Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000207

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2281

September Term, 2017

DENNIS MICHAEL DELISLE

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: January 3, 2019

A jury sitting in the Circuit Court for Anne Arundel County convicted Dennis Delisle, the appellant, of sex abuse of a minor, three counts of third-degree sex offense, fourth-degree sex offense, and incest. The court sentenced him to a combined 60 years in prison, suspending all but 30 of those years, and a period of probation. Mr. Delisle contends that his convictions must be reversed because the trial court erred in (1) permitting the State to introduce expert witness testimony regarding delayed disclosure of sexual assault by victims, (2) restricting his cross-examination of the victim, and (3) denying his request for a missing witness jury instruction. We disagree and so affirm.

BACKGROUND

The State's theory of prosecution was that Mr. Delisle sexually abused his daughter, S.L., from the time she was 13 until she was 17 years old. Mr. Delisle categorically denied the allegations.

S.L. was born on January 20, 1995. Her family, including Mr. Delisle and S.L.'s mother and two siblings, moved frequently. In 2008, the family moved to a house in West Virginia. According to S.L.'s trial testimony, Mr. Delisle's abuse began there as part of a bedtime ritual that initially ended with a peck on the lips. Over time, the peck extended in length of time and progressed to Mr. Delisle using his tongue. He later began fondling her upper body and, eventually, her vagina. The touching later progressed to Mr. Delisle lying in bed with S.L. and grinding his penis against her buttocks. She testified that Mr. Delisle would stay in her room anywhere from minutes to hours. Throughout the abuse, Mr. Delisle repeatedly told her that they had a "special bond" that "no one would understand."

S.L. testified that she brought the touching to her mother's attention at some point while they were in West Virginia. Her mother, who warned that reporting the abuse would "ruin the family," did not stop it. After about a year in West Virginia, the family moved to a house in Glen Burnie, where the sexual abuse continued to escalate. Mr. Delisle began to place his penis between her thighs while thrusting and eventually inserted his penis in her vagina. S.L. testified about specific instances of vaginal intercourse in the Glen Burnie house and stated that the abuse continued when they moved to houses in Brooklyn Park and then Halethorpe. The abuse stopped only when S.L. threatened to report her father to the police.

In 2013, S.L. joined the armed services and, a few months later, she married. She did not initially tell her husband about the abuse, although she told him that "something" had happened. The couple divorced in 2015.

According to S.L., she did not initially tell either of her siblings about the abuse but eventually told them both. She told her younger sister, K.D., "everything" at some point after she gained legal custody of K.D. in the spring of 2016. On the same day that she disclosed the abuse to her sister, S.L. reported it to a supervisor at work. The supervisor then reported it to an investigative branch for the armed services. Although she initially resisted speaking to the investigator, S.L. testified that she changed her mind after she saw Facebook pictures of Mr. Delisle's girlfriend's young daughters.

In addition to S.L., the State presented testimony from several family members and an expert witness. Mr. Delisle's brother testified as to changes in S.L. around the time the family moved from West Virginia to Maryland. S.L.'s ex-husband testified that she had

not initially shared with him any details about the abuse but that she later told him that it began when the family lived in West Virginia and continued through her senior year in high school. S.L.'s brother testified as to "weird things" he noticed in S.L.'s relationship with Mr. Delisle. He also testified that although she had said nothing to him at the time, S.L. eventually told him that Mr. Delisle "had raped her multiple times."

The State called Erin Lemon, a social work supervisor with the Anne Arundel County Department of Social Services, whom the court accepted as an expert in the fields of child sexual abuse, delayed disclosure of sexual abuse, and child development. Ms. Lemon discussed the concept of delayed disclosure and listed several factors that may cause a child to delay a report of sexual abuse, including the child's age and development; the child's relationship with the alleged perpetrator; the "grooming process," in which a perpetrator subtly manipulates the child; and the child's own understanding of what he or she is experiencing. Based on her experiences, Ms. Lemon opined that: "Children who have experienced sexual abuse, especially by someone who they know and trust, are very unlikely to come forward. Delay is very common in coming forward . . . ." Ms. Lemon, who had never diagnosed or treated S.L., did not offer any opinions specific to S.L. or S.L.'s delayed disclosure of abuse.

Mr. Delisle testified in his defense. He denied ever sexually assaulting S.L. He also offered testimony from other witnesses as to his honesty and the witnesses' observations that Mr. Delisle's interactions with S.L. had always seemed appropriate.

DISCUSSION

I. MR. DELISLE DID NOT PRESERVE HIS OBJECTION TO MS. LEMON'S EXPERT TESTIMONY.

Mr. Delisle first argues that the trial court erred when it admitted Ms. Lemon's expert testimony on the "delayed disclosure phenomenon" of victims of child sexual abuse. Specifically, Mr. Delisle argues that portions of Ms. Lemon's testimony were contradictory and that the "testimony gave an unfair boost" to S.L.'s credibility. The State responds that Mr. Delisle has not preserved this argument for our review because he did not object to the expert's testimony at trial and that the argument, even if preserved, lacks merit. We agree with the State that the argument is not preserved and so we do not address it.

