as an expert witness.

During her testimony, Detective Neeld explained that some abuse cases she investigates are "historical cases," i.e., the investigation commences sometime after the abuse allegedly occurred. While testifying about investigating historical cases, the following exchange occurred:

> **The State:** And is there – well, in your work, are you familiar with the term "delayed disclosure?"
>
> **Detective Neeld**: Yes
>
> **The State**: And is that something you deal with in your historical cases?
>
> **Detective Neeld**: Always, yes.
>
> **The State**: Can you explain to the jury what a delayed disclosure is?
>
> **Detective Neeld**: So, a delayed disclosure is essentially when a victim is allegedly abused and does not report, again, for months, years, possibly years later. And it can occur for many reasons. Whether its family related, whether they're – they don't feel safe disclosing at the time or maybe they don't want their sibling to be without their mother or their father. There's multiple reasons as to why a victim will wait to disclose incidents of abuse.
>
> **The State**: And you said you see that primarily a lot in historic cases. Do you see that a lot in the child-victim historic cases?
>
> **Detective Neeld**: Yes.

Appellant's trial counsel did not object to any of this testimony. There was no further discussion of delayed reporting during either direct or cross examination.

DISCUSSION

I. K.B.'s Testimony

A. Parties' Contentions

Appellant contends that while K.B.'s excluded testimony is hearsay, it is admissible

under Maryland Rule 5-803(b)(3)[4]:

> *Then Existing Mental, Emotional, or Physical Condition*. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Md. Rule 5-803(b)(3).

Appellant argues the stricken testimony was a statement of G.B.s then existing intent to lie about being assaulted.

The State raises three counterarguments. First, the issue of admissibility of K.B.'s excluded testimony is not preserved for this Court's review because Appellant failed to proffer below the relevance of the excluded testimony at trial. Second, the State argues that the objection to K.B.'s testimony was made because her response was inadmissible "narrative" evidence, not because it was hearsay. Third, the State contends the excluded testimony is not admissible hearsay under Md. Rule 5-803(b)(3).

B. Analysis

At trial, Appellant did not argue that K.B.'s excluded testimony was admissible as a then existing mental, physical, or emotional state under Md. Rule 5-803(b)(3). Accordingly, we decline to address this argument now.

[4] In his brief, Appellant argues that K.B.'s statements are admissible as non-hearsay. This misapprehends the operation of Md. Rule 5-803(b)(3), which allows an otherwise inadmissible hearsay statement to be admitted. These sorts of statements are often referred to as "admissible hearsay." *See, e.g., Copeland v. State*, 196 Md. App. 309, 315 (2010) ("[The] testimony was admissible hearsay under Rule 5-803(b)(3), which sets forth a hearsay exception for 'Then Existing Mental, Emotional, or Physical Condition.'")

When a trial judge sustains an objection and excludes testimony, the proponent of the testimony must explain why it should be admitted. *See Randall v. State*, 223 Md. App. 519, 557 (2015) (quoting *In re Adoption/Guardianship Nos. CAA 92–10852, 92–10853 in Circuit Court for Prince George's Cnty.*, 103 Md.App. 1, 33 (1994)) ("When evidence is inadmissible on its face and admissible only for a limited purpose or under some theory, the proponent must also explain to the court how the evidence is admissible and why it should be received.").

Failure to explain why excluded testimony should be admitted is a failure to preserve the testimony's admissibility for review. *See Ndunguru v. State*, 233 Md. App. 630, 637 ("Here, as indicated, appellant failed to explain why the excluded testimony was admissible [under Md. Rule 5-803(b)(3)]. Accordingly, this contention is not preserved for this Court's review, and we decline to address it.").

After the trial judge sustained the State's objection, Appellant's trial counsel never sought to clarify the grounds for the objection and did not argue that K.B.'s testimony was admissible hearsay under Md. Rule 5-803(b)(3). *Supra* pp. 3-4. Instead, Defense counsel moved on to a different line of questioning where she tried to get K.B. to identify an email between her and G.B. *Id*.

Because Appellant's trial counsel did not elicit the grounds of the objection from the State, it is possible that the trial judge excluded the evidence because it was unresponsive narrative evidence. Under Maryland Rule 5-611)(a), trial judges are permitted to exclude "narrative testimony" — overly long answers which do not respond to the pending question:

> "**Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Md. Rule 5-611(a). *See also* Joseph F. Murphy, Jr. & Erin C. Murphy, *Maryland Evidence Handbook* § 1205 (5th ed. 2023) ("Witnesses occasionally testify in 'narrative form,' giving lengthy responses to general questions. Under Md. Rule 5-611(a), the trial judge has discretion to permit or to prohibit narrative form testimony.").

