Circuit Court for Prince George's County
Case No. CT211062X

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2241

September Term, 2022

LUIS ALBERTO MELGAR-DELGADO

v.

STATE OF MARYLAND

Friedman,
Zic,
Storm, Harry C.
(Specially Assigned),

JJ.

Opinion by Storm, J.

Filed: November 22, 2024

*This is an unreported opinion. It 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).

Appellant, Luis Alberto Melgar-Delgado, was convicted by a jury in the Circuit Court for Prince George's County of sex abuse of a minor and third-degree sex offense. He raises one issue on appeal: "Did the court err in finding statements made four months after an alleged sexual assault admissible under the "prompt complaint" hearsay exception?"

For reasons that follow, we answer that question in the affirmative. We additionally find that Appellant's objection to the admission of the statements was preserved and that the error was not harmless.

Background

Appellant's teenage stepdaughter ("E.S.") testified that in May of 2021 when she was fourteen years old, Appellant (who was age thirty-seven at the time) had vaginal intercourse with her.[1] E.S. did not immediately disclose the incident to anyone.[2] On

[1] According to E.S. the intercourse occurred in May while her mother was out of town for a church retreat. E.S. testified that she was also subjected to two incidents of Appellant's unwanted kissing in the month before the May incident.

[2] E.S. testified that she did not tell her mother because she was afraid and thought that her mother would not believe her. Her mother had left her in Honduras when she was 13 months old; E.S. had only been in the United States since January 2020; and she did not really know her mother well. She testified that her younger brother Brian (age thirteen at the time) was home at the time the intercourse incident happened, as was her younger sister. E.S. testified that she and Brian had lived together in Honduras, and that Brian was also now living in the home where the incident occurred. According to E.S. she did not say anything to Brian because "how am I going to tell something like that to a man?" E.S. testified that on one occasion after the incident, she and Appellant talked about it and E.S. told him she was going to tell her mother. According to E.S., Appellant did not say anything in response. E.S. also testified that it was Appellant who paid the rent and brought the money home.

September 14, 2021, however, two students at the school E.S. attended discovered a letter/diary E.S. had written to herself at some unspecified time after the May incident.[3] The students brought the letter to the school office and an investigation commenced. That investigation led to the disclosures by E.S. which are the focus of this appeal.

Appellant moved *in limine* "to exclude any 'prompt complaint' evidence or testimony by any Prince George's County Public School ('PGPS') staff, police officers, social workers, or any other persons to whom the alleged victim reported that the Defendant had sexual contacts or sexual acts with her ***unless and until*** a proper foundation for a prompt complaint under Md. Rule 5-802.1(d) is established." (Emphasis in original).

At trial, after argument on the motion and after hearing testimony from E.S., Appellant's motion to exclude the statements was denied. The trial judge stated:

> Okay. So I'm going to – I think it was a prompt notice, because it was the first time anyone asked her about it, and it just wasn't something that she was going to say on her own and didn't. So the only thing that they can talk about though is who, when and what.

Following that ruling, several witnesses testified about their conversations with E.S. regarding the incident as described in the letter/diary. E.S. was first questioned about it by Elisha Janifer, a school counsellor to whom the matter had been referred. In response to questioning by Ms. Janifer,[4] E.S. disclosed that she had been sexually abused by her step-

[3] E.S. testified that she did not intend to give this document to anyone and acknowledged that she just wrote it for the sake of writing it.

[4] Following oral argument, we requested supplemental briefing from the parties on the question: "How and to what extent, if any, is the Md. Rule 5-802.1 prompt complaint analysis affected by the fact that the victim's disclosures in this case were not spontaneous,

father in their home in May 2021. Ms. Janifer reported this information to the assistant principal, who made a 9-1-1 call. Deputy Acosta responded to that call. He testified that he spoke with E.S., and that she disclosed sexual abuse by her stepfather that had occurred in May 2021 in her room. The State next called Detective Cruz, who testified that E.S. was interviewed in his presence at the Child Advocacy Center. There she disclosed that she was the victim of sexual abuse (intercourse) by Appellant in her home in May of 2021. Appellant testified and denied the accusations made against him. There was no physical evidence. Additional facts will be discussed as needed below.

