Circuit Court for Charles County
Case No. C-08-CR-21-000514

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1660

September Term, 2022

SANDERS WRIGHT, JR.

v.

STATE OF MARYLAND

Ripken,
Albright,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: April 11, 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).

A jury sitting in the Circuit Court for Charles County found Sanders Wright, Jr., appellant, guilty of sexual abuse of a minor in his custody and continuing course child sexual abuse. The court imposed a sentence of twenty-five years' imprisonment, with all but twenty years suspended, for sexual abuse of a minor in his custody, and a consecutive term of thirty years' imprisonment, with all but ten years suspended, for continuing course child sexual abuse, to be followed by five years' probation. This timely appeal ensued, presenting two issues:

> I. Should this Court exercise its discretion and vacate [appellant's] conviction and sentence on count two [continuing course child sexual abuse] where the State presented no evidence that the victim was under the age of 14 years at any time during the alleged course of conduct?
>
> II. Did the trial court violate [appellant's] constitutional right of confrontation when it precluded him from cross-examining the complaining witness and her mother on matters central to the complaining witness' credibility in a case in which no physical evidence supported the State's theory?

We shall affirm the judgments.

BACKGROUND

E., the victim in this case, was born in 2005 as the result of a brief sexual encounter between appellant and Mother.[1] E. lived with appellant during a nearly four-year period from the "middle of 2017 to the beginning of 2021[,]" when she was between the ages of twelve and sixteen years old.

[1] The parties do not use the same nomenclature for the victim and her mother. Throughout this opinion, in an attempt to protect their anonymity, we shall refer to the victim by the single initial "E." and to her mother as "Mother." We likewise shall refer to appellant's other daughters, who testified at trial, by single initials.

During Christmas break in 2020, E. visited Mother. While there, she engaged in a video telephone call with appellant. Although E. could not recall the subject of the conversation, she recalled that "in the middle of the conversation he took his phone and started playing with his genitals." At that point, E. "started screen recording so [she] could have evidence to get out of there."[2] She did not, at that time, inform Mother (or anyone else) of appellant's behavior during the phone call. When asked why, E. replied that

> when I have told people in the past, [appellant] would come behind me and tell them that I had a mental health illness, and that I was delusional and just needed to take my medication.

Then, on January 13, 2021, when E. was back at appellant's home, appellant called her "into his bedroom because of [her] grades and [her] attitude." There, appellant had vaginal intercourse with E. without her consent. According to E., it was not the first time that had happened—indeed, E. testified that appellant had raped her "[o]ver fifty" times. Previously, E. had notified "an aunt, a cousin, a sibling, and one of [her] sibling's friends" that appellant was "having sex with" her, but this time, ten days after the assault, on Saturday, January 23, 2021, E. notified Mother.

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[2] A copy of that recording was admitted into evidence at appellant's trial as State's Exhibit 1. That video corroborates E.'s description. Appellant objected on authentication grounds, but the circuit court found that the video was sufficiently authenticated, and appellant does not challenge that ruling on appeal.

We note that the Maryland Wiretap Act has been interpreted as not to apply to the interception of video recordings, so long as they lack aural components. *See*, *e.g.*, *Ricks v. State*, 312 Md. 11, 20-24, *cert. denied*, 488 U.S. 832 (1988), *disapproved on other grounds by Ragland v. State*, 385 Md. 706, 718-25 (2005). *See also Deibler v. State*, 365 Md. 185, 200 & n.4 (2001) (restating *Ricks*'s holding in dicta).

Mother took E. "to the police station[,]" where E. gave a statement. Thereafter, on January 24, 2021, E. was examined by a SANE[3] nurse. E. described the January 13th incident to the SANE nurse, stating that appellant "pushed" her "on the bed and laid on top of [her], and he held [her] down with his body weight." He then "took [her] clothes off[,]" disrobed, and had vaginal intercourse with her. After he ejaculated, he "got up, wiped himself with a tissue," returned E.'s phone to her, "told [her] to get out of his room[,]" and "left for work."[4]

In October 2021, a two-count indictment was filed, in the Circuit Court for Charles County, charging appellant with sexual abuse of a minor in his custody, in violation of Maryland Code, Criminal Law Article ("CR"), § 3-602(b)(1); and continuing course sexual abuse of a "victim who is under the age of 14 years at any time during the course of conduct[,]" in violation of CR § 3-315. A three-day jury trial[5] was held.

At that trial, the State called ten witnesses in its case-in-chief: E., the victim; Paulette Dendy, a SANE nurse who testified as an expert in the field of forensic nurse examination; Mother; A., appellant's daughter; Officer Brian Rash of the Charles County Sheriff's Office; Rebecca Levine, a forensic scientist with the Maryland State Police who testified as an expert in the field of serology; Angela Spessard, a forensic scientist with the

[3] SANE stands for a sexual assault nurse examiner. *See*, *e.g.*, *Sexual Assault Nurse Examiner*, INT'L ASSOC. OF FORENSIC NURSES, available at https://www.forensicnurses.org/page/aboutSANE/ (last visited Mar. 14, 2024).

