

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 537

September Term, 2017

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JAIME RIVERA

v.

STATE OF MARYLAND

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Berger,  
Arthur,  
Eyler, James R.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Eyler, James R., J.

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Filed: February 27, 2018

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Charles County convicted Jaime Rivera, appellant, of one count of first-degree rape, two counts of second-degree rape, and sexual abuse of a minor. Appellant was sentenced to life imprisonment for first-degree rape, a consecutive twenty-five year term for sexual abuse of a minor, and his second-degree rape convictions merged for sentencing purposes. Appellant timely appealed and presents the following question for our review, which we rephrase: Did the trial court erroneously permit the State to introduce testimonial statements of a non-testifying sexual assault nurse examiner (SANE) through the in-court testimony of her supervisor? For the reasons set forth below, we affirm the judgment of the circuit court.

### **FACTUAL BACKGROUND**

The victim in this case, (“M.A.C.”), is appellant’s step-daughter, who was eleven years old at the time he raped her in the family’s home in La Plata. On June 5, 2016, M.A.C. was sleeping with her nine-year old sister on the bottom bunk of her bed in the room that she shared with her three siblings. At approximately 2:00 a.m., appellant entered the children’s bedroom, woke up M.A.C., and told her that she had to have sex with him. He directed her sister to get in the top bunk with their brother, which she did. When M.A.C. told appellant “no” in response to his demand for sex, he told her he was going to get a knife. Appellant left the room to retrieve a knife from the kitchen and showed it to M.A.C. After he returned the knife to the kitchen, appellant came back to the children’s bedroom, where he forced M.A.C. to undress and raped her vaginally. At trial, M.A.C.’s sister testified that she heard M.A.C. say to appellant “You’re scaring me. Stop[,]” and then she felt the bed moving and heard M.A.C. crying for “thirty or 50

minutes.” When the assault ended, M.A.C. went to the bathroom to clean herself because she had “white stuff” on her body and her underwear.

M.A.C. did not report the incident until Friday, June 10, 2016, when she told two friends at school that her stepfather had raped her. According to Halee K., M.A.C. was “scared, worried, upset” and “crying” when she told her about the assault, so she notified a school counselor. M.A.C.’s mother then drove her to the University of Maryland Charles Regional Medical Center, where she underwent an examination by a sexual assault nurse.

Detective Kristen Gross, from the Charles County Sheriff’s Office, testified that she responded to the hospital later that day to investigate the report of a sexual assault. After interviewing M.A.C., Detective Gross obtained a search warrant for the family’s home. A pair of grey and white underwear that matched the description M.A.C. provided was recovered from a clothes hamper in the children’s bedroom, and was submitted to the Maryland State Police crime laboratory for DNA analysis. M.A.C. testified at trial that she recognized the underwear as her own, and that she had last worn them on the night she was sexually assaulted.

Maryland State Police forensic scientist Molly Rollo, who was accepted by the court as an expert in forensic serology and forensic DNA analysis, testified that she viewed the underwear under an alternate light source, which revealed the presence of acid phosphatase, an enzyme in semen. Ms. Rollo cut a sample from the front interior of the fabric, from which she was able to confirm the presence of a “good amount” of sperm. After she obtained a full DNA profile from the underwear, Ms. Rollo concluded that

appellant's DNA profile matched the male contributor in the underwear sample. Ms. Rollo testified that the probability of selecting an unrelated individual at random having this same DNA profile was approximately 1 in 1.5 sextillion in the Southwest Hispanic population, or approximately 200 billion times the Earth's population. Ms. Rollo also testified that it was "unlikely" that the DNA was transferred onto M.A.C.'s underwear by laundering the family's clothing together.

A significant aspect of the State's case was the introduction of evidence that M.A.C. had sustained vaginal injuries that corroborated her claim that she had been raped by appellant. Catherine Almassey, the nurse who performed the SANE examination and prepared the report, was medically unavailable to testify at trial; consequently, the State sought to introduce expert opinion testimony from Nurse Almassey's supervisor, Nurse Debbie Shuck-Reynolds. Nurse Shuck-Reynolds testified that she had been employed as a SANE nurse for twenty-three years, and had been the program manager of the forensic nurse program at Charles Regional Medical Center for twenty years. As the SANE program manager, she was responsible for reviewing charts completed by other nurses, assuring that proper procedures and policies were followed, and a 100% chart review of all SANE exams conducted at the hospital.