Under Rule 4-323(a), an objection is waived unless it is "made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." Moreover, if an objection is made at trial and specific grounds for the objection are given, all other grounds are waived. *Gutierrez v. State*, 423 Md. 476, 488 (2011). The requirement to object at the time evidence is offered at trial exists even when the party previously challenged the evidence in a motion in limine. *Reed v. State*, 353 Md. 628, 637 (1999) ("[W]here a party makes a motion *in limine* to exclude irrelevant or otherwise inadmissible evidence, and that evidence is subsequently admitted, the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve [its] objection for appellate review.") (internal quotation marks and citation omitted). A motion in limine does not serve as a continuing objection. *Beghtol v. Michael*, 80 Md. App. 387,

393 (1989). As a result, "[f]ailure to object [at trial] results in the non-preservation of the issue for appellate review." *Hickman v. State*, 76 Md. App. 111, 117 (1988).

Here, Mr. Delisle filed a pre-trial motion in limine to exclude Ms. Lemon's testimony. The circuit court heard argument on, and then denied, that motion about a month before trial. At trial, the court accepted Ms. Lemon as an expert in child sexual abuse, delayed disclosure, and childhood development. During the State's examination of Ms. Lemon, Mr. Delisle objected only once, when the State asked what effect, if any, threats might have on a child's willingness to disclose abuse. Mr. Delisle's counsel objected that "there were no threats here." Because Mr. Delisle never objected at trial to Ms. Lemon's testimony for the reasons he now asserts on appeal, he has failed to preserve his appellate argument for our review and we decline to consider it here. *See* Rule 8-131(a) ("Ordinarily, the 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 . . . .").

II. IN THE ABSENCE OF A SHOWING OF RELEVANCE, THE TRIAL COURT DID NOT ERR IN PRECLUDING MR. DELISLE FROM CROSS-EXAMINING S.L. ABOUT HER MENTAL HEALTH ISSUES.

Mr. Delisle's second contention is that the trial court erred in restricting his cross-examination of S.L. concerning her mental health and medications in four specific instances. He argues that the trial court's restriction was an abuse of discretion because the excluded testimony was "important for the jury to have in order to properly evaluate the testimony of S.L." We agree with the State that, in the absence of a showing that the inquiries were relevant, the circuit court did not err.

"The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him." *Martinez v. State*, 416 Md. 418, 428 (2010). These guarantees afford a defendant the right to cross-examine witnesses regarding matters that affect the witnesses' "biases, interests, or motives to testify falsely." *Pantazes v. State*, 376 Md. 661, 680 (2003). This right, however is "not boundless." *Id.* On the contrary, "[a] trial court may impose reasonable limits on cross-examination when necessary for witness safety or to prevent harassment, prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant." *Martinez*, 416 Md. at 428. The extent to which a witness may be cross-examined rests "within the sound discretion of the trial court." *Pantazes*, 376 Md. at 681. "This discretion is exercised by balancing 'the probative value of the inquiry against the unfair prejudice. . . . Otherwise the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the [jury's] confusion.'" *Id*. (quoting *State v. Cox*, 298 Md. 173, 178 (1983)).

A witness's mental health history is relevant if it "shed[s] light on the witness's credibility." *Testerman v. State*, 61 Md. App. 257, 268 (1985). For that to be the case, the "disorder must be one that would have affected the witness's credibility such as memory, observation and exaggeration." *Id*. Even then, admissibility "is further restricted by the weight of the evidence so indicating." *Reese v. State*, 54 Md. App. 281, 289 (1983). The proponent of questions about a witness's mental health history need not establish that the answers will show that a relevant disorder is present by a preponderance of the evidence, but "need only show that inquiry is likely to so divulge such a defect in the witness." *Id.*

The trial judge, who is required to "liberally permit[] a broad scope of credibility inquiry," must then (1) balance the "waste of judicial time" in pursuing a potentially-irrelevant line of questioning "against the value of exploration" and also (2) "take particular care not to permit annoying, harassing, humiliating and purely prejudicial attacks unrelated to credibility." *Id.* at 289-90.

Mr. Delisle takes issue with four instances in which the court sustained objections to inquiries into S.L.'s mental health and medication. First, after eliciting that S.L. was not "mentally allowed" to reenlist in the Navy, the court sustained an objection to defense counsel asking about the specific nature of the "mental health issues" that precluded her reenlistment. Second, the court sustained an objection to defense counsel questioning S.L. about her mental health diagnoses and also precluded questions about the identity of the specific medications S.L. was taking. The State argued that the diagnoses would only be relevant if Mr. Delisle could establish that they related in some way to S.L.'s credibility, which he had failed to do. The court agreed that the defense had not provided any information suggesting that any of the diagnoses would affect her credibility or recollection and also concluded that the testimony would be unduly prejudicial.

Third, after S.L. testified that three medications she took regularly made her sleepy, the court sustained an objection to a question asking whether the medication "affect[s] your brain in any way." Fourth, after S.L. testified that her medication did not affect her ability to remember, and then clarified that it helped her "clear [her] mind," defense counsel asked whether that meant it helped her "more clearly remember things." Defense counsel withdrew the question after the State objected.