[4] E. testified that appellant typically would take her cell phone from her before bedtime and would return it in the morning before leaving for work.

[5] The third day consisted entirely of jury deliberations.

Maryland State Police who testified as an expert in the fields of serology and forensic DNA examination; Sergeant John Riffle of the Charles County Sheriff's Office; Detective Jenna Smith of the Charles County Sheriff's Office; and Shreya Kamath, a forensic science technician with the Charles County Sheriff's Office. Appellant called D., his daughter; and he testified on his own behalf. And finally, the State called Detective Matthew Nauman of the Charles County Sheriff's Office as a rebuttal witness.

In addition to the factual summary noted above, E. testified about several discrete rapes appellant committed against her. The "first time" E. could remember was at an unspecified time. The next assault took place on the Sunday before Labor Day, near the beginning of her tenth grade year, after her fourteenth birthday. Yet another rape occurred "[a] few days later." And finally, E. testified that appellant raped her several weeks after Labor Day of her tenth grade year. But during cross-examination, defense counsel asked E., "You are saying that this happened over a period of four years, is that correct?" E. replied, "Yes." Also of note, forensic testing of E.'s rape kit was inconclusive, which was hardly surprising because of the eleven-day delay between the last time she was raped and the time the swabs were taken by the SANE nurse.

The jury deliberated over parts of two days, finding appellant guilty of both charges. The court thereafter sentenced appellant to twenty-five years' imprisonment, with all but twenty years suspended, for sexual abuse of a minor; and a consecutive term of thirty years'

imprisonment, with all but ten years suspended, for continuing course child sexual abuse.[6] This timely appeal ensued.

We shall set forth additional facts where pertinent to discussion of the issues.

DISCUSSION

I.

Parties' Contentions

Appellant contends that the evidence was insufficient to sustain his conviction of engaging in a continuing course of conduct involving sexual abuse of a child. He acknowledges that his trial counsel raised a motion for judgment of acquittal, purportedly on this ground, at the conclusion of the State's case-in-chief, thereafter presented a defense, and then failed to renew her previous motion for judgment of acquittal, with the result that his claim is unpreserved. *See* Md. Rule 4-324(c) (providing that a motion for judgment of acquittal after the close of the State's case is deemed withdrawn where a defendant elects to present evidence). Appellant nonetheless urges us to exercise our discretion under Maryland Rule 8-131(a) to excuse non-preservation and address the merits of his claim, emphasizing, among other things, purported gaps in the State's evidence to support an inference that the victim was under fourteen years old when the abuse began, the above-guidelines sentence he received, and the apparent absence of a tactical reason for trial counsel to have failed to renew the motion for judgment of acquittal.

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[6] In imposing sentence, the court declared that appellant's "actions have earned [him] a sentence above guidelines."

The State counters that appellant's claim is *doubly* unpreserved. Not only did his trial counsel fail to renew her motion for judgment of acquittal upon the conclusion of the case, as required under Md. Rule 4-324(c), she furthermore did not state with particularity the argument that appellant now raises on appeal, that there was insufficient evidence to establish "that any predicate act of the alleged course of conduct occurred when [E.] was under 14 years of age." Therefore, according to the State, appellant's claim also is barred by the particularity requirement of Md. Rule 4-324(a), which has been construed, by Maryland appellate courts, as foreclosing appellate consideration of insufficiency arguments not presented below.

Furthermore, according to the State, there is no legitimate reason for us to review appellant's admittedly unpreserved claim for plain error. But even were we to excuse non-preservation and address the merits of appellant's claim, there was, according to the State, "ample evidence at trial establishing that [E.] was under 14 during the course of conduct."

Analysis

Preservation

At the close of the State's case-in-chief, trial counsel moved for judgment of acquittal, declaring:

> Even looking at the evidence in the light most favorable to the non-moving party, the State has not made a prima [facie] case [of] sex abuse of a minor or a continuing course of conduct.

After the court denied the motion, she presented a defense. Then, after the close of all the evidence, trial counsel failed to renew her previous motion for judgment of acquittal.

The State is correct that appellant's claim of evidentiary insufficiency is doubly unpreserved. First, trial counsel's initial motion is deemed to have been withdrawn when she presented a defense. Maryland Code, Criminal Procedure Article ("CP"), § 6-104 provides:

> (a) *Motion after State's evidence.* — (1) At the close of the evidence for the State, a defendant may move for judgment of acquittal on one or more counts or on one or more degrees of a crime, on the ground that the evidence is insufficient in law to sustain a conviction as to the count or degree.
>
> (2) Subject to paragraph (3) of this subsection, if the court denies the motion for judgment of acquittal, the defendant may offer evidence on the defendant's behalf without having reserved the right to do so.
>
> (3) <u>If the defendant offers evidence after making a motion for judgment of acquittal, the motion is deemed withdrawn.</u>
>
> (b) *Motion after all evidence.* — (1) The defendant may move for judgment of acquittal at the close of all the evidence whether or not a motion for judgment of acquittal was made at the close of the evidence for the State.
>
> (2) If the court denies the motion for judgment of acquittal, the defendant may have review of the ruling on appeal.