Defense counsel did not challenge Nurse Shuck-Reynolds's qualifications as an expert, however, she did object to the admissibility of her testimony. Because Nurse Shuck-Reynolds did not perform M.A.C.'s SANE examination, the defense argued that her testimony lacked foundation and was derived from Nurse Almassey's observations. The trial court qualified Nurse Shuck-Reynolds as an expert with respect to a nurse's

examination of a sexual assault, and permitted her to testify about the hospital’s SANE examination procedures. Nurse Shuck-Reynolds testified that SANE nurses engage with victims on a “one-on-one” basis to obtain a history of the incident, conduct a “head-to-toe” examination to identify injuries, collect physical evidence, and complete the mandatory State sexual assault kit.

The State showed Nurse Shuck-Reynolds photographs from M.A.C.’s SANE examination, and defense counsel objected on the grounds that the SANE report and its contents were testimonial, and that Nurse Shuck-Reynolds was unable to authenticate the photographs because she did not examine the victim. After a lengthy discussion at the bench, the trial court ruled that the photographs were admissible because M.A.C. had authenticated them during her earlier testimony. The court sustained defense counsel’s objection to the admission of the SANE report, but ruled that Nurse Shuck-Reynolds could rely on the photographs to form her opinions, concluding:

“I’m very satisfied with my opinion that the witness can testify from source data, which is recorded generally in the ordinary course of business, in this manner. We have photographs. Then as long as she relied upon the source data and not any other opinions of a non-testifying expert, then I’m satisfied with the rules of confrontation and the rules of evidence.”

The State then introduced the SANE photographs into evidence, published them for the jury, and elicited Nurse Shuck-Reynolds’s opinion as to whether she observed any indicators of trauma. She testified that she could see an “abraded looking” area on M.A.C.’s labia majora. She also saw a “complete interruption between 3 and 5 o’clock in the hymenal ring” and “what I identify as a tear or again, an interruption in the hymenal ring” at 9 o’clock. She also noted that one of the transections that she observed in the

photographs “goes completely to the floor,” which indicated that the injury was caused by trauma. According to Nurse Shuck-Reynolds, the transections she observed were not a normal change of the anatomy.

### **DISCUSSION**

Appellant argues that the trial court erred by admitting Nurse Shuck-Reynolds’s testimony that M.A.C. sustained genital trauma in violation of his right of confrontation under federal and state law. He concedes that, “[h]ad the State qualified Shuck-Reynolds as an expert and showed her only the photographs from the exam . . . and asked her to opine as to whether those photographs showed injuries,” then the Confrontation Clause would not be implicated. He contends, however, that Nurse Shuck-Reynolds “specifically testified that her expert opinion was based on not just the pictures but also the SANE report and [M.A.C.]’s hospital chart,” and therefore, her opinions were based on the testimonial statements of an absent witness. The State maintains that appellant’s right of confrontation was not violated, as Nurse Shuck-Reynolds testified to her independent observations based on her review of the photographs, and was cross-examined about those opinions. We conclude that the trial court did not err in permitting Nurse Shuck-Reynolds to provide expert testimony based on her review of the victim’s SANE examination photographs.

The Sixth Amendment to the United States Constitution provides: “[i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” The Confrontation Clause generally prohibits the prosecution from introducing “testimonial” hearsay statements as evidence in trial without calling the

witness to testify. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). Article 21 of the Maryland Declaration of Rights is interpreted to “generally provid[e] the same protection to defendants” as its federal counterpart. *Taylor v. State*, 226 Md. App. 317, 333 (2016) (citations omitted). The State may introduce an out-of-court statement against the accused, however, if the statement is not “testimonial” in nature. *Crawford*, 541 U.S. at 59. Although the *Crawford* Court did not provide a comprehensive definition of the word “testimonial,” the Court did state that it would include

ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

*Id.* at 51-52 (internal quotation marks and citations omitted).