On appeal, Mr. Delisle does not explain how any of these four instances violated his right to cross-examination, nor does he contend that he made a sufficient showing that any of the inquiries were relevant to S.L.'s credibility or recollection. As discussed, a defendant's right to cross-examination is not absolute. We agree with the trial court that Mr. Delisle failed to establish that these inquiries were relevant because there was no showing of any kind that the diagnoses or medications at issue affected her credibility or recollection. *Testerman*, 61 Md. App. at 267-68 (affirming trial court's refusal to permit cross-examination regarding a witness's diagnosis of schizophrenia where the defendant failed to introduce any evidence to show that it "would affect the victim's credibility"). And even had Mr. Delisle established some minimal relevance of the inquiries, we would find no abuse of discretion in the trial court's conclusion that allowing them would have been unduly prejudicial.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO PROPOUND A MISSING WITNESS INSTRUCTION.

Mr. Delisle's final contention is that the trial court erred in refusing to propound a missing witness instruction as to the absence of testimony from his youngest daughter, K.D. Mr. Delisle argues that K.D., who was 17 years old at the time, was "peculiarly available" to the State because S.L. had sole custody of her at the time of trial. The State responds that the trial court did not abuse its discretion in refusing to give the requested instruction because the instruction was only on an evidentiary inference, not an instruction on the law, and Mr. Delisle failed to demonstrate that K.D. was "peculiarly available" to the State. We agree with the State on both counts.

Rule 4-325(c), governing when and how a trial court shall give jury instructions, provides:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

See also Thompson v. State, 393 Md. 291, 302-03 (2006) (confirming that under Rule 4-325(c), a trial court is required to give an instruction that is a correct statement of the law, applicable under the facts, and where the content is not fairly covered elsewhere). We review a trial court's denial of a requested jury instruction overall under an abuse of discretion standard. *Hall v. State*, 437 Md. 534, 539 (2014); *Carter v. State*, 236 Md. App. 456, 475, *cert. denied*, 460 Md. 9 (2018).

Here, the instruction at issue is not an instruction on the applicable law but an instruction as to a permissible evidentiary inference. The inference is set forth in Maryland Pattern Jury Instruction-Criminal ("MPJI-Cr") 3:29, which provides:

> You have heard testimony about (name), who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

"Whether, in given circumstances, an unfavorable inference may be drawn from missing evidence or witnesses is a matter of *fact*, not law, and the court is under no obligation to give an instruction on the matter." *Keyes v. Lerman*, 191 Md. App. 533, 546 (2010). Therefore, "a missing evidence instruction generally need not be given[and] the failure to

give such an instruction is neither error nor an abuse of discretion." *Patterson v. State*, 356 Md. 677, 688 (1999). In other words, while a trial court "is under no obligation to give" a missing witness instruction, "[i]t may do so, and in certain circumstances perhaps it should do so, but . . . failure to do so is not error or an abuse of discretion." *Keyes*, 191 Md. App. at 546 (emphasis omitted).

Moreover, the missing witness rule applies only where the witness at issue is "peculiarly available to one side and not the other." *Woodland v. State*, 62 Md. App. 503, 510 (1985). A witness is considered unavailable to one party where the witness has a relationship with the party that renders that witness "presumptively interested in the outcome" of the case. *Bereano v. State Ethics Comm'n*, 403 Md. 716, 744 (2008). However, the "mere possibility that a witness personally may favor one side over the other does not make that witness peculiarly unavailable to the other side," *id.*, nor does the fact that the witness may be cooperating with one side and not the other, *see Bing Fa Yuen v. State*, 43 Md. App. 109, 112 (1979) (finding the witness equally available to both parties despite the fact that the witness refused to speak with defense counsel, was at the time of trial in a federal witness protection program, and was openly sympathetic to the prosecution); *Hayes v. State*, 57 Md. App. 489, 501 (1984) (concluding that the witness, who was a brother-in-law of the defendant, was not "peculiarly available" to the defendant because "[a] witness will not necessarily testify favorably on behalf of his sister's husband").

Here, Mr. Delisle proffered that if she had been present, K.D. would have testified that she had "no knowledge about sexual actions on her end." Mr. Delisle also argued that

the only contact information he had for K.D. was a Facebook posting and that his counsel had "looked around" for K.D. unsuccessfully in the Glen Burnie area. Because K.D. was legally in S.L.'s custody, he contended, she was peculiarly available to the State. The State countered that the prosecutor had provided defense counsel with K.D.'s address in Virginia and that he could have subpoenaed her to testify, but failed to do so. Mr. Delisle did not contradict the State's assertion. The trial court agreed with the State, finding that K.D. could have been subpoenaed by Mr. Delisle and so was not peculiarly available to the State.

We find no abuse of discretion in the trial court's refusal to provide a missing witness instruction. Mr. Delisle has not persuaded us that the trial court erred in concluding that K.D. was not peculiarly available to the State or that the court otherwise abused its substantial discretion in determining whether to instruct the jury as to this evidentiary inference. We therefore affirm.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.