(Emphasis added.)

Similarly, Maryland Rule 4-324 (which implements the statute) provides:

> (a) **Generally. —** A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. <u>The defendant shall state with particularity all reasons why the motion should be granted.</u> No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.
>
> (b) **Action by the court. —** If the court grants a motion for judgment of acquittal or determines on its own motion that a judgment of acquittal should be granted, it shall enter the judgment or direct the clerk to enter the judgment

> and to note that it has been entered by direction of the court. The court shall specify each count or degree of an offense to which the judgment of acquittal applies.
>
> (c) **Effect of denial. —** A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

(Emphasis added.)

"[I]t is without doubt that our appellate courts' authority to pass on the sufficiency of the evidence in a criminal jury trial is predicated upon the accused having made a motion for judgment of acquittal at the close of all the evidence." *Ennis v. State*, 306 Md. 579, 593 (1986). More precisely, "'appellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the *refusal* of the trial court to grant a motion for judgment of acquittal.'" *Starr v. State*, 405 Md. 293, 302 (2008) (emphasis added) (quoting *Lotharp v. State*, 231 Md. 239, 240 (1963) (per curiam)).

In *Ennis*, which was in precisely the same procedural posture as the present case, the Court declared:

> The statute[7] and rule are unambiguous. Together, the statute and the rule have been construed to preclude appellate courts of this state from

[7] The statute at issue in *Ennis* was the statutory predecessor to CP § 6-104, former Article 27, § 593. The only substantive difference between the two statutes was that the first clause of the first sentence of the old statute, referring to the jury as "judges of law, as well as of fact," was deleted in the re-codified version. By then, the Supreme Court of Maryland had effectively read that language (in Article 23 of the Maryland Declaration of Rights and formerly in Article XV, § 5 of the Constitution) out of the Maryland Constitution. *See Unger v. State*, 427 Md. 383, 411-17 (2012) (tracing the historical development of the Supreme Court's interpretation and application of Article 23). *See also Kazadi v. State*, 467 Md. 1, 24-26 (2020) (explaining that, although at one time, the jury as (continued…)

> entertaining a review of the sufficiency of the evidence, in a criminal case tried before a jury, where the defendant failed to move for judgment of acquittal at the close of all the evidence.

Ennis, 306 Md. at 585.

The Court further declared:

> [Ennis] moved for judgment of acquittal at the close of the State's case. That motion was denied. Following that denial, [Ennis] put on her case. However, she failed to renew her motion for judgment of acquittal at the close of all the evidence. Her failure to do so effectively precluded the trial court from considering her insufficiency contention. Consequently, there was nothing for the [Appellate Court] to consider; similarly, there is nothing for us to consider here.

Id. at 587.

Because appellant's trial counsel did not renew her motion for judgment of acquittal after the close of all the evidence, effectively there was no motion for judgment of acquittal for the trial court to pass upon, and thus, there is nothing for us to review. *Id. See Howell v. State*, 56 Md. App. 675, 684-85 (1983) (where the State was allowed to reopen its case-in-chief after the trial court had denied the defendant's motion for judgment of acquittal, and the defense thereafter did not move for judgment of acquittal, there was "nothing before us for appellate review"), *cert. denied*, 299 Md. 426 (1984), *cert. denied*, 469 U.S. 1039 (1984), *reh'g denied*, 469 U.S. 1182 (1985).

In this case, there is an additional reason that appellant's insufficiency claim is forfeited. His motion merely asserted that the State had failed to make a prima facie case that he had committed the crimes charged; in other words, it was a "bare bones" motion.

"judges of law, as well as of fact" provision was interpreted quite literally, it now is given little or no effect).

The particularity requirement of Md. Rule 4-324(a) has been construed as precluding appellate review of insufficiency claims in jury trials where the defense makes a "bare bones" motion for judgment of acquittal. *See*, *e.g.*, *State v. Lyles*, 308 Md. 129, 135-36 (1986) (holding that where a defendant moved for judgment of acquittal but failed to state the grounds with particularity, his claim of evidentiary insufficiency was not preserved); *Mulley v. State*, 228 Md. App. 364, 387-88 (2016) (stating that a "'motion which merely asserts that evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with Md. Rule 4-324 and thus does not preserve the issue of sufficiency for appellate review'" (quoting *Johnson v. State*, 90 Md. App. 638, 649 (1992))).