The Court of Appeals, in *State v. Norton*, 443 Md. 517, 547-48 (2015), articulated the characteristics which must be present in a forensic report in order for the report to be considered testimonial: (1) the report must be sufficiently formalized, or (2) the report must include an out-of-court statement having the primary purpose of accusing a defendant of criminal conduct. (citing *Williams v. Illinois*, 567 U.S. 50, 82-83 (2012)); *see also Derr v. State*, 434 Md. 88, 114 (2013).

Here, neither party disputes the testimonial nature of the SANE examination report, which was not introduced into evidence. Moreover, both parties admit that the SANE photographs, taken on their own, are not hearsay statements as contemplated

under Maryland Rule 5-801 and are not testimonial. Appellant acknowledges that, if Nurse Shuck-Reynolds had reviewed the photographs in isolation, her testimony would not have violated the Confrontation Clause. Appellant, relying on *Green v. State*, 199 Md. App. 386 (2011), asserts that the SANE report was intrinsically testimonial and argues that, because Nurse Shuck-Reynolds also reviewed M.A.C.’s chart and Nurse Almassey’s report, it is impossible to separate that part of her testimony that was based on the photographs. Whether the admission of evidence at trial violated a defendant’s constitutional right of confrontation is a question of law, which we review *de novo*. *Taylor*, 226 Md. App. at 332.

In *Green*, the defendant was convicted of multiple sexual offenses, based partly upon the admission of a redacted copy of a forensic examination report prepared by a nurse who was unavailable to testify at trial. *Id.* at 388-89. The redacted report included a diagram of the victim’s body showing where abrasions, scratches, and a puncture wound were observed, as well as the nurse’s observations concerning the presence of an injury central to the case. *Id.* at 396-97. The trial court concluded that the report was admissible, and ruled that the un-redacted information, “does contain routine and descriptive and objectively ascertained and generally reliable facts.” *Id.* at 398. This Court vacated the judgment, holding that “the nurse’s statement fell within the ‘core class’ of extra-judicial statements against which the confrontation clause protects” and noting that “[w]hat a witness says in any out-of-court statement, can be testimonial even if the statement concerns a ‘fact.’” *Id.* at 410.



Although there have been several Maryland appellate decisions applying *Crawford*, e.g., *State v. Norton*, *supra*; *Derr v. State*, *supra*; *Green v. State*, *supra*, most are of little help here because they involve the admission of the out of court declarant's report or opinion. Here, Nurse Almassey's report was not introduced into evidence. Moreover, contrary to appellant's assertions, at no time during her testimony did Nurse Shuck-Reynolds relate any statements from the SANE report or hospital charts. The pertinent questions and answers are as follows:

[STATE]: Now I'm gonna draw your attention to June 10, 2016. Were you working on that day?

NURSE SHUCK-REYNOLDS: Yes, I was.

[STATE]: Were you the sexual assault nurse examiner for the exam of [M.A.C.]?

NURSE SHUCK-REYNOLDS: I was not.

[STATE]: Do you know who was?

NURSE SHUCK-REYNOLDS: Catherine Almassey.

[STATE]: Okay. Did you review this chart associated with the exam?

NURSE SHUCK-REYNOLDS: Yes.

[STATE]: Did you have any knowledge on that day of the exam taking place?

NURSE SHUCK-REYNOLDS: Yes. I was aware of the victim's presence in the department.

[STATE]: Okay. All right. Did you review the chart?

NURSE SHUCK-REYNOLDS: Yes. I did.

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[STATE]: All right. In reviewing the report for the exam on June 10, 2016, did you also review the photographs?

NURSE SHUCK-REYNOLDS: Yes.

[STATE]: And I'm gonna show you State's exhibit 3 through 11. If you'll take a moment to look at those photographs.

NURSE SHUCK-REYNOLDS: Okay.

[STATE]: And do you recognize those photographs?

NURSE SHUCK-REYNOLDS: Yes, I do.

[STATE]: And what do you recognize those photographs to be.

NURSE SHUCK-REYNOLDS: I recognize the victim, as well as the genital exam photos from the genital exam.