When K.B. was asked how she found out about the case, her description of the conversation she had with G.B. was an unnecessary narrative which was not responsive to the question she was asked. It is therefore possible that the trial judge chose to exclude the answer under Md. Rule 5-611(a), and not because her response was hearsay.

Having failed to argue that K.B.'s testimony was admissible hearsay at trial, Appellant may not do so for the first time now. We decline to review this issue.

II. Detective Neeld's Testimony

A. Parties' Contentions

Appellant argues that the trial judge improperly admitted lay testimony from Detective Neeld, when she testified that victims of sexual assaults often report sexual assaults several years after the fact. Appellant argues that this testimony was expert opinion testimony, only admissible if Detective Neeld had first been qualified as an expert witness.

While Appellant acknowledges that his trial counsel did not object to the testimony

at trial, he asks this Court to review its admission under the plain error doctrine.

Appellee contends that review under the plain error doctrine would be inappropriate in this case, and that the objection is not preserved for review. Appellee further argues Detective Neeld's testimony was an admissible lay opinion, as it was rationally based on her perception.

B. Analysis

Failure to Preserve and Plain Error Doctrine

We also decline to address this argument. Appellant's counsel did not object to Detective Neeld's testimony at trial, and the plain error doctrine does not apply.

Maryland Rule 4-323 governs how to properly object to evidence:

> *Objections to Evidence*. 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. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

Md. Rule 4-323(a).

Proper objections are necessary to preserve issues for appeal:

> Maryland Rule 4–323 sets forth the method of making objections to the admission of evidence in criminal trials. Maryland Rule 4–323(a) states, in part, that 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. This is referred to as the contemporaneous objection rule.

> We recognized in some older cases that to preserve an issue on appeal in regard to the admissibility of evidence, generally speaking there must be an objection made to the question eliciting the allegedly objectionable answer. Moreover, generally speaking, specific objection should be made to each question propounded, if the answer thereto is claimed to be inadmissible.
>
> Yet, as the Court of Special Appeals noted trial advocates were oftentimes obligated to lodge repetitive and disruptive objections, over and over again, even though everyone in the courtroom knew that the objections were going to be overruled.
>
> Consequently, Maryland Rule 4–323(b), adopted in 1984, was created to provide a trial judge with the discretion to grant a continuing objection and thus obviates the need to object persistently to similar lines of questions that fall within the scope of the granted objection.

Kang v. State, 393 Md. 97, 119 (2006) (quoting Maryland Rule 4-323; *Southern Management v. Taha*, 378 Md. 461, 499 (2003); *Rose v. State*, 240 Md. 65, 69 (1965); *State Roads Comm. v. Barre*, 220 Md. 91, 94 (1959); *Kang v. State*, 163 Md. App 22, 44 (2005)) (cleaned up).

As Appellant concedes, his trial counsel did not object to Detective Neeld's testimony about delayed reporting, nor was the testimony within the scope of any continuing objection. Without an objection, the admissibility of Detective Neeld's testimony was not preserved for review.

Therefore, Appellant asks us to exercise review absent an objection under Maryland Rule 8-131(a):

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by an appellate court whether or not raised in and decided by the trial court. Ordinarily, 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.

Md. Rule 8-131(a).

This type of review is commonly called the "plain error doctrine." The plain error doctrine allows an appellate court to consider an unobjected to error under rare circumstances. *Chaney v. State*, 397 Md. 460, 468 ("This Court does have discretion under Maryland Rule 8–131(a) to address an issue that was not raised in or decided by the trial court, however. It is a discretion that appellate courts should rarely exercise…").

Maryland appellate courts use a four-factor test to determine whether an issue qualifies for review under the plain error doctrine:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Beckwitt v. State, 477 Md. 398, 464 (2022) (quoting *Newton v. State*, 455 Md 341, 364 (2017)) (cleaned up).

Clear or Obvious Legal Error

All four factors must be satisfied before an appellate court conducts plain error review. *Givens v. State*, 449 Md. 433, 480 (2016). Failure to satisfy one factor makes plain error review unavailable, so we need not discuss all four. *Id*. We focus our review on Appellant's failure to satisfy factor 2, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Beckwitt*, 477 Md. at 464.