Plain Error

We note that *Ennis*, *Howell*, and other decisions[8] suggest that an appellate court lacks the authority to consider the sufficiency of the evidence if a defendant, in a jury trial, fails to move for judgment of acquittal.[9] More recently, in *Haile v. State*, 431 Md. 448, 464-65 (2013), the Supreme Court of Maryland declared that it would "exercise [its]

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[8] *See*, *e.g.*, *Warfield v. State*, 315 Md. 474, 483-84 (1989); *Lotharp v. State*, *supra*, 231 Md. at 240; *Tull v. State*, 230 Md. 152, 155 (1962); *Wersten v. State*, 228 Md. 226, 229 (1962); *Woodell v. State*, 223 Md. 89, 93 (1960); *Williams v. State*, 131 Md. App. 1, 5-7, *cert. denied*, 359 Md. 335 (2000).

[9] This is not a trivial concern. An appellate court's authority to pass upon the sufficiency of the evidence did not exist prior to 1950 and was instituted then through the enactment of a constitutional amendment. 1949 Md. Laws, ch. 407, effective Dec. 1, 1950. That amendment was believed to amount to an act by the General Assembly conferring appellate jurisdiction, initially to the Supreme Court of Maryland and subsequently, to this Court. *See Rivera v. State*, 248 Md. App. 170, 177-83 (2020) (tracing the history of appellate review of insufficiency claims).

discretion, under [Md.] Rule 8-131(a)," to consider an unpreserved insufficiency claim in a case presenting "a procedural scenario" which was "identical to that which [it] addressed in *Ennis*[.]"[10] It thus appears that we have the authority to consider an unpreserved insufficiency claim under the plain error doctrine. *Robinson v. State*, 410 Md. 91, 111 (2009); *Savoy v. State*, 218 Md. App. 130, 142 (2014).

But it is a discretion that we should exercise sparingly, lest the exception swallow the rule. *See Morris v. State*, 153 Md. App. 480, 511 (2003) (observing that "[i]f every material (prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless"), *cert. denied*, 380 Md. 618 (2004). For example, in *Haile*, 431 Md. at 465, the Supreme Court of Maryland exercised its discretion to consider an unpreserved insufficiency claim and address a novel legal question involving the interpretation of a statute proscribing aggravated cruelty to animals. More generally, the Supreme Court of Maryland occasionally has exercised its discretion to review an unpreserved issue to "promote the 'orderly administration of justice[,]'" so long as doing so does not unfairly prejudice either party. *Abdul-Maleek v. State*, 426 Md. 59, 70 (2012) (quoting *Bible v. State*, 411 Md. 138, 152 (2009) (plurality opinion)). Other reasons an appellate court might exercise its discretion to review an unpreserved issue include considerations of judicial economy and

[10] In *Testerman v. State*, 170 Md. App. 324 (2006), *cert. granted*, 397 Md. 396, *cert. dismissed*, 399 Md. 340 (2007), we addressed an unpreserved claim of evidentiary insufficiency under the guise of a claim of ineffective assistance of counsel. That decision was controversial at the time and has not been followed since, although it has never been expressly overruled.

to avoid the likelihood that a defendant subsequently would be entitled to postconviction relief. *Bible*, 411 Md. at 150-52. In *Hallowell v. State*, 235 Md. App. 484, 506 (2018), we exercised our discretion to notice plain error in giving a pattern jury instruction, caused by an intervening change in the law, to avoid the "distinct possibility" that the defendant be convicted of a "non-existent crime[.]" And in *Morris*, we observed that an appellate court might be inclined to exercise its discretion to engage in plain error review in a case where a defendant is actually innocent. *Morris*, 153 Md. App. at 523.

In the instant case, none of the reasons for excusing non-preservation applies. We note in passing that E.'s testimony was sufficient to support a rational inference by the jury that appellant began engaging in sexual abuse prior to her fourteenth birthday. On cross-examination, E. was asked, "You are saying that this happened over a period of four years, is that correct?", to which she replied, "Yes." (Recall that E. began living with appellant when she was twelve years old.) Under these circumstances, we decline to analyze further this unpreserved claim.[11]

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[11] During oral argument, appellant asserted that we should look to the "context" of trial counsel's question to E., from which we should infer that trial counsel was merely "seeking to establish exactly what the complaining witness believed her prior testimony on direct examination had been, and then to explore that[.]" Thus, according to appellant, E. did not "actually" testify that the abuse happened over the entire time when she lived with appellant. This assertion misses the mark. In assessing whether the evidence is sufficient, we "view[] the evidence in the light most favorable to the prosecution[.]" *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In the light most favorable to the prosecution, the question, and E.'s response, are evidence that appellant engaged in sexual abuse prior to her fourteenth birthday. That evidence, alone, is sufficient to establish the age element of CR § 3-315. *See*, *e.g.*, *Bailey v. State*, 16 Md. App. 83, 91 (1972) (noting that the victim's "testimony alone would have been sufficient" to sustain a rape conviction).