Discussion

According to Appellant, "the trial [was] a proverbial 'she said, he said.'" For this reason, asserts Appellant, the admission of the four bolstering hearsay statements under Md. Rule 5-802.1 was particularly prejudicial. The State on the other hand contends that the statements were properly admitted. Additionally, the State argues that any objection to the admission of the statements was not preserved for appellate review because Appellant failed to renew his objection when the evidence was offered. Moreover, according to the State, any error in admitting the statements was harmless, even assuming that the issue was preserved. We will first address the waiver/preservation issue.

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but instead were made in response to questioning by school personnel and law enforcement?" In response each of the parties filed a supplemental brief addressing the issue.

The Objection was not Waived

The State contends that any objection was waived because Appellant failed to renew his objection each time the objectionable evidence was offered. *See Klauenberg v. State*, 355 Md. 528, 539 (1999) ("When a motion *in limine* to exclude evidence is denied, the issue of admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial.").[5] Appellant disagrees. He argues that the "temporal proximity" rule applies, and that his objection was properly preserved. *See Watson v. State*, 311 Md. 370, 372 n.1 (1986) ("We find that Watson preserved his objection . . . in spite of the fact that he did not object at the precise moment the testimony was elicited . . . requiring Watson to make yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance." *See also*, *Cure v. State*, 421 Md. 300, 322 (2011) (despite a full day passing between the preliminary ruling and the conviction's introduction, nothing happened in the interim that would "lead a reasonable person to believe that the trial judge would reconsider his decision on the motion."); *Norton v. State*, 217 Md. App. 388, 397 (2014) ("given the extensive conversation of the issue that occurred

[5] *See also Reed v. State*, 353 Md. 628, 637 (1999); *Prout v. State*, 311 Md. 348, 356 (1988) ("If the trial judge admits questionable evidence, the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve his objection for appellate review."). In a dissenting opinion in *Reed*, Judge Raker (joined in dissent by Judge Eldridge) urged the Court to "eliminate the requirement of a contemporaneous objection to preserve for appellate review a trial court's denial of a motion *in limine,* 353 Md. at 643-44, noting that the "*Prout* rule is a real trap for Maryland practitioners." *Id.*, at 647.

during the motion *in limine*, and court's clear ruling denying the motion just moments before, 'a subsequent objection would [have been] futile.'") (cleaned up); *Dyce v. State*, 85 Md. App. 193, 198 (1990) ("Given the temporal proximity between the ruling on the motion *in limine* and the prosecutor's initial inquiry on cross-examination we shall exercise our discretion under Md. Rule 8-131 and consider the issue, not withstanding the lack of literal compliance with rule 4-323(a).").

In this case, the motion *in limine* was argued at trial on November 29, 2022 outside the presence of the jury. After hearing argument, and following discussion about how the letter/diary itself would be treated, the jury was brought into the courtroom. The State called E.S. as a witness. After hearing relevant portions of E.S.'s testimony, and after the jury had been excused for the day, the judge addressed the prompt complaint issue and found that the statements could be admitted.[6] The court then recessed for the day.

The following morning, after very brief additional testimony from E.S., the State proceeded with its prompt complaint evidence, starting with the 9-1-1 call that was made by school personnel based on the information from the "prompt complaint". Appellant's counsel raised additional objections about the admissibility of the call, including that it was

[6] The court recessed early that day because noises were emanating from Appellant's ankle monitor. Just prior to taking up the prompt complaint issue after the jury had been excused, the trial judge commented to counsel that while the trial would be resuming the next day, "[w]e can discuss the other stuff and we will be clear tomorrow." The "other stuff" included the prompt complaint issue.

"hearsay within hearsay;" however, no express renewal of the motion in limine objection was made. The hearsay objection was overruled and the 9-1-1 call was played for the jury.[7]

When Ms. Janifer, a school counselor, began testifying, she was shown the letter/diary. She testified that "two students found the paper that [E.S.] wrote, and they brought it to the office." Ms. Janifer said that she read it and "immediately had to identify who the student was." Appellant's counsel objected and a bench conference ensued.[8] When her testimony continued, Ms. Janifer testified that she "went and got the child from class," brought her to her office, and "asked her if she was the one who wrote it." Several questions later counsel were again called to the bench. An objection by Appellant's counsel was overruled,[9] and Ms. Janifer proceeded to testify that E.S. told her she had been sexually abused by her stepfather, in her home in May of 2021, and that it involved vaginal intercourse.

[7] The 9-1-1 call included a statement that "the child is allegedly being sexually abused by the stepfather in the house."