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[STATE]: And in reviewing those photographs, are they of the genital area in which you can render an opinion as to any trauma noted?

NURSE SHUCK-REYNOLDS: Yes.

[STATE]: Okay. And did you review the photographs in accordance with the report for the SANE examination of [M.A.C.]?

NURSE SHUCK-REYNOLDS: Yes.

[STATE]: Okay. And when did you first review the photographs?

NURSE SHUCK-REYNOLDS: Actually Ms. Almassey shared the photographs with me the day of the exam, going over the injuries. Which is not an uncommon practice among the nurses when we have findings. So I initially saw them back at the time of the exam. And then, again in preparation for.

[STATE]: All right. And I forgot what number I gave you. State's Exhibit 5, I think.

NURSE SHUCK-REYNOLDS: 5.

[STATE]: Okay. So, in State's Exhibit 5, is that one of the photographs that you reviewed pertaining to the SANE exam of [M.A.C.]?

NURSE SHUCK-REYNOLDS: Yes.

[STATE]: Okay. And do, in your opinion of looking at that photograph, do you see genital trauma?

NURSE SHUCK-REYNOLDS: Yes.

[DEFENSE]: Objection, Your Honor. Lack of foundation.

THE COURT: Overruled.

NURSE SHUCK-REYNOLDS: Yes, I do.

[STATE]: Okay. And what genital trauma do you see?

NURSE SHUCK-REYNOLDS: Identify an area, when we talk about the genital area we relate it to the face of a clock. So, the top is 12. Directly below is 6. And 3, 9. So, you'll hear me make reference to that. So at the 3 o'clock area of the outer lips I note an abraded, I would call it abraded looking at the picture. And then talking about the hymenal ring--

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[STATE]: Any other observations outside of, with that photograph, outside of what you have just discussed?

NURSE SHUCK-REYNOLDS: I'm sorry, I'm not clear with your question.

[STATE]: Any other observations of trauma outside, from that photograph?

NURSE SHUCK-REYNOLDS: From this photo? Yes. Also, there is a 9 o'clock, what I identify as a tear or again, an interruption of the hymenal ring.

Appellant specifically quotes the following exchange as signifying that the State introduced Nurse Almassey’s out-of-court declarations through Nurse Shuck-Reynolds:

[STATE]: In the, in reviewing the photographs and the chart did you form any opinion yourself referring to the thickness or thinning of the hymen?

[DEFENSE]: Objection for the record, Your Honor.

THE COURT: Yes ma’am. Thank you. Continue.

[NURSE SHUCK-REYNOLDS]: Yes. I did identify some thinning areas.

We find the analysis of the United States Court of Appeals for the Fourth Circuit instructive in this case. In *United States v. Johnson*, 587 F.3d 625, 634 (4<sup>th</sup> Cir. 2009), a defendant argued that the admission of police expert witness testimony that relied on information gathered from interviews with informants and cooperating witnesses violated his right of confrontation. The Fourth Circuit held that *Crawford* does not “prevent[] expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence.” *Id.* at 635. The Court in *Johnson* explained that the question of whether an expert is “giving an independent judgment or merely acting as a transmitter for testimonial hearsay” “is a matter of degree,” and stated that courts must evaluate whether the expert is “applying his training and experience to the sources before him and reaching an independent judgment.” *Id.*

Here, it is clear from Nurse Shuck-Reynolds’s testimony on direct examination that her opinions were based on the injuries she could see in the photographs. She made no direct reference during her testimony to the content of the SANE report or the victim’s

chart, nor did she state with any specificity what, if anything, she learned from either document. The witness was well-qualified, based on her years of direct and supervisory experience as a SANE nurse, to draw her own independent conclusions as to what she observed and whether she thought the injuries were likely the result of trauma or some other cause. On cross-examination, she testified that the thinning of the hymen that she observed may have been the result of normal adolescent changes, and not necessarily due to trauma. We are satisfied that Nurse Shuck-Reynolds presented her independent judgment and specialized understanding, and she was subject to cross examination. We see no error on the part of the trial court in admitting Nurse Shuck-Reynolds's testimony.

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