(continued…)

II.

A. Limitation of Cross-examination of E.

1. Parties' Contentions

Appellant contends that the circuit court violated his rights under the Confrontation Clause of the United States Constitution by restricting him from cross-examining E. about her "prior mental health diagnoses," which she previously had mentioned on direct examination. Evidence of E.'s mental health, maintains appellant, was relevant because E. testified that appellant had used her mental health diagnoses to discredit her when she previously had tried to disclose his abuse. Thus, by preventing trial counsel from exploring this issue, "[t]he jury was left with the impression that [appellant] lied to others about [E.'s] mental health history in an effort to cover up the sexual abuse." Moreover, appellant maintains that the State opened the door to the issue of E.'s mental health because her

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As for the State's contention that Officer Rash's testimony (that E., in her out-of-court statement, had stated that the abuse had occurred "between thirty and forty times," "[b]eginning when she was twelve") was further evidence establishing the age element of CR § 3-315, we note that the trial court later gave a limiting instruction that "[t]estimony concerning [E.'s] statement was permitted only to help [the jury] decide whether to believe the testimony that the witness gave during the trial." Because E.'s testimony on cross-examination was, itself, sufficient to establish the age element of CR § 3-315, we need not consider whether, under the circumstances of this case and notwithstanding the trial court's non-contemporaneous limiting instruction, Officer Rash's testimony (which was admitted with neither an objection nor a motion to strike) was substantive evidence. *See* Committee Note, Md. Rule 5-105 (stating that, "[o]rdinarily, if requested, [limiting] instructions **should be given when the evidence is received** and repeated as part of the court's final instructions to the jury" (emphasis added)).

testimony about it was elicited on direct examination over defense objection.[12] Because this case turned almost entirely on E.'s credibility, because there was an absence of forensic evidence tying appellant to the alleged crimes, and because the effect of the court's ruling was to bolster E.'s credibility by preventing the defense from challenging her as to why she delayed in reporting the abuse, appellant concludes that it was an abuse of discretion for the court to so limit the scope of cross-examination.

Initially, the State asserts that appellant did not raise a confrontation claim in the circuit court, and therefore, he may not raise such a claim for the first time on appeal. On the merits of the claim concerning E.'s mental health, the State maintains that it was "irrelevant to the sexual abuse charges at issue" and that E.'s "fleeting mention that [appellant] would claim she was mentally unwell when she would try to disclose his abuse did not make a wholesale dive into her mental health diagnoses proper on cross-examination." At most, E.'s mental health was a "collateral" issue, which would have confused the jury and "needlessly embarrass[ed]" E., and therefore, the circuit court acted within its discretion in limiting the scope of the defense cross-examination on that issue.

Nor, according to the State, did E.'s "passing mention" that appellant would attempt to discredit her by claiming that she was delusional "open the door to a full scale inquiry

[12] When the prosecutor asked E. why she had delayed telling Mother about the abuse, defense counsel lodged a hearsay objection, but the court overruled the objection, declaring that E.'s statement was not being admitted for its truth. Defense counsel then requested a limiting instruction, but after the prosecutor objected to the request for a limiting instruction, the court overruled that request as well.

into [E.'s] purported mental health diagnoses." Such an inquiry would not have been "proportional" to E.'s remark, and furthermore, the trial court afforded trial counsel "numerous other opportunities to elicit testimony that went directly to [E.'s] credibility and reliability, which is the threshold requirement for cross-examination."

2. Additional Facts Pertaining to the Claim

During cross-examination of E., trial counsel attempted to impeach E. with her prior mental health diagnosis:

> [TRIAL COUNSEL]: And your mom and Mr. Wright never lived together, correct?
>
> [E.]: Correct.
>
> [TRIAL COUNSEL]: Okay. Who were you living with when you were living with your mom? Who was in the house?
>
> [E.]: My mom, my three siblings, well, three of my siblings, and my grandfather.
>
> [TRIAL COUNSEL]: **Okay, and your mom actually brought you to different treatment providers during this time, is that correct?**
>
> [PROSECUTOR]: **Objection, Your Honor.**
>
> [THE COURT]: Approach.

(Emphasis added.)

During the ensuing bench conference, trial counsel argued that "the State is basically, through her testimony she said that my client told everyone that she just had mental health issues." The court replied, mistakenly, that it thought that the testimony was

that "other people said she had mental health issues."[13] The prosecutor interjected that "the mental health diagnosis of a victim in a sexual abuse case is not relevant and it is not admissible." Trial counsel replied that "[t]here is no blanket rule saying that a mental health diagnosis for a victim of a sexual case is not relevant. There's plenty of ways it can be relevant." The court then asked whether trial counsel intended to call an expert to testify about E.'s diagnosis, and she replied that she did not.