[8] At this bench conference, Appellant's counsel acknowledged that the witness was "being called *for purposes of a prompt complaint report*" and that it was his understanding that "counsel [the State] was going to lead her through it" but that Ms. Janifer's testimony was going beyond the intended scope. (emphasis added) The scope was clarified and Ms. Janifer's testimony continued

[9] Counsel for Appellant again acknowledged his understanding that *the witness was being called for the prompt complaint*. (emphasis added) He again objected to the leading questions going further than necessary. The prosecutor responded by acknowledging that "I can certainly limit the hearsay to the prompt complaint . . ." The court overruled the objection and indicated that "You can lead her through what she told the girl." Nevertheless, Appellant's counsel noted that "I would still object to the relevance of what she did after but I understand Your Honor's rulings then."

Officer Acosta was the next State's witness. He testified that he responded to the 9-1-1 call and that he spoke with E.S., and that his body-worn camera was recording. At a bench conference, counsel for Appellant raised an "objection to the video coming in" but that if it was "allowed in that only what's necessary and *falls under the complaint section* be allowed." (emphasis added) The officer then testified that he asked E.S. "can you explain to me what's going on? What exactly happened?"[10] E.S. responded by telling him about the sexual assault that occurred in May of 2021, that it involved her stepfather, that the abuse was vaginal intercourse, and that it occurred in her room.

The last State's witness was Detective Cruz of the Prince George's County Police Department Special Crimes Division (a child and vulnerable adult abuse police unit). He testified to the role of his unit in investigating child sex abuse cases. Appellant's counsel objected several times during his testimony, including to a question about the meaning of "delayed disclosure;" however, no objection related expressly to the prompt disclosure issue. Detective Cruz ultimately testified that E.S. was interviewed at the Child Advocacy Center in September 2021, that he watched the interview, and that she disclosed that she was sexually abused by Appellant, in her home, that it involved vaginal intercourse, and that it occurred in May of 2021.

It is clear from the record here that after the court's ruling on the motion *in limine*, counsel for Appellant treated the ruling as a final ruling. Considering the brief trial time

[10] Appellant's counsel interposed additional objections during the officer's testimony, but not as related to the prompt complaint aspect of the testimony.

that elapsed from the court's ruling on the prompt complaint issue on November 29th and the testimony from the witnesses the next day (all of the State's prompt complaint witnesses had testified by 11:30 a.m. on November 30th, following the court's ruling) there was "nothing that would lead a reasonable person to believe that the trial judge would reconsider [her] decision on the motion." *Cure v. State*, 421 Md. at 322. The court's ruling on the issue was definitive, and it appears that the court and the parties treated it as such. Here, as in *Dyce v. State*, "[g]iven the temporal proximity between the ruling on the motion *in limine* and the prosecutor's [inquiries] about the issue, we shall exercise our discretion under Md. Rule 8-131 and consider the issue, notwithstanding the lack of literal compliance with Rule 4-323(a)." 85 Md. App. at 198.[11]

The Trial Court Erred in Admitting the Hearsay Statements

While the admission or exclusion of evidence is "generally committed to the sound discretion of the trial court," *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 406 (2012), a court has "no discretion to admit hearsay in the absence of a provision providing for its admissibility." *Bernadyn v. State*, 390 Md. 1, 8 (2005). "Hearsay is presumptively inadmissible unless it falls under one of the recognized hearsay exceptions. *Vigna v. State*, 241 Md. App. 704, 729 (2019). This Court reviews *de novo* whether hearsay evidence was properly admitted under a hearsay exception. *Id*. We review for clear error,

[11] Md. Rule 4-323(a) provides in part that "[a]n 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."

however, any factual findings made by the trial court when evaluating whether a hearsay exception applied. *Gordon v. State*, 431 Md. 527, 538 (2013). As summarized in *Gordon*:

> Under this two-dimensional approach, the trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed *de novo*, but the trial court's factual findings will not be disturbed absent clear error. (cleaned up)

Id.

The statements that are the focus of our consideration were unquestionably hearsay,[12] but were admitted under the hearsay exception for "prompt complaint of sexually assaultive behavior" under Rule 5-802.1(d). That exception provides for the admission of a prior statement of a witness who testifies at trial and who is subject to cross examination where the statement "is one of prompt complaint of sexually assaultive behavior to which the declarant was subjected if the statement is consistent with the declarant's testimony[.]" The declarant in this case, E.S., testified and was subject to cross examination about her statements. The issue is whether the multiple statements,[13] made four months after the incident, qualified as "prompt complaints."