To deny plain-error review we need not fully accept the State's positions. The State

only needs to reasonably dispute Appellant's position. We find it is reasonable to dispute that Detective Neeld's testimony was expert opinion testimony.

Opinion Testimony

Opinion testimony is "testimony of a witness, given or offered in the trial of an action, that the witness is of the opinion that some fact pertinent to the case exists or does not exist…" *Fullbright v. State*, 168 Md. App. 168, 181 (2006). There are two types of opinion testimony, lay opinion testimony and expert opinion testimony. Lay opinion testimony is permitted under Maryland Rule 5-701:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Md. Rule 5-701.

While lay opinion testimony is limited to opinions or inferences rationally based on the perception of the witness, expert opinion testimony is based on "specialized knowledge, skill, experience, training, or education," and is not limited to matters actually perceived by the witness. *Ragland v. State*, 385 Md. 706, 717 (2005).

A witness must first be qualified as an expert witness under Maryland Rule 5-702 before giving expert opinion testimony:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
>
> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
>
> (2) the appropriateness of the expert testimony on the particular

> subject, and
> (3) whether a sufficient factual basis exists to support the expert testimony.

Md. Rule 5-702.

We note that this is not the first occasion we have considered whether Detective Needld gave lay or expert opinion testimony. In an unreported opinion in 2022[5], we considered similar testimony from Detective Needld explaining delayed reports:

> **The State**: And in the specific age range of 11 to 13, in your personal knowledge, training and experience, is it common or have you seen children between that age range not disclose and then disclose incidents that have happened to them?
>
> **Detective Needld**: Yes, ma'am, I have.
>
> **The State**: And would you say that happens a frequent amount of time?
>
> **Detective Needld**: It does occur. And victims have their different reasons for why they would initially not disclose and then later disclose.

Reimundo v. State, No. 1372, Sept. Term, 2020, 2022 WL 2230892, at *7 (Md. Ct. Spec. App. June 21, 2022).

Though we did not decide what sort of testimony Detective Needld gave, we expressed skepticism toward the State's position that it was lay opinion testimony:

> If we were to apply only *Ragland*, it is arguable that Detective Needld's testimony was based on her professional training, knowledge and experience as a child sexual abuse investigator in the Prince George's County Police Department. Indeed, it is not unreasonable to conclude that most laypersons are unlikely to be familiar with the habits of 11 to 13 year-olds in reporting child sexual abuse.

Id.

[5] Though this Court is not bound by our unreported decisions, we find much of the reasoning in *Reimundo* is applicable in this case.

The same can be said about Detective Neeld's testimony in the instant case. It is unlikely that a lay person would know the typical time frame for reporting a sexual assault without Detective Neeld's experiences as a sexual assault investigator.

However, in *Reimundo* we also noted that Detective Neeld's testimony was not clearly opinion testimony at all. We compared Detective Neeld's testimony in *Reimundo* to testimony this Court considered in *Norwood v State*, 222 Md. App 620 (2015). In that case, a first responder gave admissible lay opinion testimony about other knife wounds he had seen in the past:

> First, we observe that [the witness] never offered any opinion, lay or expert, regarding the cause of [the Defendant's] hand injury. His testimony regarding the cause of [the Defendant's] injury was stricken by the trial court and the jury was instructed not to consider how [the witness] thinks the injury happened. Rather, [the witness] testified about injuries he had observed in the past from slipped knives and described the injury he observed on [the Defendant's] hand.

Norwood, 222 Md. App. at 646.

In *Reimundo*, we found this to be an apt comparison to Detective Neeld's testimony about delayed reporting:

> Detective Neeld did not testify as to the specific reason why [the victim] may have delayed reporting or denied that any abuse occurred during prior investigations. Rather, her testimony was limited to her personal knowledge and observation from other cases. Thus, Norwood is instructive, if not necessarily controlling. It could be argued that, as we found in Norwood, that this was simply factual evidence and not a lay opinion, especially under these circumstances of the testimony having been given by the lead detective with years of experience in the difficult field of investigating child sexual abuse cases.

Reimundo, 2022 WL 2230892 at *8.

We find the same to be true in the instant case. Detective Neeld did not offer an

opinion on whether the victims' report was delayed or if such a delay impacted their credibility. Instead, she only testified about reports she had observed in the past. Therefore, it is unclear whether she offered opinion testimony at all.

In short, we conclude that there is a reasonable dispute as to whether Detective Needl's testimony should have been admitted. Without a clear or obvious legal error, we will not conduct plain error review.

CONCLUSION

Accordingly, we affirm the decision of the trial court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.