Trial counsel then explained why, she claimed, E.'s diagnosis was relevant:

> No, but I think it is relevant that this is not something Mr. Wright was making up to explain away behavior. This was true, she did have a mental health diagnosis.
>
> So, you know, if the State is going to argue that he said that just to cover it up, then I think it is relevant that the jury hear, you know, that she both has a mental health diagnosis and told the police that she didn't like to take her meds for it. So, I think that is relevant to go into. It is not just something Mr. Wright was making up.

The prosecutor insisted that E.'s diagnosis was not relevant and that it could not be admitted without expert testimony:

> One, it is not relevant to the actual event which we are here for, is sexual assault, it is not relevant to the actual event. And again, it doesn't come in, and there is case law that says that it doesn't come in.[14]

[13] E. previously had testified, "Oh, because when I have told people in the past, he [that is, appellant] would come behind me and tell them that I had a mental health illness, and that I was delusional and just needed to take my medication."

[14] The prosecutor did not cite any case law standing for this sweeping assertion.

Ultimately, the court recognized that E.'s mental health diagnosis "potentially could be relevant," and it asked trial counsel to make a proffer. She replied:[15]

> So, she told the police ADHD. What she was taken in for by her mom was some sort of adjustment disorder, because they were having a lot of issues between the two of them and their family.

The court sustained the prosecutor's objection, declaring that it was "not sure an adjustment disorder or ADHD is relevant in this case[.]"

3. Analysis

Preservation

The State contends that appellant's confrontation-based claim is unpreserved because trial counsel never expressly uttered the word "confrontation" before the circuit court when contesting that court's limitation on her cross-examination of E. That argument is wide of the mark. It relies upon *Martin v. State*, 218 Md. App. 1, *cert. denied*, 440 Md. 463 (2014), *cert. denied*, 575 U.S. 1004 (2015). But the circumstances in *Martin* were vastly different than in this case. There, the confrontation issue involved a claim that the trial court had erred in admitting evidence—testimony by the State's DNA expert which implicated Martin in committing the crimes charged. *Id.* at 20. Martin claimed that the expert was a "surrogate" for the person (or persons) who actually had performed the laboratory tests at issue and that her testimony should have been excluded on confrontation grounds. *Id.* at 20-21. Although the defense had been provided discovery that very

[15] We agree with the State that there appears to be a transcription error. In context, it appears that the paragraph beginning, "So, she told the police ADHD. . . ." was spoken by trial counsel rather than by the court, as a literal reading of the transcript would suggest.

strongly suggested that the State's expert had not performed the "bench work," Martin did not raise an objection until after the expert had finished testifying, when he made a motion to strike the expert's testimony. *Id.* at 21-22 & n.26. Under those circumstances, we held that his claim had been waived. *Id.* at 22-23.

Here, in contrast, the trial court sustained the prosecutor's objection to appellant's cross-examination of E., which resulted in the exclusion of evidence rather than the admission of evidence. Maryland Rule 5-103 provides in relevant part:

> (a) **Effect of erroneous ruling. —** Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> (1) **Objection. —** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or
>
> (2) **Offer of proof. —** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

In this case, the requirements of Md. Rule 5-103(a)(2) were satisfied. The "substance of the evidence . . . was apparent from the context within which the evidence was offered." Nothing more was required. It was unnecessary for trial counsel to utter any shibboleths such as "confrontation." The claim is properly before us on appeal.

Merits of the Claim

Governing Law

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quoting 5 J. Wigmore, *Evidence* § 1395, at 123 (3d ed. 1940)). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.* at 316.

"The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Id.* (quoting 3A J. Wigmore, *Evidence* § 940, at 775 (Chadbourn rev. 1970)). "Compliance with our federal and state constitutions requires the trial judge to allow the defense a 'threshold level of inquiry' that puts before the jury 'facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.'" *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018) (quoting *Martinez v. State*, 416 Md. 418, 428 (2010)). "To ensure the right of confrontation, defense counsel must be afforded 'wide latitude to cross-examine a witness as to bias or prejudices.'" *Id.* (quoting *Martinez*, 416 Md. at 428). "Only when the constitutional threshold has been met may trial courts limit the scope of 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.'" *Id.* (quoting *Peterson v. State*, 444 Md. 105, 122-23 (2015)). *See*

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (noting that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on" cross-examination into the potential bias of a prosecution witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible." Md. Rule 5-402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403.

"The open door doctrine is based on principles of fairness and serves to balance any unfair prejudice one party may have suffered." *State v. Robertson*, 463 Md. 342, 351-52 (2019) (quotation marks and citation omitted). "It authorizes parties to meet fire with fire, as they introduce otherwise inadmissible evidence" to respond "to evidence put forth by the opposing side." *Id.* at 352 (quotation marks and citations omitted). Whether the open door doctrine applies is a question of relevance, which is a legal question we review *de novo*. *Id.* at 353.