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[12] *See* Md. Rule 5-801(c) ("'Hearsay'" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to provide the truth of the matter asserted.").

[13] In *Parker v. State*, this Court recognized "that Rule 5-802.1(d) contains no express limitation on the number of complaints made by the victim that may be admitted at trial" and found "no valid basis to engraft such an implied limitation onto the Rule." 156 Md. App. 252, 265 (2004). In *Parker*, the statements were made by the victim within hours of, and on the day following, the sexual assault.

This Court has discussed the Rule 5-802.1 prompt complaint exception in multiple cases. In *Vigna v. State*, 241 Md. App. 704, 730 (2019) we said:

> Promptness in this context is not subject to any "immutable time frame." *Gaerian v. State*, 159 Md. App. 527, 541, 860 A.2d 396 (2004). To the contrary, "promptness is a flexible concept, tied to the circumstances of the particular case." *Id.* at 540, 860 A.2d 396. A complaint of sexual assault may be considered prompt if the victim's statement is made "without a delay which is unexplained or is inconsistent with the occurrence of the offense." *Harmony v. State*, 88 Md. App. 306, 321, 594 A.2d 1182 (1991) (cleaned up). And in making that determination, we take into account "what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so." *Nelson v. State*, 137 Md. App. 402, 418, 768 A.2d 738 (2001). When the complainant is a young child, as in this case, the time analysis can include factors related to "the natural fear, ignorance, and susceptibility to intimidation that is unique to a young child's make-up" including "the relationship between the complainant and the defendant" and "whether the defendant held a position of trust in the complainant's life." *Gaerian*, 159 Md. App. at 542, 860 A.2d 396 (*quoting Commonwealth v. Fleury*, 417 Mass. 810, 632 N.E.2d 1230 (1994)).

And, in *Gaerian v. State*, 159 Md. App. 527, 537 (2004) we explained the purpose and parameters of the rule as follows:

> The purpose of Maryland's prompt complaint of sexual assault exception to the rule against hearsay "is to corroborate the victim's testimony, and not simply to 'combat stereotypes held by jurors regarding nonreporting victims.'" *Parker,* 156 Md. App. at 267, 846 A.2d 485 (citation omitted). The victim's complaint to another is admissible as substantive evidence to contradict the inference that the failure to complain was inconsistent with the victim's trial testimony concerning the attack. *Nelson,* 137 Md. App. at 411, 768 A.2d 738 (stating that "the legally sanctioned function of the prompt complaint of a sexual attack is to give added weight to the credibility of the victim").

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> As the [Supreme Court of Maryland] said in *State v. Werner*, 302 Md. 550, 563, 489 A.2d 1119 (1985), "In prosecutions for sex offenses, evidence of the victim's complaint, coupled with the circumstances of the complaint, is admissible as part of the prosecution's case if the complaint was made in a recent period of time after the offense, but such evidence is inadmissible as part of the prosecution's case in chief if the complaint was not made at the time of or relatively soon after the crime."
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> What the fact of a timely complaint forestalls or counteracts is frequently a defense based upon consent." *Cole v. State*, 83 Md. Appl 279, 290, 574 A.2d 326, *cert. denied*, 321 Md. 68, 580 A.2d 1077 (1990).[14]

The circuit court, in allowing the various hearsay statements to be admitted under the Rule 5-802.1 exception, found that the statements qualified as "prompt notice, because it was the first time anyone asked her about it, and it just wasn't something that she was going to say on her own and didn't." In our *de novo* review of the circuit court's legal determination to admit the statements, we find that the circuit court erred.

Here, E.S. made the disclosures approximately four months after the incident. The disclosures were not made spontaneously; rather, E.S. made them only after the discovery of the letter/diary and after being questioned about its content. The explanation provided by the trial judge for admitting the statements was that "it was the first time anyone asked

[14] *See also Choate v. State*, 214 Md. App. 118, 146 (2013) (quoting *Nelson v. State*, 137 Md. App. at 411 and noting that that the "legally sanctioned function of the prompt complaint exception is to give added weight to the credibility of the victim" by corroborating the victim's account of the alleged assault.). *See also*, 6A Lynn McLain, *Maryland Evidence State and Federal* §801(2):2 at 305 (3d ed. 2014) ("Admission of the fact that a prompt complaint was made will forestall the creation of reasonable doubt in the jurors' minds, simply because they have not heard when the first report of rape was made.").