But the "doctrine of opening the door has limitations." *Id.* at 357 (quotation marks and citation omitted). It permits "the introduction of otherwise inadmissible evidence, but only to the extent necessary to remove any unfair prejudice that might have ensued from the original evidence." *Id.* (quotation marks and citation omitted). Whether otherwise inadmissible evidence was admitted to the extent necessary to cure any unfair prejudice is called "proportionality" and is reviewed for abuse of discretion. *Id.* at 358.

Application to This Case

Appellant's claim fails for the simple reason that the trial court, in this case, properly exercised its discretion to limit cross-examination into an area that was, at best, only marginally relevant. Md. Rule 5-403. Whether E. suffered from attention deficit hyperactivity disorder or adjustment disorder was a collateral issue that did not reasonably relate to her credibility. Furthermore, trial counsel was afforded ample opportunity during cross-examination to probe E.'s credibility. For example, trial counsel questioned E. about discrepancies between her trial testimony, that she had been raped "[o]ver" fifty times, and her prior statement to police, that she had been raped "over thirty times." In addition, trial counsel cross-examined E. about other inconsistencies between her trial testimony and her prior statement concerning details of the sexual assaults, as well as inconsistencies between her trial testimony and statements Mother had made in a petition for a protective order. Indeed, trial counsel questioned E. about various inconsistencies in her testimony for more than twenty pages of transcript. The "Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and

to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). Trial counsel was afforded that opportunity here.

Nor does the opening the door doctrine lead us to a different conclusion. Even were we to assume that E.'s passing remark, that appellant would claim that she was "delusional" in an attempt to discredit her accusatory statements, opened the door to otherwise inadmissible evidence, the response must be proportional. Under the circumstances here, inquiry into E.'s mental health was, at most, only marginally relevant, and it was likely to lead to harassment of the witness and confusion of the issues. We hold that the trial court did not abuse its discretion in limiting this line of inquiry.

B. Limitation of Cross-examination of Mother

1. Parties' Contentions

Appellant contends that the circuit court violated his right to confrontation by restricting him from impeaching Mother with a prior inconsistent statement relating to E.'s "credibility and character for untruthfulness." According to appellant, trial counsel had "a good-faith basis for the impeachment[,]" but the trial court erroneously believed that Md. Rule 5-608(b) prevented him from using extrinsic evidence to impeach Mother. Moreover, according to appellant, this error was not harmless because the trial court, by preventing the jury from hearing that Mother previously had "made statements casting doubt on [E.'s] credibility[,]" permitted the State to bolster E.'s credibility, which was "the central issue at trial."

The State asserts that this claim, like the previous claim regarding cross-examination of E., is unpreserved because trial counsel did not raise a confrontation

claim in the trial court. The State further contends that trial counsel failed to make an adequate proffer of either the purportedly prior inconsistent statement or "what her additional questioning would [have been]" and that, for this additional reason, this claim is unpreserved. Moreover, the absence of a proffer resulted in the lack of a proper foundation for impeaching Mother with her purported prior statement. Thus, the circuit court did not abuse its discretion in limiting this line of cross-examination.

2. Additional Facts Pertaining to the Claim

After Mother had completed testifying on direct examination about the circumstances surrounding E.'s notification to her of appellant's abuse, trial counsel cross-examined Mother about whether E. had reported the abuse to others (and at an earlier time). The following occurred:

> [TRIAL COUNSEL]: Yes, Your Honor. Alright, [Mother], [E.] also told you that she had told someone about this before, correct?
>
> [MOTHER]: Yes.
>
> [TRIAL COUNSEL]: She said she had told a counselor at school, correct?
>
> [MOTHER]: Yes.
>
> [TRIAL COUNSEL]: In the ninth grade?
>
> [MOTHER]: Yes.
>
> [TRIAL COUNSEL]: Okay.
>
> [MOTHER]: She also told me she told some in that home.
>
> [PROSECUTOR]: Objection.
>
> [THE COURT]: Hold--

[TRIAL COUNSEL]: There is no. . . there is no question, [Mother], okay? So, you will agree with me that you have had trouble with [E.] in the past, correct?

[PROSECUTOR]: Objection.

[THE COURT]: Overruled.

[TRIAL COUNSEL]: Is that correct?

[MOTHER]: Yes.

[TRIAL COUNSEL]: Okay, and you will agree with me that she would. . . she sometimes blames others for her actions?

[PROSECUTOR]: Objection.

[THE COURT]: Sustained.

A bench conference ensued. Ultimately, the court overruled the prosecutor's objection, and cross-examination resumed:

[TRIAL COUNSEL]: Alright, [Mother], isn't it true that you believe [E.] will blame others for her actions?