her about it, and it just wasn't something that she was going to say on her own and didn't." But that is not the standard for judging whether a "complaint" was "prompt." If it were, virtually any statement made in response to an inquiry could be deemed admissible. The fact that nobody asked E.S. about it is not an explanation for the delay in the disclosure.[15] It is simply an explanation for how and why the investigation began when it did. Moreover, the fact that it "wasn't something that she was going to say on her own and didn't," while perhaps true, seems inconsistent with the logic behind the "prompt complaint" hearsay exception – i.e., that "the victim's complaint to another is admissible . . . to contradict the inference that the failure to complain was inconsistent with the victim's trial testimony concerning the attack." *Gaerian v. State*, 159 Md. App. at 537.

While there was evidence here from which the trial court could have found an explanation for E.S. not disclosing the incident to her mother, younger brother or perhaps others,[16] the court made no findings in that regard. Instead, the court found the statements admissible because no one had asked E.S. about it in the preceding four months – essentially determining that the statements were admissible because they were not

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[15] Indeed, E.S. testified that she had not intended that her letter/diary be given to anyone.

[16] We are mindful of the fact that E.S. was a child, and that consideration should be given to such things as fear, intimidation, nature of the relationship and the like. *See Gaerian v. State*, 159 Md. App. at 542.

spontaneous.[17] While the fact that a victim's statement was made in response to an inquiry may not, standing alone, preclude a "prompt complaint" finding, *see e.g. Vigna v. State*, 241 Md. App. at 713 (mentioning that victim was first asked if she was okay); *Robinson v. State*, 151 Md. App. 384, 391 (2003) (recounting that victim's statement was made in response to roommate's questions); *Cantrell v. State*, 50 Md. App. 331 (1981) (in a case decided prior to the adoption of Rule 5-802.1(d), victim's mother testified that her daughter, who was bruised and had a handcuff hanging from her wrist, told her in response to the question "what happened?" that she had been raped)[18] the fact that a statement was not spontaneous and was not previously made because no one asked about it cannot, standing alone, justify its admission under Rule 5-802.1(d), particularly when the delay was as extensive as it was here.[19]

The Error was not Harmless

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[17] This is not the standard. A trial court "should consider whether the complaint is prompt as 'measured by the expectation of what a reasonable victim, considering age and family involvement and other circumstances, would probably do by way of complaining once it became safe and feasible to do so.'" *Gaerian v. State,* 159 Md. App. at 544.

[18] Whether the victim's statement was spontaneous or in response to limited questioning or extensive interrogation is a consideration in determining whether a statement should be admitted as a "prompt complaint." For a general discussion of the issue, *see D*ale Joseph Gilsinger, Annotation, *Application of Common-Law 'Fresh Complaint' Doctrine as to Admissibility of Alleged Victim's Disclosure of Sexual Offense – Post 1950 Cases*, 39 A.L.R. 6th 257, 26, 27 (2008).

[19] *See Gross v. State*, 481 Md. 233, 249 (2022) (in the course of affirming this Court's unreported decision, the Supreme Court noted that this Court had noted (albeit in *dictum*, that it "was not persuaded that 'statements [the victim] made to her Grandmother several months after the abuse ended [would] qualify as prompt.'"

The State argues that any error was harmless because the court properly limited the scope of the statements, without narrative detail. We disagree. Based upon our independent review of the record, we cannot "declare a belief, beyond a reasonable doubt, that the error [in admitting the multiple statements under Rule 5-802.1(d) that nevertheless confirmed the essence of E.S's claim] in no way influenced the verdict." *Gross v. State*, 481 Md. at 254, *quoting Dorsey v. State*, 276 Md. 638, 659 (1976). Given the absence of physical or other evidence, the case necessarily turned on whether the jury believed E.S. or Appellant. The repetition of E.S.'s statements multiple times by other witnesses was therefore significant, and prejudicial. We cannot say that hearing multiple bolstering statements in no way impacted the jury's decision.

<u>Conclusion</u>

In conclusion, because we find that the trial court erred in admitting the statements without making findings necessary to justify their admission as a prompt complaint under Rule 5-802.1(d), *see* n. 15 above, the judgments of the circuit court will be reversed, and the case remanded to the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY ARE REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.