[MOTHER]: No.

[TRIAL COUNSEL]: You have never indicated to anyone else that she has a habit of blaming others for her actions?

[PROSECUTOR]: Objection, asked and answered.

[THE COURT]: Overruled?

[MOTHER]: I don't feel that [E.] blames others for her actions.

[TRIAL COUNSEL]: But my question was, you have never told anyone that?

[MOTHER]: No.

> [TRIAL COUNSEL]: Okay, and you have never indicated that she rarely takes accountability for what she does?
>
> [MOTHER]: No.
>
> [TRIAL COUNSEL]: You have never told anyone that?
>
> [PROSECUTOR]: Objection, asked and answered.
>
> [THE COURT]: Sustained.
>
> [TRIAL COUNSEL]: Your Honor, may we approach briefly?

Another bench conference ensued. Trial counsel asked the court for an opportunity to ask one more question "to lay foundation for an impeachment on that." Counsel further explained, "Because she did indicate that to an individual." The court declared that the proposed questioning, which was directed toward "what [E.] said to other persons," was "beyond the scope of the statute."[16] The court further declared that trial counsel was "stuck with [Mother's] answer" to the question, "what is [Mother's] opinion regarding her daughter's truth and veracity[.]" Then the following occurred:

> [TRIAL COUNSEL]: And it is tricky now, because I understand that for like 5-608.B.,[17] I know I am stuck with, you know, prior non-charged

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[16] The court was referring to Maryland Code, Courts and Judicial Proceedings Article ("CJP"), § 9-115, which states:

> Where character evidence is otherwise relevant to the proceeding, no person offered as a character witness who has an adequate basis for forming an opinion as to another person's character shall hereafter be excluded from giving evidence based on personal opinion to prove character, either in person or by deposition, in any suit, action or proceeding, civil or criminal, in any court or before any judge, or jury of the State.

[17] Trial counsel was referring to Maryland Rule 5-608(b), which states:

(continued…)

> instances. But now she is blatantly lying about an opinion she gave in the past.
>
> [THE COURT]: Perhaps, but you called her as a character witness.[18] I think you are stuck with your answer.
>
> [TRIAL COUNSEL]: If I could just ask the, I mean, the specific—
>
> [THE COURT]: I don't think you can ask specific instances of conduct.
>
> [TRIAL COUNSEL]: No, no, no, not conduct. I just wanted to ask to maybe see if she will actually shift to telling the truth about an organization she told that to.
>
> [THE COURT]: She has already denied it. I think you are stuck with the answer.
>
> [TRIAL COUNSEL]: Okay.

3. Analysis

Preservation

We reject the State's non-preservation argument based upon *Martin v. State*, *supra*, 218 Md. App. 1, for the same reasons we explained previously with regard to appellant's claim that the trial court improperly restricted cross-examination of E. But concerning

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> (b) **Impeachment by examination regarding witness's own prior conduct not resulting in convictions. —** The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

[18] Mother was called by the State, not the defense. This bench conference occurred during cross-examination.

appellant's claim that the trial court improperly restricted cross-examination of Mother, the State raises an additional non-preservation argument—that appellant's trial counsel failed to make an adequate proffer when the trial court sustained the prosecutor's objection to trial counsel's attempt to impeach Mother with a prior inconsistent statement. We agree.

Maryland Rule 5-613 provides:

> (a) **Examining witness concerning prior statement. —** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence of prior inconsistent statement of witness. —** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

In this case, where the trial court did not allow trial counsel to ask the question that, she claimed, would lay the foundation to impeach Mother with her purported prior inconsistent statement, it was incumbent on trial counsel to proffer Mother's prior statement. Because trial counsel made no such proffer, we have nothing to review. *See* Md. Rule 5-103(a)(2) (stating in part that "[e]rror may not be predicated upon" a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered").

This is a far different case than *Devincentz v. State*, 460 Md. 518 (2018), a sexual assault case in which the Supreme Court of Maryland held that the absence of a proffer did

not result in non-preservation of the defendant's claim that the trial court had erred in excluding testimony that cast doubt on the complainant's credibility. In that case, Devincentz's son, Joshua, testified for the defense. *Id.* at 530, 532. Joshua made several statements casting doubt on the credibility of the complainant, his stepsister, but each time, the trial court sustained the prosecutor's objections. *Id.* at 532-33. Although the Supreme Court of Maryland acknowledged that "counsel should make a proffer regarding excluded testimony[,]" the failure to do so was not fatal to Devincentz's claim because Joshua's "answers clearly revealed the relevance of his testimony." *Id.* at 538.

In contrast, in this case, trial counsel's failure to make a proffer would require us to speculate as to the substance and relevance of the purported prior statement. Indeed, from the sparse record available to us, we do not even know whether this was an oral or a written statement, nor do we know to whom it was made, nor what it purported to say. This claim is not preserved.

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